

# **Freedom of Information and Business**

The impact of a Freedom of Information Act upon business as suppliers of  
products and services to the UK Government

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# Contents

<b>CONTENTS</b> .....	<b>1</b>
<b>FOREWORD</b> .....	<b>2</b>
<b>SUMMARY</b> .....	<b>3</b>
<b>THIS STUDY</b> .....	<b>5</b>
<b>CONTEXT</b> .....	<b>5</b>
<b>THE EXPERIENCE OF OTHER COUNTRIES</b> .....	<b>6</b>
<b>WHAT INFORMATION DOES GOVERNMENT HAVE?</b> .....	<b>8</b>
<b>WHICH COMPANIES WILL BE AFFECTED?</b> .....	<b>10</b>
<b>WHAT IS THE CURRENT POSITION?</b> .....	<b>10</b>
EU-INITIATED REGULATIONS AND INITIATIVES.....	10
UK CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION.....	11
<b>THE DRAFT FREEDOM OF INFORMATION BILL</b> .....	<b>13</b>
<b>WHAT WILL CHANGE FROM THE CURRENT POSITION?</b> .....	<b>15</b>
SUMMARY INFORMATION MATRIX.....	17
<b>WHAT ARE THE RISKS?</b> .....	<b>18</b>
<b>WHAT ARE THE BENEFITS?</b> .....	<b>20</b>
<b>PROPOSED ACTION PLAN</b> .....	<b>20</b>
IMMEDIATELY AND PRIOR TO TENDER.....	20
AFTER RECEIPT OF TENDER.....	22
AFTER AWARD OF CONTRACT.....	22
DURING IMPLEMENTATION OF CONTRACT.....	22
WHAT ABOUT THE COSTS OF ALL THIS?.....	23
OVERALL.....	24
<b>CONCLUSIONS</b> .....	<b>24</b>
<b>REFERENCES AND FURTHER READING</b> .....	<b>26</b>
NOTES.....	28

## Foreword

Freedom of Information is full of surprises. One of the surprises is that it is generally used far more by business than by public interest groups or campaigning organisations. I first discovered that when, as a visiting civil servant, I studied the introduction of the new FOI laws in Australia, Canada and New Zealand. Business there had initially viewed FOI with hostility and suspicion: but, while still regarding it as a threat, they also quickly learnt to exploit its opportunities.

Jim Amos has had a distinguished career in business, mainly in the computer industry. He was a natural to undertake this study, which is written in a different style from other Constitution Unit reports. Because of his background Jim has addressed this report primarily to a business audience, and in terms which business people will understand. It focused mainly on the contractual relations between government and business. By adopting this sharply practical focus it is in the best traditions of all the Constitution Unit's previous work.

Robert Hazell  
June 1999

## Summary

This is a guide for business to the impact of a Freedom of Information Act (FOIA). It focuses on the effect that a FOIA is likely to have upon business as a supplier of products and services to government.

The Government was elected with a commitment to the introduction of a FOIA. A draft Bill has now been published. It will be the subject of discussion and amendment and it is expected to become law in 2000, with implementation possibly phased over a maximum period of five years.

It will apply to information held by public authorities. Therefore the information business has supplied and is supplying now to public authorities may be made available under the proposed FOIA unless it is 'exempt' information as defined in the Bill. 'Trade secrets' are exempt and so is information if its disclosure would be likely to 'prejudice the commercial interests of any person.' However a public authority will have the discretion to disclose exempt information after taking into account all the circumstances including the 'public interest.'

This means that if it has not already done so, it would be prudent for a company to plan now to ensure that it is managing positively the information it provides to public authorities. It would also be wise to review the sensitive information about its business that they already hold and ensure that, where justified, the confidential status of the information is properly recorded and recognised.

We have looked at the experience in the USA, which has had a FOIA since 1966, and at Canada and Australia, which introduced FOIAs in 1982. After early problems and scare campaigns in the USA, the impact upon business has settled down. Business is now well educated in how to protect its information. In the USA, to a greater extent than in Canada and Australia, there is substantial use of FOIA requests by business for marketing reasons and to help gain competitive advantage.

There are some important lessons to be learned from the practical experience of FOIA in these countries. One key lesson is the need to protect that which is really confidential, by managing its availability and clearly distinguishing it from material that is not really confidential. The usual practice for many companies who sell to UK public authorities is to mark everything as 'commercial in confidence'. Under FOIA that will not be sufficient. Unless the information is defined as a trade secret, the exemption is only given if its release would be likely to prejudice commercial interests, not just because it is marked confidential.

However the overseas experience shows that FOIA may also provide business with new opportunities and more information to help address existing ones better. If a business can find out more about the needs, plans and cost structure of the departments to whom it wishes to sell its products, then it can focus on the opportunities that best fit its capabilities and market its products more effectively.

FOI enables business to find out more about the real needs of its customers and the proposals and performance of its competitors. It can then judge better how to compete more effectively or whether to compete at all. So a company can win more bids or spend its money to better effect somewhere else.

Essentially FOIA is not a threat but an issue to be managed, both to contain the risks and to win more business more economically. Businesses that trade in the USA, Canada or Australia, are accustomed to working in a FOIA environment. But they need also to consider the UK dimension. Those that do not trade substantially in these countries may find this a new subject. In both cases we suggest they start to address the subject of business information and a UK FOIA now.

## **This study**

This study focuses in a practical way on the impact upon business of a FOIA which arises from the role of government as a purchaser of products and services. It does not therefore cover in detail the impact upon business which arises from its relations to government as the subject of regulation, licensing and taxation, or the issues that arise from the trading of government information by third parties.

However many companies relate to government in different ways, and a simple seller - buyer relationship can be affected by a problem in another area, eg. environment, health and safety, or employment law. The issues that can arise from information held as a result of regulatory or other government activities are considered.

While this study focuses upon central government as a purchaser of products and services much of the argument and many of the recommendations can be applied by companies that do business with other public authorities, such as local government,<sup>1</sup> educational establishments, and health authorities, all of which are included within the scope of the draft FOIA.

We cannot know exactly how FOIA will work in the UK until we have seen the precise wording of the Act that is passed, the code of practice that will be adopted for implementation, and had some years experience of the case law that will grow up around it as the boundaries are tested.

However business needs to start now to plan for the FOIA environment. This is a practical study, and it is based upon what we believe are reasonable and prudent assumptions about how FOIA will work in practice. We recommend the actions that should be taken to counter the risks and take advantage of the opportunities.

Our study is based primarily upon published government information, discussions with people in government and business with relevant knowledge, and evidence from other countries, in particular, the USA, Canada, and Australia. We have looked at the early experience of FOIAs in these countries as well as the current situation, since this may give useful pointers to the position in the UK in the period shortly after our FOIA is enacted.

## **Context**

The prime purposes of a Freedom of Information Act (FOIA) are to:

- enable citizens to know more about the work of government that is carried out on their behalf.
- enable individuals and companies to see the information held on them by government.
- create a culture of more open and accountable government which makes better decisions.

In the UK it is part of a wider programme of constitutional reform, which includes devolution, parliamentary reform and incorporation of the European Convention on Human Rights into UK law.

The UK FOIA will build upon the recent experience of business in the UK of the operation of The Code of Practice on Access to Government Information,<sup>2</sup> and EU-initiated regulations including, The Environmental Information Regulations 1992,<sup>3</sup> and the various Public Contract Regulations.<sup>4</sup> In effect the UK has been moving in the direction of greater openness without yet having a FOIA.

In a practical sense an important part of the context is provided by a number of government and EU initiatives that relate to information. These include the UK initiatives relating to better government,<sup>5</sup> and the better management and exploitation of government information.<sup>6</sup>

In January 1999, the European Commission published a long awaited Green Paper that has a number of aims relating to the better use of public sector information. These include improving the effectiveness of government and the competitiveness of European industry, providing easier access for the citizen, and encouraging the development of a growing information content and service industry.<sup>7</sup>

Overall, these initiatives may be expected to create a climate in which there is much greater business awareness of government information, and they are likely to cause more emphasis to be given to the creation of indices and the publication of increasing amounts of information on the Web. Information that can be made available legally as a result of a UK FOIA, may therefore become easier to identify and access.

Within the business community there has been an increasing recognition of the value and importance of information. In one sense this is not new. It has always been understood that some company information was important and needed to be kept secret. The newer issue is to appreciate the value of information as an asset, to question whether information assets are as well understood as other strategic assets and the degree to which they are properly exploited and protected.<sup>8</sup>

The proposed FOIA will cover the information held by 'public authorities'. It is not about information which businesses themselves hold. It is about access to government information, or more precisely, access to information held by 'public authorities. However 'public authorities' in the UK hold a great deal of information about business since they regulate, license, tax and buy products and services from business.

The impact upon business, while theoretically collateral, is therefore very important.

## **The experience of other countries**

A number of countries have had freedom of information or access to official information laws for some time. Indeed Sweden had a Freedom of the Press Act in 1766. However in recent times, the USA Freedom of Information Act in 1966 is the most significant for the impact that it had upon business. In 1982, Australia, New Zealand and Canada adopted access to official information legislation. They had looked closely

at the experience of the USA FOIA and adopted provisions to enable companies to protect their confidential information more easily.

Within the European Union, in addition to Sweden, whose current Freedom of the Press Act dates from 1949, a number of countries have adopted access to official information laws. These include, Finland in 1951, Denmark in 1970, France in 1978, the Netherlands in 1978 (amended in 1991), and most recently Ireland where its law came into force in 1998.

The USA FOIA in 1966, had a major impact upon business. Initially there was no provision for business to be warned when a requester asked for information claimed to be confidential. There were some early high profile mistakes where it was claimed that design information was given to competitors. This caused widespread concern amongst the business community. This had two effects. One was for business to lobby strongly for improvements to make it easier to protect confidential information and to produce greater consistency with much lower risk of mistakes. The other was for the subject to get on the agenda of senior management in major US companies. These companies learnt quickly how to protect their confidential information effectively and how to exploit the opportunities to find out more about their competitors, the requirements of their customers, and the policies of government.

If we look at the recent operation of the FOIA in the USA, the main concerns of business have been addressed. While there are some related concerns, for example a current one is about access to federally-financed research data, there are no major current issues. There is pressure for more and better quality information to be put on the Web and for it to be better indexed. There is extensive routine use of the FOIA, both by companies and specialist agencies for marketing purposes.

In Australia and Canada, the effect upon business has been much less. In both countries the legislation has been implemented with a strong bias towards secrecy. The main suppliers to the public sector market are regarded as having much better channels to the information they need than FOIA would give them. In Australia there has been little business use. In Canada, in recent years, there has been growing business use of a type similar to that in the USA. More information is becoming available, with for example contract information on the Web since April 1997.

In the European Union it is a very mixed picture. We have been referred to the Code Napoleon tradition of state secrecy which continues to effect most countries other than the Nordic countries who have a long tradition of openness. The Commission is working in a number of areas to create more openness as part of their work to create an effective single market. Procurement and Environment Directives are examples. However implementation of Procurement Directives is currently very limited.

There is an interesting contrast between the position in Sweden and in The Netherlands with regard to information about public contracts. In Sweden, the Freedom of the Press Act operates in parallel with EU procurement regulations. Public contracts and bids are normally made public and business makes routine use of this information. In The Netherlands, EU procurement regulations effectively replace the rights to information that would otherwise be available under their Access to Information Act.



One of the most interesting effects of this variety of access to information laws and their practical implementation has been the degree to which many USA based multi-national companies have adopted policies and practices towards the protection and management of the confidential information they provide to governments. Also the degree to which they use FOIA as a positive source of information about their competitors, their customers and the policies of government. This is in contrast to some even very large non-USA based companies who typically address such issues only a country by country basis.

## **What information does government have?**

What information does government have that is relevant to business as suppliers of products and services in a competitive market?

A USA House of Representatives Report in 1978<sup>9</sup> summarised it as follows:

A portrayal of every private enterprise of any consequence lies in government files, frequently unassembled like pieces of a picture puzzle. Collection and maintenance of such information is a universal characteristic of government operations that regulate private industry, license commercial activities, purchase, and sell goods and services and deal in numerous ways with the Nation's businesses.

To the best of our knowledge no overall catalogue or index exists to help comprehend the range of information that is held. There was a move to publish catalogues over 10 years ago but this was not followed through.<sup>10</sup>

The House of Commons Select Committee on Public Administration<sup>11</sup> used three classifications:

1. Information gathered as a result of regulatory functions or given for monitoring purposes.
2. Information relating to contracts.
3. Information relating to the commercial activities of the authority itself.

Government has a great deal more information that is relevant to business than is often appreciated. For the purposes of this study the most relevant information is in the area of contracts. Information relevant to contracts covers a wider area than is immediately apparent, and includes:

1. Market surveys, consultants reports, working party reports.
2. Internal information: for example about current operating costs and performance, and showing how a department has previously analysed the issues and considered alternative approaches.
3. Details of previous contracts, competitive evaluations and the performance reviews of current suppliers
4. Similar information from other departments and public authorities relating to the performance of competing suppliers.

In the USA, an active market has grown up to obtain and market government information. One such company in this field, FOIA Group Inc.<sup>12</sup> promotes its ability to obtain material such as:

Active contract summaries, agency organisation charts, telephone directory, budget and funding documents, strategic plans, requests for information and responses, bidders lists, past contracts, modifications, engineering change proposals, performance reports, price cost intelligence including labour rates, test and demonstration reports, audit reports.

That is not to say that such information is universally available or that we expect the USA experience to translate exactly to the UK, but it shows what companies that trade in the USA are accustomed to.

Outside the area that is most directly related to contracts, a great variety of information about companies is collected and created by government across a wide spectrum of circumstances. The range includes information given by a company; as part of a request for advice; as a response to a survey or to a Green or White paper; as part of a grant application; as a condition of product approval; as a regulatory requirement; or within the context of a legal investigation.

Some of the information that is held relates to most companies, e.g. information relating to, health and safety, employment, environment. Other information is sector specific, e.g. information associated with air-worthiness certification, drinking water testing, slaughterhouse licensing. The Department of the Environment published a guide in 1996 which gives details of 54 public registers in the environment field alone which cover a very wide range of subjects including pollution, pesticides, radioactive substances and waste.<sup>13</sup>

Other than the official bibliographies of published material there is no overall catalogue of information holdings by government. Until that situation is remedied, people with inside knowledge of what exists and where to ask for it, will have an advantage. The federal government in Canada has started to address this question with the publication of the Info Source book.<sup>14</sup> This is at a very overall level, but it is an example of an attempt to publish in one place a comprehensive review of the information holdings of government departments and agencies related to their functions. The USA government is implementing its Government Information Locator Service (GILS).<sup>15</sup> This system, as it becomes more widely implemented, is expected to provide the overall framework within which people are able to search both the physical and electronic information resources of the federal government to find what they are looking for.

This is a key question in the UK and we note that the responses to the Green Paper, Crown Copyright in the Information Age,<sup>16</sup> have highlighted the issue. We understand that this area is now being looked at within government. It is also an issue in the context of internal government effectiveness and it may therefore need to be addressed not simply to help the public, but to enable the government to develop more efficient and effective information systems.

## **Which companies will be affected?**

All companies that trade in the UK will be affected to some degree. They are all subject to government regulation and as a result, information about them is held by government, more of which may become available as a result of FOIA. This study focuses upon the effect of this upon suppliers of products and services to government.

All suppliers will be affected. The larger suppliers with the widest range of links and contractual relationships with government will have the largest range of information questions to manage. If they are long term established suppliers with a high market share, their interests may be mostly defensive.

If they are not in this category and are keen either to grow their share or to enter this market, they may be expected to use FOIA positively to gain intelligence to help them plan how best to succeed. According to how easy the FOIA regime becomes to use and the growth and competence of information consultant services, smaller companies may find it easier to enter the market.

We understand that suppliers are increasingly being considered by government procurement departments to fall into four main categories:

1. Strategic partners: major PFI contractors who provide for example, major outsourcing services, transport schemes, built and serviced facilities for an increasing range of government activities, often working in consortiums.
2. Strategic suppliers: eg. long term suppliers of IT solutions and consulting services.
3. Competitive purchase suppliers: eg. who provide relatively high value items, such as vehicles and computers, but whose market share may change quite rapidly according to the competitiveness of their products.
4. Suppliers of essentially commodity items, eg. PCs, stationery, furniture.

All of these wish to grow profitably their share of the government spend. This amounted to about £63bn in 1996. It had grown 250% over the previous 10 years and now represents over 8% of UK GDP.<sup>17</sup> The European Commission estimates that public procurement represents about 11% of the GDP of the EU as a whole.<sup>18</sup>

## **What is the current position?**

Information is made available currently within a framework of rules and practice defined by EU-initiated regulations and by the Code of Practice on Access to Government Information.

### **EU-initiated regulations and initiatives**

#### **EC Procurement Directives**

These have been implemented in UK law by Treasury regulations.<sup>19</sup> Four sets of regulations implemented from 1991-5 create a legal framework to which public authorities and utilities must adapt their contract award procedures. They apply above given threshold values and define criteria for specification of requirements, selection of

tenderers and award of contracts. There are provisions for publication in the Official Journal of the EC (OJEC). Unsuccessful tenderers are entitled to be told the name of the successful tenderer and, since October 1998, the characteristics and relative advantages of the winning tender.<sup>20</sup> The price should be published in the OJEC unless it is regarded as commercially confidential, which is not defined. It is expected that increasing levels of openness will be required, albeit at a slow rate of movement.

### **Environmental Information Regulations 1992: also known as Freedom of Access to Information on the Environment**

These regulations implement an EC directive of 1990 and are incorporated into UK law as the Environmental Information Regulations. They potentially have a very broad scope since they cover any information which relates to the environment, including activities that could affect it adversely. Information to which any, 'commercial or industrial confidentiality attaches..,'<sup>21</sup> is protected. There is no evidence that these regulations have been widely used by business. However they were used in the Birmingham Northern Relief Road case<sup>22</sup> and this is thought to have stimulated the policy change described in the Department of the Environment, Transport and the Regions (DETR) Press Release in July 1998.<sup>23</sup> This announced that with certain limited exceptions, contracts placed with DETR in the future would be available on request.

There is a trend for EU-initiated environmental and health and safety regulations to require greater openness than current UK law. An example is the Genetically Modified Organisms (Contained Use) Regulations 1992,<sup>24</sup> which require the maintenance of public registers of consents and enforcement actions. This overrides the restrictions on disclosure of Section 28 of the Health and Safety at Work Act 1974.

### **EU initiative on the exploitation of Public Sector Information**

EU sponsored initiatives in this category include, the INFO 2000<sup>25</sup> programme, driven by DG XIII, which aims to exploit Europe's public sector information under the banner of developing a European information content industry. While the main purpose of this is to encourage the development of a value-added information industry with focus upon 'multi-media', it will include measures to make access easier to government information across the EU. It is difficult to judge now the timescales when business may see a practical result of these initiatives and programmes. However it makes clear the trend towards greater openness.

### **UK Code of Practice on Access to Government Information**

This was first introduced in 1994 and revised in 1997. It has encouraged departments to make available an increasing range of information, including for example, internal guidance manuals, advice from specialist committees, together with a range of background material on decisions and consultative papers. On occasion this has included contract details and inspectors reports. The HSE, for example, now makes more details of their enforcement actions available. Where previously they would simply refer to enforcement action taken under a particular clause, they now include a 200 word summary of the details of the incident. MAFF now publish the HAS (Hygiene Assessment System) scores for each slaughterhouse by name in the UK.<sup>26</sup>

The announcement by DETR referred to above, explicitly cites the commitment of the government to freedom of information and in effect describes a degree of openness about contracts at a level likely to be broadly similar in its effect to that specified in the FOIA.<sup>27</sup>

In theory therefore a great deal of the type of information which business would like to access or to protect is available now. In theory the assumptions we make about the type of contract information that could be disclosed under the proposed FOIA, could also be made about the current Code of Practice. The Cabinet Office reply to a question by the House of Commons Select Committee on Public Administration, explained that the *minimum* aim was essentially the same level of disclosure as set out in the Code.<sup>28</sup>

Evidence about business usage of the Code is not clear, but it is very small. The examination of the Parliamentary Ombudsman by the Select Committee on Public Administration showed concern about the visibility, use and effectiveness of the Code, together with the substantial variations in implementation and charging.<sup>29</sup> The published evidence is that the Code has been little used by business. For example in 1997, requests under the Code for information by business totalled 323, some 11% of the total requests. Of these 113 were to the Inland Revenue.<sup>30</sup> It is believed that a large proportion of these were mainly from accountants acting for clients.<sup>31</sup> The Ombudsman has recommended that information contained in an inspector's report and a research contract should be released. Also that the prices at which British Rail businesses had been sold, and the cost of a publicity campaign by the Legal Aid Board be revealed.<sup>32</sup> That does not mean that such matters are revealed widely or easily.

There is anecdotal evidence that some businesses make valuable use of the information that has been made available as a result of the Code. There are a number of examples. A software company uses information about department size, organisation and function to create a prospect list of those departments whose needs might represent a good market for their software. EIRIS<sup>33</sup> acquires a wide range of company information from government as part of their information gathering to enable their clients to take equity investment decisions in accordance with their defined ethical policies. We understand that the Health and Safety Executive receives a number of requests from law firms and large companies for enforcement and prosecution history profiles of specific companies. It is assumed this relates to procurement decisions and potential acquisitions.

In 1997, The Campaign for Freedom of Information showed, through a survey of parliamentary answers, the diversity of responses from different departments to requests for details of contracts and prices. Some refused to give any information; others gave overall spend figures; and some gave full details including the value of individual contracts. A University of Sheffield Study, *The Private World of Government*, describes the variability and general reluctance of departments to provide contract details.<sup>34</sup>

The current position can best be summarised as saying that much information is now made available routinely. This is of value to companies looking for opportunities and who have found out that it exists. However real detail about, for example, contracts, suppliers, costs and performance is much more rarely available. In evidence to the Select Committee on Public Administration, the Campaign for Freedom of Information outlined the problems and cited a report by the former Ombudsman on the

obstructiveness he had found.<sup>35</sup> However there is some recent evidence of change towards greater openness, with the changes implemented by DETR, the HSE and MAFF, which are referred to above, as examples of this.

