

Freedom of Information and Contracts

This document was jointly produced by Dundas & Wilson - <http://www.dundas-wilson.com/> and the JISC Legal Information Service.

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Note

The document is one of a series which attempts to illustrate how certain matters relevant to Further and Higher Education are likely to be treated under the Freedom of Information (Scotland) Act 2002 (“FOISA”). Although the information is principally aimed at Scottish institutions some of the information will be of interest to institutions UK wide.

This document summarises the current thinking surrounding the application of the FOISA to contracts entered into by or with public authorities (referred to as institutions in the note). It sets out some of the exemptions which may apply when a request for disclosure about such contracts is received and gives some guidance on the use of confidentiality clauses in such contracts.

The document is provided as information only. It should not be relied upon solely. It is advised that where necessary you should seek professional legal advice from a law firm.

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1. *Introduction*

Freedom of Information legislation is of great importance to the Further and Higher Education Sector as both providers and purchasers of services. This note will focus on the interaction between Freedom of Information and contracts, specifically dealing with the disclosure of sensitive information and the difficulty of protecting commercial confidentiality.

1.1 **Freedom of Information – General**

There are two pieces of legislation which implement the Freedom of Information regime in the United Kingdom: the Freedom of Information Act 2000 (“FOI”) and the Freedom of Information (Scotland) Act 2002 (“FOISA”). For the purposes of this note, we will concentrate of the provisions of the Scottish statute.

From the 1st of January 2005 any person who makes a request for such information from a public authority must be provided with that information, subject to certain conditions summarised below. The legal right of access includes all types of “recorded” information of any date held by Scottish public authorities no matter when it was created or received.

The Scottish Information Commissioner is an independent public official appointed to enforce and promote the FOISA.

The FOISA applies to all Scottish public authorities including the Scottish Executive and its agencies, the Scottish Parliament, Local Authorities, Universities and Scottish Further Education colleges (in this note, collectively “Institutions”).

1.2 Rights of Access

Section 1 of the FOISA establishes the right of access for individuals and corporate entities to;

- All information;
- Held by or on behalf of an Institution;
- No matter when it is generated or received by that Institution; but
- Subject to certain exemptions.

To exercise the right of access, the access request must be made to the Institution in writing or some other permanent form (e-mail is acceptable in most instances). There is no need for the request to explicitly mention Freedom of Information legislation. However, the information requested must be described.

The Institution must respond to such a request within 20 working days. Whilst FOISA does not apply to “private” companies, it does apply to information about private companies held by an Institution, including information provided by a private company to the Institution. So for example, and subject to any relevant exemptions, a Tender received by an Institution may well be subject to disclosure under the FOISA requirements. Such disclosure would be made only after any relevant exemptions had been applied.

1.3 Procurement and Confidentiality

The FOISA will create a change in the working environment for both public and private sectors. One of the greatest fears expressed by Institutions, and indeed suppliers to Institutions, is that information which was previously guarded jealously because of its commercial value and/or sensitivity may become public knowledge through Freedom of Information disclosure requests. Specifically in the area of procurement, questions have been raised as to the effect of FOISA on confidential tenders or price lists.

1.4 Exemptions

The FOISA contains a number of exemptions from the general requirements on an Institution to disclose information. Of these, the following exemptions are likely to be relevant for an Institution which has been asked to disclose information about a tender and/or a contract it has with a third party:

- Section 26 (Prohibitions on disclosure);
- Section 30 (Prejudice to the effective conduct of public affairs);
- Section 33 (Commercial interests and the economy); and
- Section 36 (Confidentiality).

This note deals with each of these 4 exemptions in turn.

2. Section 26 (Prohibition on Disclosure)

The FOISA states that;

“26. Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act) -

- (a) is prohibited by or under an enactment;***
- (b) is incompatible with a Community obligation; or***
- (c) would constitute, or be punishable as, a contempt of court.”***

2.1 Prohibited under an enactment and EU Procurement

It is possible that this exemption may apply to some information received as part of a procurement process conducted under EU procurement rules as there are references to confidentiality in the various EU Regulations.

Notably the current EU procurement regime already requires that some information about a tender process is made available. Specifically, (i) unsuccessful tenderers can ask for a debriefing as to the reasons for rejection and for certain details of the successful tender, and (ii) specific information must be published in a contract award notice.

Under the legislation implementing the EC procurement regime there is an indirect requirement on the purchasing Institution to maintain the confidentiality of tenders until the tender process is complete. This, together with Section 26, will allow an Institution to refuse a request to disclose tender information until the relevant tender process is complete.

Legislation implementing the EC procurement regime also contains provisions obliging an Institution to comply with any reasonable request made by a tenderer to keep information supplied by that tenderer confidential. Thus if a tenderer has requested that information supplied by it is to be kept confidential and that request is reasonable, then the relevant information will be exempt from the FOISA disclosure requirement under the Section 26 exemption.

