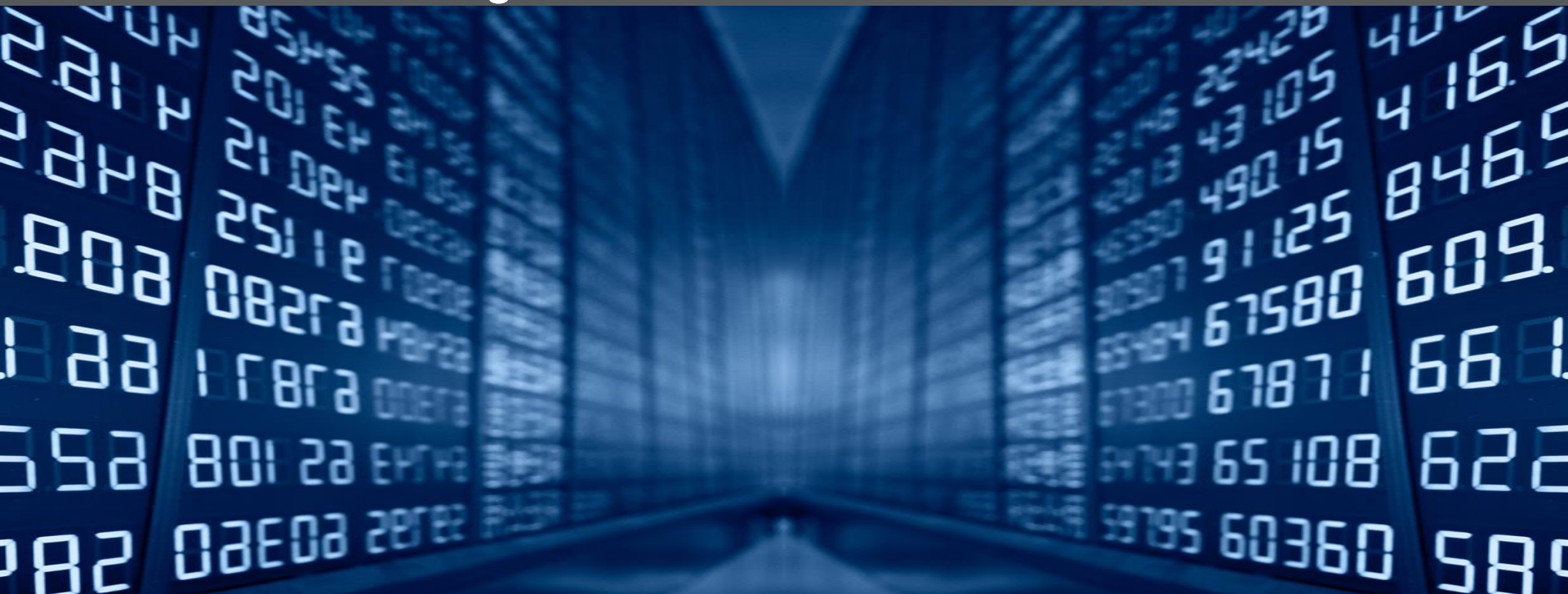


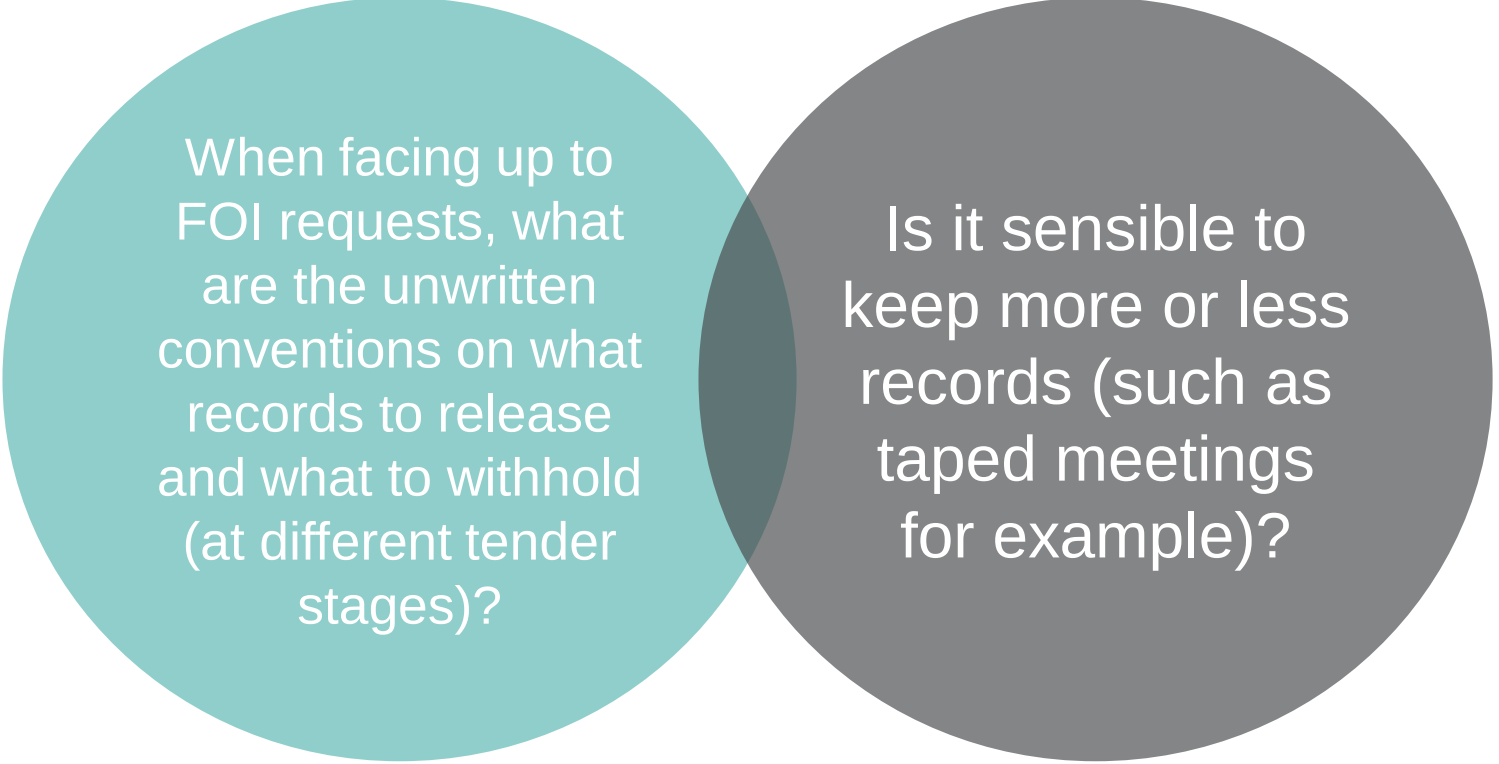
FREEDOM OF INFORMATION REQUESTS

Unwritten conventions on what to disclose

How much is 'enough' when it comes to records?



Two key questions



When facing up to FOI requests, what are the unwritten conventions on what records to release and what to withhold (at different tender stages)?

Is it sensible to keep more or less records (such as taped meetings for example)?

Summary

- ▶ Recap of FOIA rules
- ▶ Use of FOIA in procurement context:
