

SEC **GROUP** *briefing*

Voice of the Specialist Engineering Contractor

The members of the
SEC Group are:

Association of
Plumbing and Heating
Contractors

British Constructional
Steelwork Association

Electrical Contractors'
Association

Heating and Ventilating
Contractors'
Association

Lift and Escalator
Industry Association

SELECT

¹NB: The FOIA refers to
information – not documents.
Requested information will be
extracted from any relevant
document(s) but the whole
document(s) will not necessarily
be supplied.

DO YOU PROVIDE INFORMATION TO PUBLIC AUTHORITIES? IF SO, READ THIS

The FREEDOM OF INFORMATION ACT (FOIA) has been on the statute book since 2000 but its provisions on disclosure of information came into force on 1 January 2005. Subject to certain exemptions the FOIA provides a person with a statutory right to information that he has requested from a public authority – provided, of course, the relevant authority has the required information¹. The authority has 20 working days to comply with the request. The FOIA is retrospective – information created before the Act came into force can be requested.

Freedom of Information Act 2000

“Any person making a request for information to a public authority is entitled... to have that information communicated to him.”

Section 1

The authority is obliged to disclose the requested information even where it has been received from third parties. In the United States, where freedom of information legislation has existed since the 1960s, the majority of requests have come from companies seeking information on their competitors.

Where does the Act apply?

The Act applies to England, Wales, Northern Ireland and UK authorities operating in Scotland. There is, however, similar legislation in Scotland for public authorities north of the border.

Office of Government Commerce (OGC) Guidance

The OGC – an agency within the Treasury - provides public sector procurers with best practice advice. It has issued helpful guidance on the FOIA which can be downloaded from the OGC website: www.ogc.gov.uk.

What happens if the requested information is either not provided or information supplied is not that requested?

The Act has established a very simple enforcement process. Any complaints must go initially to the public authority which has failed to comply with a request. The next port of call is the **Information Commissioner** who can issue a *decision notice*. This will give instructions to the authority on the steps, including the release of the information, that need to be taken. Parties may appeal against this notice to the **Information Tribunal**. If the *decision notice* is ignored the Commissioner could issue an *enforcement notice* which will give deadlines for the necessary action(s) to be taken. Ultimately, the Commissioner can ask the High Court to declare the authority in contempt of court if it persists in non-compliance with his notices.

What is a public authority?

The term *public authority* embraces most bodies and agencies within the public sector including local councils, schools and GP surgeries. Construction bodies such as the Commission for Architecture in the Built Environment and the Construction Industry Training Board are listed in the Act as public authorities. The Lord Chancellor has been given the power to designate other bodies as public authorities if they carry out public functions.

This power could, conceivably, be used to designate **trade associations** as public authorities. This could arise, for example, where trade associations are operating schemes for qualifying firms for technical competence under statutory *competent persons* or *self-certification* schemes. It could also be used to designate firms as public authorities where they are involved in PFI contracts especially where they are running schools or prisons.

²An interesting question is the extent to which public authorities can be required to provide information on the make-up of their workforces when outsourcing work. Under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (better known as TUPE) a new employer is required to adhere to the existing terms and conditions of employment of the workforce on the transfer of an undertaking. Information specific to individual employees will be protected by the Data Protection Act. But, it is still possible that the new employer will be entitled to seek information on the workforce provided that it does not encroach upon personal information kept on individual employees.

When can an authority refuse to release information?

The majority of exemptions from disclosure will not cause any great surprise. Information likely to prejudice the country's defence, international relations and security interests does not have to be released. Neither does information that relates to on-going criminal investigations. Information on individuals cannot be released since such information is likely to be protected by the Data Protection Act². Rather more controversially, information relating to the formulation of Government policy is exempt. This includes documents that have been prepared by civil servants in the course of considering policy options or developing existing policy.

What about commercial confidences?

