

Early Disclosure

Fionnuala McCredie Q.C.

16 November 2018

White Paper Conference

When facing up to early disclosure and FOI, what are the unwritten conventions on which records to release and withhold at different tender stages?

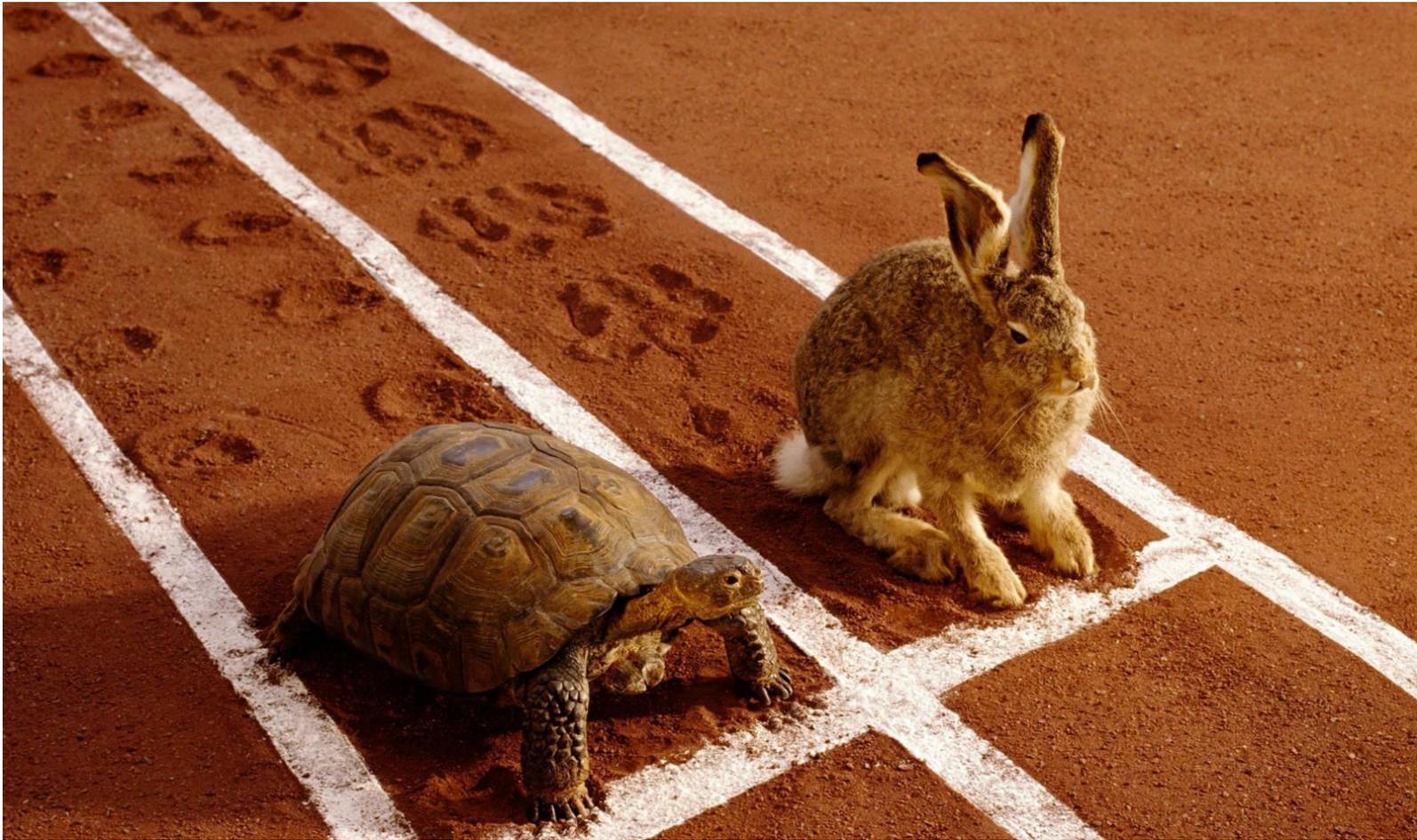
- FOI/Disclosure and limitation periods
- FOI at different stages of the procurement
- Approach of the Courts
 - Test
 - Categories of documents
- Confidentiality rings - developments
- Redaction - developments
- Prevention is better than cure

FOI or disclosure?



