

Freedom of Information Act

How does it affect SCC Partners and Contractors?





What is the Freedom of Information Act (FOIA)?

The FOIA is 'An Act to make provision for the disclosure of information held by public authorities or by persons providing services for them'. The Act ensures that anyone can ask the Council for any information and, unless an exemption applies, the information must be supplied. It is fully retrospective.

The Code of Practice on discharge of Public Authority Functions under Part 1 of the Act (available on the Department of Constitutional Affairs' (DCAF) website <http://www.dca.gov.uk/foi/understand.htm> gives public authorities



guidance on procedures for consultation with third parties when responding to requests, the impact of the Act on public sector contracts and accepting information in confidence from third parties

Does the Act apply to contractors, partners and Private Finance Initiative (PFI) companies?

The Act does not mention contractors, partners or PFI companies.

Section 5 of the Act contains a provision allowing the Secretary of State to designate 'Additional Public Authorities'. Before he can do this he has to be satisfied that each organisation either exercises

public functions or provides contracted out public authority functions. So far, no order has been made under this Section so the Act does not currently apply directly to such companies.

However, the right of access applies to information that is held, not necessarily owned, by the public authority. So if a public authority holds information about a contractor it will be accessible, subject to the FOIA exemptions. 'Held' is defined under the Act as including information held by another person on behalf of the authority, so if your contract terms state that records relating to the contract are the Council's property, these are also covered by the Act.

If you create and hold records on the Council's behalf, you should be aware that FOIA requires good standards of records management that are detailed in the Code of Practice issued by

DCAF under Section 46 of the FOIA. This Code can be accessed on the Internet at <http://www.dca.gov.uk/foi/codemanrec.htm> As any recorded information can be requested, we would advise against recording unnecessary information that could be embarrassing or incriminating if released. In addition, you should be aware that it is a criminal offence under Section 77 of the Act to alter or destroy a record in order to prevent disclosure once a request for information has been received.

How does this impact your company?

This means that all information which your company has provided and may provide in the future to the Council will be subject to FOIA. Examples of such information include content submitted in relation to contracts, development proposals and information held for licensing and regulatory purposes.

Only public authorities themselves are required to respond to requests, so a requestor cannot apply to you direct. They will make their request to the Council; we are then obliged to respond according to the FOIA.

What will the Council do if it receives a request for information held on your contract/company?

If we receive a request which involves information provided by your company and its unclear whether any claim to confidentiality applies then we will consult with you. However, we have a very limited time to decide whether or not the information can be released so we need up-to-date contact details for someone who can respond quickly to a request. Otherwise we may have to make a decision without your organisation's input as the Council is required to respond to requests within a 20 working day time limit.

What if you are providing the Council with information which is confidential or commercially sensitive?

Whenever your company provides information to the Council which you believe would prejudice your interest if released under FOIA you should make the Council aware of this at the time it is provided. All future contracts will include a schedule specifying this information. However, you should appreciate that simply marking information as 'confidential' or 'commercial in confidence' only has the effect of identifying that an exemption could apply under FOIA. The issue will be not the marking but whether, at the time the request is received, a duty of confidence applies, or whether release would be likely to prejudice your commercial interests.

If you wish to propose a confidentiality agreement or that a duty of confidence should apply to particular information, you



should do so in compliance with the Code of Practice issued by DCAF under Section 45 of the Act. This will ensure that claims are based upon reasons that address the requirements of the Code. The Code can be accessed on the Internet at:
<http://www.dca.gov.uk/foi/codepafunc.htm>

What are the exemptions which might apply to information supplied by contractors?

There is no blanket exemption for commercial confidentiality. Each request will have to be examined on its own merits and the Act applied. The following exemptions are likely to be



relevant when the Council has to decide whether to disclose information under FOIA about contractors and partners relationships with the Council, details of contractors, tendering information etc.

Section 40 protects personal information, though a public interest test can apply to third party information in some circumstances.

Section 41 provides an absolute exemption where disclosure of the information will constitute an actionable breach of confidence.



Section 44 provides an absolute exemption where disclosure (otherwise than under this Act) by the public authority holding the information is prohibited by, or under any other enactment or it is incompatible with any Community obligation.

This may apply to some information received during the procurement process conducted under the EU Procurement Rules. It may also apply to confidential information identified in various Contract regulations (the Public Works Contract regulations 1991, the Public Services contract Regulations 1993 and the Public Supply Contract Regulations 1995).



Section 43 allows information to be withheld where it constitutes a trade secret or where disclosure is likely to prejudice the commercial interests of any person (including the public authority). This is a qualified exemption subject to the public interest test.

The Department of Constitutional Affairs has issued guidance on interpretation of these exemptions that is available on the Internet at : <http://www.dca.gov.uk/foi/guidance/index.htm>



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