2.2 Contempt of Court

Under section 26(c), an Institution should not disclose any information which would place it in contempt of court. This refers to any information whose publication is forbidden by law or a court order.

2.3 Applying the Test

Section 26 is designated as an absolute exemption and is therefore not subject to the public interest test (for further information see the paper on the public interest test on the JISC Legal website at <http://www.jisclegal.ac.uk/publicationspage.htm>).

3. Section 30 (Prejudice to the effective conduct of public affairs)

Section 30(b) of the FOISA exempts from disclosure, information which if disclosed;

“30 (b) would, or would be likely to inhibit substantially –

(i) the free and frank provision of advice; or

(ii) the free and frank exchange of view for the purposes of deliberation; or

(c) would otherwise prejudice substantially, or be likely to prejudice substantially the effective conduct of public affairs.”

Section 30(a) relates specifically to the Scottish Ministers.

It could be argued that the disclosure of information surrounding a tender process may inhibit the free and frank exchange of views on the merits of the relative tenderers in the evaluation process. However, the precedents in this area (including the Australian case of **Re Byrne and Hill Rural City Council (VCAT 666 March 31, 2000)**) indicate that this will be a difficult argument to succeed on.

The exemption in part (c) of section 30 is perhaps of more use. Notably it will apply to both tender documents and signed contracts. An Institution must show “prejudice” and the use of this exemption will develop through case law.

Section 30 is a qualified exemption under the FOISA and is therefore subject to the public interest test. An Institution is required to examine the decision to withhold information on the basis of a section 30 exemption while balancing the public interest in disclosing the information (for further information see the paper on the public interest test on the JISC Legal website at <http://www.jisclegal.ac.uk/publicationspage.htm>).

4. **Section 33 (Commercial Interests and the Economy)**

In addition to the exemption available for confidential information, the FOISA also recognises that Institutions have concerns about their commercial information and the valuable nature of that information.

Section 33(1) of the FOISA states that;

“Information is considered exempt information if:

- (a) It constitutes a trade secret; or***
- (b) Its disclosure under this Act would or would be likely to prejudice substantially the commercial interests of any person (including without prejudice to that generality, a Scottish public authority).”***

The exemption itself is twofold. The information must be a “trade secret”. Alternatively, disclosure of the information must be likely to prejudice substantially the commercial interests of some person.

A trade secret is usually taken to mean secret know-how associated with the manufacture of a product or formula. However, there is no one definition of what a trade secret is.

The broader exemption of ***“likely to prejudice substantially the commercial interests of any person”*** is one which may allow an Institution to withhold valuable information which would not generally be described as a trade secret. There is some authority available from decisions by tribunals and other Information Commissioners that this commercial interest exemption may be applied to unsuccessful tenderers. This is particularly true of pricing calculations and details of the products or services.

It is likely however that the Scottish Information Commissioner will closely examine any attempt by a public authority to claim this exemption. The Information Commissioner in his guidance has stated that;

“Public authorities should be aware that changing circumstances could strengthen or weaken the public interest arguments in favour of disclosure.”;
and

“When weighing up the public interest it might be appropriate for the public authority to take account of the possible consequences of a third party successfully taking legal action against it following the disclosure of the information.”

This guidance can be found at

<http://www.informationcommissioner.gov.uk/cms/DocumentUploads/Pub%20Sec%20Contracts.pdf>

The exemption relating to Commercial Interests (Section 33) is not an absolute exemption. Rather it is a qualified exemption and thus in applying the exemption an Institution must apply the public interest test (for further information see the paper on the public interest test on the JISC Legal website at <http://www.jisclegal.ac.uk/publicationspage.htm>).

5. Section 36 (Confidentiality)

Section 36(2) provides that

“Information is exempt information if -

- (a) it was obtained by a Scottish public authority from any other person (including another such public authority), and***
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.”***

This is an absolute exemption from the obligation to disclose information provided “in confidence”. It is important to note that this exemption only applies to information received from **another** body or person in confidence and does not apply to information which the Institution generates itself. Information which falls within this section may also be covered under other exemptions for example section 33(1) (Commercial Interests) as discussed above.

However, this exemption is much narrower than it initially sounds as it only applies in circumstances where a legally actionable breach of confidence might arise.

To put it simply, an actionable breach of confidence is likely to exist where a party has breached a contractual obligation of confidence. However, it can also exist when there is no express contractual obligation of confidence provided the disclosure was of secret information and made on a confidential basis.

