



# Freedom of Information

Managing the risks: an introduction  
for the private sector

2017

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# Overview of the UK Freedom of Information Regime

## Introduction

### The right to know

Any person, irrespective of domicile or nationality, has a right of access to any information held by, or on behalf of, a public authority.

That right is implemented in England and Wales via two principal pieces of legislation: the Freedom of Information Act 2000 ("FOIA") and, in respect of environmental information, the Environmental Information Regulations 2004 (the "EIRs").

The scheme of each is broadly the same, providing for a general right of access upon request, subject to a limited number of statutory exemptions.

The information susceptible to disclosure in response to a request is not limited to information relating to or owned by the public authority in question, but extends to all information held by it or on its behalf.

As such, any commercial entity that interacts with public authorities — whether as policy-makers, regulators or contracting parties — is exposed to the risk of disclosure of its sensitive information.

That exposure is likely to be especially significant for companies that regularly contract with public authorities, particularly in the PPP/PFI field.

With neither FOIA nor the EIRs providing any right of consultation or appeal to a third party whose information is the subject of an information request, it is crucial that the risks of disclosure are identified early and managed effectively.

### This Note

This Note provides an introduction to the principal provisions of FOIA and the EIRs, including the statutory exemptions from disclosure, and outlines a number of possible strategies for managing the risks of disclosure.

## The Freedom of Information Act 2000

### Key points: FOIA

- Right to access is identity – and purpose-blind
- Applies to all information held by or on behalf of public authorities at the time of the request, including information relating to or produced by third parties
- Right is retrospective – it applies to all information held, whenever first produced or provided
- Limited statutory exemptions from the duty to disclose
- No statutory right of prior notification, consultation or appeal for affected third parties

### Who is subject to FOIA?

FOIA applies to all public authorities listed in its schedule Act (as amended from time to time) and publicly-owned companies (being companies wholly owned by either the Crown or any other listed public authority). The listed public authorities include central Government departments, regulators, local authorities, schools, NHS bodies and many other "core" public authorities (both statutory and non-statutory). Some of those bodies (such as the BBC) are public authorities only in respect of certain of their functions.

The scope of FOIA may also be extended by the Secretary of State to other persons exercising functions of a public nature or performing under contract the functions of a public authority.

### What information is covered by FOIA?

The right of access provided by FOIA applies to all information held, at the time of the request, by or on behalf of a public authority (as defined by FOIA, and described above). Information may be found to be held by the public authority if the authority has a right to require that the information be provided to it. For example, documents produced by consultants under contract may be disclosable, even when not provided to the authority, if the authority is entitled under the terms of the contract to copies of the documents.



The information may be contained in paper documents (typed or handwritten, from formal memos to post-it notes), but can take any recorded form, including emails, electronic records, and video and sound recordings (such as voicemails). It may also include information that has been archived or deleted but is reasonably recoverable.

Environmental information is effectively excluded from FOIA as it is covered by the EIRs.

### Requests and responses

In order to engage the rights under FOIA, a request for information need not make any mention of FOIA, nor need it be in any particular form, provided that it is made in writing, identifies the information sought and provides a name and address for correspondence.

Subject to any applicable exemptions, a public authority is required within twenty working days of receiving such a request to confirm or deny that it holds the information requested and to disclose any such information that it holds. This time limit applies unless a qualified exemption applies, in which case the authority must respond within a reasonable time (generally taken to be no more than forty days).

### Exemptions

Both the duty to confirm or deny and the duty to disclose are subject to a number of statutory exemptions. Some of those exemptions are absolute; others (qualified exemptions) are only effective if the public interest in maintaining the exemption outweighs the public interest in disclosure. The statutory exemptions are explained in more detail below.

In a commercial context, the most relevant exemptions are typically those relating to confidential information and commercially sensitive information. In general, there is a strong presumption in favour of disclosure and the exemptions are to be interpreted restrictively.



