

What must be disclosed in response to FOIA requests?

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- Information – what and why?
- Common exemptions and the PCR 2015
- The types of documents/stages of competition
- Practicalities

- Obtaining information is critical to challenger; CA holds all the cards
- De brief - Regs. 50/55 – characteristics and relative advantages of the winning tenderer (CRAST), scores of winner and loser
- CRAST includes price, see *Veloss v European Parliament* T-667/11 (2015)

No requirement for CA to provide on a debrief

- detailed summary of how tender evaluated
- detailed comparative analysis of tenders,
- copy of evaluation report

*see European Dynamics v European Union
Intellectual Property Office Case T-556/11
(27.4.16)*

- Pre-action/early specific disclosure
Roche Diagnostics v Mid Yorks (2013)
The Claimant ought to be provided promptly with the essential information and documentation relating to the evaluation process carried out so that an informed view can be taken of its fairness and legality
- Scoring sheets, evaluator's comments, specific relevant documents, Regulation 84 report and documents

- Mandatory written reports which **shall** include
 - Name and address of CA, subject matter and value of contract, framework etc, results of qualitative selection and/or reduction of numbers
 - Reasons for **rejection of ALTs**
 - **Justification to use competitive negotiations/dialogue/negotiation without prior publication**
 - **Reasons CA decided not to award**
 - **Conflicts of interest detected and measures taken**
- Communicated to Commission or National Courts on request (84 3.) *Directive 2014/24/EU Article 84*

R 84 Obligation to document progress (1)



- CAs shall **document the progress** of all procurement procedures, whether or not conducted by electronic means
- They shall ensure that they **keep sufficient documentation to justify decisions taken in all stages of the procurement procedure**

Directive 2014/24/EU Article 84 2.

R 84 Obligation to document progress (2)



Includes

- Documentation on **communications with EOs**
 - **Internal deliberations** (evaluator's comments)
 - **Preparation of procurement documents** (drafts)
 - **Dialogue or negotiation** if any
 - **Selection and award of contract**
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- Keep for 3 years (84 3.)

- S.10 – 20 working days (exc Sat, Sun, Bank Holidays)
- 20 days often honoured in the breach
- Qualified exemptions - reasonable extension of time to consider public interest test

FOIA Time limits and challenges



(1)

A time limit of 20 days means that it is unlikely that a challenger will obtain information within

- The standstill period (**10 days**) or
- The limitation period (**30 days**)

FOIA Time limits and challenges



(2)

FOI = early, cheaper disclosure of documents **and**

- Inconsistencies debrief/FOI information
 - can uncover further breaches = new limitation periods
 - the CA looks shifty, increasing suspicion
- Also useful
 - post-contract
 - after abandonment and before a re-run
 - just before a re-tender of a long running contract

FOIA Relevant Exemptions



- S. 36 Prejudice to the effective conduct of public affairs
- S. 41 disclosure would constitute an actionable breach of confidence
- S. 43
 - (1) Trade secrets
 - (2) Prejudice commercial interests
- S.44 prohibited by any enactment/EU obligation
- S. 39 disclosable under Environmental Information Regs

Public Interest Test – Qualified exemptions



May withhold information

- If, in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosure
- Public interest means the public good, not what is interest to the public or in the private interests of the requestor

S. 41 Breach of Confidence



- Absolute exemption, but subject to the public interest test in the common law of confidence
- Requirements
 - Information has “the necessary quality of confidence”
 - Communicated in circumstances importing an obligation of confidence
 - Unauthorised disclosure detrimental to the tenderer

Coco v Clark (1968)

Confidentiality

Unless otherwise provided in the Directive or in national law, in particular legislation concerning access to information, and without prejudice to ... Arts. 50 and 55, **the CA shall not disclose information forwarded to it by EOs which they have designated as confidential, including technical or trade secrets and the confidential aspects of tenders**