This means that an Institution can at first glance claim exemption under section 36 both where it has an express contractual obligation to do so, and also where it has received information where it knows that the discloser expects the Institution to keep it confidential. However, although section 36 is stated to be an absolute exemption it is effectively subject to its own public interest test/requirement.

In general, a court will not enforce a non-contractual obligation of confidence where to do so would be contrary to the public interest. While this is likely to be a more limited provision than the other instances where the public interest applies in the FOISA (see parallel note regarding the FOISA public interest test), the Scottish Information Commissioner has indicated that he believes that the balance should always be on the side of disclosure.

There is always a risk to an Institution relying on a section 36 exemption that a Court will decide that the underlying duty of confidentiality should be overruled in the public interest. If this happens then the exemption under section 36 would be lost in respect of that information.

6. ***Practical consequences when drafting contracts***

When drafting a confidentiality clause it will be important to include a statement that a disclosure of information in order to comply with Freedom of Information legislation will not be a breach of confidentiality obligations.

It may also be a good idea to impose an obligation on the other party to provide the Institution with reasonable assistance in responding to Freedom of Information requests.

Finally, where an Institution or supplier wants to keep commercial information confidential it should ensure that the relevant information is in a severable part of the document, e.g. a pricing schedule. It is suggested that where appropriate it should also be expressly identified that the disclosure of that information would “prejudice substantially” its commercial interests. While this statement will not be definitive, it may assist in relation to a subsequent claim for exemption under Section 33 (Commercial Interest and the Economy) discussed above.

7. ***Case law and audit trails***

As part of the implementation of the FOISA, a Code of Practice on Access to Scottish Executive Information (“the Code”) has been published. One example of the Code in use has been the publication of the contract between the Scottish Prison Service and Reliance Secure Task Management Limited (further details can be found on the Scottish Commissioners website <http://www.itspublicknowledge.info>). The contract was disclosed because of alleged failures in the standard of service. The Scottish Prison Service published the contract on its website with the proviso that “the contract has been published with the exclusion of terms deemed to be commercially or operationally sensitive”.

The Scottish Information Commissioner noted this on his website and stated he would expect where information has been withheld that:-

“the specific reasons for doing so in terms of the exemptions applied to each exclusion would be stated.”

This statement reinforces the value and importance of maintaining a comprehensive and clear audit trail of the decision making process. Not only does this assist in documenting an Institutions’ reasoning if challenged, but it may also assist in streamlining the decision-making process if a similar request is subsequently received.

8. ***Guidance - UK Information Commissioner***

Notably, the UK Information Commissioner (c.f. the Scottish Information Commissioner) has issued guidance in the area of commercial interest. This can be accessed at - <http://www.informationcommissioner.gov.uk/> (search for “commercial interest”)

9. Summary

When a request for information is received which an Institution relates to commercially valuable information or that which is subject to a confidentiality agreement, there are a number of exemptions in the FOISA which may apply.

In considering whether to rely on an exemption, an Institution must:

- Consider carefully any confidentiality clauses that are included in draft contracts. An Institution should try to discuss Freedom of Information at an early stage of any tender process and/or contractual negotiations;
- Remember that the Scottish Information Commissioner has indicated that disclosure is to be encouraged;
- Remember that confidentiality agreements are no longer the iron clad defence that they were; and
- Keep audit trails of decisions made.

Equally, Institutions should not:

- Automatically assume that information can't be disclosed if it is subject to a confidentiality provision. Weigh up the competing interests before making a decision;
- Forget that an Institution may be obliged to assist others when a request for information is received, for example if an Institution is part of a consortium;
- Rely on confidentiality to hide information that may cause embarrassment; and
- Assume that if something is marked as confidential that it automatically prevents disclosure. Just because something has been marked as confidential does not mean that it has the necessary "quality of confidence" in order to prevent disclosure.

In negotiating and drafting contracts, an Institution should expressly address Freedom of Information issues.

The UK Information Commissioner has acknowledged the concerns raised by both Institutions and private sector companies. In guidance issued in July 2004 entitled "**Freedom of Information Act 2000 – Annex to Awareness Guidance 5 Commercial Interest**" it is stated;

"The Freedom of Information Act ("the Act") recognises that there are valid reasons for withholding some information in response to a request. The Act lays out 23 situations in which information is considered exempt. A public authority cannot attempt to contract out of its responsibilities under the Act and unless information is covered by an exemption it must be released if requested."

FURTHER READING

Freedom of Information Act 2000 – Awareness Guidance 5 – Commercial Interest, and the Annex to Awareness Guidance 5 – Commercial Interest – Public Sector Contracts available on the UK Information Commissioner Website at <http://www.informationcommissioner.gov.uk>

Code of Practice on Access to the Scottish Executive Information, available on the Scottish Executive website at <http://www.scotland.gov.uk/library2/doc01/code.pdf>.

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