## Rights of appeal

A requester who considers that the public authority has not complied with its obligations under FOIA can first ask the authority to conduct an internal review of the initial decision. If the requestor still has concerns he is entitled to make a complaint to the Information Commissioner, who has mandatory powers to enforce compliance, with a further right of appeal to the Information Tribunal.

By contrast, affected third parties (such as those that are the subject of information requested) have no statutory right to be consulted or informed prior to disclosure, nor to complain to the Information Commissioner if information concerning them is, or is intended to be, disclosed.

## The Environmental Information Regulations 2004

The EIRs operate in essentially the same way as FOIA, but in respect of "environmental information". Although less well-known, they are important. Like FOIA, when a request for information is made and it relates to environmental information, the EIRs apply whether or not the request mentions them. The definition of environmental information is very broad, covering, for example, information relating to applications for planning consent, reports on utility plants and operations, and may extend to environmental aspects of procurement exercises and other decisions.

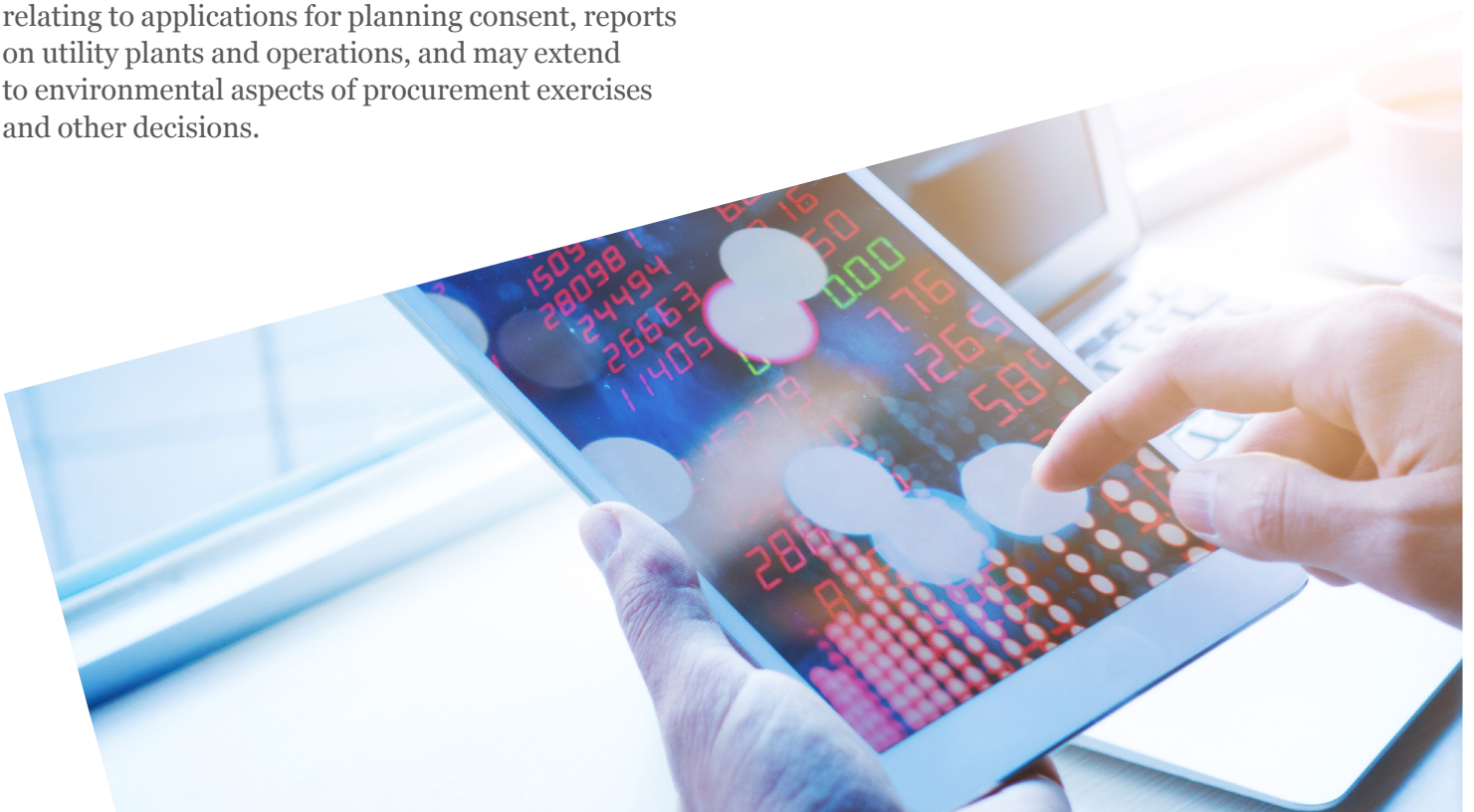
Requests for environmental information must be dealt with in accordance with the EIRs, and not FOIA.