## **The draft Freedom of Information Bill**

The draft Bill was published on 24th May 1999. It will now be the subject of discussion and amendment. It is expected that the Bill, as revised, will be proposed for legislation in the 1999/2000 session, and become law in 2000.

The draft Bill defines a general statutory right of access to information held in any form by a public authority. This right is subject to a number of exceptions, where disclosure would 'prejudice' one or more of a limited number of specified 'interests' or where the information is simply defined as being exempt. However a judgement of the 'public interest' may override an exemption.

The Data Protection Commissioner will become known as the Information Commissioner and will have responsibilities under this Bill to promote the observance of the Act and good practice in its implementation. Complainants can appeal to the Information Commissioner who can issue a decision notice requiring compliance. Appeals about the decision notice may be made to the Information Tribunal. An appeal from the decision of the tribunal may be made to the High Court on a point of law.

The Bill seeks to promote publication of information and clause 6 imposes the duty on public authorities to adopt and maintain publication schemes and for the Information Commissioner to approve such schemes.

The following are some of the key questions to which business will look for answers in considering this Bill:-

1. What are the criteria for exemption of information claimed by a company to be secret or confidential?

Clause 34, addresses the question of commercial interests. 'Trade secrets' are exempt, as is other information, 'if its disclosure would, or would be likely to, prejudice the commercial interests of any person.' This may be an easier test of commercial confidentiality than the the test of 'substantial harm' that applies in the USA and which was proposed in the White Paper.

However a public authority, under clause 14, has the discretion to disclose information that is exempt, if 'having regard to all the circumstances of the case, including the public interest ...' it decides to do so.

2. How are these exemptions made effective in practice? Does this depend upon a company having marked all such information appropriately? Will a company be told before any release of confidential information and in sufficient time to present arguments why it should not be released?

Such practical questions are left to the details of the code of practice. Clause 38 requires the Secretary of State to issue a code of practice. This code must include a number of provisions. These include provisions relating to:

- ‘consultations with persons to whom the information ... relates or persons whose interests are likely to be affected by the disclosure.’
  - the inclusion in public contracts of terms relating to the disclosure of information.
  - procedures for dealing with complaints.
  - advice to persons who propose to make requests but not to providers of information.
3. If the arguments of a company as to why its information should be exempt are not accepted by the public authority, will it be able to appeal and what is the route for this?
- Appeal in the first instance is through the process established by the public authority under the Code of Practice. (Clause 38). The next step is to appeal to the Information Commissioner. The legal basis upon which a company may argue its case that it would be prejudiced if its confidential information is released is not clear. In clause 41 the reference is to ‘any person’ who may apply to the commissioner for ‘decision notice.’ However the context assumes that it is only requesters rather than ‘defenders’ of the information who would be involved. Appeals from the Information Commissioner are to the Information Tribunal. Appeals from the Information Tribunal are to the High Court, but on points of law only.
4. If a company provides very sensitive information under a confidentiality agreement, could it be assured that this would be respected?
- Clause 32, deals with information provided in confidence. Such information is exempt if it is obtained by the public authority from any other person and its disclosure ‘would constitute a breach of confidence actionable by that other person.’
5. Could this Bill apply to information that a company is providing to government now?
- Yes, there is no cut-off in time. Clause 8 refers simply to information ‘held’ by the public authority at the time of the request.
6. When would the proposed Act come into effect?
- Clause 72, states that it will come into force five years after the date when it is passed or earlier if the Secretary of State so decides. There is provision for phased implementation within this five year period and we judge that may well happen.
7. What recourse will a company have if its information is released by mistake or failure to follow the Code and commercial harm is caused as a result?
- Clause 48 states that the Act ‘does not confer any right of action in civil proceedings in respect of any failure to comply with any duty imposed by ... this Act.’

Overall this Bill leaves a number of questions unanswered in terms of its potential impact upon business. On the one hand the test for exemption seems easier to meet than the ‘substantial harm’ test proposed in the White Paper. On the other hand many of the key practical questions relating to the protection of sensitive information are to be left to a Code of Practice which has not yet been produced. There is a lack of clarity in relation to both the practical and legal process by which a company may defend its sensitive information.

## What will change from the current position?

In theory the draft Bill does not represent a radical change. However in practice the difference should be substantial. Enforceable legal rights are expected to create a different climate compared to an effectively voluntary code. The Code and the various EU-initiated regulations have led to more openness in some areas. The large variations in the way the Code is applied will be more difficult to sustain when legislation is in place. Business should anticipate and plan for the situation where openness about contracts for example, will generally be greater than is the practice now, but secret and confidential information will continue to be protected. The difference will be that claims of confidentiality will need to be justified, not just asserted.

The exemptions in the draft Bill seem very similar to those in the Code. In the Code the reference is to information whose 'unwarranted disclosure would harm the competitive position of a third party. In the Bill the reference is to disclosure which would be likely to 'prejudice the commercial interests of any person.' However and significantly the Information Commissioner will have an enforceable power to require compliance as compared to the negotiating role of the Parliamentary Commissioner.

The lessons we can learn from the USA in particular and also from Australia and Canada are relevant:-

- A large amount of information is available as a matter of course and increasingly published on the Internet. NASA told us that they expected to put contract details on line to save time handling 20-30 requests for each contract. We found information about both USA and Canadian public contracts on the Web.<sup>36</sup>
- An information broker industry is established strongly in the USA.
- The publishing of contract price information in the USA is now established by new procurement rules.<sup>37</sup> While this remains a subject of contention, it is now increasingly recognised as a cost of doing business with government
- A major new source of competitive intelligence has become available to assist enterprising companies to seek new business opportunities from government and to increase the risks for any existing suppliers who are slow to respond to change.

Exactly what will and will not be available will be subject to the specific wording of the Act, the code of practice to be issued by the Secretary of State, and the development of case law as the boundaries are tested. However, there is a presumption of openness and we make the following general assumptions, which are towards the more open end of the spectrum:-

- |                                                                                                |                                                                |
|------------------------------------------------------------------------------------------------|----------------------------------------------------------------|
| 1. Trade secrets, sensitive intellectual property etc.:                                        | not disclosed                                                  |
| 2. Price information and contract details with performance standards and analyses of decisions | prior to contract not disclosed.<br>After contract disclosable |
| 3. Performance review information:                                                             | after formal review; disclosable                               |
| 4. Contract amendments                                                                         | after signed; disclosable                                      |
| 5. Market Research, consultants reports                                                        | available unless withheld for specific reasons                 |
| 6. Previous contracts and performance                                                          | generally disclosable                                          |



We should recognise the difference between an item of information that is legally available as a result of the FOIA, and information that is usefully available because it can be easily identified, questions about its confidentiality have been resolved and it is quickly accessible. While a pressure group may go to a great deal of time and expense to acquire some specific information even if it takes a long time, a company is much less likely to do this. A Netherlands government paper<sup>38</sup> distinguishes between: Openness, when access is open in the legal sense; Access, which is the actual possibility of acquiring the information; and Accessibility, which means it can easily be found, and it is reliable, clear, affordable and usable. We may expect a mixed picture in terms of practical availability as departments develop their internal systems with differing priorities and complexities, and increasingly, over time, material is published on the Web.

The date from which the proposed FOIA will apply is not yet clear. The draft Bill specifies that it will be within five years from the date it becomes law. However it may be implemented earlier and progressively. There is no limit on retrospection. The definition is information 'held' by public authorities. That is a powerful reason to start now to plan for a FOIA environment. Australia has the strongest restriction on retrospection, limiting this to five years before the Act. Access in New Zealand is fully retrospective.

This chart, Summary Information Matrix, summarises the key information relating to contracts and shows the assumptions we are making currently about what type of information is likely to be protected, available and subject to question. These assumptions are broad brush but do seek to highlight the difference between secret and validly commercially confidential information which the FOIA will protect, and contract related material which, with allowance for timing and any special circumstances, and in some cases consideration on a case by case basis, is likely to be releasable. In the middle is a variety of material, mostly funded by government, which is also likely to be considered on a case by case basis.

## Summary Information Matrix

### Information held by government relating to business

	This project/department	Other projects/departments
P R O T E C T E D		Trade secrets Intellectual property, e.g. product design, formulas, secret plans Commercially confidential information e.g., internal costs, supplier relations, marketing plans company viability information
	[Commercial Confidentiality] ↓	
	?	Inspectors reports, Product test reports, Environment/Health reports Scientific advice Consultants reports Methodology of supplier
	[Public Interest] ↑	
A V A I L A B L E	Contract details including price & service standards*	Details of other contracts* Performance on other contracts*
	Studies upon which project is based	
	Operating costs & performance prior to contract	
	Evaluation of bids*	
	Contract performance reviews & contract modifications*	
	Department's procurement history	

\* after contract or review

## What are the Risks?

In general a company will find that its customers and competitors will be able to find out more information about it more easily. This may include details of the contracts it has with public authorities and its performance in satisfying them. Also where it is the subject of, for example, enforcement orders under environment and health and safety regulation, the details of these may become more fully and easily available than at present.

### When a business wins a government contract

- Competitors will learn the price of the contract the business won, possibly in detail, and may be able to estimate its costs and profit, together with at least some knowledge of its methodology.
- They may find out the contractual levels of performance to which it is committed.
- They will find out the reasons why it was evaluated the winner rather than one of them.
- They may find out the results of regular performance reviews, so they will be able to see how well/badly it is doing.

They may be able to make use of this information to their advantage.

The effect will vary. In some industries where there is frequent interchange of staff between the main players and a changing pattern of project partnerships, this may not represent a large change. In many cases these things become known over time. FOIA may have the result of making such information more quickly and easily available. However timing may be of crucial importance.

### When it loses

It is not clear that competitors will be able to find out the detail of the losing bids. However it would be wise to plan on the basis that they will. In the USA this is now restricted to reduce the administrative burden of line by line examination of bids to delete confidential information.<sup>39</sup> In Sweden they are generally available.

Probably they will find out how the losing bid of a business was ranked compared to theirs and be able to deduce the main areas of strength and weakness in the bid. Again this may not represent a large change.

### What about tangential risks?

The government may hold information about a company that is not directly related to the item of business it is bidding for, but which could damage its position if it became known. Examples might include the fact that it has been the subject of a report, investigation or enforcement notice, relating to product safety, environmental impact, trading standards, market dominance, employment law, transfer pricing to avoid taxation, etc. Some examples of this type of information are available now and for example, used and circulated by EIRIS to clients who wish to engage in ethical investment. Greater levels of detail about the circumstances may be provided which could cause difficulties to a company engaged upon a bid.

Whether any new and more detailed information becomes available is a judgement of whether the claim of a business that disclosure would 'prejudice' its commercial interests is considered valid and would outweigh any 'public interest' in disclosure. Appeal is firstly in accordance with the process of the authority, then to the Information Commissioner and finally to the Information Tribunal unless a point of law is involved, in which the High Court may be asked to decide that.

A business may also have supplied detailed product and market information voluntarily as part of its plan to develop close relations with government. If this was supplied on a confidential basis, in circumstance where a breach of confidence would be actionable then this will be protected. This is a harder test of information given in confidence than applies under the Code. However it may be thought that the 'prejudice a commercial interest' test would meet the most common needs.

### **Risks of change**

An established supplier, who has worked out how best to thrive under the current regime, may be at some risk simply as a result of the change. In the transition period he may be less motivated to react quickly and a competitor may exploit the opportunity. The informal advantages that an existing supplier has enjoyed may be eroded. A potential new supplier may be able to access much of the information that an expensive account team has built up relationships over a long period to obtain. However existing suppliers are probably aware of the view expressed by the European Commission that, 'Public procurement is too fundamental for the European economy to be left in the hands of a limited number of specialists.'<sup>40</sup>

Suppliers with a small market share without a significant account team, or those who are looking to enter the market may see this as a time of opportunity. The greater opportunities to obtain information may enable them to compete more effectively against more established competitors. The European Commission explicitly wishes to help smaller suppliers play a larger part in public sector business, partly through the easier availability of information.<sup>41</sup>

### **Will business be consulted before the government discloses its information?**

The assumption is that business will be consulted in advance and with time to put forward its case and if necessary implement the appeal process. The Bill leaves the detail of how this will work to be defined in the code of practice. Advance consultation with the opportunity to implement a formal process to object to disclosure is known as 'reverse FOI'. This has become an essential part of the current USA FOIA, and Canada and Australia adopted provisions for this as a result of the early US experience. As outlined in the summary of the draft Bill above, this area does not yet seem to be adequately defined.

The management of information given to government is an area of risk. A poor process for managing this information is a risk now. This risk may increase with the FOIA, but this may provide the stimulus to address the issue.

## **What are the benefits?**

Even established suppliers do not generally win all the bids they submit. They have the advantage of getting to know, more quickly and accurately than before, the detail of the winning bid and the contract that has been placed. They are therefore better placed to know what they have to do to improve their performance and costs to have a better chance of winning next time.

They may be able to find out more easily and in more detail the costs of operation and performance standards relating to areas of opportunity they are planning to address. This is however subject to the capabilities of internal systems to produce the information. Access to relevant consultants reports and market research should be easier.

Suppliers with a small market share and those seeking to enter the market should gain proportionately more. They have the benefits that apply to the established suppliers above. In addition the information available and its timeliness adds more to their understanding than to that of a supplier who knows much of it already.

Such suppliers need to be very selective about the bids they make given the high costs of failed bids. They are placed in a better position to know realistically what they have to do to win next time or to decide that this area of business is not for them. As a result they may be expected to avoid wasting money on bids where they know they are not well placed and to win a higher proportion of the bids they do submit.

One USA consultant told us that in his view there is a marked difference between companies that understand and use FOIA effectively and those that do not. Most major US companies are very aware of the risks and opportunities. They protect their information effectively and use the opportunities to gain useful marketing information. A USA FOIA consultancy gave us a detailed explanation of how it helps its clients.<sup>42</sup>

## **Proposed action plan**

### **Immediately and prior to tender**

There is good reason to give serious consideration to this question now. There is a marked difference in the level of awareness of the issue in most US companies and that commonly found in the UK. This is understandable given that the USA has had a FOIA regime since 1966 and the UK has yet to introduce one. However in the UK the historic blanket confidentiality applied by government to business matters has been significantly reduced, and in a global market, information available in the most open regime may be used for competitive advantage elsewhere. Also the UK FOIA will apply retrospectively. The suggestions here are largely drawn from experience in the USA, where the USA FOIA represents a high degree of openness in a litigious culture. They may well therefore not be directly applicable in the context of the UK FOIA. However it is useful to consider these questions as an aid to more specific planning.

Some key questions for business are:

1. Is the information that is given to government provided as part of a formal management process with clear responsibilities and accountabilities?

To address this may be a major task for large companies. In 1976, the Chairman of Eli Lilly & Company reported that his company prepared 27,000 government reports and forms annually.<sup>43</sup> This is an interesting measure of the scale of information acquired by government from a major company.

The widely adopted policy of putting 'commercial in confidence' on everything is not sufficient and will tend to devalue information that really is sensitive.

2. What information does government have about this company that could assist its competitors, where is it, and on what basis has it been supplied?

It would be advisable for the company to review all the information government has about it and clarify the status of it. Do the government departments with the information understand which parts are really confidential and the reasons why? Have they passed it on to other departments and non government agencies? If so which ones, and has the understanding of confidentiality been passed on also?

This area was a recognised issue in the USA. Polaroid Corporation gave an example to a House hearing in 1984 on this subject where it found that its information had been passed to over 40 federal contractors and subcontractors.<sup>44</sup> We are not aware of any similar situation arising more recently. There seems to be a current consensus that US corporations have learned how to mark and protect their information effectively and that agencies have learned how to handle sensitive information properly in accordance with the law and regulations.

3. Review and update of competitive intelligence

Each company should consider whether its people responsible for competitive intelligence are sufficiently briefed on the new opportunities FOI provides. It may be appropriate for a company to consider appointing a person/agency not linked to it to make FOIA requests. This is common practice in the USA. Such agencies develop expertise in the law, know who to ask for what, and can provide anonymity. It has been common in the USA for a company or agent to ask for all the information its competitor has been given.

In the USA it is usual for a company to make FOI requests for information about contracts, performance and evaluation material relating to itself, its potential partners, and competitors, both to the relevant department, and to other departments where the contract would be comparable. This has several purposes including checking how effectively its own information is protected.

The international dimension should be considered. If a company's main competitors and partners have a track record in one of the other countries with an FOI regime, it should consider checking out their performance in these countries.

4. Are the business requirements that the anticipated tender will address really understood?

A company can request information about the current costs and performance of the area being considered for tender. Also are there consultants reports, department studies or market surveys about future requirements, costs and options that may be available? This becomes more important in the area of outsourcing, where companies

sometimes take on commitments without as complete an understanding of the costs and obligations as they need. This is generally seen as a result of the limitations of internal systems rather than policy on confidentiality. However FOIA may be one of a number of catalysts to provide stimulation for the production of information that is needed.

5. Is it really understood how the department will decide upon the winning bid?

It may be useful to check out how previous bids were evaluated by the department and by other departments. A USA FOIA consultancy has explained that they look for how the 'trade-offs' to achieve 'best value' have actually been made.<sup>45</sup>

The information that is needed has not changed as a result of FOIA. The people responsible for competitive intelligence have always looked for this type of information. FOIA provides a new and valuable additional resource to find out the information that is needed. It may provide a faster and lower cost route to better information. Depending on circumstances and how close a company is to the other main players in the market it may not provide so much. However the USA experience in particular shows that it is worth checking out.

### **After receipt of tender**

A company should request all relevant background material, partly to ensure that its competitors do not get something it has failed to get.

As a result of the information gained it can make a better assessment of what it needs to do to win and whether it should bid at all. A company only wants to bid if it judges its chances are good. The costs of public sector bidding are high and it may find a better way to spend the cost of a bid that is likely to fail.

### **After award of contract**

The winning company should ask for details of the evaluation and for bids submitted by its competitors (a grey area). It wants to know how well they are doing, to judge what it needs to do to stay ahead, and it may want to assess the quality of a competitor's partner who it might want to approach in the context of another bid.

It should check with the department that its really confidential material is properly marked and that they are sensitised to what should not be released. It does not want any mistakes. It could, through an agent, ask for details of its own bid just to check the process works as it should.

The losing company should get a detailed debriefing so that it can do better next time. It should ask for as much detail as is available about the winning and the other bids. It may want to change partners for the next bid. It may want to challenge the process

### **During implementation of contract**

The winning company wants to know what its competitors can find out about its performance. Again it may want to use an agent for this. If it has performed well openness will be helpful in other areas of government and in the market in general. If

there is a problem with performance it will, so far as it can, want to manage the release of information so that ideally the solution is revealed at the same time as the problem.

The losing company may want to ask for performance details. It can use this information to learn more about its competitors and their partners when they appear in other bids, and to ensure that it learns any lessons it can from any poor performance by its competitor.

### **What about the costs of all this?**

One element of the costs to business will be the fees charged by a public authority for information requests. Clause 9 of the Bill simply states that any fees to be charged must be in accordance with regulations made by the Secretary of State. So at present we do not know what the costs will be. The consultation paper indicates that 'up to 10% of the reasonable marginal costs ... maybe charged.'<sup>46</sup>The White paper had suggested a charge of £10 per request with a possibility of charging more for commercial use. Under the current Code, charges range from free through a £15 flat rate and £20 per hour, to individual quotations. There have been occasions when for a troublesome or complex request a public authority has quoted between £2000 and £3000.<sup>47</sup> Clause 12 of the Bill provides an exemption for the public authority 'if the authority estimates that the cost of complying would exceed the appropriate limit.'

The greater cost for business is likely to be the cost of management and staff time deployed in using FOIA effectively, both defensively and actively. The areas of work comprise:

- the setting up and management of the process under which information is made available to government. If such a process exists, then the incremental costs that will result from the UK FOIA should not be substantial. However, even if a sound process exists, the FOIA will require new judgments about what should be given, how it should be marked, whether confidentiality agreements should be required in more situations, and for example, whether information should be provided for a short period and then returned.
- a review of the sensitive information currently held by government may be desirable with the aim of clarifying what parts of it are confidential, and ensuring that its status is recognised and recorded by the department.
- adding to the current competitive intelligence activity the new opportunity to use FOIA as an additional source of information. The aim being to assist the development and implementation of marketing plans, to find and assess new opportunities, and to monitor the performance and activity of competitors to help win current bids.

The costs may vary widely according to the current position of the company in terms of the scale and variety of its business with government, and the degree to which it manages and protects its information and engages in competitive intelligence.

The net cost is unlikely to be high. With an easy-to-access regime there could be useful cost advantages in getting information through FOI. However the real question is to assess the potential benefits from better judged bids. A small percentage improvement



in the proportion of bids won would in most cases justify a substantial investment in finding information.

It is likely to be far more cost effective to adopt a careful process to decide upon, select, mark and check the protection given to confidential information, than to spend management time and cost defending against an apparently reasonable request for it to be made available. In the early period in the USA there were complaints that business incurred significant costs to protect information and fight law suits, with no initial provision in the USA FOIA for 'reverse FOI'. In Australia, even with 'reverse FOI' provisions, there were complaints about the costs of defending information before the appeals tribunal. The current evidence from the USA is that companies do take great care with the information they give and how they categorise it, and as a result find that it is protected without the need to incur the costs of defence.

## **Overall**

FOIA can be expected to provide something between a very valuable new source of competitive and market intelligence and a marginally helpful addition to current knowledge.

It may be less useful to a company that already has a large market share and a team dealing with its customer department on a day to day basis and that knows its competitors very well, than to a company who wants to enter the market or has a small share.

However the company with a large market share will still need to consider the 'defensive' aspects of its use of FOIA. It wants to be sure it is managing the information that government has about it positively with clear responsibilities and accountabilities. This will include clarifying exactly what is confidential and identifying it quite separately from other material. Mistakes may happen and the company does not want them to be with its information at a critical time.

Companies will want to test the boundaries to find out all the relevant information about their competitors, partners and itself to know what its competitors can or cannot find out. It can use the same route to find out more about its potential partners before committing to them. Will they really be the asset they should be?