- **10 calendar day** standstill period – can force the issue of proceedings
- **20 working days** for FOI response – that could be **33** calendar days **and** that period extendable at the discretion of the CA
- **30 calendar days** limitation
- Main focus is Court ordered disclosure

Co-ordinate FOI and other disclosure



FOI conflicts with disclosure



- Close working relationship between FOI team and procurement team

- Consistent approach, both with the FOI and the procurement documents
 - Documents disclosed
 - Withheld
 - Redacted

Stages of the procurement



The Ages of Modern Man

variationsonnormal.com

- PQQ participants – ***Birmingham City Council***
 - **No** - strong public interest in not disclosing information likely to disadvantage private companies or have a negative impact on the council in a suspended procurement
- PQQ Evaluation reports – ***Keene v IC***
 - Unsuccessful bidder sought forms of other participants and a report of the procedure. **No** - IC held the information would prejudice commercial interests of CA, negative comments would damage bidder credibility, make entities reluctant to bid and make evaluators reluctant to record frank comments. On **appeal, yes, public interest favoured disclosure**



- **Winning tender - *Ballan v IC***
 - Unsuccessful bidder sought disclosure of winning bid 2 years after the tenders submitted. **No**, prejudicial to commercial interests; the way a tenderer presents material and answers questions was an important means by which the authority is able to evaluate competing tenders.

- **Contract – *DWP***
 - Request for contract information relating to a major IT system. **Yes**, all documents disclosable **except** for the location of Data Centre (sensitive government information) and the Financial Model, which was a trade secret.

Approach of the Courts



Legal Test - Roche v Mid Yorks



- Unsuccessful tenderer knows he has lost, but the reasons for failure are in peculiar knowledge of Authority
- Challenger ought to be provided promptly with essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality

- Applications must be considered on individual merit.
- A request must be tightly drawn and properly focussed.
- Distinction between cases where a *prima facie* case has been made out and those where there appears to be little or no basis for the claim

- Most likely to succeed where what is sought is material that demonstrates how the evaluation was actually performed and therefore by C lost
- Balancing C's lack of knowledge of what actually happened with the need to guard against a fishing exercise to shore up a weak claim

- Much easier to get early specific disclosure than pre action disclosure
 - **No time** for pre-action disclosure
 - Easier for C to persuade a Court to give early disclosure when there is a Particulars of Claim in existence which explains the case and where the gaps are in the C's knowledge
 - The optics are better when CA gives essential documents without the need for an order

- Challenge of award decision for the manufacture and supply of railway sleepers on the basis of an ALT
- Cemex served a Claim Form and sought specific disclosure, including the winning bidder's tender and an extension of time for service of Particulars (7 weeks)
- Disclosure of the winning bid refused, held that Cemex had sufficient information to plead the Particulars

- The Court will balance the protection of business secrets and fair competition on the one hand with the requirements of effective legal protections and the right to a fair trial on the other. ***Varec SA***
- Confidentiality alone is not a bar to disclosure, and so whatever the stage of a procurement, if disclosure is necessary for a fair trial, it is likely to be ordered, subject to protections to safeguard confidentiality

Categories of documents I



- Drafts of the PQQ (*Amaryllis*)
- Documents in an ongoing procurement (*Croft House*)
- Model answers (*Croft House, Mears*)
- Winning PQQs (*Amaryllis, Croft House*)
- Winning bids (*Croft House, Alstom, Geodesign, Alstom v LUL, Counted4*)
- Marking schemes (*Amaryllis*)

Categories of documents II



- Guidance/instructions for evaluators (***Croft House, Roche, John Sisk, Geodesign***)
- Evaluation templates and detailed scoring (***Alstom v Eurostar***)
- CA decision making and evaluation procedures (***Amaryllis***)
- Evaluation score sheets (***John Sisk, Geodesign***)
- Evaluators Notes (***Croft House***)

Categories of documents III



- Evaluation Report (***Geodesign***)
- Documents relating to an independent check of the evaluation process actually carried out (***Roche***)
- Contemporaneous documents relating to the evaluation (emails, spreadsheets, minutes etc) (***John Sisk***)

- Fishing expedition (*Scott's Electrical* NI)
- Disclosure not necessary before application to lift (*Pearson Vue* 2013, *Covanta* 2013, *Group M* 2014)
BUT
- Much less likely now, see *Alstom v LUL* 2017
- Application for disclosure an abuse in abandoned procurement (*Gem*)
- Not necessary to plead Particulars (*Cemex*)