That distinction is significant for three main reasons.

- First, the definition of public authority is both broader and less well-defined.
- Secondly, the exemptions, although covering similar ground, are more broadly drafted and except for that relating to personal information, are all qualified, with an express statutory presumption in favour of disclosure.
- Thirdly, a request for environmental information will engage the EIRs even if not made in writing.

## Public authorities under the EIRs

In contrast to the approach adopted in FOIA, the EIRs do not list the public authorities subject to its provisions, but instead provide a definition of what constitutes a public authority for these purposes. Whilst the precise limits of the definition remain unclear, what is clear is that the scope of the EIRs is significantly wider than FOIA.



Under the EIRs, public authorities comprise:

- the authorities subject to FOIA;
- any other body or person that carries out "functions of public administration"; and
- any other body or person that is under the control of a person falling within the above categories and has public responsibilities relating to the environment, exercises functions of a public nature relating to the environment, or provides public services relating to the environment.

### Function of public administration

Private companies may be found to perform functions of public administration, although regard will be had to the nature and history of the entity in question. The early cases on this point were restrictively interpreted, with an emphasis placed on whether the functions are truly administrative. Thus, Network Rail was found not to perform functions of public administration, while the Port of London Authority was.

The Upper Tribunal has recently held, however, that where a body has "special powers" over and above those applicable in private law relations (for example, powers of compulsory purchase of land, or the power to make byelaws), it will be exercising a function of public administration. The Tribunal has thus ruled that private water companies are public authorities and therefore subject to the EIRs.

It remains unclear whether a body falling within this part of the definition will be treated as a public authority (and thus subject to the duty of disclosure) in respect of all its functions, or only those that are found to be functions of public administration.

### Control and environmental functions

Whilst functions of public administration have been interpreted narrowly, the final category of public authority is much wider in its scope. This requires, in short, that the body is under the control of a true public authority, and performs responsibilities, functions or services relating to the environment.

For these purposes, "control" may arise from statute, regulations, licences, contracts or other means. The test is whether a public authority exercises a decisive influence over the body or its performance of the relevant responsibilities, functions or services. Thus, private companies or public private partnerships involved in, for example, the supply of essential public services such as water, sewerage, electricity and gas may fall within the scope of the EIRs, as may consultants performing environmental functions (such as conducting environmental assessments) on behalf of a public authority.

#### EIRs: Key exceptions

- Incomplete or unfinished materials, documents or data
- Internal communications
- Prejudice to the course of justice
- Prejudice to intellectual property rights
- Confidential information
- Prejudice to third party interests where information volunteered



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# The statutory exemptions: FOIA

## Introduction

FOIA provides a number of statutory exemptions from the duties of disclosure, of which all but eight are qualified exemptions.

Where an absolute exemption applies, the public authority may refuse to disclose the information without applying any further test.

## The public interest test

By contrast, where a qualified exemption applies, the information is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption (and therefore not disclosing the information) outweighs the public interest in disclosing the information. Although there is no express presumption in favour of disclosure, where the competing interests are evenly balanced, disclosure would still be required; only where there are overriding grounds not to disclose will disclosure not be required.

The public interest test requires the public authority to assess and balance the countervailing public interests on a case-by-case basis. The outcome of the test will therefore depend upon the information in question, the context and the qualified exemptions engaged, but there are number of points of general application.