FOIA may help companies to find out more about the business opportunity they are looking at and identify initiatives they may want to take. It may also help them to understand how the department actually takes decisions when trade-offs are made to achieve 'value for money'.

## **Conclusions**

The introduction of FOIA into UK represents a major change in the law in the way government handles and makes available information which is relevant to business. However in another sense the changes that it will bring have already started with a growing trend over the last few years towards greater openness.

The issue of the management of information provided to public authorities is a particular case of the wider issue of the effective management of information assets. There has been increasing openness under the Code in the UK, and global companies can use the most open regime to find out about their competitors. This means that the processes necessary to protect sensitive information and to use the opportunities to find valuable marketing information are needed now anyway.

One effect of the 1966 FOIA in the USA, with its serious limitations and some well publicised mistakes, was to get the subject of information protection onto board agendas. The FOIA has been improved but the tightly managed policies and processes that were stimulated by it have remained.

In the UK there has been no such stimulus. The publication of the proposed UK FOIA provides a strong reason why companies that have not already done so should look seriously at the management of the information they provide to public authorities.

The UK FOIA, is not expected to create a sudden or dramatic change, but it is significant to business both in terms of what will be made available and in raising the profile of the value of information held by government so that more companies make more use of it.

It can therefore be seen as a discontinuity whereby opportunities may open up for new entrants who exploit the change quickly and effectively, compared to large existing suppliers who have invested over a long period in their way of addressing government business and been successful. The balance of advantage will favour those who plan early and well.

There is no credible evidence that business will suffer as a result of greater openness. That is not to say that individual companies may not be harmed. By far the most likely reason for harm to be suffered will be through lack of preparation and adequate process.

However there should certainly be benefits. It can be used to reduce costs. A company should be able to find out more about its public authority market more easily and make better decisions about what it needs to do to win, and not bid when it judges it would only waste time, money and prevent it winning another more winnable opportunity.

The overall message is plan now to use it positively, not just to live with it.

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## Notes

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- <sup>1</sup> Local Government is currently subject to the *Access to Information (Local Government) Act*, 1985. However the proposed FOIA is expected to create a common access to information regime.
  - <sup>2</sup> *Code of Practice on Access to Government Information*, 2nd Edition 1997. The Stationery Office CNN 58386
  - <sup>3</sup> *Environmental Information Regulations 1992*, S.I. 1992 No 3240, put into effect EC Directive 90/313/EEC on Freedom of Access to Information on the Environment.
  - <sup>4</sup> EU Procurement Directives have been implemented in UK law by Treasury Regulations in the period 1991-5. The regulations cover three areas of public authority procurement; Supply Contracts, SI 1995/201; Works Contracts, SI 1991/2680; Services Contracts, SI 1993/3228. They also cover Utilities with, SI 1996/2911. See Treasury web site for latest versions; [www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk)
  - <sup>5</sup> White Paper, *Modernising Government*, CM4310, March 1999.
  - <sup>6</sup> The UK Green Paper, *Crown Copyright in the Information Age*, Jan.1998, CM3819, addresses the issues relating to, 'the establishment of a framework which offers both to the public and the information industry a simple .. means of accessing and disseminating official information.'- The UK Treasury paper, *Selling Government Services into Wider Markets*, July 1998, encourages the exploitation of government assets, including information, for revenue purposes. Pricing policies will be an issue.
  - <sup>7</sup> EU Green Paper, *Public Sector Information in the Information Society*, COM(1998)585, January 1999.
  - <sup>8</sup> See the Hawley Report, *Information as an Asset*, published by the Impact Programme Ltd in 1997.
  - <sup>9</sup> 95th Congress 2nd Session 1978 : House of Representatives Hearings on The Freedom of Information Act, *Requests for business data and reverse FOIA lawsuits*, page 1
  - <sup>10</sup> An initiative from the Tradable Information Committee set up by Kenneth Baker. We believe that DTI, MAFF and DOE did each produce a catalogue but that there were no others and the initiative ended.
  - <sup>11</sup> *House of Commons select committee on Public Administration, Third Report* May 1998, Volume 1 page xxxvi
  - <sup>12</sup> FOIA Group Inc. 1090 Vermont Avenue Washington DC 20005
  - <sup>13</sup> *Environmental Facts, A Guide to Using Public Registers of Environmental Information*, Department of the Environment, January 1996, 94EP335
  - <sup>14</sup> *Info Source*, Sources of Federal Government Information 1996-1997 ISBN 0-660-16704-2
  - <sup>15</sup> GILS is also known as The Global Information Locator Service. It is based on the ISO 23950 standard. There is claimed to be consensus among the G7 countries for its use for environmental information. [www.gils.net/](http://www.gils.net/)
  - <sup>16</sup> See note 5 above: responses to the Green Paper at: <http://hmso.gov.uk/pquest/response.htm>

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- <sup>17</sup> *The Blue Book 1997*: NB central govt procurement: £sbn                      1986                      1996
- |  |           |      |      |
|--|-----------|------|------|
|  | military: | 11.2 | 12.6 |
|  | NHS       | 8.0  | 38.7 |
|  | Other     | 4.5  | 11.5 |
- <sup>18</sup> Commission Communication, COM(98)143, *Public Procurement*, 11th March 1998, page 1.
- <sup>19</sup> See note 3 above.
- <sup>20</sup> EC Directive 97/52/EC, which came into effect in October 1998 and implements a WTO agreement.
- <sup>21</sup> Statutory Instrument, 1998 No. 1447, *Environmental Information (Amendment Regulations 1998*, 2. (2) (e)
- <sup>22</sup> *R v Sec. of State for DETR and Midlands Expressway Ltd. ex parte Alliance Against the Birmingham Northern Relief Road and Others*. CO/4553/98. The case is subject to appeal.
- <sup>23</sup> DETR Press Notice 619, 23rd July 1998, DETR Contracts to go Public - Hayman. 'If there are good reasons why, exceptionally, certain parts of contracts should remain confidential, these will need to be specified by tenderers and negotiated during the tendering process.'
- <sup>24</sup> *Genetically Modified Organisms (Contained Use) Regulations, 1992*, implement EC Directive 90/219/EEC.
- <sup>25</sup> INFO 2000, Draft 4 year work programme 1996-1999, produced by European Commission DGXIII, 9/5/96
- <sup>26</sup> MAFF, *Meat Hygiene Enforcement Reports*, ISSN 1369-9903, with supplement HAS Scores, Monthly.
- <sup>27</sup> *Draft Freedom of Information Bill, 1999*, clause 37 (d), reference to inclusion of disclosure terms in contracts.
- <sup>28</sup> *House of Commons Select Committee on Public Administration, Third Report* May 1998, Volume 1 page lxiii
- <sup>29</sup> *Ibid.*, pages 1 - 12
- <sup>30</sup> Code of Practice on Access to Government Information, *1997 Report*
- <sup>31</sup> Code of Practice on Access to Government Information, *1995 Report*. page 3 para. 14
- <sup>32</sup> Office of the Parliamentary Commissioner - Reports: Inspectors Report - *case A.4/94*: Research contract - *case A.9/94*: British Rail business prices - *case A.5/96*; Legal Aid Board publicity costs - *case A.27/96*.
- <sup>33</sup> EIRIS, Ethical Investment Research Service, provide services to their members based upon a database of about 1700 UK and European Companies. A significant amount of the information is government sourced.
- <sup>34</sup> *The Private World of Government*, Prof. N D Lewis & J Goh, Faculty of Law, Univ. of Sheffield. pages 15-19.
- <sup>35</sup> *House of Commons select committee on Public Administration, Third Report* May 1998, Volume 1 page 32
- <sup>36</sup> US, see <http://pub.fss.gsa.gov>                      Canada, see <http://contractscanada.gc.ca/en>
- <sup>37</sup> USA Dept. of Justice, Office of Information & Privacy, FOIA Update Vol. XVIII No. 4
- <sup>38</sup> *Towards the Accessibility of Government Information*, Ministry of the Interior, The Hague, June 1997
- <sup>39</sup> USA Dept. of Justice, Office of Information & Privacy, FOIA Update Vol. XVIII no 1
- <sup>40</sup> Commission Communication, *Public Procurement*, COM(98)143, March 1998, page 4.
- <sup>41</sup> *Ibid.*, pages 3-4.
- <sup>42</sup> Information from Pompan, Murray, Ruffner & Werfel. See appendix D in full version of report.
- <sup>43</sup> Statement before the President's Commission on Federal Paperwork, June 1 1976 and quoted in *Getting and Protecting Competitive Business Information*, Braverman, Chetwynd & Hammitt, Mgt. Concepts Inc. 1997, ISBN 1-56726-043-
- <sup>44</sup> *House Committee on Government Operations: FOIA Hearings* 98th Congress 2nd Session 1984. Polaroid evidence.
- <sup>45</sup> Evidence from Pompan, Murray, Ruffner & Werfel. They seek information on how other contracts have been awarded by the department to understand how in practice the trade-off between cost and non-cost factors has been made in practice to achieve "best value". This can be of help to a new supplier in particular, in designing his proposal.
- <sup>46</sup> Stationery Office *Freedom of Information, Consultation on Draft Legislation*, CM4355, May 1999 page 28.
- <sup>47</sup> *The Campaign for Freedom of Information. Press Release dated 9th November 1994*. Cost of Information 'prices right to know out of public's reach'.

**APPENDICES**  
**to**  
**Freedom of Information and Business**

# Contents

<b>APPENDICES .....</b>	<b>3</b>
INTRODUCTION .....	3
AUSTRALIA .....	4
<i>Summary</i> .....	4
<i>Legislation summary</i> .....	4
<i>Early reaction</i> .....	4
<i>Current situation</i> .....	5
<i>Notes</i> .....	8
CANADA.....	9
<i>Summary</i> .....	9
<i>Legislation summary</i> .....	9
<i>Early reaction</i> .....	9
<i>Current situation</i> .....	11
<i>Notes</i> .....	13
USA.....	14
<i>Summary</i> .....	14
<i>Legislation summary</i> .....	14
<i>Early reaction</i> .....	15
<i>Current situation</i> .....	18
<i>Notes</i> .....	21
A FOIA AGENCY CASE STUDY FROM THE USA: POMPAN, MURRAY, RUFFNER & WERFEL.....	22
<i>Introduction</i> .....	22
<i>FOIA Process Paper: by Jacop B Pompan, Senior Partner</i> .....	22
PRACTICAL QUESTIONS OF IMPLEMENTATION WITHIN THE US DEPARTMENT OF DEFENSE .....	25
<i>Introduction</i> .....	25
<i>Questions and Answers</i> .....	25
EUROPEAN UNION.....	30
<i>Summary</i> .....	30
<i>Introduction</i> .....	30
<i>Public Information in Europe</i> .....	31
<i>EU Procurement Directives</i> .....	32
<i>Sweden</i> .....	33
<i>The Netherlands</i> .....	34
<i>Notes</i> .....	35
THE CURRENT POSITION IN THE UNITED KINGDOM .....	36
<i>Summary</i> .....	36
<i>Introduction</i> .....	36
<i>Framework of regulations and policy</i> .....	37
<i>Code of Practice on Access to Government Information</i> .....	39
<i>Government departments and public bodies</i> .....	40
<i>Business views</i> .....	41
<i>Notes</i> .....	43



# *APPENDICES*

## **Introduction**

Much of the reasoning and many of the suggestions that are described in the main part of this report are based upon the evidence we have obtained relating to the practical experience of freedom of information and access to information laws in Australia, Canada and the USA. We have also included an overview of the current position both in the UK, and within the European Union where a number of countries have had access to official information legislation for some time.

The sources used include the main official and published documents as shown in the References and Further Reading section, together with other information provided by individuals in relevant roles who have either provided background information or material that they have agreed may be attributed.

The material from the USA is more comprehensive than that from Australia and Canada. This arises from a number of factors including; a much larger government market with more players, including FOI players; a longer FOIA history; and a greater variety of information available.

We have also included a paper produced by a specialist FOIA law firm in the USA at our request as an example of the type of activities such organisations commonly undertake. We are not suggesting that it is typical. All such firms and consultancies have unique qualities, in terms of market focus, staff expertise and clientele. However the activities described give an interesting insight into how this market operates.

We also thought it would be helpful to include an example of how the FOIA officials in a major USA government department are supported in practice with authoritative answers to their questions. It is also interesting to see the type of questions that are still asked over 30 years after the US FOIA was introduced. The Office of the General Counsel in the US Department of Defense made this material available to us. The material has been selected and shortened but not otherwise changed

Within the European Union, the scale of the task, with the large number of countries each with different legislative histories and cultures in terms of access to official information, means that we have not attempted a comprehensive study. However we judged that an overview, with some more detailed consideration of two countries, Sweden and The Netherlands, would give a useful insight into the current position and the trends.

The current position in the UK is the foundation for the UK FOIA. It is a very mixed picture but there is evidence of a growing degree of openness in some areas. We thought it would be useful to show in more detail the levels of openness that exist today to assist a judgement about the impact upon business that a UK FOIA is likely to have.

## AUSTRALIA

### *Summary*

There has been a high level of personal use of the FOIA, combined with a low level of business interest and use. There is no strong evidence that the FOIA either causes concern for business or produces major benefits. Most business use has focused upon protection of data, but it is now widely accepted that there are no substantial risks of wrongful disclosure. There is little evidence of active use by business to improve competitive performance. There is some evidence of the Act being used to find out more about government policies and decisions. Following the review by The Australian Law Reform Commission in 1995, a number of proposals have been made which are intended to create greater openness. There is also some pressure for more information about contracts to be made available. However there are no signs that this is likely to happen soon.

### *Legislation summary*

The Freedom of Information Act was introduced in December 1982. Australia implemented FOI wishing to benefit from the USA experience and avoid the problems they perceived the USA to have suffered. In particular:-

\* Appeals are made to the Ombudsman or the Administrative Appeals Tribunal (AAT), a generalist tribunal with power to review most government decisions. The view was that the courts in the USA were the cause of expense and delay.

\* Australia included 'reverse FOI' procedures to enable companies to protect requested information. These required government agencies to consult with businesses which had supplied information to government prior to any release of that information. The reverse procedures were specifically designed 'to overcome perceived abuses of the system in the USA, particularly by commercial competitors seeking to get hold of information which had been provided to government.' Senate Standing Committee Chairman in 1986<sup>1</sup>

### *Early reaction*

The best evidence comes from the **Australian Senate Standing Committee on Constitutional & Legal Affairs** which heard evidence during 1986, just over 3 years after the FOIA came into effect.

In its submission to the committee, **The Business Council of Australia** referred to problems of cost and uncertainty. They were concerned that business did not know what information government had about them, and therefore even though reverse FOI was available, they were not sure what needed protecting. Business, having given information sometimes had to incur legal costs to protect it. However, they reported, 'no serious examples, so far as we can detect, of actual disclosure creating very serious problems. Case law in the Administrative Appeals Tribunal has tended to leave us reasonably satisfied.'<sup>2</sup>

**The Confederation of Australian Industry (CAI)**, wanted an education campaign to raise public awareness of FOIA. Their experience of using it was that agencies were not responding positively to requests. They were concerned about the costs of defending matters at the AAT.

When asked specifically whether he knew of any examples where confidential business information had been disclosed, Mr Guardini (for CAI) could only refer to one example where an agency had failed to invoke reverse FOI, the business was not therefore advised, but had been able to retrieve the situation.<sup>3</sup>

**CRA Ltd.** (a mining company), explained that they had objected to release of information in three areas and had won their cases with the AAT but had spent money to achieve this. These related to documents about the settlement of a USA anti-trust case (Westinghouse request), about diamond mining and marketing arrangements (Argyle Request) and exports of bauxite and alumina to assist a tax dispute (Comalco request). They were concerned that the burden of proof falls on supplier of information. They were devising guidelines about the type and volume of information supplied to government.<sup>4</sup>

**The Political Reference Service, Sydney**, referred to lack of use of the FOIA by the business community, 'due to the fact that business, like lots of other people in Australia, does not know what government does.' They proposed that departments should publish indexes of files. Also there were major differences in the costs charged by departments for similar information. They were concerned about differences in the attitudes of departments to openness.<sup>5</sup>

**Alcoa of Australia Ltd.** was concerned that a competitor, in dispute with Commissioner of Taxation, wanted information about the bauxite and alumina market which may have enabled them to deduce sensitive information about Alcoa's business. The effect 'has been to make the company more careful about the provision of information to government.' Mr McClintock, Alcoa.<sup>6</sup>  
Alcoa did not use FOIA to get information about competitors,

because we all know that if one of my competitors goes digging into the department's files on us, then I can do the same to him and we can all end up in a dog eat dog, nobody wins situation. I do think there has not been too much use made of the FOIA by business so far because we are all gentlemen and we do not want that to happen. Mr McClintock, Alcoa.<sup>7</sup>

## **Overall**

The main concerns were about the costs of defending reverse FOI claims, and the risks and uncertainties that information might be released by people who did not understand the sensitivity of a particular item of information. There was no evidence of any actual harm to business. There was very little evidence of active use for competitive purposes. The low level of business use at one point caused the Attorney General to express disappointment that there were not more requests from business, which could benefit from the commercial information held by government.<sup>8</sup> Also by the sixth year 50 per cent of agencies had never received a request.

## ***Current situation***

**The Annual Reports on Freedom of Information Act 1994-5 and 1995-6,**<sup>9</sup> published by the Attorney-General's department, paint a negative picture of the operation of the Act. For example in the 1994-5 report, a letter the Minister for Justice sent to his colleagues is reprinted. This included the following statement:

In finalising the 1993-4 annual report ... I have noticed that a number of government departments have failed to meet their reporting obligations under the Act. It would appear that entrenched attitudes of non-co-operation and non-disclosure persist in some agencies, resulting in decisions which are not defensible in terms of the government's policy on FOI.<sup>10</sup>

Analysis of use shows that the vast majority of requests in Australia - over 90% - come from individuals seeking access to their personal information. The level of business use is relatively slight.

In 1994, **The Australian Law Reform Commission (ALRC)**, was asked to review the scope and operation of the Freedom of Information Act. This review included extensive consultation with government agencies, organisations and individuals, and some public seminars were held. The Commission published its report in 1995.<sup>11</sup> It concluded that the FOI Act was accepted as part of the legislative landscape of Australia. However concerns about the Act included the number and breadth of exemptions, and the costs. The report included some suggestions to clarify the third party information area. These included that the Act should make clear that it applied to information about the competitive commercial activities of agencies (recommendation 68). It also expressed concern about the FOI issues that arise with the 'contracting out' of services and proposed that it should not be possible to avoid accountability and openness by contracting with the private sector (recommendations 99-102).

An associated **ALRC Discussion Paper**<sup>12</sup> identified a need for a radical change in attitudes, from 'not disclosing information unless absolutely required to, to one of disclosing unless there was a very good reason not to.' The clear implication was that the Act has not been working in the way intended.

In March 1995, a speech by **Alan Rose, President of ALRC**,<sup>13</sup> focused strongly on the need to change the culture and to change the Act in a major way, for example by; the appointment of an FOI Commissioner; revision of the object clause to make clear the purpose was to provide openness, not to promote exemptions; and to address the problem of charges. Also that Government Business Enterprises (GBEs) who predominantly engaged in commercial activities in a competitive market should not be subject to FOI.

**The Industry Commission on Competitive Tendering and Contracting by Public Sector Agencies**, published a report in January 1996.<sup>14</sup> In this report, the commission noted that the New South Wales Public Accounts Committee, in a 1993 report into the management of infrastructure projects, had argued for the release of a wide range of information, including price payable, the basis for any changes, details on any significant guarantees or undertakings, details of transfer of assets and the results of cost-benefit analyses. The type of information it did not consider suitable for disclosure included the private sector's internal cost structure or profit margins, matters having an intellectual property characteristic, and any other matters where disclosure would pose a commercial disadvantage to the contracting firm. The Industry Commission made its recommendation as follows:

Recognising the balance between commercial confidentiality and accountability, governments should make public as much information as possible to enable interested people to assess contracting decisions made by agencies. Of particular importance is information on the specifications of the service, the criteria for tender evaluation, the criteria for the measurement of performance and how well the service provider has performed against those criteria.<sup>15</sup>

A report from the **Western Australia Commission on Government**,<sup>16</sup> in August 1995, included a consideration of commercial confidentiality in the context of FOI. The Chamber of Commerce and Industry had pointed out in its submission,

As government ties with the private sector broaden through privatisation and contracting out there is clearly a need for these relationships to be conducted in an accountable and proper manner ...

So government agencies have the right to demand information and to make it public if appropriate, but the requirements must be 'up front', so business know what information will be required and whether it will be made public ...<sup>17</sup>

The Commission considered that the principle of public accountability of public funds should outweigh concerns for commercial confidences. They judged this would require more careful consideration of the development of contracts so that outcomes, which should not be commercially sensitive, rather than processes (such as methodologies) were specified.

Evidence from Les McCarrey compared the situation in Australia and USA with regard to gas supply contracts. Publicity had been given to the confidentiality of contracts to supply gas to the Western Australia State Energy Commission. He had been asked to chair a committee to review the contracts and report to government. He went to USA and had no difficulty in looking at all major inter-state gas supply contracts. They were in the public domain. Also any hearings to review the contracts were open to the public. He concluded:

it is my considered view that a requirement for disclosure of contractual obligations of the parties would in some cases result in the public getting a better deal, if for no other reason than because of the knowledge of the parties the terms of any agreement would be subject to critical scrutiny by external experts.<sup>18</sup>

The Commission recommended that there should be clear instruction in tender documents that all contract details would be released.

In his 1997/8 Annual Report, the **New South Wales Ombudsman**, reported that he had advised the Department of Corrective Services that,

we did not agree with its view that information disclosing that a private contractor had improperly overcharged the Department for the provision of goods could be considered to be information of a 'commercial value' (to that private contractor) that would be damaged if it was released.<sup>19</sup>

The pressure and arguments for reform have not yet been accepted by the Federal Government and two knowledgeable and experienced participants in the FOI scene in Australia share similar views.