Section 41 of the Act enables public authorities to refuse to give information supplied in confidence by a third party where, otherwise, a breach of confidence action could be brought. A company should have stipulated that the information provided to the public authority is confidential and such confidentiality is necessary to protect some specific and legitimate interest of the business. If that confidentiality is broken the company will have an action for breach of confidence.

However, the Lord Chancellor has already advised public authorities to reject broad-brush confidentiality clauses unless they are considered absolutely necessary.

Furthermore, under Section 43, public authorities are not obliged to release information constituting *trade secrets* or *commercially sensitive* information. Trade secrets, for example, could include computer software developed by a company whilst commercially sensitive information would include details of current bids (at least, until the contract is awarded). But these two exemptions are dependent upon the satisfaction of a **public interest** test. There will be a pre-disposition to release the information since the concept of public interest will generally dictate openness in decision-making and in the spending of taxpayers' money.

Firms regularly provide masses of pre-qualification information to public sector procurers. This information could become available to competitors.

What will be the likely impact of the FOIA on construction?

The impact of the FOIA could fall hardest on construction as compared to other industries. The construction industry is a massive provider of information to all kinds of regulatory bodies.

By the same token, firms can use the FOIA to their advantage. They can obtain information about the procurement and selection policies of public authorities. It should be possible, for example, to obtain minutes of meetings where bids were considered to determine whether the evaluation criteria and weightings were properly applied. Such information could provide useful evidence in a contractual claim against a public body for unfairness in operating the tendering process.

Information can be obtained from public authorities about the performance strengths and weaknesses of competitors in the discharge of their contracts. Sub-contractors, not awarded contracts, will be able to discover whether their tendering main contractor has used their prices or their designs in winning the main contract. This evidence could found a claim for breach of an implied contract that the sub-contractor, in helping the main contractor obtain the contract, would be awarded a sub-contract.

Information generated through the course of managing projects will be available for disclosure. There will, no doubt, be many who will be interested in delving into information concerning the management (or lack of it) of the costs in the design and construction of the Scottish Parliament.

What can firms do to protect themselves?

Public authorities are not required to inform you if they are about to release



information concerning your company. The Lord Chancellor has issued a code of practice in which he has advised authorities to consult firms if there is a question mark over the sensitivity of particular information. The difficulty is that the authority may not recognise that certain information is commercially sensitive or, even if they do, they may feel that disclosure is necessary in the public interest.

When submitting bids, firms should indicate:

- *whether there is commercially sensitive information contained in their bids, and*
- *the period over which the information is likely to remain sensitive, and*
- *in broad terms, the harm likely to result from disclosure.*

³Sub-contractors may need a similar clause in their sub-contracts that requires main contractors to inform the client that it should also consult their sub-contractors. But, a sub-contractor will not be able to enforce such obligation directly against the client. If the circumstances demand it (because the information is highly sensitive) an agreement should be sought directly with the authority.

Where the above is done the OGC has advised public sector procurers to consult with suppliers before a decision whether or not to release information is made.

Sub-contractors, tendering to main contractors on public sector projects, may need to carry out this exercise if sensitive information is likely to be passed on to the client. The main contractor should ensure that the sub-contractor is identified against the relevant information.

Firms should also consider including a clause in their contracts with public authorities that require the authority to consult them if a request has been made for information concerning their business³. In effect this will provide an early-warning system allowing a firm sufficient opportunity to raise its objections to disclosure. If necessary, an injunction can be sought to restrain disclosure if the information is, in fact, commercially sensitive or is a trade secret.

It has already been stated that broad-brush confidentiality clauses are unlikely to be acceptable. But, firms should identify any specific information to which a confidentiality clause could attach. This is more likely to be accepted.

Overall, firms will need to consider very carefully the information that they provide to local authorities. Whilst refraining from being economical with the truth, firms should only provide information that precisely relates to the needs of the authority requesting it. Unfortunately, it may be too late to do anything about information which has already been created.

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