 - ▶ Pre-tender
 - ▶ Mid-process
 - ▶ Post-award
- ▶ Records

Freedom of Information Act 2000

- ▶ “Right to know” grants a general right of access to information held by public authorities
- ▶ ‘Public authorities’ includes government departments, Parliament, the armed forces, local authorities, the Police and NHS bodies
- ▶ Information Commissioner responsible for enforcement
- ▶ No prescribed form for a request

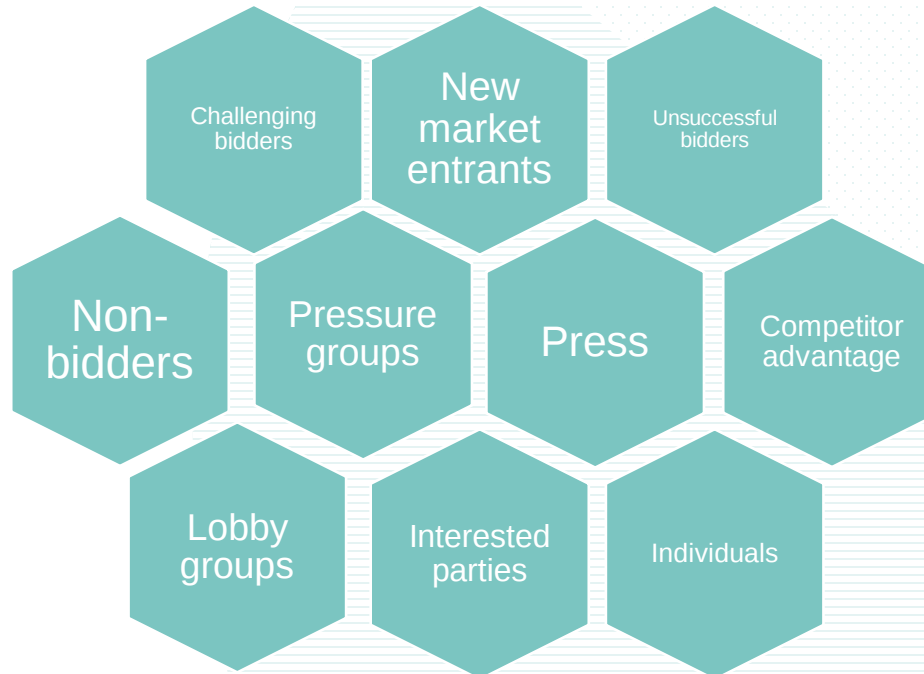
Freedom of Information Act 2000 - continued