**Rick Snell**, in his paper, **Re-thinking Administrative Law: A Redundancy Package for FOI?**<sup>20</sup> argues that the current Australian FOIA is a system that is in decline, and the idea of a general right of access has been transformed into a privilege for a small elite. One important factor in this, is the trend to reconfigure the boundaries between the public and private sectors. Examples include; separating service delivery from policy formation, proliferation of government corporations, privatisation and outsourcing. Generally speaking information that was held and stored in the government sector is now "...scattered across an intriguing variety of locations many of which contain 'Keep Out-Private Property' signs."

In the book, **Open Government**, which **Greg Terrill** co-edited, he contributed a chapter, **The Rise and Decline of Freedom of Information in Australia.**<sup>21</sup>

Greg explains the background to FOIA in Australia and the negative climate created by government attitudes with the Ombudsman reporting delays and failure to meet deadlines. He quotes from the 1994-5 report, 'many government agencies still do not operate within the legal framework and certainly not the spirit of the Freedom of Information Act.'<sup>22</sup>

In his view the attitude of departments may have hardened over recent years taking a cue from political attitudes. 'AAT's generosity to protests that information is "commercial in confidence" has led to exaggerated claims under this heading.'<sup>23</sup>

In a comment that he provided for this study, **Victor Perton MP**, who is active in the FOI area, wrote,

The main FOI political issue in Australia relates to the use of commercial confidentiality provisions in contracts and in the FOI Act to protect tenders from disclosure. In this sense, companies/businesses are using FOI as a shield.  
As to business using the Act for the purposes of extracting information from government, there has been no major change in recent years. It occurs but has created no particular controversy nor burden to government.

## **Overall**

A high level of personal use combined with a low level of business use, with business use mostly focused upon protection. We have some evidence of company use to find out more detail about government policies and decisions, but not to a level that causes any concern. The comment by the MP above seems to express the business position concisely. There is business use to gain information but there has been no major change in this area or current controversy. There is quite strong pressure for a more open system but no clear signs that this will happen soon.

*Notes*

## CANADA

### *Summary*

There was initial business concern inspired by prejudiced reports from the USA. The response from business was largely defensive. The larger established suppliers were considered to have better access to information from their public sector customers than they could obtain with freedom of information legislation. Business use has grown, with contract information increasingly available and there is extensive use to obtain licensing and regulatory information. Details of contracts placed by Public Works and Government Services Canada (PWSSGC), including price and reason for selection, have been published on the Contracts Canada Web site since 1st April 1997. The trend is for more contract details to be provided.

### *Legislation summary*

Federal Access to Information Act (AIA) came into force in July 1983.

As with the Australian FOI, concern about USA practice caused provisions for 'reverse FOI' to be included. There is a requirement to provide written notice to any supplier of information whose confidential business information is later requested. The third party has a right of appeal to the Federal Court.

An Information Commissioner appointed by Parliament, acts as a specialist Ombudsman to investigate complaints that government has denied rights under AIA. He can only recommend release. He relies on persuasion but can ask for a Federal Court review.

The provision that governs treatment of third-party information does not always include a harm test. Sections 20(1)(a) trade secrets, and 20(1)(b) confidential information, do not require evidence of harm, if information is a trade secret or has been supplied in confidence it is exempt from disclosure.

### *Early reaction*

The concern felt about the USA FOIA was expressed in a **Financial Times article in August 1983**.<sup>1</sup> This referred to aggressive use of FOIA by business in the USA, but pointed out that Canada's AIA contained improvements over the USA FOIA. The most significant improvement was the requirement to provide written notice to any third party about whom confidential business information had been requested. The new Information Commissioner, Inger Hansen, was quoted:

I think we have learned from the US. Public servants here know there are such things as trade secrets and confidential information.<sup>2</sup>

The importance of business becoming alert to the risks of the AIA was highlighted in the **Insight Publication: Organising your Company's Information Procedures under the new Act**.<sup>3</sup> This was essentially a wake-up call to business. The authors, from Shell and General Motors, were concerned that government had a great deal of corporate information which was vulnerable to public disclosure as a result of the AIA.

They stressed that it was incumbent on every corporation to develop a plan for dealing with all information provided to the federal government, whether statutorily or voluntarily. Any corporation

which failed to take preventive action to address the AIA, might find it had become an open book to its competitors.

In their view the amount of information submitted by the private sector to government was staggering. They suggested that other companies might be shocked by the number of their employees who came into contact with government departments on a regular basis.

Trade secrets, and company confidential records seemed to be well protected by the AIA, so why should business be concerned? The reason was that definitions were not precise. It was hard for someone outside the organisation to know whether information would cause harm if it was released.

Practical advice was included, stressing the importance of standardising procedures and suggesting that companies should use the AIA themselves, eg. to find out about possible legislation and competitors.

In 1985, two years after the AIA had been implemented, a study of the impact upon business was carried out by for an **LLM Thesis by Ms Longworth**.<sup>4</sup> This provides a very useful insight into the early operation of the Act.

She concluded that early 'hype' about risks was either exaggerated or misleading. AIA was being used minimally by business requesters. The main users were the media, lawyers and academics. In the first 21 months there had been 3702 requests in total, with 47 government institutions subject to the Act receiving none.

The most obvious reason for low business use was that the law was much more generous to information submitters compared to FOIA in the USA. Officials had a wide discretion to interpret the exemptions in a conservative way. Small firms had originally viewed AIA as an opportunity. It was now seen that effective use was in large part a function of company size and resources.

The Information Consultant industry had not grown as in the USA. The reason was that the small requester market, combined with the need for detailed knowledge of government systems and procedures, required significant resources. Also copyright protection was a constraint.

The most active area of business use related to government tenders and contracts.

Longworth's survey revealed a predominantly defensive reaction to AIA with little active use. Officials had a policy of encouraging companies to designate the confidentiality status of submissions and of consulting about the 'mosaic' effect. (This might enable a requester, by piecing together items of information from several sources to assemble information which, if requested as a whole, should have been exempt)

Canada had a small, concentrated market which inhibited companies from using AIA to spy on competitors. They expected to be identified and subject to retaliation. They were concerned not to get a reputation for an activity that might be seen as espionage. Large companies already had better channels to government information with regard to policy making than AIA would give them.

Consultation and consensus were the dominant characteristic of government-business lobby relations. This had been perceived as natural, legitimate and in the public interest by a Royal Commission. The USA style of business was seen as more adversarial.

The most obvious change had been the implementation of defensive procedures with new processes and marking of documents and special appointees to liaise with government.

There was considerable business satisfaction with AIA. The majority view was that AIA had and would have very little impact upon business.

One of the few consultants in the AIA field, but a very visible one, **Michael A Dagg Associates**, provided a survey of his experience and published an article in *Byword*<sup>5</sup> in April/May 1986. The article was to promote how the 'Access Law can serve as a highly effective research tool for business to monitor government procurement activity.' However his frustrations in using the AIA with inconsistency, unreasonable refusals, persistent non-compliance by some institutions etc. were made clear in his survey.<sup>6</sup>

## Overall



There was initial business concern as a result of alarmist reports from the USA. This stimulated some defensive action. This was followed by growing low key business use, with no reports of harm, and some reports of frustration with officials who were not motivated to implement the Act.

### *Current situation*

At about the ten year point, in 1994, a report, **The Access to Information Act: A Critical Review**,<sup>7</sup> was prepared for the Information Commissioner. This painted a sober picture of the AIA as it was being used at that time. The report stated that the Act was in danger of losing relevance as the system faced the challenges of the information society. Lack of clarity in ministerial leadership had slowed down progress on information policy issues and had served to send signals to an already reluctant and nervous bureaucracy that openness was not the order of the day. The AIA had stultified and was threatened with losing its relevance. 'It has come to express a single request, confrontational approach to information provision.'

The report made a number of recommendations for reform, including the proposal that a Canada Information Network should be mandated to serve as a focal point for locating and accessing government information sources and services as these became increasingly available in electronic form.

A more positive view of the AIA was given in a speech in 1994 by the Minister of Public Works and Government Services, **The Access to Information Act: Ten Years On**.<sup>8</sup> This referred to the long tradition of secrecy, and explained that it was understandable why open government in Canada was a concept still in its early childhood.

However some court decisions had started to set some precedents in favour of disclosure. Federal judges had ordered disclosure of information about a company's application for a government grant or benefit, details of a winning tender, information about government approval of a drug, safety information gathered by government inspectors about an airline and inspection reports on meat packing plants.

... about 43% of all requests come from the corporate sector ... Businesses file 4000-5000 requests a year; many of them, not surprisingly trying to determine the missing ingredients in their bids for government business or to find out what the government needs and wants.

Unlike media requesters, businesses were not anxious to propel their access findings into the public domain.

There was a good measure of public interest in business users acquiring information that could lead to more competitive pricing. Business checking on business can help consumers.<sup>9</sup>

In a speech in 1996, **John W Grace, Information Commissioner**,<sup>10</sup> praised the AIA and its use but expressed concern that attempts to 'reform' it might weaken rather than strengthen it. He referred to a very negative political and bureaucratic culture.

... special hostility is reserved for those requesters who make multiple requests and those who use the information so acquired to embarrass government or for commercial purposes.

... perhaps of most concern to some officials are the ... professional requesters. Parliament never intended, it is often said, that the Access Act should spawn a business. I'm not at all sure it didn't, but that is irrelevant. There are a few - a very few professionals, and they don't live lavishly.<sup>11</sup>

He referred to the myth of the abusive requester. After six years he had yet to find a requester who could be certified as truly abusive. However he thought that fear of such abuse was out of all proportion in Ottawa.

**The Annual Report of the Information Commissioner: 1997/8**, highlighted some of the problems the commissioner had perceived:

A culture of secrecy still flourishes in too many high places even after 15 years of life under AIA.

... the fault lies ... not in the law. It must be placed at the feet of governments and public servants who have chosen to whine about the rigors of access.

... public servants who would be profoundly insulted to be considered anything but law-abiding ... sometimes have no hesitation in playing fast and loose with access rights: destroying an embarrassing memo, conducting only the most cursory searches for records, inflating fees to deter a requester, delaying the response until the staleness of the information blunts any potential damage or embarrassment and by simply refusing to keep proper records. There are now no penalties for those who break the access law.

The problem of delay in answering access requests is pervasive, serious and chronic.<sup>12</sup>

However the report went on to say that the use of the Federal Court as a delaying tactic by government, was, by and large, a thing of the past, although four cases in this category were cited.

Some important cases relevant to contracts were summarised.

**Third Party motives (11-98).** In this case a failed bidder for a Public Works and Government Services Canada (PWGSC) contract for audio visual equipment requested details of the contract that had been placed. The contract winner objected. The ruling stressed that simple assertion of harm did not satisfy the test. If the department wished to exempt information at the request of the third party, it had an obligation to take reasonable steps to verify the third party's rationale.

**Transparent bidding (12-98).** In this case, disclosure of some unit prices had been refused to a losing bidder. The PWGSC procurement office had mistakenly omitted the unit-prices-will-be-disclosed clauses from the Request for Proposals (RFP). The refusal was upheld. Also the commissioner was satisfied with the claim that unit prices in this case satisfied the tests for confidentiality under clause 20. The commissioner praised the PWGSC for re-considering its previous position on unit prices and from March 31st 1997, directing its contracting authorities to include in all RFPs for standing offers for goods and services, a clause informing bidders that the unit prices of the winning bid would be disclosed.

The **PWGSC Supply Manual**,<sup>13</sup> makes clear that after a contract or standing order has been awarded, some requests for contract information can be handled by contracting officers on a routine basis. This includes, for goods and services, names of successful and unsuccessful bidders, together with total amount of their bid and total score, if applicable. For standing offers, unit pricing information would be disclosed on a routine basis, where the bidder has been notified of the Department's intent to disclose such information.

A number of individuals with close knowledge and experience of the AIA in Canada have provided very helpful comments for this study. **Robert Peter Gillis, President of RPG Information Services of Edmonton, Alberta.** explained that in his view FOIA is used quite extensively by business in some specific areas. eg.

... in the field of drug licensing and other trade mark and licensing endeavours. Almost all of Health Canada's FOI traffic revolves around this type of request plus requests from public interest groups ...

FOI is also used in government contracting where firms try to find out about winning bids. There is at least one broker who makes a living off selling this type of information to companies. A second impact will be in the regulatory areas. In Canada, we have had media and public interest groups use FOI to look at meat inspection, aircraft safety inspection, the competency of those running nuclear power plants and a host of other public safety issues. In one case, Air Atonabee, the airline was actually forced into bankruptcy after it was revealed that it was flying marginally unsafe aircraft.

A third impact is in the environmental area. Increasingly FOI is being used by environmental groups to challenge environmental impact assessments whether that is for a coal mine near Jasper National Park or the reclamation of contaminated properties in downtown Vancouver. Companies will have to be prepared to have information they provide to government departments as part of such assessments or, more likely around such assessments, sought under FOI.

A research company specialising in competitive intelligence in Canada and the US, explained that it uses the AIA extensively in Canada, in particular for contract award information. It also finds the reading rooms very helpful, in that it is easy to find when something related to the subject of interest has already

been released. The main problem is time delays, when to use AIA outside routine enquiries takes weeks and sometimes months.

## **Overall**

While considerable concern has been expressed about the limitations of the AIA and the reforms that are needed, there is good evidence of growing business use. Nearly half of all requests now come from the business sector and the publication of contract information on the web is growing.

## *Notes*

## USA

### *Summary*

There was a great deal of early hostility to the Freedom of Information Act (FOIA) in the USA. This came from within government and also from business as they became concerned about the protection given to business information. Part of this reaction was based upon misinformation. For example there was a report that the Japanese had used the FOIA to get the design of the space shuttle nose cone.<sup>1</sup> This was shown to be untrue.

However the failure of the 1966 Act to include provisions for business to be consulted before release of its data, was soon recognised as a serious problem. This led to the creation of 'reverse FOI' law suits.

The major change in business attitudes, from active concern to acceptance, can be dated to around 1981, when the new Reagan administration revoked the previous Department of Justice guidelines, and began a policy of defending all suits challenging an agency's decision to deny an FOI request.

The Executive Order in 1987, requiring agencies to notify submitters that their information was being sought, codified a practice that had by then, been generally adopted.

The contentious question of the release of contract prices was placed on a new footing in 1997, with a Federal Acquisition Regulation (FAR) amendment which specified that unit prices of government contracts were to be disclosed. While there is still some business concern about this, it is being generally implemented.

It would be fair to say that the system has now settled down with no current active issues apart from the need for better indexing and more information to be placed on the Web, both of which are being addressed.

### *Legislation summary*

Freedom of Information Act (FOIA): 1966

All records of executive agencies of the federal government are presumptively accessible to the public, unless in whole or in part, exempted.

Nine exemptions provide the primary bases for non-disclosure and they are generally discretionary, not mandatory. Appeal is to courts if access is refused.

Certain categories of information must automatically be disclosed by publication in the Federal Register. This includes details of Agency organisation, functions, procedures and substantive rules.

Certain types of records, eg. final opinions in cases that have been adjudicated, policy statements, some staff manuals, must be routinely made available for public inspection and copying. The 'Reading Room' provision.

In *Vaughn v Rosen*<sup>2</sup> the court required a detailed index of withheld documents and justification for exemption, together with the requirement that agencies release segregable non-exempt portions of a partly exempt record. This led to motions for a 'Vaughn Index' to be produced.

1974: amended: reduced scope of exemptions, and broadened many procedural provisions.

1976: amended: more precise definition of exemption 3 (other statutes).

1986: FOI Reform Act: broader exemption for law enforcement, plus new fee and waiver provisions.

1987: Executive Order 12600: predisclosure procedures for confidential commercial information.

1996: Electronic FOIA: largely to address subject of electronic records. "Reading room" records created after 1 Nov. 1996 should be made available electronically.

1998: Amendment to Part 15 of Federal Acquisition Regulations: 'items, quantities, and any stated unit prices of each award' required to be released, with no submitter notice necessary.

### *Early reaction*

Considerable concern was expressed both by business and by agencies, about the effect the FOIA was having in making confidential information available which could cause harm both to US companies and to the USA economy. As a result a subcommittee of the House of Representatives held hearings and in July 1978, published a report, Freedom of Information Act, Requests for Business Data and Reverse-FOIA lawsuits.<sup>3</sup>

### **House of Representatives Report, Freedom of Information Act, Requests for Business Data and Reverse-FOIA Suits**

This was a substantial review of the operation of FOIA in relation to business data. Firms that had submitted confidential documents to Federal Agencies had expressed concern about their release. Numerous disputes and court cases had arisen over the release of such information. The committee found that the major problem concerned the procedure by which agencies decided what to release or withhold. It concluded however, that there had been no major abuses.

Most difficulties had been procedural rather than substantive. Committee recommendations included:-

- notice be given to the submitter about pending release of information.
- submitter should mark confidential records. This would not be binding on the agency but would assist.
- agencies should adopt substantive disclosure rules providing for disclosure of classes of documents.

Reverse FOIA lawsuits had developed as a result of a lack of statutory guidance. They represented a last resort for business and other less drastic measures had developed:

... a small industry had grown up to monitor the flow of information out of government files. One company, FOI Services Inc.,<sup>4</sup> publishes weekly logs of all FOIA requests made to the Food and Drug Administration (FDA), Environmental Protection Agency (EPA), Federal Trade Commission (FTC) and the Consumer Product Safety Commission (CPSC). A subscription to the FDA log costs \$280/year and the others \$90 apiece.

It is common practice for those who submit information to the Government to use FOIA to obtain a copy of each FOIA request made by competitors and others ... as well as a copy of the material supplied in response ... A significant portion of corporate use appears to be the result of this type of monitoring ... None of this is necessarily unhealthy.<sup>5</sup>

The report judged that while not all uses of FOIA are necessarily desirable, many reflected a legitimate interest in government files. Evidence to the House Committee from Terry D Miller, Government Sales Consultants Inc., gave four examples of improper contracting:

- 1) GSA awarded a contract for ADP equipment to a company as a result of an error in evaluation of the firm's bid. The cost had been incorrectly computed, and the winner was thought to be the low offeror but in fact was second low.
- 2) The Army at Aberdeen, Md., in a contract for ADP maintenance, forgot to subtract the prompt payment discount from a vendor. It incorrectly awarded to the apparent low offeror as a result.
- 3) The Navy, in a remote computing services proposal, made mathematical errors in computation of life cycle cost.
- 4) GSA ... lost a vendors proposal, never opened the proposal and incorrectly awarded to another vendor.<sup>6</sup>

The committee strongly recommended that Federal Agencies make every effort to collect from business only that information that is necessary to a legitimate agency function so as to reduce the problems and costs.

The Administrative Conference of the United States (ACUS), was charged with investigating and making recommendations on the trade secrecy exemption of the FOIA. It commissioned two studies. The first, by Russell B Stevenson, Professor of Law at George Washington University, was published in

1981 with the title, *Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4*.<sup>7</sup>

### **Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4**

In his report, Professor Stevenson argued that as the use of FOIA by business had grown there had been a parallel increase in the concern of business that their information would go to competitors. One manifestation of this was the growing number of reverse FOIA suits. There had also been criticism of the performance of agencies and of release through inadvertence.

He posed the question, how serious was the problem? It was difficult to answer because there were very few documented instances of improper disclosure. Even among those cases that were mentioned, many were of dubious accuracy or had no relationship to FOIA.

eg. The Sikorsky Aircraft Division of United Technologies, had withdrawn from a bid giving FOIA risks as one of the reasons in a press release. The view of the contracting officer was that this was a 'smokescreen'. They already had a great deal of work and knew their price would be too high.

Professor Stevenson had advertised in the Federal Register, asking for information about businesses which had suffered competitive harm as a result of improper release under FOIA. He had received 19 replies to his notice.

In five cases it was reasonably clear that information that fell within Exemption 4 (business information), had been disclosed. Three of these were the result of sloppy information handling by FTC. None of the government personnel interviewed could recall any instance in which serious competitive harm resulted .

One of largest groups of complaints involved instances of disclosure by inadvertence, unrelated to FOIA.

Professor Stevenson's main conclusion was that it was the perception of the results of FOIA that was the problem. There was a need for agencies to improve procedures to alter the perception that business secrets were not safe with government. A rule was needed to require that notice be given before information marked confidential was released, submitters should be assured a right to appeal, and senior officials should be personally involved with decisions.

He stressed the value of class determinations; i.e. certain classes of information would be routinely released and submitters told in advance. The Food and Drug Administration (FDA) had used this most widely. His overall conclusion was:

... exemption 4 probably achieves more satisfactory results in practice than the vociferous criticism from business would seem to indicate. That criticism ... evidences a great deal of suspicion and uncertainty that is, itself, quite real. ... the perception that business secrets are not safe in the hands of the government is itself reason enough to attempt to rationalise agency procedures in order to provide greater guarantees that competitively sensitive business information will not be improperly disclosed pursuant to FOIA requests.

... there appears at least equal cause for concern that business information escapes to competitors through means other than FOIA, often simply as a result of sloppy administrative practices.

The best way for agencies to attack both sets of problems is to assign information management a higher priority.<sup>8</sup>

This study was criticised by the business community, and a further study was commissioned from James T O'Reilly, Professor of Law at the University of Cincinnati, and senior counsel for Procter & Gamble. His report , *Regaining a Confidence: Business Confidential Data and Statutory Protections*,<sup>9</sup> was published in November 1981.

### **Regaining a Confidence: Business Confidential Data and Statutory Protections**

Professor O'Reilly was concerned with the way in which the 'substantial competitive harm' standard had evolved and been applied. He argued that the fact that little information had come to light about companies suffering harm, did not mean it had not happened. Those who lose valuable information, may not know they have lost it, and if they do, they have an incentive not to advertise the fact. He referred to the work of Casey, Marthinsen and Moss<sup>10</sup> on 'circumstantially relevant business information,' defined as those pieces of valuable knowledge of time and place which aid the entrepreneur to gain advantage.

Narrow interpretations of the exemptions made it very difficult to protect such information. However it had a valid claim to protection.

He wanted the focus of the Act redirected towards oversight of the activities of Government and away from revealing information about private interests.

