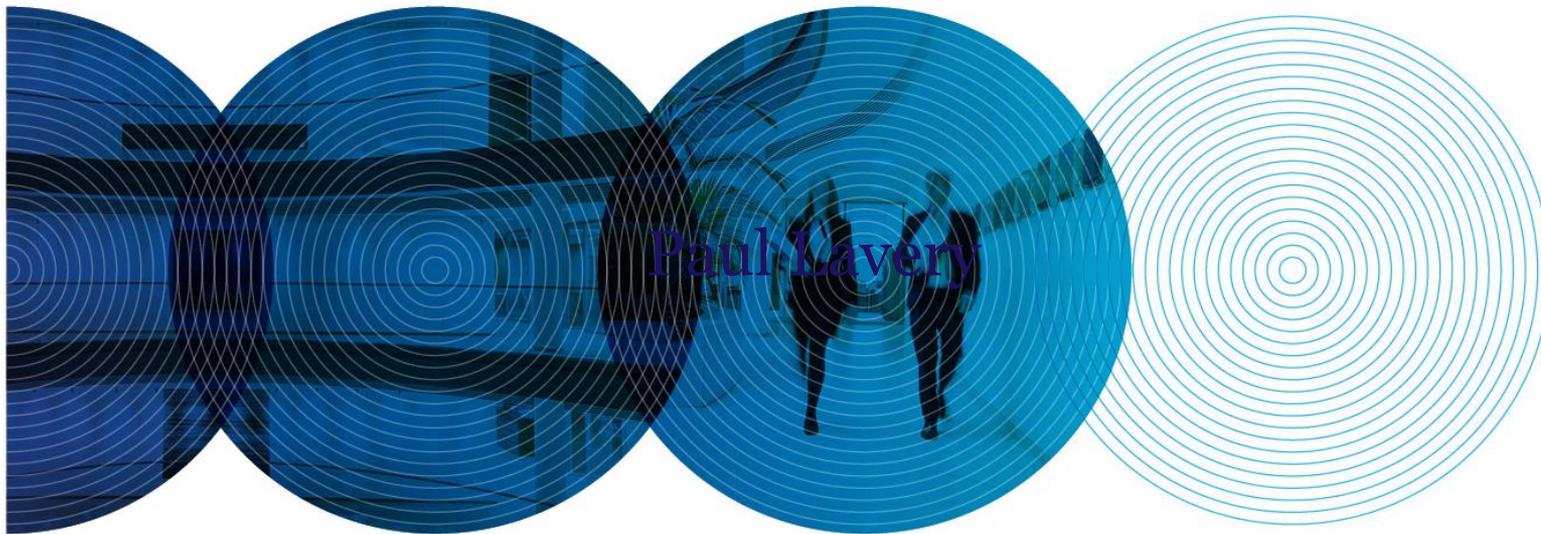

White Paper Conferences FOI Requests and Public Procurement

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Tuesday, 22 May 2018

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Freedom of Information Act 2014

- Principle: freedom of information = essential feature of democratic society
- Designed to ensure transparency/accountability in the activities of public bodies
- Not absolute: safeguard categories of information requiring protection from disclosure
- FOI Act seeks to strike a balance
 - Right of access
 - Appropriate exemptions
 - Public interest

Main Features

- Legal right to access records within the possession or control of public bodies
- Legal right to obtain reasons for decisions of public bodies which materially affect the person
- Legal right to have personal information amended where it is incomplete, inaccurate or misleading
- Independent appeals system to oversee decisions by public bodies
- Office of Information Commissioner with a mandate to report on the operation of the Act generally, and on compliance by public bodies or any particular public body with its provisions.

Information to which the Act applies

- “record” is defined as including:
 - (a) A book or other written or printed material in any form (including in any electronic device or in machine readable form),*
 - (b) A map, plan or drawing,*
 - (c) A disc, tape or mechanical or electronic device in which data other than visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the disc, tape or other device,*
 - (d) A film, disc, tape or mechanical or electronic device in which visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the film, disc, tape or other device, and*
 - (e) a copy or part of any thing which falls within paragraphs (a), (b), (c) and (d).*

FOI - Means of obtaining information

- Freedom of Information Access request – section 12
- Request for reasons for decision/information regarding acts of public bodies affecting the person – section 10
- No automatic exclusion of FOI solely because there is or has been a tender process or a separate way of obtaining information (letters to bidders and debriefing sessions etc.)
- FOI Central Policy Unit Notice No. 5 of FOI and Public Procurement – Public bodies are not in a position to give guarantees of confidentiality