- ▶ Able to request any information recorded in any form
- ▶ Numerous duties with which a public authority must comply
- ▶ Must comply with a request for information within 20 working days
- ▶ Limited exemptions
- ▶ NB: GDPR on 25 May and impact on DSARs

EIRs- Environmental Information Regulations 2004

- ▶ Similar to FOIA – but information relating to:
 - ▶ state of environmental elements and factors affecting them
 - ▶ measures and activities affecting those elements and factors, including economic analysis of such measures and activities
 - ▶ reports on implementing environmental legislation
 - ▶ impact on human health and safety of the above
- ▶ Fewer exemptions than FOIA – broader in scope, all qualified by public interest test

How FOIAs are used in a procurement context



- ▶ *Requests for information – does not necessarily mention FOIA expressly*
- ▶ *Used alongside debriefs, EIR, pre-action disclosure*

Pre-tender FOIAs

Used by economic operators to place them in a better position to bid

CAs need to be careful – the same information must be provided to all bidders

Used by non-incumbents to elicit information about the current services/supply

Can be used to try work out timescales for re-tender/extensions

Mid-process FOIAs

- ▶ Can be a sign of bidder frustration at the speed / level of detail in the clarification process
- ▶ Re-check communications with all bidders to check consistency
- ▶ Consider if information released as part of a mid-process FOIA request should be sent to all bidders
- ▶ A high level of clarification questions / repeat clarification questions should be reviewed – can be a sign of deficiencies in the tender documents which needs to be addressed
- ▶ Unlikely to be a sign of a mid-process challenge – timescales don't work
- ▶ May be used prior to a partial or full re-run of a process/stage

Post-tender FOIAs



- ▶ FOIA request likely to still be outstanding at the end of the standstill/limitation period
- ▶ Can be used by an unsuccessful bidder who does not challenge to monitor compliance by the CA. *Is the contract as advertised following a restricted process? Are any contract changes being made?*
- ▶ Could be used by a non-bidder challenger to check the conduct and outcome of the tender process
- ▶ Can be used much later after the close of the process – *monitoring for extensions/variatioins*

Responding to FOIA requests: conventions

- ▶ Treat each request on its own merits and consider carefully
- ▶ CAs must comply with the terms of the legislation – potential conflict s.44 FOIA and Regulation 21 PCR
- ▶ Take advice (early) on possible exemptions
- ▶ Watch for ‘unofficial’ FOIA requests – only need a request in writing
- ▶ Ensure close working relationship between FOIA team and procurement team from the outset – FOIAs about large tenders should not be a surprise

Responding to FOIA requests: conventions - continued

- ▶ Take care not to create information in the course of responding to a request which is then in a 'recorded form' and disclosable
- ▶ Plan from the outset how the 'paper trail' will be maintained and recorded
- ▶ Be wary of redactions – make sure they match what is being done/disclosed by the procurement team and respect bidder confidentiality

