

# What is and is not disclosable in response to FOIA requests?

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- Obtaining information is one of the most important issues for prospective and actual claimants in procurement challenges
  
- Main methods of obtaining information:
  - De-briefing
  - Application for early disclosure
  - Freedom of Information Act request
  
- Why use FOIA?

## ➤ Reg. 86 PCR 2015

- Characteristics and relative advantages of the successful tenderer, the score obtained by the winner and loser
- Information not required to be released if it (a) would impede law enforcement or be contrary to the public interest, (b) would prejudice the legitimate commercial interests of a particular tenderer or (c) might prejudice fair competition
- Not often relied on (but see ref. in *Varec* (2008))

- Characteristics and advantages include the price (*Veloss v European Parliament* T-667/11 (2015))
- But, no requirement to provide:
  - Detailed summary of how tender evaluated
  - Detailed comparative analysis of tenders
  - Copy of evaluation report

See e.g. *European Dynamics v European Union Intellectual Property Office* (27.4.16)

- Principles: *Roche Diagnostics Ltd v Mid Yorkshire Hospitals* (2013)
  - subject to issues of proportionality and confidentiality, 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

- applications must be considered on their individual merits and a clear distinction will often be made between cases where a *prima facie* case has been made out by the claimant (but further information or documentation is required) and cases where the unsuccessful tenderer is aggrieved at the result but appears to have little or no grounds for disputing it
- applications must be tightly drawn and properly focused: information likely to be disclosable on an application for early disclosure is that which demonstrates how the evaluation was actually performed and, therefore, why the claiming party lost and
- the court needs to balance the claimant's lack of knowledge with the need to guard against an application being used as a fishing exercise, designed to shore up a weak claim which will put the defendant to needless and unnecessary cost

- What information can a bidder expect?
  
- Fact dependent but may include:
  - Evaluation sheets
  - Evaluation report
  - Reg. 84 report and documents



- Too late?
  - s.10 - 20 working days
  - Reasonable extension of time to consider the public interest test
  
- But useful:
  - Post contract?
  - After an abandonment?
  - As a supplementary weapon?

## ➤ Relevant exemptions:

- s.41 – breach of confidence
- s.42 – trade secrets, prejudice to commercial interests
- s.44 – prohibited by any enactment, incompatible with any EU obligation

## ➤ Public interest test for qualified exemptions:

- In all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

## ➤ s.41 – actionable breach of confidence

- Information imparted in circumstances giving rise to an expectation of confidence
- Information has the necessary quality of confidence
- Unauthorised disclosure would be detrimental to the tenderer

(See *Coco v Clark* (1968))

- s.43 – trade secrets and commercial interests
  - 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* (1991))
    - Usually suggests something technical, unique and achieved with a degree of difficulty (*DoH v IC* (EA/2008/0018))
    - The Financial Model for an IT contract was a trade secret in *DWP v IC* (EA/2010/0073) (and its disclosure would prejudice the contractor's commercial interest)

- Prejudice to commercial interests
  - Commercial interests are wider than trade secrets (ICO Guidance no. 5)
  - Must be a real and significant risk of prejudice (*John Connor v IC* (EA/2005/0005), *DoH v IC* (EA/2008/0018))
  - Relevant whether information is still current and commercially important (*DoH v IC*)

- s.44 – prohibitions on disclosure
  
- Relevance of section 21 PCR 2015:
  - *A contracting authority shall not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including but not limited to, technical or trade secrets and the confidential aspects of tenders*

- OGC Guidance, assumptions:
  - Information received from tenderers and evaluation information and reports should not be released prior to contract award
  - Information, including some price breakdowns, should be released after contract award. Level of information released likely to increase with length of time from contract award

➤ **ICO Guidance:**

- Where information is provided as part of a procurement process, likely to be an expectation that sensitive information will be treated as being confidential
- Confidentiality can change with time

# What decisions are made?



- The outcomes are very fact specific
- After the contract has been placed, documents to be disclosed *may* include:
  - Tenders
  - Evaluation reports
  - Contracts
- Commercial sensitivity is likely to reduce with time but a time gap will not always lead to disclosure
- Before the contract is placed, such documents are likely to be exempt

➤ *Telford v Wrekin* (EA/2013/0035)

- Request for disclosure of winning tender
- Contained sensitive commercial pricing
- IT accepted disclosure would constitute actionable breach of confidence
- The passage of time was relevant – but at the date of the request, the information was still “very current”
- No evidence of any particular public interest in disclosure

➤ *Ballan v IC (EA/2015/0021)*

- Request for winning tender (2 years old) without prices by unsuccessful SME
- “to try to address where we are going wrong”
- Prejudice to authority’s ability to distinguish between tenders
- Public interest in SMEs improving bids, but not by getting this sort of information

- *Keene v IC (EA/2008/0097)*
  - Request for PQQ evaluation forms
  - Claims that negative comments could damage bidders' credibility; affect number of bidders; make evaluators reluctant to record comments
  - Insufficient evidence to establish prejudice

- *IC v Camden PCT (FS50214920)*
  - Request for contract including pricing information
  - Insufficient evidence of prejudice to authority in future tenders (different specifications etc)
  - Contract did not include pricing model/mechanism
  - Passage of time relevant (8 months)

- *DWP v IC (CA2010/0073)*
  - Request for contract including financial model
  - Financial model was a trade secret – contained contractor's unique model for calculating prices, rates of return etc
  - Disclosure of other parts of the contract (liability caps, KPIs) etc would be likely to prejudice commercial interests but public interest in disclosure outweighed public interest in maintaining exemption

- Procurement documents (and subsequent contracts) may be disclosable:
  - Default position under FOIA is disclosure but
  - Timing of request relevant
  - Right outcome very fact specific
  - Disclosure of detailed workings e.g. pricing models unlikely

➤ Tips for bidders:

- A useful weapon
- Use as one of a number of methods for obtaining information
- Unlikely to help bring a challenge in the standstill period or within 30 days of the standstill letter
- But may lead to a new date of knowledge

➤ Tips for authorities:

- Beware risks of limited disclosure at an early stage
- Risk of post contract challenge