Both reports were regarded as thorough and scholarly and in fact agreed on most of the reforms that were needed. Overall, O'Reilly wanted greater changes to secure stronger submitter rights to protection.

### **Senate FOIA Hearings in 1984<sup>11</sup>**

The Senate Committee heard evidence from business about their concerns, and included a discussion of procedural changes that would permit business to receive notice in advance of disclosure.

The **Monsanto** case was rehearsed by Mr Rader for Senator Hatch:

Several months ago a US business was greatly damaged by the release ... of a valuable trade secret ... the formula of a widely used herbicide ... it is now possible that foreign companies can replicate the trade secret and deprive our US company of a major share of its export market. The result ... may be the loss of countless American jobs to foreign corporations. Mr Rader.<sup>12</sup>

This was clearly a trade secret ... it clearly did not have to be released under FOIA ... the fault was not with the law. The fault was with the fact that ... it was administered in an extremely poor fashion. Senator Leahy.<sup>13</sup>

**Procter & Gamble:** Mr O'Reilly, senior counsel, gave evidence about their experience. He was concerned about the confusion that existed amongst submitters as to what would happen to their confidential information. Lack of uniformity amongst the agencies caused concern. He explained that each agency treats business information according to its own standards, with the FDA the least likely to accord procedural rights. He wanted at least minimal uniform standards to apply across the agencies.

**General Electric Company:** made a submission detailing their concern about engineering designs and blueprints being obtained under FOIA, giving foreign governments free access to their technology. GEC had recently taught a valuable technology to a foreign company under licence. This company now claimed they did not owe GEC anything because the data was available under FOIA.

The committee also heard evidence that contrary to what the business community claimed, the agencies were extremely deferential to industry assertions of competitive harm. This was particularly true in the light of the Trade Secrets Act which provided criminal penalties against agency personnel who disclosed 'trade secrets.'<sup>14</sup>

### **House of Representatives, FOIA Hearings in 1984<sup>15</sup>**

These hearings followed the same lines as the Senate hearings above but heard different testimony.

**Burt Braverman:** from a Washington DC law firm, explained that in the early years commercial information was well protected. However in 1974, National Parks & Conservation Association v Morton set a new standard, Courts discarded the 'customarily treated as confidential' standard and looked to the question of 'substantial competitive injury'. This National Parks test was accepted by courts over next 10 years. The effect was to make the protection considerably more narrow.

**Polaroid Corporation:** F de Lima, Vice President and Secretary, explained that Polaroid had attempted to audit the handling of its secrets in governments hands. The Environment Protection Agency (EPA) had collected Polaroid chemical trade secrets which it needed to administer the Toxic Substances Control Act. Polaroid had filed an FOIA request. Over 1 month later they got a response and an apparently unlawful disclosure of a Polaroid secret to another Federal agency had occurred. Further they learned that EPA might have disclosed Polaroid secrets to over 300 people employed by over 40 Federal contractors and subcontractors, but they could not learn exactly because some contractors claimed that the information was confidential business information, and need not be disclosed under FOIA.

**Business Coalition:** Mr Thomas Susman replied to the Committee Chairman's questions:

\* Can you provide data on harmful disclosure?

Statistically valid data not available; many companies do not hear of damaging releases; firms inhibited from reporting; there may be a very high level of damage from a single disclosure, eg. Monsanto; and little damage from a large number of small disclosures.

\* Is there any data on the motivation behind the requests?

No survey and no statistical data; motivation cannot be easily ascertained since agencies cannot inquire; the value must bear a relation to cost and firms spend hundreds of thousands of dollars each year with lawyers and search firms to obtain competitors data; companies ask for competitors information to keep track of technology, to determine how to bid competitively against them next time, to learn about agency attitudes and strategies that may affect the private sector, to assess possibilities for obtaining licenses, contracts etc. and to make sure that agencies are treating parties similarly situated on an equal basis.<sup>16</sup>

**Public Citizen Health Research Group:** Sidney M Wolfe MD, Director: addressed the question of what were the examples in which there had been disclosure and harm to the company as a result of the FOIA?

He explained that a simple way to answer is to ask the agencies to list the complaints they have had under FOIA. At FDA there were 9 out of 70,000 (1 in 8000). He guessed that the most important determinant of disclosures may in fact be human error. Those mistakes could not be condoned, but he suggested they may happen regardless of which agency is involved.

**Information Consultants Inc. (ICI):** Martin Beer, President, in a letter dated 9th Jan 1984, explained that they had found the FOIA to be a vital tool to uncover misconduct by federal agencies and to protect the rights of small businesses. Using FOIA, ICI were able to obtain documents which showed that Small Business Administration (SBA) had committed a more serious violation of its own procedures than its official correspondence admitted. This led to SBA terminating an illegal contract.

Without FOIA their only alternative would have been to sue the government. However the cost of such a suit is prohibitive for a small business

## **Overall**

There were some significant early problems with lack of well managed processes and clear mistakes. It was quickly recognised that the lack of 'reverse FOIA' procedures was a weakness in the legislation. However there was very little evidence of harm, apart from the Monsanto case which was frequently referred to. In any case what was revealed was in fact clearly protected by the FOIA exemption and so not a result of a gap in the law, but of the law being wrongly administered.

Some businesses complained strongly about the risks they perceived. There was positive use by business and agencies seeking information to help them grow their businesses, both by finding out more about future requirements and procurement practices and checking out the performance of their competitors. In the business community there was a major problem of perception and a questionable one of improper release. However a serious issue was lack of effective implementation with variable standards.

## ***Current situation***

The turning point in the attitudes of business in the USA towards FOIA can be dated to the early days of the Reagan administration. In line with his philosophy of reducing the level of government intervention in the economy he sought to give greater assurance that business information would be protected. The previous FOIA guidelines, issued by the Carter administration to the Department of Justice, had ordered agencies not to withhold information 'even if there is some arguably legal basis for doing so,' and had committed the Department of Justice to defend 'FOIA suits only when disclosure is demonstrably harmful to the public.'<sup>17</sup>

In 1981, the Reagan Attorney General, William French Smith, revoked the previous guidelines and began a policy of defending:

all suits challenging an agency's decision to deny a request submitted under the Freedom of Information Act unless it is determined that: (a) the agency's denial lacks a substantial legal



basis; or (b) defense of the agency's denial presents an unwarranted risk of adverse impact on other agencies' ability to protect important records.<sup>18</sup>

## FOIA Updates

The Office of Information and Privacy (OIP) in the Department of Justice, is regarded as having done a very good job in providing a focal point for policy, training and advice about the implementation of the Act. Its FOIA Updates,<sup>19</sup> published on the web, are an authoritative source of information about FOIA in the USA. In 1997, several subjects of relevance to business were addressed:-

### **Protection of contractor proposals<sup>20</sup>**

Under new provisions that were included in the National Defense Authorisation Act for Fiscal Year 1997, agencies were prohibited from releasing under FOIA any proposal submitted by a contractor unless that proposal was set forth or incorporated in a contract. The intent of Congress was to alleviate the administrative burden faced by agencies in processing FOIA requests. It allowed agencies to dispense with line by line reviews of bids by potential suppliers.

### **New disclosure rule adopted for unit prices<sup>21</sup>**

Revision of Part 15 of Federal Acquisition Regulation (FAR) made clear that for contracts solicited after 1 January 1998, unit prices of each award were to be disclosed to unsuccessful offerors during the post award notice and debriefing process and to be made publicly available on request.

Numerous 'reverse' FOIA cases had challenged agency decisions to disclose unit prices, and agencies have been forced to litigate this issue time and time again. The FAR rewrite was expected to remedy this problem.

An entirely new provision has been added to the FAR to specifically provide that 'the items, quantities, and any stated unit prices of each award shall be made publicly available, upon request' the 'overall evaluated cost or price (including unit prices)' shall be furnished to the debriefed offeror.<sup>22</sup>

### **Air Force Press Release<sup>23</sup>**

This stated that proactive release of information was likely to be of widespread interest, and would both serve the public and ease processing burdens. Air Force Historical Research Agency had 70m pages on history of military aviation.

The records available now includes material from Gulf war with over 1m pages scanned into electronic images together with raw electronic data including imagery. It considered that through affirmative disclosure the Agency could meet public demand without unnecessarily encumbering its FOIA processes.

## Evidence from FOIA Officials

Some key FOIA officials in US Government Departments have given us their views.

**Office of Information & Privacy, Department of Justice**, gave us the view that the impact upon business was pretty well set. It was not a hot issue any longer. Current issues were more to do with electronics - there was not enough stuff on the web. There was nothing unique to business. They were not aware of any recent study in the US about the impact upon business.

**Charlie Y Talbott, Freedom of Information Act Specialist, US Defense Department**, explained that companies used FOIA largely 'to scoop each other out!' Most business questions were to find out details of winning proposals. The Defense Department normally gave out contract details unless classified, but excluded information that was proprietary which was sometimes contained in a contract. Losing proposals were protected; however winning proposals were generally released with proprietary material removed.

Performance reviews were normally releasable subject to individual judgement about what type of material should be removed.

Typically businesses would hire a law firm to find out about procurement policy. The Department of Defense often did not know whether the firm was asking on behalf of a particular client or on a

speculative basis to get information to sell to new clients. The volume of requests was stable and they were now accepting electronic requests.

**Patricia Riep-Dice, Freedom of Information Act Officer, NASA,** explained that they generally got about 3000 FOIA requests a year. These were divided between HQ and 9 centers. About 80% of these were commercial, and of these, about 80% were in the name of the company who wanted the information. About 5% come from 'FOIA Clearing Houses' where the company can be anonymous. Most of the requests were for contracts, proposals, modifications to contracts and RFPs (Requests for Proposals). Most requests came between 6 months and a year before a re-bid was due, presumably so that potential bidders could plan their campaigns.

99% of all contracts are releasable and 99% of all proposals (ie bids from companies) are denied. They had backlogs from time to time but these did get cleared and the situation should improve with increasing availability of material electronically, in the electronic FOIA reading rooms. They expected centers to put the releasable parts of contracts on line. This would save time when they sometimes get 20 or 30 requests for a contract.

## **Evidence from Commercial Users of FOIA**

A number of commercial users of FOIA have also given us their views.

**Harry Hammitt,**<sup>24</sup> of **Access Reports Inc.** (publishers of a specialist FOIA newsletter), gave a very helpful overview from his perspective. There was some anecdotal evidence that sensitive information had been disclosed, but almost invariably that information was disclosed by mistake and not because the government decided it was not protected. Generally speaking government agencies were very good at protecting bona fide confidential business information and the case law was pretty well settled. There had been some arguments of late having to do with unit prices -- specific prices within an overall contract -- but the general principle was set, that prices the government agrees to pay for items or services were disclosable after a contract was awarded.

There was an executive order that required agencies to contact business submitters if the agency was contemplating disclosing information and that allowed the business to weigh in on the merits of disclosure and present its arguments.

There was a perception in some quarters of the business world that FOIA made life harder. Of course it depended on what side of the fence you were on, since the business community was by far the greatest user of FOIA to get information about the business climate for various agencies. He thought that on balance the ability to learn more about the regulatory climate through making FOIA requests was a greater value to business than the possibility that truly sensitive information would be disclosed.

**Jeff Stachewicz, President, FOIA Group Inc.,**<sup>25</sup> told us that many of the Fortune 500, together with smaller companies and universities had used his services at one time or another. His company specialised in FOIA rather than competitive intelligence in general. They therefore typically had more expertise in understanding the legislation than most of the agency staff, who varied considerably in competence. They could afford to be more aggressive in pushing for documents than a company pressing its customer agency in its own name. The bulk of the requests were related to contracts and business opportunities. eg. details of capacities and pollution licences for new plants. Universities had also used FOIA to get information to position themselves for grants.

Typically companies used FOIA to get a better insight into the requirements of the agency and into the likely pricing of their competitors. Price was often the main factor in the award of government contracts and finding out how competitors had priced similar bids to other agencies with detailed labour rates etc. was very helpful.

The recent Economic Espionage Act had given more importance to FOIA. Its definitions of confidentiality and secrets were vague, and civil and criminal penalties were severe. However information provided under FOIA was exempt. They therefore now insisted on having information under FOIA and not just being given it informally.

The FOIA was a vital competitive research tool for all businesses. All large companies maintained departments that specialised in the acquisition of competitor data and future business opportunities. The FOIA provided a vehicle to obtain federal documents not only in the government contracts area, but in all areas of regulatory oversight.

**Federal Sources Inc.,**<sup>26</sup> claimed to be the leading source for information in the public sector marketplace. It used FOIA to request copies of on-going contracts and their task orders, to help develop the opportunity database that they marketed to their clients. Their monitoring of task orders helped them

to develop an understanding of who was doing the work, what type of work they were doing, who they were doing it for and what were their fees.

They also acted as a third party to make blind requests for their clients. Information released varied from department to department, and in some cases a vendor was able to determine a competitor's pricing strategy for a competitive opportunity, based on pricing released on similar contracts under FOIA. The new FAR regulations stating that unit prices were releasable had made more companies aware of the value-added to be obtained.

### **Evidence from US Companies**

Information from large companies is, for understandable reasons, more difficult to obtain. We have spoken to senior counsel in several Fortune Top 100 companies on the subject of FOIA. While this was not sufficient to draw general conclusions, it did provide a useful insight into what happens in practice. There was a greater readiness to explain the actions they had taken to protect their confidential information, than to describe the actions they had taken to find information about their competitors.

One company explained that it took great care with its filings of information with government, with formal procedures, marking of confidential data and use of special paper for confidential information.

Another explained that they only gave trade secret information to government under a specific non-disclosure agreement on each occasion. Now that contract information was releasable, they tried to avoid having the full proposal incorporated in the contract. They had been successful in having confidential technical data protected. Implicitly this was a result of them being fully alert to the issues and well organised to manage what they give to government.

They all used agencies to some degree, typically to check that their own information was protected and to find information about competitors and government policies. The cost of effective defensive measures was small, but senior management attention was necessary. The logic was: to establish who gave what information to whom in government on what legal basis: to clarify responsibilities: and to implement a process, with initial and regular refresher training. One important part of the process was to be able to respond quickly when the need arises to defend a request for confidential data.

The view amongst the legal community involved with FOIA, was that the major US companies did this effectively as a matter of course.

### **Overall**

The system has settled down and is functioning without any very active current issues. Contract prices and details of contracts are regularly disclosed. The Act is being widely used, as evidenced by the reports of the specialist FOI companies. Some of these are very specialised and rely upon detailed knowledge of a department, its files and methods.

A comment from The American Enterprise Institute, was to the effect that overall FOIA had settled down, price details were open, the effect upon business was pretty neutral, and a key area of use was to find out government intentions.

The arrival of the promised new Government Information Locator System (GILS) should assist the use of the information more widely.

The main pressure is to get more information on the Web and this is expected to reduce backlogs.

### **Notes**

## **A FOIA Agency case study from the USA: Pompan, Murray, Ruffner & Werfel**

### ***Introduction***

We were looking for a specialist FOIA agency who would be prepared to explain how they operated to help their clients obtain information using the FOIA to support their business activities. A senior FOIA officer in one of the major USA government departments suggested that we approach **Pompan, Murray, Ruffner & Werfel**, a law firm, based in Alexandria VA, who specialise in FOIA work. Jacop B Pompan, Senior Partner, produced this paper at our request, and we are very grateful for the insight that it provides. It is included as a real example of how a specialist agency works. It is not suggested that it is typical, since we have spoken to a number of specialist FOIA agencies, with different policies, areas of expertise, and marketing approach. It has been shortened but not otherwise changed.

### ***FOIA Process Paper: by Jacop B Pompan, Senior Partner.***

We help clients walk through the minefield of regulations. We try to help clients win contracts by making certain they know the rules, know what the solicitation (tender) says, and that they adhere to or learn how to use the laws that control the process. We obtain information for several specific reasons:

#### **New Requirements:**

There is a publication called the Commerce Business Daily, which the US Department of Commerce publishes every day. It includes all new requirements. However, you want the information on new requirements before your competitors. The new Federal Acquisition Regulations [FAR 15.201] tells government personnel that they should share these requirements with contractors very early in the game. The trouble is, that while that is an excellent philosophy, there is still a strong tendency at all operational levels to hold future requirements closely. We use the FOIA process to obtain organizational requirements data. We know that there are many official documents and data files that include inventory data from which requirements are developed. We have used this for clients that are in the spare parts business. We obtain usage rates, current inventory on orders, etc. and from that we can get an idea whether there will be procurements for an item. It may help us and the client make current decisions with respect to purchasing as well as the client's own inventory control.

#### **Evaluation Techniques:**

The procurement regulations require the contracting personnel to keep records of their rationale in making awards. Evaluations for multi-million dollar contracts involve evaluations of management, technical, past performance, risk analysis, and of course cost. Each procurement can have a different algorithm on the relationship of these factors to determine the winner. What generally is the same however, is the technique that a particular organization applies to come up with an award decision. For example, in the current "trade-off" approach, which has been called the "best value" approach, the intention is to balance the non-cost factors [technology, past performance, management, and personnel] against the price. A company could be high in price and high in non-cost and still win. The current craze is not necessarily to award to the low bidder. The intelligence information that we seek is the manner in which a particular buying organization does that trade-off analysis. We ask for the records of evaluations perhaps 2 and 3 years old. These will be redacted so that the names might be eliminated, but we will be able to obtain an organizational approach to evaluation. This will give the client information that may be of use in designing its proposal.

#### **No standard:**

We find that there is no standard at all with respect to how the government responds to a FOIA request. Some activities have an attorney handle the response. Sometimes it is a fairly low-level clerk. Sometimes it is just a summer replacement who is working between semesters at the local university. The result is that one never knows what to expect. We have been refused data by the government at one location, which is systematically released at another location of the same Agency.

### **Client Identification:**

Our general approach is not to identify the client. Oftentimes the government personnel will ask why we want the data. When we get that question, we know we are dealing with someone who has not the foggiest idea of the law, the regulations, or the process. We do not want to identify the client because we know that government technical and contracting people do not like to have contractors penetrating their database -- it is a rather normal human reaction.

If awards are being made on price alone, without any technical evaluation, we sometimes are not too concerned about client anonymity. The reason, of course, is that the agency must generally award to the low bidder. To the extent that the contracting people get increased discretion to evaluate offerors on non-cost factors, we become more concerned with the identification of the client.

### **FOIA and reverse FOIA of proposals:**

When our client wins an award, other companies want to get their hands on our technical and price proposals. Of course, we regularly submit FOIAs for the technical and price proposals of companies who have won contracts that our clients lost. The agencies do not release these proposals without first going to the company that submitted it. Sometimes we get a lot of information from this exercise, and sometimes the proposals are greatly redacted. Sometimes the agency refuses to release anything. The agency will almost always go back to the original contractor and ask him whether he has any objections to the release. The contractor will "knee-jerk" the answer and say YES, do not release!! We then will argue that the information should be released. One danger is that if the client's competitor knows who is asking for his data, then he knows who his competitor is, and sometimes that knowledge is important.

For example, sometimes a client knows its competitors for a contract, but very often our client is trying to penetrate a new government agency and a new requirement. The client does not want the current incumbent contractor to know who is targeting his "rice bowl." So, whenever we ask for any data which originated from another company, we take great pains to disguise the origin of the request.

### **Litigation:**

We have never litigated a denial of a request. In the first place, we do not think it is ever wise to litigate against your customer and that is what an FOIA litigation is. Litigation is expensive -- no one makes any money except the lawyers, and it is very damaging to the relationship of the client to the Agency. So, we make the requests and then we try very hard to get as much as we can (or to give away as little as we can) without even the hint of litigation. That is one very important place where your relationship with the FOIA official of the agency is critical.

### **Delaying the release:**

Sometimes release of data to a competitor is inevitable. We very recently had a case in which our client won a contract for the maintenance of certain electronic equipment. About two years later, the solicitation was out for the re-bid of that and it was really important to maintain an honorable and close relationship with the Agency FOIA personnel. We see the FOIA as a "fishing license." We submit requests with the knowledge that we might get everything we want, or a small piece. In that environment, the relationship with the personnel who are processing the cases is extremely important.

### **Acquisition:**

This is a case that is happening right now. Company X intends to buy a wholly owned subsidiary of Company Y and Company Y agrees that it will sell. Company X is trying to determine an appropriate bid price. Company Y has an Indefinite Delivery, Indefinite Quantity ("IDIQ") contract with the Air Force. This means that any Government agency can issue orders against the contract. It also means that the contract has no single dollar value or list of items that are to be delivered. The value of the contract and the items that are delivered under it is really the total of all of the delivery orders which are executed by the various government agencies who use this "umbrella" contract. We filed an FOIA with the Air Force office that awarded the IDIQ contract and requested a copy of every delivery order issued against the contract by any federal agency. Those orders will tell us who is buying the product, which products

are being purchased, and how much revenue the company is getting from that contract. That will help our client determine how to structure his offer to buy.

### **FOIA Yourself:**

When we want a solicitation of Company X, who was the winner in a competition in which we were also involved, we would ask not only for Company X's proposal, but our own as well. We learn how that particular FOIA office operates. We know that each FOIA office operates differently with their own personal standard of release. Sometimes it is done by an attorney. More often it is a fairly middle to low level administrator. We may have a contact in New York that made the actual request, but once we are one of the targets, we get a chance to speak with the Agency FOIA people. We understand who they are, how reasonable they are, how "loose" they may be in release of information. In other words, we have developed a profile of that particular FOIA office at the same time we have our New York contact make the request.

### **Who Is Asking About Us?**

It has been important to some clients to know who their competition will be for a forthcoming procurement. There is no single way to know all of the possible competitors, but one way that some of our clients have used it is to identify what companies are attempting to obtain their prior proposals for this same work on previous contracts. Therefore we submit an FOIA request to the office over that procurement and request a copy of every FOIA request involving the incumbent contractor currently doing the work. If we are the incumbent, the general rule is that nothing is released about our original proposal without contacting us. However, we may not be the incumbent. We simply need to know who is asking for data about that contract and how it was evaluated for award. This is a very important reason for using a "cover" when making some FOIA requests. Opposing companies should not be able to easily identify who is asking for the information.