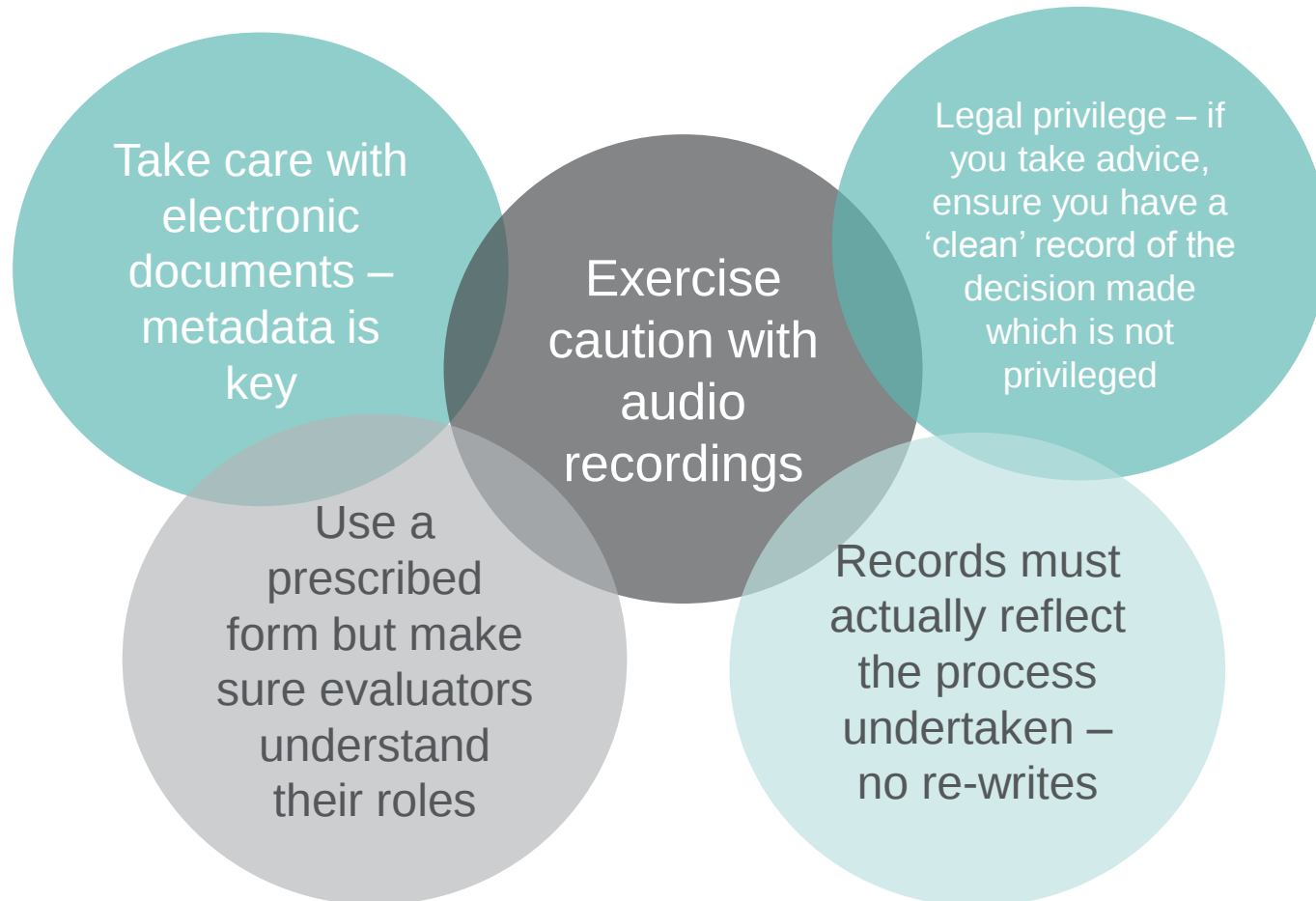
FOIA decisions regarding tenders

- ▶ Sally Ballan
- ▶ *No disclosure under FOIA of winning bid where unsuccessful bidder wanted insight on how to bid 'better'*
- ▶ NHS England
- ▶ *'Commercial interests' exemption used to prevent disclosure in full of a specific bid - partial disclosure given*
- ▶ Birmingham City Council
- ▶ *Decision to withhold names of bidders at PQQ stage upheld due to public interest in maintaining integrity of the remaining process*

Records – more or less?

- ▶ ‘Paper the trail’
- ▶ Of utmost importance following requirement for Regulation 84 reports (3 years of records needed) and recent caselaw – including *Energy Solutions*
- ▶ Documentation should not be designed to be artificially brief, or destroyed
- ▶ Documents are key to preparation of standstill letters, responding to queries from bidders about the process, and defending allegations of comparative scoring / manifest error / bias / conflict of interest in any challenge
- ▶ Key protection for a contracting authority

Types of records



Disclosure requests

TCC Guidance Note on
Procedures for Public
Procurement Cases

Take advice

To rely on something
later, you need to
disclose it early – be
mindful of any future
application to lift the
automatic suspension

Early engagement with
successful bidder and
confidential information

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