- The grounds for not disclosing must be significant and specific to the particular case.
- The balance of the public interest may change over time.
- The substantial public interest in public sector transparency and accountability must be taken into account. It is particularly heightened where questions of policy or expenditure from the public purse are involved.
- The test must be applied in respect of each piece of information (and not merely in relation to the request, or a particular document, as a whole).

## The exemptions

Many of the exemptions are principally directed at protecting the machinery of government. These relate to matters such as national security, defence, international relations and parliamentary privilege.

On the whole, such exemptions are rarely relevant to requests for commercial information, although two of the broader exemptions, concerned with the formulation of government policy and prejudice to the effective conduct of public affairs, sometimes arise in the context of requests for information regarding internal considerations of commercial matters.

There are, however, also a number of exemptions that are often engaged, either directly or indirectly, in relation to commercial information.

### FOIA: Key commercial exemptions

- Confidential information (s.41)
- Commercially prejudicial information and trade secrets (s.43)
- Legally privileged information (s.42)
- Disclosure prohibited by law (s.44)

## Confidential information

Section 41 FOIA provides an absolute exemption in respect of information the disclosure of which, otherwise than under FOIA, would amount to an actionable breach of confidence.

In short, this exemption will only apply if:

- the information has the requisite quality of confidence
- it was provided to the public authority by another person (including another public authority)
- it was provided in circumstances imparting a duty of confidence, and
- the disclosure would be actionable.

### Quality of confidence

In order to be capable of being protected, the information must be worthy of protection: it must be more than frivolous or anodyne and must not be accessible. Thus, information with no intrinsic worth will not be exempt, even if it is subject to a duty of confidence. This would include, for example, boilerplate provisions in contracts.

### A duty of confidence

A duty of confidence may arise from an express agreement to that effect or by virtue of all the circumstances in which the information was imparted.

Accordingly:

- not all of the information contained in a contract containing express confidentiality provisions will necessarily be exempt; but
- equally, in the absence of any express agreement, information may still be protected, for example, where it was obviously sensitive information disclosed in the course of commercial negotiations or the conduct of business.

### Actionable

The requirement that the disclosure be an "actionable" breach of confidence is not entirely clear, but it is widely understood to mean that it must be capable of forming the basis of a claim with a real (but not necessarily good) prospect of success. However, some case law suggests, to the contrary, that this exemption requires the public authority to determine whether the claim would ultimately be successful.

Although the Section 41 exemption is an absolute one, the common law of confidence itself imports a public interest test, albeit that the presumption is reversed: it is a defence to a claim for breach of confidence to demonstrate that there was a sufficient public interest in disclosure to override the duty. In such a case, the information will be disclosable under FOIA.

In general, public authorities are encouraged to interpret this exemption restrictively, and blanket confidentiality provisions are strongly discouraged.

### Commercial prejudice

In the context of commercial arrangements, the exemption for confidential information overlaps substantially with the commercial prejudice exemption.

Section 43(2) FOIA provides a qualified exemption in respect of trade secrets, or information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person (including the public authority itself). It differs from (and is wider than) the Section 41 exemption in that it relates to all information held by a public authority, whether received from another person or produced by the authority itself.

### The public interest test

However, information will only be exempt from disclosure under this provision if the public interest in maintaining the exemption outweighs the public interest in disclosure. That test is applied particularly restrictively in respect of this exemption.

The core principles in relation to this exemption have been clear since early on in the life of FOIA.

- There must be a specific, real and substantial risk of prejudice arising from the particular disclosure at the relevant time.
- The public interest in maintaining the commercial prejudice exemption in respect of contractual information is likely to outweigh the public interest in transparency only for so long as that information is relevant to other ongoing commercial negotiations or activities.
- The commercial prejudice to the private sector entity must be viewed in the context of FOIA, and a general commercial interest in protecting pricing information may not be sufficient to overturn the presumed interest in disclosure.

As such, generalised concerns that disclosure may, for example, be embarrassing or may reveal a company's general approach (to risk allocation, pricing, etc.) will not suffice. That is part of the price that those contracting with the public sector pay.