### **Internal Company Co-ordination:**

Our firm recently was involved in a protest against an award by the Navy. We had won the award and Company X protested against our win. The General Accounting Office (GAO) rules say that you must protest within ten days from the date that you knew about the basis for the protest. The basis for this protest was in a package delivered to Company X by the Navy in late April and ten days after receipt of this package, Company X filed a protest. However, unknown to the outside attorneys for Company X, the Company had a standard policy of submitting an FOIA request for the Navy documents which reveal the basis for every solicitation in which they were involved. The Navy had released these papers to Company X about 30 days earlier. Within Company X, low level clerks had the information on which to base their protest for about 30 days, but did not know it. Company X's New York attorneys did not know that there was such a standard policy and were unaware that the critical documents were in the possession of the company. The result was that Company X was late in filing the protest. I think the lesson here is to make certain that the company people involved in making FOIA requests understand what they are doing and why and that the attorneys ask whether there is any policy within the company to regularly ask for data from the Government. In this scenario, the right hand never knew what the left hand was doing.

### **What Did I Leave on the Table?**

Our spare parts client won a significant award from the Air Force. It was a negotiated procurement in which there was "open bidding." Bid prices were not made public. In other words, we do not see all the other bids. In a "sealed bid" environment, all the bids are opened in public and we see the difference in the numbers. In a negotiated procurement, we may win, but we do not know if we bid too low and "left money on the table." We may have bid \$700,000 and won. What we want to know is whether we could have bid \$500,000 and still won. The proposed prices were in fact in that neighborhood. I requested the Air Force to give me a copy of the abstract of the proposed prices. The local contracting office refused. The General Counsel ordered the Air Force personnel in the field to release the data, which they did.

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## **Practical questions of implementation within the US Department of Defense**

### ***Introduction***

We thought it would be helpful to provide an insight into the kind of practical implementation questions that still arise in the USA over 30 years after the Freedom of Information Act became law in 1966. The Office of the General Counsel in the US Department of Defense (DoD), kindly provided us with a selection of real questions and answers that have arisen recently. These cover both privacy and freedom of information, but we have made a selection of questions and answers most relevant to business use. Apart from shortening the material in some cases, the questions and answers are unedited. Each question comes from one of the DoD FOIA co-ordinators. The questions and answers are then circulated to some 100 plus FOIA co-ordinators world-wide.

### ***Questions and Answers***

#### **1. Records passed to National Archives**

**Question:** our agency has accessioned records into the National Archives and Records Administration (NARA) and we did not keep copies. We have a FOIA request for the records and the requester is insistent that we get the records back from NARA and process them under FOIA. Do we have to?

**Answer:** yes. According to the records schedule, NARA is in possession and control of the records, but because you are the originator of the records, NARA would have to send them back to you for review for release.

#### **2. Information on Internet**

**Question:** I have a FOIA request for information that is posted on the Internet. Do I have to process this as a FOIA, or can I simply tell them where to find the information?

**Answer:** DoD Regulation 5400.7-R, tells us that FOIA requests that are available through an established distribution system, Fed Registry, National Technical Information or Internet, normally need not be processed under the provisions of FOIA. You do have to advise the requester on how to obtain the information. HOWEVER, if the requester insists that the request be processed under the FOIA, then the request shall be processed under the FOIA. The same rule applies for requests for regulations and directives.

#### **3. How to handle a refusal**

**Question:** when we decline to send an entire document because it is pre-decisional or whatever, do we send a fully blacked-out copy, or just not include it?

**Answer:** do not include it. In every case, the explanation of the substantive basis for a denial should always include specific citation of the statutory exemption applied, inclusive of a brief statement describing what the exemption(s) cover. In the case of withholding the entire document you could say, "We have denied the 3 page record in full" and cite the exemption applied. The number of pages withheld should be indicated. It has to be very clear in the letter to the requester what is released and what is denied. Explaining to the requester the basis for your determination in sufficient detail will permit him to make a decision concerning appeal.

If you release a redacted document, the amount of deleted info should be indicated on the released portion of the paper record by use of brackets or darkened areas indicating removal of information. Since the policy of the President, Congress, Ms. Reno [the Attorney General], DoD, et al is to make the maximum amount of information available to the public, FOIA requests should only be denied when disclosure would result in a foreseeable harm to an interest protected by a FOIA exemption, and the

record is exempt under one or more of the exemptions of the FOIA. If there is information that can be released, it should be segregated and released even if it makes no sense. Ask yourself these questions in the segregation and release of information. What harm will be caused by the release of this information? Are there any reasonably segregable portions of the record that can be released that a skilful and knowledgeable person could not reconstruct to know the meaning?

#### **4. Email requests**

**Question:** is it okay to allow requesters to submit FOIA and PA [*Privacy Act*] requests via Email. I know that we must verify the identity of a Privacy Act requester; consequently, a signature is required for that purpose generally. With regard to FOIA, I feel that accepting them via Email places an extra burden on us since we would have to print our paper copies etc.

**Answer:** a written request for records, made by any person, that invokes the FOIA, DoD Directive 5400.7, DoD Directive 5400.7-R, or Army Regulation 25-55, may be received by postal service or other commercial delivery means, by facsimile, or electronically.

The Privacy Act requires that we identify an individual who requests his record or information pertaining to him before the record or information is made available to the individual. Several components require that requesters submit a notarized signature when requesting records or waiving the restrictions on disclosure of personal information from records maintained in systems of records.

I can understand the enormity of the requests and records that you have to process. Electronic mail is just one more avenue to request records under the FOIA and Privacy Act. We have to take the business as usual approach. Email requests have to be handled as you would a request received by mail. The fact that a FOIA request is broad or burdensome does not give us the ground that it should not be processed, nor does it entitle us to deny it.

#### **5. Frequent requester, owing money**

**Question:** our organization has a frequent requester who owes us money from a previous FOIA request. Do we have to process his FOIA request?

**Answer:** no. 5 U.S.C. 552(a)(4)(A)(v) tells us that you may refuse to process future FOIA requests should a requester elect not to pay fees. You should, however, advise him that you have no obligation to process his request until he pays the fee. Be sure to use the above cite. Appeal rights are not necessary.

#### **6. Information about contracts**

**Question:** We have received a request for recently awarded contracts. Here are the facts:

- a. Type: IQ/ID (indefinite quantity/indefinite delivery)
- b. It was negotiated and awarded to three awardees
- c. Task orders will be competed among the three awardees for actual performance. As of this date, no task orders have been issued.
- d. The prices in the proposal were incorporated in Section B of the contract. The contract states that this pricing information will be modified to reflect the actual task order amounts when executed and issued. The amounts serve as "place holders" until the actual amounts for task orders are known.
- e. The RFP [*Request for Proposals*] was issued prior to the change in the FAR [*Federal Acquisition Regulation*] Part 15. The contract was awarded 27 February 98. The period of performance for the basic effort is 60 months. There is an additional 60 month period of performance for the options if exercised.
- f. Only the total proposed prices were revealed during the post award debriefing, not the breakdown. Two of the submitters objected to the release of the information in Section B of the contract, citing Exemption 4 (proprietary/commercial information) and they consider the information highly competition

sensitive. The requesters disagreed stating that the information in Section B is releasable.

With these facts in mind, should Section B be released?

#### **Answer:-**

This is quite a contentious issue. Disclosure is affected by the distinction between two related concepts: unit prices vs. cost breakdown. Even if it is included in the contract, certain price information may still be exempt by operation of FAR 15.1003 and 15.1006 -- sometimes there is no clear bright line between unit prices (generally releasable) and a cost breakdown (generally exempt).

Another related issue is competitive harm. Price info submitted when competing for contract award is generally considered a "required submission," thus only the competitive harm prong of the National Parks/Critical Mass is relevant to post-award disclosure of the contract awardee's price info.



The broadest theory for the release of price information is found in the reverse-FOIA cases, *Martin Marietta v. Dalton*, and *McDonnell Douglas Corp. v. NASA*. This line of cases emphasizes the discretion afforded to the agency in making a decision to disclose price information -- especially when the submitter has failed to show competitive harm.

Ultimately, a decision could be based to disclose after examining the particular facts in light of the above three "themes." You should examine this and make your own decision based on the above information. We stress that it is necessary to have all responses to requesters reviewed by your legal department before release.

### **7. Disclosure of unit prices**

**Question:** I'm aware of FOIA Update, Fall 97, which states unit prices for awarded contracts are disclosed without submitter notice. Bid abstracts must obviously contain unsuccessful offerors bids -- so do we withhold using 10 USC 2305(g), or send submitter notice? DoD 5400.7-R, para C5.2.8.2. states the new statute does not apply to "bids." Does this include "bid abstracts?"

**Answer:** The DoD Regulation says, "This statute does not apply to bids, ...". Then it says, "In such situations, normal submitter notice shall be conducted... except for sealed bids that are opened and read to the public." Therefore the answer to your first question is do not use the statute for bids, and do not send submitter notice for bids. Release bids. Bids are opened and read publicly, therefore nothing can be withheld. In answer to your second question, while the Reg is silent on "bid abstracts", the intent is that if the statute does not apply to bids, then it will not apply to bid abstracts either. Department of Justice concurs with this.

### **8. Request for a financial report: Exemption 4 Proprietary Info/Request for Info in Electronic Format/Computer Fee Schedule**

**OGC [Office of General Counsel] Review:** this office reviewed the response from an acquisition agency to a requester who asked for a financial report of the agency. The report was prepared for the agency by a bank. The agency denied it in total as proprietary information, using no cites/exemptions. The following are OGC questions to the agency that denied the request:

How is the report proprietary? Is it unique as to how it is put together? Can we truly deny the whole report under exemption 4, proprietary information? Can any of the report be segregated to give the requester some info? The letter also says that the report "is no longer provided in that format and is not readily available." Can any of the info which the bank is now reporting for you be given to them electronically with proprietary info deleted? It's great that you have negotiated with him in narrowing his request in order to get information at a reduced cost, but you cannot pass along the costs of the bank search on to the requester. Only charge as described in the statute and refer to the FOIA fee schedule to determine your costs.

The term "search" includes electronic search and we should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both you and the requester. Time spent reviewing documents in order to determine whether to apply an exemption is "not" search time, but "review" time.

Get from the requester a willingness to pay the assessment.

In your second paragraph, you are telling him that the report is proprietary and not releasable. Review for segregability, and cite exemption 4, 5 USC 552(b)(4) for the portions of the report that are not releasable. Don't forget to give appeal rights.

### **9. Contract Insurance details requested**

**Question:** we have a requester who has asked for records of past and current certificates of insurance on a certain awarded contract. Winning contractor protested disclosure of any info reference the certificates of insurance for the contracts because of the many hours it took to research lowest priced insurance company that could provide required insurance needs. We want to deny insurance company carrier (agency), underwriting company and policy numbers on certificates of liability ins. citing ex 4, privileged/confidential records obtained from non DoD sources outside the govt. Can we?

**Answer:** this one is a little unusual. There is some authority under Exemption 4 for protecting info when it takes substantial time and expense to develop it and giving it "freely or cheaply" under the FOIA would then save a competitor the time and expense that the original submitter incurred.

The Worthington Compressors case, and other cases cited on page 185 of the Dept of Justice FOIA/PA Overview guide in connection with "reverse engineering" address this. (For example, this argument has

been recognized for research data developed at great expense by drug co's. If that research data was then given to a competing drug company, that company could use it in support of its own drug approval application and it wouldn't have had to incur the cost of developing the info itself. It could then get its product to the market sooner, or offer it at a reduced price.) In your case, the sticking point--it seems to me--is articulating how a competitor would actually benefit from access to this insurance info. In other words, to withhold it, I think the company needs to link its expenditure of time to research insurance co's and get the best rates, with giving a competitor a "bargain" or "benefit" that, in turn, hurts the submitter. I don't think it's enough that it took the submitter "time and effort" to get the info.

The submitter has to show that release under the FOIA would save competitors time (which means showing that competitors would want/need this same insurance info) and that the cost/time savings is somehow valuable or useful info to the competitor, which in turn, is detrimental to your submitter.

## **10. Request by French Embassy**

**Question:** can the French Embassy request information under the FOIA? On our homepage, we have some information regarding "Contracting Statistics" that shows competition performance in previous years and projected goals for the next year for each command and as a total for the Army. Someone from the French Embassy has verbally requested that we tell them what contractors are involved. Can we give it to them? If not releasable based on a verbal request, then would it be releasable under the FOIA rules if the French Embassy sends a request under FOIA?

**Answer:** Yes.

A written request for DoD records, made by any person, including a member of the public (US or foreign citizen), an organization, or a business, but not including a Federal Agency or a fugitive from the law, that either explicitly or implicitly invokes the FOIA, or DoD supplementing regulations or instructions has to be answered. Written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically.

Prompt responses to requests for information should be encouraged to eliminate the need for requesters to invoke the provisions of the FOIA and thereby assist in providing timely information to the public. Requests from members of the public (and this includes the French Embassy) for information that would not be withheld under the FOIA should continue to be honored through appropriate means.

## **11. Time limit**

**Question:** When does the time limit (20 days) begin? Does it begin from the date of receipt in the Army (no matter what agency), or does it begin from the date of receipt of the official/agency designated to respond.

Here's an example: Fort Benning receives a FOIA request on March 23, 1998. The request is processed at Fort Benning and, since they do not know where to send the request for action, they forward the request to the Army FOIA Office. It is received by the Army FOIA Office on April 22, 1998. The Army FOIA Office conducts research in order to determine who the proponent is, and then forwards the request. It is received at the responsible agency on May 8, 1998. Was this case already 34 working days old and in violation of the law when received by the responsible agency, or is this case considered only 18 days old (as of today) and still within legal parameters?

**Answer:** generally, when a requester complies with the procedures established by DoD 5400.7-R and DoD Component regulations for obtaining records under the FOIA, "and after the request is received by the official designated to respond", you should endeavor to provide final response determination within the 20 working days. When the request is received by the responsible agency, the 20 day time begins. Each agency that handles the request should be mindful to let the requester know that his request is being forwarded.

You can't throw a request in a pile and not read it until it works its way up to the top of your queue two years later, then find out all you have to do is refer it to another agency. That situation is where para 1-508 e. would force you to rightfully place the late, misdirected request in your queue at the point that it was received in the original agency. However, if you get the misdirected request out within the 20 days, the other two paragraphs kick in to allow logic to set in when it finally arrives at the right location. There will be argument from FOIA co-ordinators who have to move the request up in their queue, but the intent of this particular portion of the regulation is to "not" penalize the public.

## **12. When can a FOIA requester sue? Exhaustion of Administrative Remedies**

**Question:** why is a FOIA requester allowed to sue us in Federal District court before he files appeal?

**Answer:** requesters must still exhaust administrative remedies but needn't wait until Gabriel sounds his horn. Agencies have 20 days to respond to a FOIA request, and a failure to act within that time is a

constructive denial for purposes of seeking judicial action. That goes for the Initial Denial Authority (IDA) and for us on appeal.

Although the general rule of administrative law is that all administrative remedies must be fully exhausted before one can sue, the FOIA provides an exception. Under 5 U.S.C. Section 552(a)(6)(C), a FOIA requester is "deemed to have exhausted his administrative remedies" when an agency fails to meet the statutory time limits. Thus, when an agency does not respond to a FOIA request within 20 working days, the requester can seek immediate judicial review, even when the requester has not filed an administrative appeal.

Department of Justice guidance says that requesters can treat an agency's failure to comply with the FOIA's specific time limits as full, or constructive exhaustion of administrative remedies.

### **13. Definition of Agency Record**

**Question:** Do you have any case history or DoJ information concerning the "control" aspect of the definition of an agency record?

**Answer:** a Supreme Court ruling in 1989, "Tax Analyst versus Department of Justice" defines control simply as if you have possession and use the record in the course of your business, you have control.

### **14. Contractors working your FOIA Requests**

**Question:** is there something in writing that would prohibit a contractor from performing the functions of the FOIA?

**Answer:** this is not a FOIA issue, but a contracting one. There is nothing in the FOIA that prohibits a contractor from doing your work. You should deal directly with your contracting folks. FOIA programs at Army installations cannot be contracted out in their entirety, because the approval authority for an Army response to a FOIA request must be vested in an Army decision maker. Just remember, someone in the agency must be the release and denial authority. Very important - you cannot pass the contractor's monetary charges on to the FOIA requester. Significant contracted support to installation FOIA programs may be possible, subject to the requirement that effective government oversight must be exercised over any support contractor's efforts.

### **15. Handling of denials**

**Question:** need your advice on how to deal with a new situation which has arisen. There seems to be some confusion about negotiating with the requester concerning the scope of their request and accepting releasable information, in relation to when a request is processed as a denial. One of my legal advisors is of the opinion that in spite of the fact that the requester has agreed to accept what is releasable, if we redact anything from the record, that it has to be formally processed as a denial regardless. What do you recommend that would help sort this out?

**Answer:** your legal advisor is legally correct. See Tax Analyst v. Justice Supreme Court ruling in 1989. It says you may not withhold information without an exemption. Even if the requester agreed to accept only releasable info., does this mean they will not contest denied info? If the paper has black holes in it, legally that info has not been provided, or denied. Thus, according to Tax Analyst, it must have an exemption. However, as a practical matter, there is nothing wrong with getting written agreement that the requester does not want "denied" information, and will accept it without protest. If the requester agrees to this, I see nothing wrong as long as you can prove agreement. However, I must tell you the denial technically requires an exemption with appeal rights. I just think if both the requester and the agency agree in writing not to contest denied info, that all is well. However, if the requester changes their mind, then the exemption must be used with appeal rights. I believe it is best to get agreement as stated above, restate it in the letter and say "since you have agreed that you do not desire the redacted info, we therefore do not consider it a denial in this instance." Then follow with; "however, should you change your mind and desire the redacted info, it is exempt under the appropriate exemption and you have the right to appeal, etc." Actually, this is the best of both worlds. It will not have to go to the IDA, will likely save an appeal, and yet still satisfies the legal requirement to provide an exemption with appeal rights.

## **European Union**

### *Summary*

The size and diversity of the European Union (EU), makes it difficult to draw generalised conclusions. Several EU countries have had access to official information laws for some time. A number of sources seem to agree that there is a significant divide between the Nordic countries, who have strong traditions of openness, and the others, where the influence of the Code Napoleon continues. The Code Napoleon tradition enshrines the view that all information related to the state is confidential and cannot be divulged. This includes information about business that is held by the state.

Sweden is an example of the most open access to information regime. Here information about public sector contracts is generally available to a requester, and there is evidence of business use of public information about companies.

Outside the Nordic area, confidentiality of information about business is respected as normal. This is well illustrated by the fact that The Netherlands, which has an access to information law, has established by case law and policy, that EU procurement directives define the maximum information that may be made available about public contracts, even contracts that are outside the scope of the directives.

There is a drive for much greater openness and access to official information, both within the Commission and in most countries. However this is focused primarily upon the use of official information as the basis for the growth of a value-added information content industry, to create employment and growth. The possibility that companies might use information about their competitors to improve their performance, in the way that is normal in the US, is not considered.

Information about individual companies is being made increasingly available, primarily as a result of EU-wide directives, relating for example, to making the single market more effective and to protection of the environment.

### *Introduction*

Given the scale of trade and the growing impact of EU directives upon business in the UK, we judged it would be helpful to look at the current position in the EU in relation to the availability of information about companies that is held by public bodies. For the purposes of this part of the study, reference to the EU should be read as the EU excluding the UK.

There is considerable diversity of law, culture and practice across the 15 member states. We have not attempted a comprehensive study, but have sought to understand some of the main themes and reach useful conclusions. In doing this, we have talked to some of the key central bodies, and a number of people in the UK and in other countries with relevant knowledge and experience. We have also looked in more depth into the position in two countries, The Netherlands and Sweden. The Netherlands is possibly the most open example of a country still influenced by the Code Napoleon tradition of state and business confidentiality. Sweden represents the far more open Nordic tradition, with its original legislation dating from 1766.

A number of member states of the EU have had access to official information legislation for some time. In fact the original legislation in Sweden, in 1766<sup>1</sup> is considered to be by far the earliest in the world.

Finland followed in 1951, Denmark in 1950 and France and The Netherlands in 1978 (amended in 1991), and most recently Ireland, where its law came into force in 1998.

We asked people within the EU, about public access to government information in the context of information about government contracts that might be used to assist companies to compete more effectively. The idea of seeking information about government contracts held by private companies was hard for our respondents to grasp. Outside the Nordic countries, the concept of such information being available and used by private sector companies seemed culturally alien.

In the area of contracts, the common view is that EU Procurement Directives address the matter fully, and in the area of environmental information, EU Environmental Directives do the same. The idea that any national legislation might require more to be made available is not regarded as likely.

However the question of the availability of public information is a current and actively debated subject. The focus for this is the recently published EU Green Paper on public sector information.<sup>2</sup> It is useful to consider this in more detail since it is likely to form an important part of the framework within which companies can access and make use of public information in the EU.

### ***Public Information in Europe***

The Green Paper, Public Sector Information in the Information Age, was produced by DGXIII and published in January 1999. It had its origins in concern for the future competitiveness of European industry, and the view that the USA had gained advantages from its active policy of access to and commercial exploitation of public sector information. Earlier drafts of the Green Paper referred to an estimate that 1 million new jobs would be created in the 10 years from 1996 in the multi-media content segment.<sup>3</sup> However ready access to public information would be a necessary facilitator.

The paper stressed that public sector information was a key resource; for citizens to enjoy their rights and have access to employment opportunities; for businesses to understand their rights, duties and responsibilities to enable them to operate effectively across the EU and assist their marketing decisions; for businesses, in particular SMEs, to develop value-added information content services based upon public information; and also to improve the quality of government.

It explained that the emphasis should be upon creating a common framework for the exploitation of public information by business to create employment and economic growth. There is reference to the need for transparency in public procurement and for patent information to be made available at European level. 18 billion Euros a year are spent on research that had been done before.<sup>4</sup> However the possibility that companies might want to make use of contract and regulatory information about their competitors, and that this might be a valid use with economic benefit, had not been considered. When we spoke to DGXIII, in November 1998, it was clear that their prime focus was to facilitate the growth of the value added information services business.

