

## Access all areas

**From 1 January 2005, every company supplying products and services to government bodies could find that their commercially sensitive information can no longer be kept secret. Jo Farmer, Solicitor and Brinsley Dresden, Partner, at Lewis Silkin, examine the consequences of the Freedom of Information Act 2000 to the private sector.**

The Freedom of Information Act 2000 (“FOIA”) came into force in the UK on 1 January 2005. This new piece of legislation purports to give citizens the right to know information held by any governmental or public body, from Downing Street to the local parish church. The furtive and clandestine dealings behind the closed doors of Whitehall and all other public sector decisions are now ostensibly visible and transparent to all citizens. If an individual requests access to information on a particular matter, public authorities must grant access to it within 20 days, provided that it is not covered by an exemption under the FOIA.

It all sounds like a utopian ideal. But has spin, secrecy and subterfuge really been eradicated by the introduction of FOIA? Unfortunately, probably not. The likelihood is that most politically sensitive information will come within one of the 23 exemptions to the disclosure requirement. The most significant exemptions to disclosure include any information relating to the development of government policy, any information which needs to be kept secret for national security purposes and any information relating to security matters (such as any information held by GCHQ and the Security Services).

### **Who will be affected?**

Given that the FOIA is unlikely to allow access to the really juicy information, what type of information is likely to be disclosed, and who is going to be affected by this? There are over 100,000 public bodies in the UK which fall under the FOIA’s definition of “public authority”. Any company which supplies services to a public authority (or tenders to provide services) could see its own commercially sensitive information relating to the public authority being disclosed to anybody who requests access to it under the FOIA, whether it likes it or not. This information could include prices and payment terms, details of services being provided, future advertising campaigns, agency staff, financial information and other sensitive information. The experience in other countries which have similar freedom of information systems shows that the biggest use of the FOIA is likely to be in relation to the private sector supplying services to the public sector. Indeed, in countries such as Ireland, Australia, New Zealand and Canada, the right to request information has been used predominantly by businesses as an intelligence tool in the market place. If requests for information under the FOIA develop along similar lines, we can expect competitors and journalists using the FOIA as a fishing expedition to request access to copies of agencies’ tender documents, contracts and even invoices.

### **How will the FOIA apply to confidential information from the private sector?**

Before the advent of the FOIA, most suppliers to government bodies probably entered into contracts on the basis that most information about the commercial relationship is confidential. However, the public's "right to know" extends to all information held by a public authority, unless it falls under one of the exceptions to disclose. If a public body receives a request for access to information, it is required to disclose all relevant information within 20 days of the request, unless the information falls within one of the exemptions under the FOIA.

There are two exemptions that are likely to be relevant to companies supplying services to public authorities. These cover information which:

- is provided in confidence, where disclosure of the information would put the public authority at risk of an action in breach of confidence being brought against it; or
- is a trade secret, or is likely to prejudice the commercial interests of any person, company, public authority or other organisation if it is released.

Neither exemption is anywhere near as wide or comforting as it might appear. Merely marking information as "Private & Confidential" or "Secret" will not necessarily be enough to make the information fall within one of the exemptions. Qualification for an exemption will be judged at the time the request is made. Information that was once provided in confidence might no longer be judged as a trade secret under the FOIA, in which case the public authority would be required to disclose it. For example, pricing proposals in a tender document could be a trade secret under the FOIA at the time of the tender and exempt at the time of the tender. But after the tender is awarded, pricing proposals might not be classed as a trade secret. This means that the public authority would be required to disclose the pricing proposals to anyone who requests access to such information.

The second exemption listed above is also subject to an important qualification. Even if the information falls under the exemption, the public authority must disclose the information if it is in the public interest for the information to be disclosed. There is a bias in favour of disclosure being in the public interest. If the request relates to a contract for the outsourcing of public services, or relates to an issue of national importance, there will be an even stronger presumption in favour of disclosure. An example of how the public interest question might work can be found in relation to the highly topical subject of the marketing of food, tobacco and alcohol. One might argue it would be in the public interest to disclose any and all information disclosed by an agency supplying marketing services to a government department about the marketing of such goods, given the current national debate about this issue.

### **How can companies protect sensitive information from disclosure?**

How can companies avoid their sensitive information being disclosed under the FOIA and finding its way to a competitor, or into a tabloid? There is no requirement in the FOIA for public authorities to consult

companies about requests for information prior to disclosure, and the FOIA does not give companies the ability to prevent disclosure of information which they believe should not be disclosed.

Crucially, it is not possible for public authorities to contract out of the FOIA. General “boilerplate” confidential obligations in contracts, which up until now have rarely been negotiated, cannot exempt a public authority from the requirement to disclose information under the FOIA, even if it means that the public authority is in breach of contract by doing so.

The Office of Government Commerce (“OGC”) has issued model contract clauses dealing with the FOIA in procurement contracts, together with guidance notes. It has to be said that they are heavily weighted in favour of the public authority, and agencies will probably wish to consider amending these clauses in their contracts with public authorities. In particular, it is recommended that agencies providing marketing services to government consider carrying out the following actions:

- the agency should examine the types of information which might be exempt from the duty to disclose under the FOIA now, before a request for information is received by the public authority (as timing will be tight because of the requirement to disclose within 20 days);
- the agency should agree a list or schedule with the public authority which sets out the commercial information held about it that is potentially disclosable under the FOIA and confidential information which is potentially exempt;
- if information held in one document is exempt in part but disclosable in part, the agency should consider reformatting the document so that all exempt information is held in one separate document;
- the agency could agree with the public authority in their contract that the public authority must consult with the agency, or at the very least notify them, before a disclosure is made about any of their commercial information under the FOIA (this clause is not covered under the OGC model clauses);
- the agency might want to negotiate the inclusion of a clause in the contract that it will receive its costs in dealing with any requests for information under the FOIA (which is also not covered under the OGC model clauses). Requests are likely to take significant time and resources to progress. Agencies might even wish to go one step further and ask for fees covering the time they spend dealing with any requests for information under the FOIA.

Finally, it is interesting to note that the Government has allegedly set its own example as to how to deal with the expected deluge of requests for disclosure under the FOIA. On 19 December 2004, it was reported that the Cabinet Office told officials to delete all emails over 3 months old, before the FOIA comes into force. A housekeeping exercise to delete old and irrelevant files and free up memory space on Government servers, or an attempt to get around its own legislation?

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