Before it was made part of the Cabinet Office, the Office of Government Commerce ("OCG") published guidance and working assumptions relating to the application of these exemptions in the public procurement context. Although the OCG no longer exists and the guidance is neither binding nor intended to be of general application, it is a useful indicator of the likely approach taken by public authorities.

## Other important exemptions

### Legal Privilege

Section 42 FOIA provides for an exemption in respect of legally privileged information. Surprisingly, however, that exemption is qualified, so that, at least in principle, an authority may be required to disclose privileged information where the public interest in disclosure is sufficiently great. Indeed, this was the case in relation to parts of the Attorney-General's advice regarding the legality of the Iraq War.

That said, the very substantial public interest in preserving the fundamental principle of legal privilege has repeatedly been expressly recognised, and it is likely to be extremely rare that disclosure of privileged information would be required in the commercial context. So far, disclosure has not been ordered in such circumstances, although there are isolated examples of the Information Commissioner taking a broad view of when privilege has been waived and ordering disclosure of information that the authority asserted remained privileged.

### Prohibitions on disclosure

In introducing FOIA, the Government sought in most cases to remove other statutory prohibitions on disclosure. However, some important examples of such prohibitions remain and, in those cases, s.44 will provide an absolute exemption to disclosure under FOIA.

Typically, such prohibitions exist where highly sensitive information is acquired by regulators in the course of performing their duties. Key examples include certain information held by the FSA and competition authorities.

## Applying the exemptions

The application of the exemptions is a matter for the public authority in question. Although the Code of Practice (issued by the Ministry of Justice under Section 45 FOIA) encourages public authorities to consult where possible, there is no requirement to do so and the views of affected persons are not determinative of whether the information is exempt. However, particularly in respect of the exemptions outlined above, the views and evidence of affected commercial parties are likely to be highly material.

It is crucial, therefore, that commercial parties ensure that they have in place effective mechanisms to ensure that their views are effectively communicated and taken into account before any disclosure of sensitive information. We highlight a number of ways in which this can be achieved, and other risk management strategies, below.

Those who engage in commercial activity with the public sector must expect that there may be a greater degree of openness about the details of those activities than had previously been the case prior to the Act coming into force.

*Information Commissioner*



# Managing the Risks: Practical Steps

## Three steps to effective risk management

Whether sensitive information relating to you is disclosed will ultimately depend on the public authority's decision, but there are things you can do to minimise that risk.

### The three steps

- Know, and keep control of, your information
- Put in place effective arrangements for protecting information provided
- Be ready to respond

## Know your information

Prevention is better than cure, and withholding information is better than trying to protect it later. The first step is therefore not to disclose sensitive information unless you need to.

That, of course, may be easier said than done. It requires you to monitor and control what information is being disclosed and to whom, something which can be complex where your business engages with a range of public authorities on different levels. Effective internal mechanisms for identifying sensitive information and intended disclosures to public authorities are essential to ensuring that disclosure is appropriate, and that related risks are recognised and, where possible, addressed in advance.

## Protecting information

Express confidentiality agreements are one of the best ways of protecting sensitive information. However, few public authorities will be willing to enter into blanket agreements. Where a confidentiality agreement is possible, the truly confidential information should be clearly identified in advance wherever possible, either as part of the agreement itself or on an ongoing basis at the time of disclosure. In large contracts, it is common for the parties to agree what they consider to be the confidential and/or commercially sensitive information. This will not be decisive, but will assist in responding to any request.

Even where a confidentiality agreement is not possible or appropriate, there are a number of steps you can take to improve the protection afforded to sensitive information.

- Ensure that the authority knows what information you consider to be sensitive and/or confidential, and why.
- Agree how the authority will hold and disseminate such sensitive information internally.
- Agree how any request for information will be dealt with, including where possible agreeing mechanisms for prior notification and consultation. In some instances, authorities may be willing to give an undertaking to consult in accordance with the Ministry of Justice's Code of Practice.
- Ensure that the authority knows whom to contact in the event of a request – and keep those contact details up to date.