Previous studies that had been commissioned by DGXIII had a similar focus. The Publaw 3 report,<sup>5</sup> published in 1995, was carried out by the Policy Studies Institute in London, and the Centre de Recherches Informatique et de Droit, Namur. This provided comparisons across all European countries of the law and practice relating to the exploitation of public sector information by the private sector. There was no consideration of commercial confidentiality. It did expect SMEs to be able to exploit company information, although the assumption was that this would be the kind of information available at Companies House in the UK. It did include an interesting example of the commercial exploitation of public information. It reported that in Austria, Alcatel obtained information from the PTT to target potential clients and develop its technical products.

A discussion paper on Access to Public Sector Information, by the Schoordijk Institute in The Netherlands,<sup>6</sup> emphasised the need for an EU-wide legal framework for access to public information. The purpose was the development of the information market in Europe. It included a table that showed that in electronic publishing, USA revenues were more than two and a half times greater than those of

EU-based operators.<sup>7</sup> The question of commercial confidentiality was not addressed except for an assumption that it would qualify for exemption. There was some mention of the anomalies that may arise when companies that operate in countries with a strict access regime, trade in others with more liberal regimes. It highlights this as an issue for Europe, without recognising that for companies that trade globally, the issue has been with us for some time.

Overall, the commercial exploitation of public information is a very visible current subject of consideration within the EU. The possibility that greater openness of public information may cause companies to want to make use of it for competitive advantage is scarcely considered. The best reason we can suggest is that there is an assumption, that the kind of blanket confidentiality with regard to commercial information that exists in many countries, will continue.

### ***EU Procurement Directives***

When we asked about the availability of information about contracts in the EU, the normal assumption was that the matter is dealt with by the Procurement Directives and that they define the rules about what information is made public, when, and under what circumstances. These directives cover supply, works, services, and utilities and are implemented in national law by appropriate regulations.<sup>8</sup>

They define value thresholds for qualification, and prescribe four types of notices to be published in the Official Journal of the EC (OJEC). Since October 1998, under directive 97/52/EC, any losing tenderer must be informed of the ‘characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.’ The information to be given in a contract award notice should include the prices paid or the prices of the highest and lowest offers taken into account in the award of the contract. However where any of the information ‘may prejudice the legitimate commercial interests of a particular enterprise .. it need not be published.’<sup>9</sup>

In effect, assertion of confidentiality by the buying agency is sufficient to ensure the information is not released. In practice little information is given and confidentiality is either asserted or just assumed. The evidence for this comes from an interesting analysis that was produced at our request and which is shown below.

This analysis in **Table A** shows award notices published compared with those that were expected to be published. The table shows that less than half the notices expected were actually published. It also shows the proportion of those published that included any mention of value at all. We were advised that even where some value is shown it is often incomplete and uninformative. For example: price per unit with no quantity: total budget for a wide range of products, one price for several contracts. We are grateful to Mr Sketchley and the DataOp Alliance for making this available to us.

**Table A**

<b>Country</b>	<b>Award Notices (ANs) expected *</b>	<b>ANs published</b>	<b>% of ANs published</b>	<b>ANs with value given</b>	<b>% ANs published w value given</b>
<b>France</b>	20,900	9,600	46%	6,500	68%
<b>Germany</b>	18,100	8,200	45%	4,950	60%
<b>Ireland</b>	1,050	370	35%	150	41%
<b>Italy</b>	8,500	4,700	55%	3,000	64%
<b>The Netherlands</b>	1,550	960	62%	475	49%
<b>Spain</b>	4,400	2,600	59%	2,400	92%
<b>Sweden</b>	2,700	1,750	65%	1,350	77%

<b>United Kingdom</b>	12,550	6,300	50%	2,100	33%
<b>EC Institutions</b>	1,800	400	22%	310	78%
<b>Total EU</b>	<b>84,000</b>	<b>40,000</b>	<b>48%</b>	<b>24,000</b>	<b>60%</b>

\* Based upon pre-qualifying and bidding opportunities published in the same period  
Based upon a table produced by Mr P Sketchley from data supplied by DataOp Alliance.  
Source TED © European Communities, 1998

The Commission has expressed concern that the directives have been implemented in a patchy way, with only 56% of the Procurement Directives implemented correctly in all member states.<sup>10</sup> This is important because 11% of the GDP of the EU is represented by public procurement.<sup>11</sup> The aim is therefore to improve transparency and clarity. The Commission is concerned with the low response from suppliers to the enormous volume of contract opportunities, wants specific action in favour of SMEs, and asserts that ‘public procurement is too fundamental for the European economy to be left in the hands of a limited number of specialists.’<sup>12</sup>

Overall, procurement directives are not yet fully implemented in law across the EU and even where they are implemented, conformance is very limited. The view we obtained from DGXV was that these directives do in fact specify the (maximum) contract information that is available in any EU country. While this seems generally true, we do not believe it applies to Sweden, or indeed to parts of the UK public sector.

### *Sweden*

Sweden is widely considered to have the most open regime for access to official information. The initial law on this subject dates from 1766.<sup>13</sup> The current law, The Freedom of the Press Act 1949, adopts the main rule that all public documents are open to the public. The only exceptions are defined in The Secrecy Act, 1980. There are two articles that are relevant to public procurement. Chapter 6, paragraph 2, is designed to protect the interests of the public (personal privacy); and Chapter 8, paragraph 10, is designed to protect the valid interests of companies (commercial confidentiality).

Tenders are always secret until:-

1. The contract has been signed.
2. The procurement has been terminated.
3. They are opened in public as part of the formal process prior to contract. In this case only the total price and the names of the tenderers are made public.<sup>14</sup>

After a contract is signed, the contract and all the bids are normally made public, unless a claim for confidentiality is accepted by the public authority. In practice a great many such contracts and bids are made available. They are not generally published, but are made available in response to specific requests. A public authority should not ask the reason for the request.

After a contract is signed, the winning bidder can request that secrecy is continued, but only for a maximum of 2 years. He presents his claim for secrecy under either or both of the two paragraphs referred to above. The claim must be made out for specific parts of the bid/contract, and explain the reasons. Claims of confidentiality are generally accepted for designs, techniques and unique ideas that are not known outside the supplier concerned. A losing bidder, using similar arguments, can get secrecy extended to appropriate parts of his bid for up to five years.

Public authorities mostly accept apparently reasonable cases. When an authority refuses, the company whose information is at risk of being revealed, can appeal to the Administrative Appeals Court (Kammarrätt). This is rare. More usually, the person requesting the information lodges an appeals against a refusal, and typically wins more information three out of four times.

All government agencies and companies owned by municipalities have to follow these rules, but not companies owned by the state. Contracts relating to defence and national security are exempt. In the past

there were many claims to keep prices secret. Now they are generally made available unless the circumstances are exceptional.

Sweden's compliance with EU Procurement Regulations is a separate matter. In effect these regulations require a minimum level of openness, which is substantially exceeded by the requirements of The Freedom of the Press Act 1949. The contrast with The Netherlands in this area is interesting.

Companies in Sweden commonly look at the bids and contracts of competitors, in particular to prepare for an anticipated new tender. In a conference in Stockholm, the Swedish Minister of Justice, expressed the view that

.. the right of access to information is .. essential for trade and industry to compete on equal terms, because it gives every business the same opportunity of access to information. It is particularly evident among the EU institutions that companies are treated less than equally with regard to access to information. At present, small businesses do not have the same possibility to obtain relevant information through lobbying in Brussels that major companies have.<sup>15</sup>

The information upon which this is based comes from a number of sources. Part of the factual information is included in the National Board for Public Procurement (NOU) web site.<sup>16</sup> For comments and views about the context and what happens in practice we are grateful to senior officials in the NOU and to published talks given by Swedish participants at the 1996 Stockholm conference on access to public information.

### *The Netherlands*

The Netherlands is an interesting example within the EU to compare with Sweden. It has a relatively open access law, although of more recent origin than that in Sweden, and in many respects is regarded as one of the most open of the countries influenced by the Code Napoleon tradition. It adopted its access to official information law in 1978. It is commonly referred to as the Wob (Wet Openbaarheid van Bestuur, 1978).

This compels public bodies both to provide information upon request and to disseminate information on their own initiative, in particular in relation to policy preparation and execution. Applicants are not obliged to identify themselves or state the reason for their request. The exemptions that are most relevant to company information cover corporate and manufacturing data that has been supplied in confidence to the public authorities. There is a provision that information will not be provided if the public interest in making information available does not outweigh the 'prevention of disproportionate advantage or disadvantage to the parties concerned or to third parties'<sup>17</sup>

The main contrast with the position in Sweden is in the status given to EU Procurement Directives. We were told by the Ministry of the Interior that the 'disproportionate advantage' exemption has been used to create the position whereby no Wob applicant will receive more information than is specified by the directives. This has been the subject of some contention and in a number of court cases,<sup>18</sup> the right to obtain more information was denied. The directives, apart from the requirements to publish in the Official Journal, do not cover the rights of third parties. The implementation of this quite complex interaction is that third party applicants must use the Wob to request information about contracts, but they will not be given more than would be given to a losing bidder under EU directives.

The Wob is considered to be a general regulation whereas the directives are specific rules. Specific rules are given priority. In discussion with the Ministry of the Interior, we asked about contracts which fell below the thresholds for application of EU directives. The reply was that they applied the information limits of the EU directives to these also to avoid anomalies.

There is no doubt that the prime focus of people in The Netherlands concerned with the question of access to official information, relates to the commercial exploitation of information. This is made clear



by the Government paper, Towards the Accessibility of Government Information.<sup>19</sup> We were told that there are about 30,000 public sector electronic databases in The Netherlands, for example, covering social benefits, legislation, rainfall, geographic information. With government support, Delft University of Technology hosted an international conference on the subject of the free accessibility of geo-information.<sup>20</sup>

These are the areas of government, academic and, so far as we can tell of business interest, in The Netherlands. Company information seems well protected, with EU directives seen as specifying a maximum to be disclosed, rather than as in Sweden, a minimum.

The information upon which this is based comes from a number of sources. There is a wealth of material published as a result of Dutch initiatives relating to the need for transparency in the EU and access to public sector information.<sup>21</sup> The information about the use of the Wob in relation to commercial and contract information comes largely from discussions with and information provided by the Ministry of the Interior and the employers organisation, VNO-NCW.

### *Notes*

## **The current position in the United Kingdom**

### ***Summary***

The new Freedom of Information Act in the UK will build on a series of earlier initiatives which are gradually opening up access to government information, including information supplied by business. After a long history of blanket confidentiality being applied to information about companies, information is increasingly being made available but in a patchy and not always predictable way. The effect of a number of EU-initiated regulations, the UK Code of Practice on Access to Government Information, and a more open policy by the government, has been to produce significantly greater openness in recent years.

More information about companies, their products and their contracts with public authorities, is available now than was the case a few years ago. This has faced companies both with new risks and opportunities. However companies have not generally become sufficiently aware of the issues to give greater priority to the management of the information they provide to public authorities. By comparison, USA based multi-nationals seem to be fully alert to the risks and opportunities. This was probably stimulated initially by the USA FOIA in 1966, which was perceived at the time to cause a high level of business risk. The matter quickly reached the agenda of senior management with policies implemented to contain the risks and exploit the opportunities.

UK companies and even some multi-nationals based outside the USA have not had the same motivation to give the matter priority, and we do not expect the proposed UK FOIA to provide the same level of business risks as the early USA FOIA. However the introduction of a UK FOIA is expected to provide a far greater focus for management attention than the Code of Practice.

In the UK there are issues for government and business to resolve. For government it is to meet the challenge of greater demand and greater exposure, with a need for systematic training to ensure smooth implementation of the FOIA. For business it is recognition that the subject demands priority attention from senior management so that the risks are managed and the opportunities grasped.

### ***Introduction***

Legislation for Freedom of Information is being proposed in the context where there are a number of current initiatives and proposals that relate to the use and exploitation of government information. These include, the UK White Paper on Modernising Government,<sup>1</sup> The EU Green paper on Public Sector Information in the Information Society,<sup>2</sup> the UK Green Paper, Crown Copyright in the Information Age,<sup>3</sup> and the Treasury paper, Selling Services into Wider Markets.<sup>4</sup> These, taken together, promote the better use of public 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.
- \* generate more revenue for government from the exploitation of its information assets.

As a result, the information government holds is, over time, likely to be more clearly indexed, and more available, increasingly on the Web, both directly from government and from re-sellers.

The UK FOIA will therefore be introduced into an environment where far more information, including information about companies, will be readily available, and companies may be sensitised to the opportunities to make use of it for competitive advantage.

The current position in relation to the availability of information about companies is mixed, but there has been a growing move in the direction of greater openness. This is however, from a base of what was effectively blanket confidentiality not many years ago. For example, in October 1997, reference could still be made to departments finding it 'simpler to label all information about identifiable companies and products as secret.'<sup>5</sup> This was in preference to carrying out the task of judging whether any particular information was or was not, validly commercially confidential.

The combination of various EU Directives, the Code of Practice on Access to Government Information,<sup>6</sup> and the policies that are now being applied by some ministers to the interpretation of this code, are all creating a climate of greater openness

### ***Framework of regulations and policy***

Information may be released or withheld under a variety of specific regulations and legislation. The impact of EU-initiated regulations is growing, and in general these require more openness than had been customary in the UK. The Code of Practice has created an overall framework within which more information is being made available. However the overall framework of regulations and policy within which information is currently made available, is both fairly complex and subject to differing interpretations.

Some types of information are applicable to many companies. Examples are, health and safety information, environmental information, public contract information.

Others are sector specific and of interest to companies in the sector, but not usually to other companies. Examples are information about; medicine licensing; water quality; airworthiness certification; financial services compliance; toxicology studies relating to new food additives; etc.

The range is large and diverse. We have not carried out a comprehensive study, but we believe it will be useful to look at a few examples from the widely applicable areas and the sector specific areas.

### **EU-initiated regulations**

#### **EU Procurement Directives**

These have been implemented into UK law by Treasury Regulations.<sup>7</sup> Four sets of regulations, implemented from 1991-1995 create a legal framework to which public authorities must adapt their contract award procedures. The regulations apply above given threshold values and define criteria for specification of requirements, selection of tenderers and award of contracts. There are provisions for publication in the Official Journal of the EC (OJEC). The specified contract information should be published within 48 days and should include the price or price range unless the price is confidential. Confidentiality is not defined and assertion of confidence by the purchaser is in practice effective. The recent World Trade Organisation Agreement, expressed in an EU Directive, requires a losing tenderer to be told within 15 days of 'the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.'<sup>8</sup>

There is a very useful analysis of the degree to which each country in the EU complies in practice with the requirement to publish. This was prepared for us by Mr P Sketchley and the DataOp Alliance, who publish a CD Rom of tender information for the Commission. A table extracted from the full analysis is included in Appendix F, European Union, as Table A. In 1998, for the UK, out of 12,564 award notices that were expected, 6,281 - about 50% were published. This compares with the EU average of about 48%. Out of the 6,281 that were published, 2,107 - about 34% included some indication of value. This compares with the EU average of 59%.

These directives require little information, and that which is specified, is often not provided. There is however concern within the Commission, and a wish to improve the transparency of public procurement with a higher level of compliance with directives.<sup>9</sup>

### **EU Environmental Directives**

These are implemented in UK law as The Environmental Regulations 1992, also known as Freedom of Access to Information on the Environment. Their scope is very broad, since they cover any information that relates to the environment, including activities that could affect it adversely. Information to which any 'commercial or industrial confidentiality attaches...' is protected.<sup>10</sup>

Since the regulations apply to a wide number of public bodies, no regular statistics of use have been maintained. However we were told of a special analysis that was carried out, relating to the first five years of operation of the regulations. This showed some 16,000 requests and 62 refusals. There is some evidence of business use.

The Environment Agency explained to us that they operate a process to check if claims for confidentiality are valid and if so whether they are outweighed by the public interest. They place enforcement notices on public registers, and have given out waste return details, sometimes giving the content but refusing volume information, according to their judgement of a confidentiality claim. Many requests relate to the Integrated Pollution Control Index. One example of a business request was for details of burner type and chimney stack discharges from power stations, from which it is thought a supplier could deduce the total amount of coal used, to help judge how to price the next bid.

Over the last few years, The Environment Agency has become more aware of the commercial value of the data they hold. We understand they have agreements with at least two large value-added re-sellers, which generate significant revenue. One example of value-added use, is the provision of information about environmental issues within a defined distance from a proposed property development. Another is an analysis of the Flood Risks Register to provide a service to insurance companies.

The Department of the Environment, Transport and the Regions (DETR), now publish some 54 registers of environmental information.<sup>11</sup> These include enforcement notices relating to pesticides issued by the Health and Safety Executive (HSE), and registers relating to pesticide evaluation, air pollution control, radioactive substances, waste management, and works discharges.

A case brought under the Environment Regulations, known as the Birmingham Northern Relief Road case,<sup>12</sup> is thought to have stimulated the policy change towards greater openness of Government contracts that was made public in a DETR press release in July 1998.<sup>13</sup> This announced that subject to certain limited exceptions, in future contracts placed with DETR would be made available.

### **Health and Safety law and regulations**

There is an overlap between environmental and health and safety issues. Control of pesticide use and radioactive substances are two examples. Health and safety inspectors acquire a great deal of sensitive company information in carrying out their tasks. Under Section 28 of the Health and Safety Act 1974, they are prohibited from releasing information obtained as a result of the use of statutory powers.

However a growing number of EU Directives and Regulations are being introduced to cover health and safety issues. The Health and Safety Act must be interpreted in the light of these subsequent provisions, which usually include provisions for openness. The legal interaction is sometimes quite complex. For example, The Environmental Regulations 1992, override the constraints of Section 28 of the UK Act, but then impose confidentiality, but not in precisely the same way.

An example of an EU-initiated regulation that requires openness is the regulation on Contained Use of Genetically Modified Organisms 1992. This requires the maintenance of public registers of consents and enforcement actions.

The HSE receives about 500,000 requests for information each year. A small proportion of these are for business purposes. One organisation that we spoke to, Ethical Investment Research Services (EIRIS),<sup>14</sup>

ask for enforcement and prosecution information from some of the environmental and health and safety registers, in relation to over 1000 UK company groups. They collate this with information from other sources, to provide individual profiles for each of the company groups they research. They provide this information to pension, trust, and investment funds, to assist them to invest in accordance with their defined ethical criteria.

The HSE explained that they also get requests for the enforcement profiles of specific companies, from law firms, legal departments, and purchasing departments. It is known that this includes local authorities checking the records of potential suppliers as part of their selection process. It appears that some large companies are using the information for similar purposes. Other motivations appear to be getting information about competitors and checking out potential candidates for acquisition, in order to understand the record of the company and any obligations that may pass to the purchasing company.

HSE also explained that the Code of Practice had encouraged them to provide more information than previously. In the area of enforcement, they will now provide a 200 word summary of the incident, where previously they would just have reported action taken under a particular clause.

Overall more information is now being released than was the case, say five years ago, and a number of companies have become aware of the opportunities.

### ***Code of Practice on Access to Government Information***

This was first introduced in 1994 and revised in 1997. It encouraged departments to make available an increasing range of information, including for example internal guidance manuals, advice from specialist committees, together with background material on decisions and consultative papers. This has, on occasion included contract details and inspectors' reports. Some of the key areas of contention are illustrated by the cases considered by the Ombudsman, who investigates complaints of failure to comply with the Code.

**Ombudsman's reports:** the following cases are examples of important cases that are relevant to business information. They provide an insight into some of the issues and to the attitudes of departments towards disclosure.

- 1) **The Department of Transport** had refused to give details of the Inspector's report on the inquiry into the proposed Birmingham Northern Relief Road scheme in 1988. The Ombudsman recommended release of the inspector's report. Case A.4/94, Selected Cases 1994 Vol: Access to Official Information
- 2) **The Department of Health** had refused to give information about discussions with representatives of the pharmaceutical industry about a pharmaceutical industry code of practice. The information sought was about the nature and timing of these discussions and who had been involved. The complaint was upheld in part; identities of representatives could be withheld. Case A.5/94, Selected Cases 1994 Vol: Access to Official Information
- 3) **Scottish Office Environmental Department** had refused to release all the information relating to a research contract. After the intervention of the Ombudsman the information was disclosed. While the Ombudsman did not doubt that there would be occasions when the price of a contract could be exempt from disclosure under the Code, he stated that it would be unwise for assurances to be given to tenderers that the price of an accepted tender would not be disclosed. Case A.9/94. Eighth Report. Session 1994-5, Selected Cases Volume 3.
- 4) **The Department of Transport (DTp)**, had refused to disclose prices at which 27 British Rail businesses were sold to buyers in the private sector. They justified withholding this information under exemption 7 (effective management and operation of the public service) and 13 (third party's commercial confidences). The Ombudsman accepted that where the information sought concerned businesses that resembled others still to be sold, DTp were entitled under exemption 7 (but not exemption 13) to withhold it. However four of the businesses appeared wholly unlike any of those remaining to be sold. DTp accepted this and agreed to immediate disclosure. They released details of the others later. Case A.5/96. Sixth Report, Session 1995-6, Selected Cases 1996, Volume 3.

**5) The Department of Transport, Vehicle Inspectorate** refused to provide details of its correspondence with a manufacturer about a safety defect. They had however given some information and this meant that exemption 14 did not apply. The Ombudsman asked the Vehicle Inspectorate to seek the consent of the manufacturer, which was given and the information released. Case A.25/97 2nd Report Session 1998-9, Selected Cases April - October 1998.

**6) The Legal Aid Board (LAB)** had refused to provide information about the cost of a publicity campaign for their franchise scheme. The Ombudsman advised that this refusal was in breach of the Code. Initially none of the possible exemptions had been cited and no valid case for any exemption was made. LAB apologised. Case A27/96, First Report, Session 1997-8, Selected Cases 1997, Volume 3.

### *Government departments and public bodies*

There is a range of views across departments, and some differences of policy in relation to the practical implementation of the Code of Practice. In part this may be a reasonable reflection of the differing circumstances that departments face. This view was expressed to us very strongly by one department. It may have some merit, but even so, some of the differences are not easily rationalised. The views we outline below reflect, we believe fairly, the background information we obtained from people in a good position to know what happens. We should stress that they do not reflect the officially approved position of any department.