Directive 2014/24/EU Art 21

S. 43 Trade secrets



- Trade secrets (not defined in FOIA)
- Information which, if disclosed to a competitor, would be liable to cause real or significant harm to the owner of the secret (Lansing Linde v Kerr CA (1991))
- Technical, unique and achieved with a degree of difficulty and investment (eg Coco-cola recipe) (DoH v IC EA/2008/0018)
- Financial model held to be equivalent to a trade secret on DWP v IC EA/2010/0073

S. 43 Commercial interests



- Wider than trade secrets
- Test is whether there would be prejudice “likely” or “real” as a result of disclosure
- Information must be still current, commercially important and not widely known

(DoH v IC (EA/2008/0018))

S. 44/Reg 21 Circularity?



- FOIA s. 44 provides information is exempt if it is prohibited by an enactment or EU obligation
- PCR 2015 Reg 21, while expressly subject to domestic FOI legislation, prohibits disclosure of material designated as confidential
- Reg 21 pretty wide

PQQ participants



Birmingham City Council ICO FS50518095 14 April 2014

- Names of bidders who submitted PQQs in procurement for operating Birmingham Library, procurement suspended at PQQ
- Council claimed prejudice to public interest, commercial interests of Council and third party bidders (“TPs”)
- IC normally required TPs to make arguments as to prejudice to their interests, but prejudice real here
- Disclosure likely to undermine confidence in unsuccessful bidders and in the council
- Strong public interest in NOT disclosing information likely to disadvantage private companies or have a negative impact on council and suspended procurement

PQQ Evaluation Reports



Keene v IC (EA/2008/0097)

- Request for PQQ evaluation forms
- Unsuccessful applicant sought the forms of the other 13 applicants and a summary report for the procedure
- IC found that the information sought was likely to prejudice the commercial interests of the Central Information Office
- Claims were that negative comments could damage bidder credibility, affect number of bidders and make evaluators reluctant to record comments
- On appeal to IT, held insufficient evidence of prejudice and even if there had been sufficient, PI favours disclosure

- Unsuccessful bidder sought sight of the winning tender *“to try and address where we are going wrong”*
- Tender documentation was 2 years old
- Held: refused, prejudice to commercial interests the way a tenderer chooses to present its material and answer questions was an important means by which the authority is able to evaluate competing tenders. Disclosure would be likely to hinder the competitive process.

Ballan v IC (EA/2015/0021)

- Request for information re a major IT system: KPIs, liability caps, benchmarking models, schedule of charges, change control notification, data centre location and Financial Model (“FM”).
- Held, all except the FM and the data centre location was disclosable. FM was a trade secret and the public interest lay in keeping the location of the data centre secret as it processed sensitive government information. Rest normally disclosable

DWP EA/2010/0073

- Fact dependent
- Trade secrets generally protected (see *Varec v Belgian State* Case C-450/06)
- Commercial sensitivity usually decreases over time
- Sensitive material during a procurement likely protected
- Price is usually not confidential after contract award decision (*Veloss*)
- Commercial aspects of tenders can be protected, eg financial models and means of delivery if sensitive

Managing risk (1)



- Prevention is better than cure - make your debrief letter a really good one; compliant, accurate, consistent with the tender documents
- FOI applications run in parallel with disclosure applications to the Court
- FOI likely cheaper for CA and EO than discovery application

Managing risk (2)



- **FOI department should talk to procurement department**
 - Challengers are **highly motivated** by **conflicting disclosure**
 - Understanding what the procurement department is doing does not mean a derogation from the FOI function; it means an informed decision about confidentiality and commercially sensitive information
- Disclosure outside the FOI process gives CA more control **over what is disclosed**

Managing risk (3)



- Make sure you have complied with Art. 84 2. – document progress of the procurement at every stage. Assign a team member to the task.
- Consider whether it is worth giving the challenger a lot of information immediately so that any limitation periods are triggered and they have to “put up or shut up”
- Make sure tenderers understand they must designate material as confidential and **give reasons** but responsibility is with CA under FOIA