

Freedom of Information: briefing note

The right to recorded information:

The Freedom of Information Act 2000 (“FoIA”/ the “Act”) introduced a general right to recorded information held by public authorities.

“Public authorities” are either listed in Schedule 1 or are “publicly owned companies” as defined by S.6. They include central and local government, non-departmental public bodies, the police, health service, schools, nurseries, colleges and universities.

The right to information under FoIA is available to any person, whether based inside the UK or outside. They do not have to indicate why they want the information.

There are two parts to the right: (1) a duty to confirm or deny whether it holds the information requested; and (2) an obligation to provide the information.

Exemptions:

There are a large number of exemptions. Exemptions must be applied separately to the duty to confirm or deny and to the duty to provide a copy of the information.

The two exemptions most likely to be relevant to commercial organisations are: (1) information provided in confidence; and (2) commercial prejudice.

Absolute or qualified exemptions?

Absolute exemptions:

once engaged, there is no obligation to disclose.

For example, this applies to disclosures which would breach the Data Protection Act.

‘Qualified’ exemptions:

if engaged, the authority must go on to consider whether, in all the circumstances, the public interest in maintaining the exemption outweighs the public information in disclosure.

FoIA sets the balance in favour of disclosure: if all else is equal, the information should be disclosed.

S.41: Confidential information

Information is exempt where it was obtained by a public authority from any other person and the disclosure of the information to the public (otherwise than under the Act) would constitute an actionable breach of confidence.

The exemption is absolute. However, there is a public interest defence to a claim for breach of confidence, so a slight variant of the usual public interest test must still be applied.

For the exemption to apply:

- the information must have the “necessary quality of confidence” and must have been communicated or become known to the recipient in circumstances that created an obligation of confidence; and
- the information must have been obtained by the public authority from another person: it does not cover information that the authority has generated.

In *Derry City Council v Information Commissioner* (EA/2006/0014, 11 December 2006) the Information Tribunal confirmed that section 41 did not cover information which the public authority had generated itself. It did not apply to protect the confidentiality of the terms of a contract to which a public authority was a party (technical information obtained from the other contracting party and recorded in the contract might be covered).

S.43: Commercial prejudice

Information is exempt if it constitutes a trade secret, or if its disclosure would, or would likely to, prejudice the commercial interests of any person, including the public authority.

This is a qualified exemption, so the public interest test must be applied.

It is usually (relatively) easy to establish that disclosure of information about contract terms will engage the exemption, as the information could be used by competitors to obtain a competitive advantage. It is harder to satisfy the public interest test.

There were a series of decision notices issued by the Information Commissioner relating to commission fees payable by pension funds in February 2008 which concluded that the public interest in upholding

both exemptions outlined above did not outweigh the public interests in transparency.

The Commissioner was influenced by the high level of interest in public sector pensions and debate as to whether the commission payments created a conflict of interest for advisers, which made the public interest in transparency particularly important.

Procedural matters

A public authority must respond to a request within 20 working days. If a qualified exemption is engaged, a longer period is allowed (best practice suggests a further 20 working day period).

There is no 'right of reverse FoI' or right for those affected to be consulted although it is best practice to consult. It is, therefore, important to obtain contractual rights of consultation.

The requester can require an internal review of a FoIA decision. There is a right of appeal to the Information Commissioner and thence to the Information Rights Tribunal, with appeal to the High Court or the Upper Tribunal on points of law.

If a public authority rejects a FoIA request, it must specify which exemptions are relied on (including specifying whether prejudice would, or would be likely to occur). If a commercial organisation wishes to object to disclosure, it is most effective to phrase objections in a way which can be re-used by the FoIA officer handling the request - so reflecting guidance and decisions from the Commissioner and the

Information Rights Tribunal. Evidence of prejudice should be supplied.

New provisions on "datasets"

On 1 September 2013, several amendments to the Freedom of Information Act came into force that require public authorities to make certain datasets available in re-usable electronic form. These amendments are targeted at assisting big data initiatives not already caught by the Statistics and Registration Service Act 2007. Only 'raw' datasets are in scope - value-added data (the result of analysis, organization adaptation or interpretation) is exempt. A statutory code of practice on these amendments, including licensing and fee guidance, was published by the Secretary of State on 17 July 2013. Under the amendments, the Secretary of State has the power to set fees for providing datasets subject to authority copyright, and has chosen to set a fee assessment framework for public authorities based on a 'reasonable return on investment'.

Transparency agenda

The Government has set out a Transparency Agenda: a commitment to greater transparency across its operations to enable the public to hold public bodies and politicians to account. This includes the proactive publication of contracts and expenditure information over a set amount, subject to the same exemptions as apply under FoIA.

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