Confidentiality Rings



Factors relevant to the imposition of a confidentiality ring I



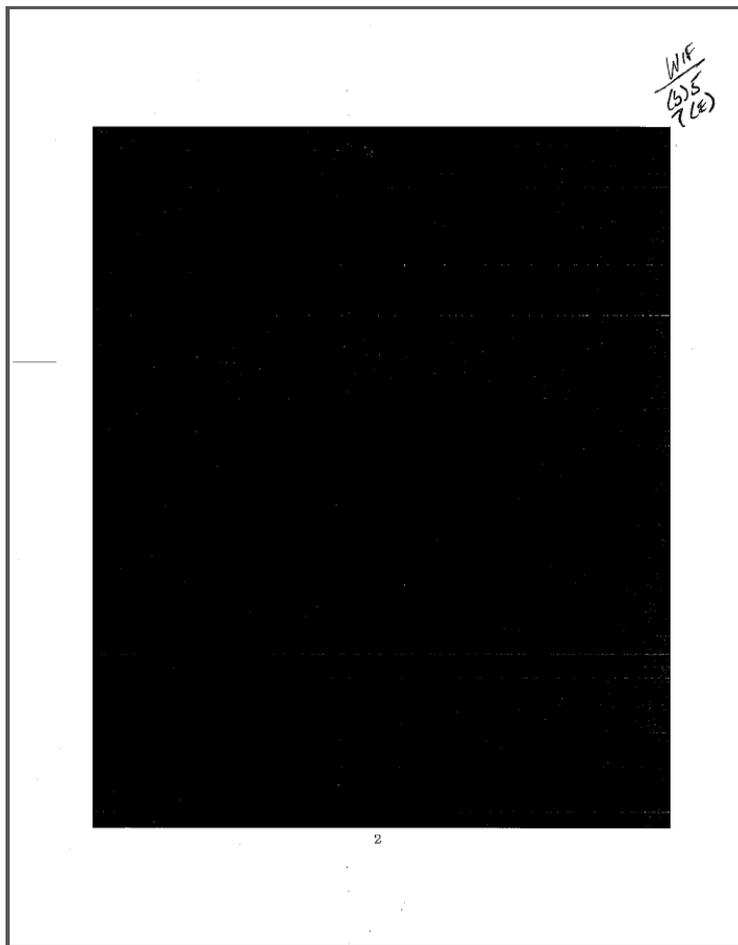
- SRCL v NHSE
 - Degree and severity of the identified risk and the threat posed by the inclusion/exclusion of individuals
 - **The inherent desirability of at least one representative of each party within the ring**
 - The importance of the material to issues in the case
 - The nature of the confidential information and whether it needs to be considered by people with technical/expert knowledge
 - Practical considerations such as disruption to the legal team if only part of the team may review

Factors relevant to the imposition of a confidentiality ring II



- SRCL v NHSE
 - No order for disclosure of third party information without giving that party the right to make representations to the court
 - In the balancing exercise there are a range of options available to preserve confidentiality and be consistent with the challenger's rights and the administration of justice
 - The court will rule on any opposed application in this respect
- Likely to be easier to get client representatives in the ring

Redaction



TCC Guidance Note on Public Procurement Cases



- Redaction on grounds of privilege or confidentiality
- Schedule justifying redaction (para 32)

Document Title	
Location in Document	Reason for assertion of confidentiality
Page 15, paragraph 4.2	The deleted material relates to ABC Limited's confidential costs and prices The information is in the nature of a business secret

- Copy for the Court in unredacted form with redactions indicated

Prevention is better than cure, or



Make Regulation 84 your friend!



- 84 (7) Document the progress of procurement procedures
- 84 (8) Sufficient to justify decisions taken in all stages of the procedure
 - Communications with EOs
 - Internal Deliberations
 - Preparation of procurement documents
 - Dialogue or negotiation
 - Selection and award

- Regulation 84 file
- Independent “keeper” of the file and auditor of the documents
- Review adequacy of the documents and the process as procurement proceeds
- Early warning if things are going wrong/documents inadequate so it can be fixed before it is too late
- Make sure you have adequate documents; not artificially brief, or destroyed, or never created at all

Be Prepared!



Thank you for listening

FIONNUALA M^CCREDIE Q.C.
FMCCREDIE@KEATINGCHAMBERS.COM