Whether these steps are embodied in an agreement, a protocol or more informally will depend on the circumstances.

## Responding effectively

Responding effectively when consulted in relation to a request for information requires that your response is timely and detailed.

### Timely

Given the time limits for the public authority to deal with requests, you are likely to need to respond within a matter of a few days. Where the request is lengthy and complex, you may be able to provide a holding response indicating that the authority should exercise its right to take more than twenty working days to respond where qualified exemptions are applicable.

## Detailed

As indicated earlier in this note, generalised concerns are unlikely to be sufficient to protect information from disclosure. Where your commercial interests are engaged, you are uniquely placed to provide evidence of the issues and prejudice that would arise from disclosure. That evidence should be:

- specific,
- relevant,
- time-sensitive, and
- substantiated.

In some cases, this will mean that you may need to have prepared outline arguments at the time of providing the information to the public authority. In most cases, it will be prudent to seek legal advice on the most appropriate arguments.

When responding to the public authority, you should make it clear that you expect prior notice of any decision to disclose information that you have identified as exempt, so that you have an opportunity to consider pre-emptive action if necessary.

## What to do if it goes wrong

If, notwithstanding your best efforts, the public authority decides to disclose the information, your options are limited.

You will need to take legal advice but, where the anticipated harm is very serious, you may be able to seek an interim injunction preventing disclosure, either as part of a claim for breach of confidence, breach of a statutory prohibition on disclosure, or in a judicial review challenge to the decision to disclose. Any application for an injunction will need to be brought with extreme urgency.

If the public authority decides not to disclose, but the requester complains, you may need to become involved in proceedings before the Information Commissioner or Tribunal as an interested party.









# Our freedom of information expertise

## Our expertise

Hogan Lovells has substantial experience of advising on contentious and non-contentious matters relating to FOIA and the EIRs, including:

- advising both commercial parties and public authorities on the drafting and interpretation of contractual provisions concerned with the application of FOIA and the EIRs
- advising on internal processes, protocols and systems to manage freedom of information issues
- advising public authorities on the application of exemptions and the public interest test
- advising commercial parties and public authorities on responding to information requests
- advising on using information requests, including in litigation, and
- representing public authorities and commercial parties before the Information Commissioner and Information Tribunal.

We also have considerable expertise in EU and international information rights issues.

## Examples of our work

- Acting for the **Port of London Authority** in a ground-breaking appeal before the Information Tribunal, which is the leading case on the definition of "public authority" under the EIRs.
- Advising a **major retail bank** on Information Tribunal proceedings concerning the disclosure of commercially sensitive information.
- Advising the **Department for Work and Pensions** on a number of requests for disclosure of a major and highly sensitive property and outsourcing agreement with a private contractor.
- Advising an engineering consortium on freedom of information issues in connection with a landmark **London 2012 Olympics** infrastructure project, including in proceedings before the Information Commissioner.

- Advising a number of clients on **proposals to extend the scope of FOIA** into the private sector, including formal engagement with the Ministry of Justice and the Scottish Government and related public policy activities.
- Advising the **All Party Parliamentary Group on Extraordinary Rendition** on requests to government departments for disclosure of information regarding the UK's alleged involvement in extraordinary rendition of terrorist suspects.
- Advising a **major financial services provider** on requests to local authorities for disclosure of commercially sensitive information regarding the management of pension funds.
- Advising a number of clients on the impact of Freedom of Information obligations on the disclosure of information during **public procurement exercises**.
- Advising a pharmaceutical manufacturer in relation to requests to the **MHRA** for disclosure of commercially and clinically sensitive information.
- Acting for a property development company seeking disclosure from the **DCMS** of information relating to the listing of properties.
- Advising the **Prudential** on use of information requests in litigation.
- Advising a major international IT company on the tactical use of freedom of information requests alongside judicial review litigation.

## Key contacts



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### Further information

If you would like further information on any aspect of this note, please contact a person mentioned below or the person with whom you usually deal.

### Contact

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