



**BRODIES**<sup>LLP</sup>

# White Paper Procurement Conference

## Disclosing tender information

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# Overview

- The 2016 Regulations and disclosure of information
- Freedom of information and public procurement
- Disclosure in procurement litigation

“Should you ever disclose evaluators’ comments?”

# Help and Guidance



**Scottish Public Sector Procurement  
& Freedom of Information  
Guidance**

# Help and Guidance



## Public Contract Regulations

Freedom of Information Act  
Environmental Information Regulations

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# Help and Guidance

## FOISA Guidance

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### **Section 33: Commercial interests and the economy**

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#### **Exemption Briefing**



# Public Contracts (Scotland) Regulations 2015

## 22.— Confidentiality

(1) A contracting authority must not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

(2) Paragraph (1) is without prejudice to—

(a) any other provision of these Regulations, including the obligation relating to advertising of awarded contracts and to provision of information to candidates and tenderers set out in regulations 51 (contract award notices) and 56 (informing candidates and tenderers)];

(b) the Freedom of Information (Scotland) Act 2002<sup>1</sup>;

(c) the Environmental Information (Scotland) Regulations 2004<sup>2</sup>; and

(d) any other enactment to which the contracting authority is subject relating to the disclosure of information.

(3) A contracting authority may impose upon an economic operator requirements aimed at protecting the confidential nature of information which the contracting authority makes available throughout the procurement procedure.

# Freedom of Information

- Freedom of Information (Scotland) Act 2002
- Environmental Information (Scotland) Regulations 2004
- Freedom of Information Act 2000

# FOISA 2002

- General entitlement – section 1
- Presumption in favour of disclosure – section 2
- Exemptions
  - Information otherwise accessible
  - ‘Trump’ prohibition on disclosure – s26
  - Commercial interests – s33
  - Confidentiality – s36

## Recent decisions

- **Decision 169/2015: Mr Sam Cook and Renfrewshire Council** (information otherwise accessible; advice and assistance)
- **Decision 001/2016: Mr Alan Howard and Moray Council** (implied confidentiality of tender process upheld)
- **Decision 234/2014 Shetland Line (1984) Ltd and Transport Scotland** (FOI in the context of ongoing litigation)

# EIRS Guidance

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## The Exceptions

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**A guide to applying EIRs exceptions**



## Disclosure of evaluators' comments

- The standstill letter – a word of warning
- Voluntary disclosure
- Disclosure prior to proceedings being raised:  
Administration of Justice (Scotland) Act 1972
- Specifications of documents and commission and diligence



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