**1) Department of the Environment, Transport and the Regions (DETR):** in the paragraph on the effect of the EU Environmental Regulations above, reference was made to the stimulus the Birmingham Northern Relief Road case had given to a change of policy by DETR. In a press notice in July 1998, the then Roads Minister, Lady Hayman, announced that in future all DETR contracts would, 'as far as possible, be publicly available documents.'<sup>15</sup> The press notice explained that where there were good reasons why, exceptionally, certain parts of contracts should remain confidential, these would need to be negotiated during the tendering process.

A clause alerting tenderers to this policy is now incorporated in the instructions that the department issues to tenderers. We asked what the effect had been. Our understanding is that this policy has not caused any problems or complaints. It is possible that business is not fully aware of the implications.

**2) Department of Social Security (DSS):** we were told that the presumption is in favour of disclosure in all tendering exercises. They required substantial reasons before agreeing to confidentiality. Assertions were not sufficient. The question of making available the details of performance reviews had not yet been decided. With more long term contracts this would become an increasingly important question.

**3) Department for Education and Employment (DfEE):** their internal staff guide to the Code of Practice explains that some basic contract information should normally be made public. However, it warns that 'Disclosure of the winning tender price could prejudice future tendering exercises.'<sup>16</sup> We understand that in practice they generally gave the winning tender price, but only after a delay of 12 to 18 months. There seems to be very little use of the Code by business, and very few requests under the Code for any reason.

**4) Ministry of Defence (MOD):** they are placing emphasis upon making available more information to help suppliers on their web site. They explained that they were seeking to work more in partnership with their suppliers. Basic details of contracts awarded are published in their Contracts Bulletin. However prices seem to be withheld as confidential. We were told that losing tenderers are debriefed and are given a rough approximation of the difference between their bid and the winning bid, and an indication, if appropriate, of where they finished in the competition. This exercise is however, treated as commercial in confidence between the MOD and the individual tenderer.

**5) Ministry of Agriculture, Fisheries and Food (MAFF):** following a number of very high profile problems, in which confidentiality was seen as an aggravating factor, MAFF have adopted a policy of greater openness. An example is the decision, from January 1998, to publish Hygiene Assessment System (HAS) scores for slaughterhouses. This decision was opposed both by the industry and by the retailers. There was concern that the scores could be misinterpreted, the information was considered to be commercially confidential, there was some discomfort with premises being identified individually, and some retailers were concerned that they could face problems from their customers.

MAFF nevertheless decided to publish. They took care to clarify in their regular monthly reports,<sup>17</sup> exactly what the HAS scores did and did not mean. In these reports they list all licensed slaughterhouses

by name and location in the UK, together with the HAS score for each, which for example, in the November 1998 report, ranged from 44 to 100. (100 is the maximum score)

One year later, we understand that concerns are sometimes still raised by the industry but with no great emphasis. There is no evidence of commercial harm. We were told that at least one operator had said the effect had been beneficial. There is anecdotal evidence of retailers putting pressure on their suppliers to raise their scores. MAFF had received calls from operators whose scores had been excluded by mistake, to please issue an update and publish them at once. The overall view is that it does seem to have produced some pressure to raise standards and there is also pressure to improve the consistency of scoring, where there have been some complaints that were regarded as justifiable.

**6) Office of Water Services (OFWAT):** they had received about 12,000 requests for information in 1997 and the volume was growing. A large number were from students carrying out projects on privatisation. Many questions were wrongly addressed to them, for example, environment questions, which were a matter for the Environment Agency, and water quality questions, that should have been addressed to the Water Quality Inspectorate.

Their function was to be the economic regulator of the industry. This meant they had a great deal of sensitive financial information about each company and used their own models of costs, revenue and profit. They would not release these but were prepared to explain their methodology. They were considering whether to release the models after a gap of time.

Essentially water companies had to release a great deal of information in their regulatory accounts in addition to the normal requirements of the Companies Act. There was little demand for company information that was not already or about to be published. The boundaries were fairly obvious. They would not release sensitive information to an individual requester. They either said no or published the information for everyone.

### *Business views*

In general, it seems that business views in relation to the current Code of Practice, and those expressed in response to the White Paper on FOI,<sup>18</sup> are comparatively low key and mostly about concerns that are specific to a particular sector. It is significant that there was a very low level of business response to the White Paper. There were very few individual companies that responded, although the responses from some industry organisations, for example, the CBI and FEI,<sup>19</sup> were detailed and focused upon the additional risks that companies could be exposed to.

Most companies are not yet alert to the issues and opportunities that have already arisen with the Code of Practice and are likely to arise more strongly with a UK FOIA. The policies adopted by major US companies to manage positively the information they gave to government, to protect confidential information, and to look for information about market opportunities and their competitors, required the attention of senior management. The clearly visible risks posed by the USA FOIA, when it was first introduced, ensured that the issue reached the agenda of the senior management of US companies.

In comparison, nothing has yet occurred to force the matter onto the management agenda of companies in the UK. We do not expect the UK FOIA to create the level of risk that would ensure that result. It should however raise the visibility of the issue. The work of the Hawley Committee, which produced the report, *Information as an Asset*,<sup>20</sup> was a useful example of a related subject. This addressed the question of the importance of information to a company, in terms of how it was classified, how it was used and managed, what its value was, how it was protected, and what were the risks if it was lost. This report received a wide circulation, was the subject of a number of seminars, and has been taken up by some companies. However the impression we have is that it has not yet succeeded on getting onto the senior management agenda very widely.

We have spoken to people in a number of large companies trading in the UK, including some multi-nationals, to seek to understand how they make use of the current facilities to access government information and how they protect their own information. The result is some interesting anecdotal information, rather than material from which broad conclusions could reasonably be supported.

The majority were not aware of the possibilities for use of the new sources of government information or of the risks they faced. They believed they had adequate sources of information already and were not in general sensitive to the risks. However, others seemed very aware of the question, and used their USA experience to manage the information they provided to public bodies. They took great care to clarify what was confidential, with markings and processes, to ensure that the chances of a mistake by government were very low.

We gained the view that the intensity and the priority given to searches for detailed information about competitors was to some degree sector specific. One company in the chemical and pharmaceutical sector told us that amongst other things, they regularly carried out patent searches, undertook analyses of competitive products and studied reports of relevant committees. In the IT sector we received fairly consistent views from several companies to the effect that they already knew what they needed to know about their competitors. The development of good relationships with their public sector customers ensured they found out the information they needed about requirements and the performance of competitors. A similar view was expressed by a major accounting firm who felt all the players were comparatively open books to each other.

In the food and drink industry, there was some concern with the current levels of openness. A recent change of the rules by government now meant that when a product analysis is carried out by trading standards officers, for example, the chemical analysis of an orange juice, the results are now published with the brand name identified. There was concern about information potentially becoming more available from sources that had up to now been regarded as secure. For example the MAFF intervention board, who administer export subsidies on behalf of the EU, required the precise ingredients of products for which subsidies were claimed: eg to calculate exactly how much high price EU milk, sugar and cereals were included in chocolate bars exported outside the EU.

There was a wider concern about the risk that lay representatives on key advisory committees, for example relating to the approval of new chemicals, additives and food products, might be a source of untimely leaks of information. We were told that some committees do leak. The main current concern was that the early release of say toxicology data might cause damaging press coverage, which would not arise if the entire study and data was published at the time of product approval.

A major and widespread concern was the question of predictability. Companies needed to know what would and would not be made available so that they could plan accordingly. People from a number of companies who otherwise argued strongly for a high degree of confidentiality, said they would be happy with the current USA system. It was predictable, case law was well established, rights could be asserted by law with confidence about where the boundaries lay. Participants in the food industry in the UK had some envy for the respect in which the USA FDA was held by the public. Their processes were seen as open and transparent, but their approval meant that the public bought the products with confidence.

In the area of compliance in the financial services industry, we were told that more publicity to 'name and shame' offenders could have a negative outcome. It was explained that the highly detailed and onerous nature of the regulations meant that most of the participants in the main areas were non-compliant. If they were all named regularly for offences that were regarded as technical breaches it would devalue the impact when more serious breaches occurred. We were referred to the example of the mis-selling of pensions where a large majority of the participants have suffered bad publicity with very limited impact upon their businesses.

In some areas companies wanted more information from government. One concern that was expressed related to the need to be able to establish the cost base of an undertaking being transferred to a private sector company much more accurately. This may be more an issue of lack of information rather than a policy not to release it.

The position in the UK at present is seen as an unpredictable mixture of confidentiality and openness. It sits between the USA with a high degree of openness, that is however predictable, and the main EU countries which retain a high level of confidentiality. There is seen to be a need to educate the officials who manage access to information. Claims for greater confidentiality by business may in practice reflect a need for greater predictability. The new Freedom of Information Act could help to introduce this, so



long as it is properly administered and backed by effective training of the many different staff in different departments who handle business information.

## Notes

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- <sup>1</sup> Australian Standing Committee on Constitutional and Legal affairs. Statement by the Chairman in the context of The Confederation of Australian Industry submission (CAI), on 1st July 1986.
  - <sup>2</sup> *Ibid.*, 11th August 1986, Mr Allen for Business Council of Australia
  - <sup>3</sup> *Ibid.*, 1st July 1986, Mr Guardini for CAI
  - <sup>4</sup> *Ibid.*, 11th August 1986, Mr Armstrong for CRA Ltd
  - <sup>5</sup> *Ibid.*, 11th August 1986, Mr Timmins for Political Reference Service Sydney
  - <sup>6</sup> *Ibid.*, 11th August 1986 Submission by Mr McClintock, Alcoa.
  - <sup>7</sup> *Ibid.*
  - <sup>8</sup> Freedom of Information Act, *Annual Report by the Attorney General*, Canberra. 1996-7. ISSN 1030 6692
  - <sup>9</sup> *Ibid.*, 1983-1997.
  - <sup>10</sup> *Ibid.*, 1994/5.
  - <sup>11</sup> Australian Law Reform Commission (ALRC) *A review of the Freedom of Information Act* ALRC 77, 1995
  - <sup>12</sup> ALRC Discussion Paper 59, 1995
  - <sup>13</sup> Speech to Second National Freedom of Information Conference March 1995 ALRC 69
  - <sup>14</sup> *Industry Commission on Competitive Tendering and Contracting by Public Sector Agencies, Report No. 48*, 24th January 1996, AGPS, Melbourne.
  - <sup>15</sup> *Ibid.*
  - <sup>16</sup> *Commission on Government, Western Australia, Report No. 1*. August 1995.
  - <sup>17</sup> *Ibid.*, Page 84.
  - <sup>18</sup> *Ibid.*, Page 88.
  - <sup>19</sup> *Annual Report, New South Wales Ombudsman, 1997/8*, Page 172.
  - <sup>20</sup> Paper to Australian Institute of Administrative Law Forum in Melbourne on 18th June 1998, by Rick Snell, Lecturer in Law, University of Tasmania.
  - <sup>21</sup> *The Rise and Decline of Freedom of Information in Australia* by Greg Terrill. Chapter 6 in *Open Government, Freedom of Information and Privacy* Macmillan 1998 ISBN 0-333-72678-2
  - <sup>22</sup> *Ibid.*, page 101
  - <sup>23</sup> *Ibid.*, page 106
  - <sup>1</sup> Financial Times of Canada, 8th August 1983, article by Gary Lamphier
  - <sup>2</sup> *Ibid.*
  - <sup>3</sup> Insight, Tab VIII, *Organising your Company's Information Procedures under the New Act*: Derek C Hayes, Vice-President & Secretary, Shell Canada: Ross W McFarlane, QC, General Counsel, General Motors of Canada: September 15th 1983.
  - <sup>4</sup> *Study to assess the impact of the AIA on business in the 2 years since implementation*: LLM Thesis: Ms Elizabeth Longworth, 1985
  - <sup>5</sup> Byword : *The Government: Improving Your Competitive Edge*, Michael A Dagg , April/May 1986
  - <sup>6</sup> *Access to Information: 1982-6 An Applicant's Perspective*, Michael A Dagg, Ottawa, February 1986
  - <sup>7</sup> *The Access to Information Act: A Critical Review*, published by the Information Commissioner of Canada, April 1994
  - <sup>8</sup> *The Access to Information Act: Ten Years On*: Minister of Public Works & Government Services. 1994
  - <sup>9</sup> *Ibid.*
  - <sup>10</sup> Notes for an Address to the Canadian Access and Privacy Association, November 7th 1996, Ottawa by John W Grace, Information Commissioner of Canada
  - <sup>11</sup> *Ibid.*
  - <sup>12</sup> *Annual Report of the Information Commissioner of Canada, 1997/8*, April 1998, Pages, 2, 5, 9.
  - <sup>13</sup> *PWSGC Supply Manual, 7.706 (3/03/97)* ( <http://contractscanada.gc.ca/en/manual-e.htm>)
  - <sup>1</sup> *Senate Committee on the Judiciary, FOIA Hearing, 100th Congress, 2nd Session 1989-90*, Senator Leahy.
  - <sup>2</sup> *Vaughn v Rosen*, 484.F.2d 820, 827 (D.C. Cir. 1973)
  - <sup>3</sup> House of Representatives Report, July 1978, 95th Congress, 2d session, *Freedom of Information Requests and Reverse FOIA Lawsuits*. Report 95-1382
  - <sup>4</sup> FOI Services Inc. Rockwell MD. Now at 11 Firstfield Road, Gaithersburg, MD 20878-1703.
  - <sup>5</sup> House Report - see note 3 above - pages 6 & 7.
  - <sup>6</sup> *Ibid.*, pages 9 & 10.

- 7 Published in *Administrative Law Review* Vol. 34 1981
- 8 *Ibid.*, page 261
- 9 Final Report. *Regaining a Confidence: Business Confidential Data and Statutory Protections. A study for the Committee on Regulation of Business. Administrative Conference of the United States.* James T O'Reilly, Nov. 1981
- 10 *Entrepreneurship, Productivity, and the Freedom of Information Act*, William L Casey, John E Marthinsen, Laurence S Moss, Lexington Books, ISBN 0669-06349-5
- 11 *Senate Committee on the Judiciary, FOIA Hearings: 98th Congress, 1st Session 1984*
- 12 *Ibid.*, Mr Rader, page 419
- 13 *Ibid.*, Senator Leahy, page 420
- 14 *Ibid.*, page 393
- 15 *House Committee on Government Operations, FOIA Hearings: 98th Congress, 2nd Session 1984*
- 16 *Ibid.*, page 368-369
- 17 Letter from Attorney General, Griffin Bell, dated 5th May 1977, to agency heads. Quoted in book detailed in note 7 above. page 23
- 18 Letter from Attorney General, William French Smith, dated 4th May 1981. Quoted in book detailed in note 7 above. page 28
- 19 *FOIA Updates, Dept. of Justice. Office of Information & Privacy.* ([www.usdoj.gov/oip/foi-upd.htm](http://www.usdoj.gov/oip/foi-upd.htm))
- 20 *Ibid.*, Vol. XVIII No. 1
- 21 *Ibid.*, Vol. XVIII No. 4
- 22 *Ibid.*
- 23 *FOIA Updates, Dept. of Justice. Office of Information & Privacy*, Vol. XIX No. 1
- 24 Harry Hammitt is also one of the authors of *Getting and Protecting Business Information, A Business Guide to using the Freedom of Information Act.* ISBN 1-56726-043-8
- 25 FOIA Group Inc., 1090 Vermont Avenue, N.W. Suite 800, Washington DC 20005.
- 26 Federal Sources Inc., 8400 Westpark Drive, Fourth Floor McLean, VA 22102
- 1 Freedom of the Press Act, 1766. After a subsequent period of royal autocracy, the principles were re-asserted in Acts of 1810 and 1812. The 1812 act remained in place until replaced by the act of 1949
- 2 *Public Sector Information: A Key Resource for Europe*, Green Paper on Public Sector Information in the Information Society. European Commission, COM(1998)585. Published January 1999
- 3 Draft of Green Paper, dated June 1998. Chapter 1, para. 15. Report by Anderson Consulting quoted, Strategic Developments in the European Publishing Industry Towards the Year 2000. for DGXIII, 1996.
- 4 See 2 above. Chapter 1 , para. 34.
- 5 Publaw 3 Report, Prepared for the European Commission, 1995. ([www2.echo.lu/legal/en/publaw/publaw.html](http://www2.echo.lu/legal/en/publaw/publaw.html))
- 6 *Access to Public Sector Information*, Schoordijk Institute ( Prof. Dr. (Corien) J E J Prins, (Ellen) P A M Vunderdink, J D, Tilburg University: Franke A M van der Klaauw-Koops, JD, Gerrit-Jan Zwenne, J D, Leiden University. DGXIII LEGASSIST95B
- 7 *Ibid.*, page 34.
- 8 Council Directives. Service Contracts, 92/50/EEC. Supply Contracts, 93/36/EEC. Works Contracts, 93/37/EEC. Utilities Contracts, 93/38/EEC. All as amended.
- 9 There are similar terms in all directives - see 8 above. For example in 92/50EEC, it is in Article 16, para. 5.
- 10 DG XV, Commission Communication, COM(98)143, Brussels March 1998. page 2.
- 11 *Ibid.*, page 1
- 12 *Ibid.*, pages 3 & 4.
- 13 See note 1 above
- 14 This form of procurement process is rare in Sweden, but more common in Denmark. Information from National Board for Public Procurement (NOU), Sweden.
- 15 Speech by Ms Laila Freivalds, Minister of Justice on 27th June 1996, at the Access to Public Information Conference in Stockholm.
- 16 NOU web site. [www.nou.se](http://www.nou.se). Also material about Sweden in the DG XV procurement information site, <http://simap.eu.int>
- 17 From guidelines to the Wob, in English, dated 22/12/98, and given to us by the Ministry of the Interior and Kingdom Relations, Constitutional and Legislative Affairs Department
- 18 We have been referred to three relevant cases involving the Wob:-
- \* President Rechtbank Zwolle dd 3-1-1997, conc, RSA BV/College van BW van Almere.
  - \* Afdeling bestuursrechtspraak van de Raad van State dd 5-5-1997 conc. Papiergroothandel Vierhout/Staatssecretaris van Defensie.
  - \* Rechtbank Zwolle dd 8-10-97 conc. RSA BV/B&W van Almere.
- We have been told that in all these cases, the ruling was that the Wob cannot be used to give more information than the procurement directives specify.
- 19 See note 8 above

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- <sup>20</sup> *Free Accessibility of Geo-Information in The Netherlands, the United States and the European Community*. Proceedings of a seminar held on October 2nd 1998 in Delft. Delft University Press, ISBN 90-407-1756-6
- <sup>21</sup> See for example, *Openness and Transparency in the European Union*, Eds. Veerle Deckmyn and Ian Thomson, European Institute of Public Administration, Maastricht. article by Professor Curtin, University of Utrecht. Also Access to Public Sector Information, see note 6 above.
- <sup>1</sup> White Paper, *Modernising Government*, CM4310, March 1999.
- <sup>2</sup> European Commission, Green Paper, *Public Sector Information in the Information Society*, COM(1998)585.
- <sup>3</sup> UK Green Paper, *Crown Copyright in the Information Age*, January 1998, CM3819
- <sup>4</sup> UK Treasury publication, *Selling Government Services into Wider Markets*, July 1998.
- <sup>5</sup> Campaign for Freedom of Information, Press release, quoting a paper given by Maurice Frankel, Director, in October 1997.
- <sup>6</sup> *Code of Practice on Access to Government Information, 2nd Edition 1997*. The Stationery Office CNN 58386
- <sup>7</sup> EU Procurement Directives have been implemented in UK law by Treasury Regulations in the period 1991-5. The regulations cover three areas of public authority procurement; Supply Contracts, SI 1995/201; Works Contracts, SI 1991/2680; Services Contracts, SI 1993/3228. They also cover Utilities with, SI 1996/2911. See Treasury web site for latest versions; [www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk)
- <sup>8</sup> EC Directive 97/52/EC, dated October 1997, amending Directives, 92/50/EEC, 93/36/EEC, 93/37/EEC, relating to public service, public supply and public works contracts.
- <sup>9</sup> See, Commission Communication, Public Procurement, COM(98)143, Brussels, 11th March 1998
- <sup>10</sup> Statutory Instrument, 1998 No. 1447, Environmental Information (Amendment) Regulations, 1998, 2. (2) (e).
- <sup>11</sup> *Environmental Facts, A guide to using public registers of environmental information*. 94EP335, Jan.1996.
- <sup>12</sup> *R v Sec. of State for DETR and Midlands Expressway Ltd. ex parte Alliance Against the Birmingham Northern Relief Road and Others*. CO/4553/98. The case is subject to appeal.
- <sup>13</sup> DETR Press Notice 619, 23rd July 1998, DETR Contracts to go Public - Hayman. "If there are good reasons why, exceptionally, certain parts of contracts should remain confidential, these will need to be specified by tenderers and negotiated during the tendering process."
- <sup>14</sup> EIRIS Services Ltd, a subsidiary of the Ethical Investment Research Service, provide services to their members based upon a database of about 1700 UK and European Companies. A significant amount of the information is government sourced. 80-84 Broadway, London, SW8 1SF
- <sup>15</sup> See note 13 above.
- <sup>16</sup> DfEE, *Departmental Openness, a guide for staff to the Code of Practice on Access to Government Information*, para. 6.12
- <sup>17</sup> MAFF, *Meat Hygiene Enforcement Reports*, ISSN 1369-9903, monthly with supplement, Hygiene Assessment System (HAS) Scores.
- <sup>18</sup> See note 1 above. submissions placed on the 'informing government' web site (<http://foi.democracy.org.uk>) and some published in *House of Commons Select Committee on Public Administration, third report vol 2*, May 1998.
- <sup>19</sup> Confederation of British Industry (CBI), Federation of the Electronics Industry (FEI), responses to the Government's proposals for a Freedom of Information Act. March 1998.
- <sup>20</sup> The Impact Programme, *Information as an Asset*, report of the Hawley Committee, published 1997.