

Freedom of Information Requests and Public Procurement

Eleanor Grey QC
39 Essex Chambers
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The challenge

“We fully expect to see all government bodies that contract out public services... having transparency, not commercial sensitivity, as their default position.”

*Public Accounts Committee,
Margaret Hodge chairing, 2014*

Transparency Principles -

“Government has in place a presumption in favour of disclosure of contract and related information, that may previously have been withheld on grounds of commercial confidentiality.”

(Procurement Policy Note – Update to Transparency Principles Action Note PPN 01/17)

Guidance on what should be released includes -

- Government Tenders and Contracts Central Government Transparency Guidance Note (November 2017)
- The Local Government (Transparency Requirements) (England) Regulations 2015, Local Government Transparency Code 2015
- Model Services Contract – Transparency and Freedom of Information Clause

Overview of legal framework securing public access

- Freedom of Information Act 2000
- Environmental Information Regulations 2004
- Exemptions and exceptions
- Stages of the procurement process
- General approaches

Two Disclosure Regimes:

- Freedom of Information Act 2000 (FOIA)
- Environmental Information Regulations 2004 (EIRs)
- Identify the applicable regime
- EIRs are more onerous?
- All exceptions are ‘qualified’ under EIRs;
- Test of ‘disclosure would adversely affect’ (rather than ‘would be likely to’)

Key Exemptions

- The “confidentiality of commercial or industrial information’ - EIRs Reg 12(5), FOIA s43(2), also s41 (confidence);
- Effect on ‘intellectual property rights’ (EIRs) or “trade secrets” (s43(1) FOIA);
- Material ‘which is still in the course of completion, or unfinished documents or to incomplete data’ - EIRs Reg 12(4) - or intended for future publication (s22 FOIA)

Commercial Interests (1)

- Define confidential material in the contract
- Evidence the prejudice relied upon
- If relying on third party interests – consult them!
- “speculation is not enough”
- “disclosure supports competition”?
- But *Topp v ICO* EA/2012/0253: disclosure of pricing structure would not assist

Commercial Interests (2)

- North East Lincolnshire Council, ICO Ref FS50554846 (2014)
- “Winning tender documentation” requested (without figures), s43(2) relied upon
- ‘the possibility of prejudice should be real and significant’
- Detailed justification of USP, business model of leisure services operator set out
- Weighed against improvements to be gained by information to potential competitors

Common thread?

Evidence of prejudice / harm to the commercial interests relied upon.

Stages of the Process (1)

- Early discussion of expectations and potential disclosure on contract award and thereafter;
- All pre-contract award information will *generally* be confidential until award;
- After contract award, there is a distinction between the successful and the unsuccessful;
- Successful bids may expect to see information about contract price and type of goods supplied released – but not underlying ‘strategic’ information

Stages of the Process (2)

- There is a weaker public interest in releasing information about unsuccessful bids, or their evaluation;
- There is a stronger case for releasing information, including evaluations, of the successful bidder, as public money received;
- Each case must be considered on its facts.

Evaluation and Scoring

- Evaluation notes withheld in FS50554709 (2014)
- *Mears v Leeds City Council* [2011] EWHC 1031 – no general duty to disclose Model Answers (but ensure do not create additional undisclosed scoring criteria)
- FS50601053 (2016): scores and evaluation reports for CCG elective care services withheld under s43(2).

Who holds what ?

- There can be confusion about what is held by public authority, plus ...
- Whether, and if so what, information is held by a contractor *on behalf of* a public authority
- i.e., Contractor's information about contract delivery?
- Scope depends on contract
- Early definitions of responsibilities and responses, and identification of sensitivities

Note Keeping

- Brief or detailed?
- Old debate!
- Short notes may be easier to disclose –
- But
- Poor record-keeping, poor aids for decisions
- Limited justification for treating as sensitive