Potential FOI Request

- All competitor tender documents
- Public body internal notes and correspondence on all tenders including the requester's tender
- Detailed marking schemes

Freedom of Information Act Exemptions

- Deliberations of Public Body (Section 29) – will apply during process, but unlikely to apply after decision is made
- Negotiations of Public Body (Section 30)
- Legal Professional Privilege (Section 31)
- Confidentiality (Section 35)
- Commercial Sensitivity (Section 36)
- Public Interest Test

Deliberative processes – s29

- S29(1) – public body may refuse to grant an FOI request -
 - (a) if the record contains matter relating to the deliberative processes of an FOI body (including opinions, advice, recommendations and the results of consultations considered by the public body, its head, members or staff for the purpose of those processes); and
 - (b) the granting of the request would, in the opinion of the head, be contrary to the public interest

and without prejudice to the generality of (b), the head shall, in determining whether to grant or refuse the request, consider whether the grant thereof would be contrary to the public interest by reason of the fact the requester would become aware of a significant decision that the body proposes to make

- Likely that tender documents and internal memoranda of public bodies will not be released whilst the procurement process is still on-going

Deliberative processes – s29

- Records relating to the “Thinking processes” of the public body
 - policy formation, strategic business decisions, procurement of services, etc
- Excludes decision making on routine administrative functions
- Public interest
 - Deliberative stage – more likely to favour non-disclosure – premature release of information could contaminate decision making process
 - Post-decision stage – balance shifts in favour of disclosure – public right to transparency/accountability

Functions and Negotiations – s30

S30(1) – public body may refuse to grant FOI request if access to the record could reasonably be expected to:

- (a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits carried out by or on behalf of a public body or the procedures or methods employed for the conduct thereof
 - product testing, aptitude tests, recruitment competitions, health and safety/adverse incident investigations, internal financial audits, internal disciplinary inquiries, etc
- (b) have a significant adverse effect on the performance by a public body of any of its functions relating to management (including industrial relations and management of staff)
 - management of HR/personnel, industrial relations functions, management of operational matters, financial resources, strategic planning, etc

Functions and Negotiations – s30

- (c) disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations carried on or being, or to be, carried on by or on behalf of Government or a public body
 - provides strong protection – no requirement to show disclosure would have an adverse effect on the conduct of negotiations
 - e.g. pay negotiations, negotiations regarding sale of assets, working conditions, funding, etc.
- S30(1) exemptions do not apply where the public interest would, on balance, be better served by granting than refusing the request

Legal Professional Privilege – s31

S31(1) – public body ***shall*** refuse request where record concerned:

- (a) would be exempt from production in court proceedings on grounds of **legal professional privilege**
 - Legal advice privilege – confidential communications between lawyer and client for the purpose of obtaining legal advice
 - Litigation privilege – prepared for the dominant purpose of litigation
- S31(4) – right not to disclose whether legal privilege record exists if such revelation alone would be contrary to the public interest – i.e. right not to confirm or deny existence.

Confidential Information – s35

- s35(1)(a) - a head shall refuse to grant an FOI request if the record concerned contains information:
 - given to a public body in confidence;
 - on the understanding that it would be treated as confidential (including information that a person was required by law, or could have been required by law, to give to the body);
 - its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons; and
 - it is of importance to the body that such further similar information should continue to be given to the body

Confidential Information – s35

s35(1)(b) - a head shall refuse to grant an FOI request if:

- disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment
 - Contractual duty of confidence
 - Statutory confidentiality obligation (other than those specified in the Third Schedule)
 - Equitable duty of confidence - *Coco v. A. N. Clark (Engineers) Limited* F.S. R. 415
 - information has the necessary quality of confidence; and
 - imparted in circumstances imposing an obligation of confidence; and
 - unauthorised use of that information to the detriment of the party communicating it

Confidential Information – s35

- s35(2) – excludes
 - records prepared by the staff of the public body or a service provider in the course of performing their functions
 - unless disclosure of the information would result in the breach of a duty of confidence owed to a third party
- s35(1)(a) does not apply where the public interest would be better served by granting than refusing the request
- S35(1)(b) – public interest test under general law
 - **National Irish Bank –v- RTÉ (Supreme Court, 1998)** – necessary to reveal a fraud, serious crime, or other misdeed

Commercial Sensitivity - s36

S36(1) – public body shall refuse to grant request if record contains:

- (a) trade secrets of a person other than the requester
 - confidential information of a commercial character which if disclosed to a competitor would cause real or significant harm to the owner
- (b) financial, commercial, scientific, technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his profession, business or occupation
 - e.g. – financial statements, pricing structures, operating and financial information, future strategies, expected export market movements, selling prices, etc.
 - viewed objectively

Commercial Sensitivity - s36

(c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates

- Contractual negotiations must be in train or reasonably foreseeable
- Show precisely how disclosure could prejudice the conduct or outcome of such negotiations

Case 98049, 98056, 98057 – Henry Ford & Sons Limited, Nissan Ireland and Motor Distributors Limited and the OPW

- Public interest – exemptions in s36(1) do not apply where public interest would, on balance, be better served by granting than refusing request
- Subject to s38 third party submission procedure

Public Interest

Arguments against disclosure

- To enable public bodies to make informed decisions and maintain confidentiality of proceedings where deliberative processes or other negotiations ongoing
- To protect the integrity of decision making processes which could be contaminated by future release
- To avoid the premature release of information which could be misleading to the public
- To protect the legitimate business interests of third parties and to ensure that they are not unduly impeded in the pursuit of their business or disadvantaged vis-à-vis their competitors
- To protect the bargaining power of the public body in commercial negotiations

Public Interest

Arguments in favour of disclosure

- Right of public to have access to information
- Reveals reasons for decisions of public bodies, improves transparency and accountability
- Encourages value for money in use of public funds
- Need for public to be better informed and more competent to comment on public affairs
- Information makes valuable contribution to debate on an issue
- Balancing democratic control of citizens against control of Government

Timing

- Significant impact on public interest considerations

Relevant Information Commissioner Decisions on Tenders

Confidentiality and Commercial Sensitivity

- During a tender process - reasonable to assume that information is confidential and will be maintained in confidence (*Henry Ford & Sons limited, Nissan Ireland and Motor Distributors Ltd and the OPW; Mark Henry and the OPW*)
- After completion of tender process - relationship of vendor and purchaser - no mutual understanding that the tender price would be maintained in confidence. (*Henry Ford & Sons Limited, Nissan Ireland and Motor Distributors Ltd and the OPW*)

Relevant Information Commissioner Decisions on Tenders

Confidentiality and Commercial Sensitivity

- Unsuccessful Tenderers - pricing information can still be subject to a confidentiality obligation. (*Mark Henry and the OPW*)
- In circumstances where confidentiality obligations apply, pricing information can still be provided on a “disassociated basis” (*Mark Henry and the OPW*)
- Hourly and daily fee rates regarded as commercially sensitive (Mr X and the Department of Education and Skills)

Relevant Information Commissioner Decisions on Tenders

Confidentiality and Commercial Sensitivity

- Information Commissioner not convinced that the disclosure of the successful tender price would be likely to result in commercial enterprises refusing to tender in the future (*Henry Ford & Sons Limited, Nissan Ireland and Motor Distributors Ltd and the OPW; Mark Henry and the OPW*)

Relevant Information Commissioner Decisions on Tenders

Confidentiality and Commercial Sensitivity

- Significant public Interest in public bodies obtaining value for money and in openness about expenditure of public funds, though not absolute. (Eircom plc, Mark Henry, Dept of Agriculture and Food etc)

Relevant Information Commissioner Decisions on Tenders

Confidentiality and Commercial Sensitivity

- Commissioner accepts that non-pricing successful tender information may be commercially sensitive and confidential – e.g. details of internal organisation of a tenderer's business, analyses of the requirements of the public body)

Relevant Information Commissioner Decisions on Tenders

- Company T and UCC (2017)
 - hourly rates and costs withheld
- Mr X and OPW (2017)
 - Related to award of concession for tea rooms
 - Concerned fee proposals, methodologies, detailed information of tenderer business, staff costs
 - No information released – competitors gaining access to the information would gain and advantage
 - Tender process did not conclude and was due to be retendered

Information Commissioner Guidance

- Guidance Note on Information Received in Confidence (2016)
- Guidance Note on Commercially Sensitive Information

General Rules on FOI Disclosure (Not Absolute)

- Little information will be released during tender competition
- More information released after tender competition has concluded
- Name of Successful tenderer and overall tender price may be disclosed
- Elements which make up overall tender price may still be confidential or commercially sensitive
- Unsuccessful tender prices may be disclosed as long as they are divorced from names of unsuccessful bidders

General Rules on FOI Disclosure (Not Absolute)

- Disclosure of other parties' tender documents
 - Some information in tenders capable of disclosure, e.g. public domain information and general marketing information
 - Remainder of information likely to be confidential or commercially sensitive.

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