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Freedom of information: A guide for business
Since the Freedom of Information Act came into force a little over 7 years ago, it has had a huge impact on public authorities. But freedom of information law does not only affect public authorities. It can have and is having a significant impact on businesses in all sectors. It presents an opportunity for obtaining useful information but also gives rise to the risk that information provided by a business to a public authority might be disclosed to the public or competitors. Whenever a regulated business submits information to its regulator or another public authority, it should be aware of the risk that the information may be subject to disclosure.

The present government has expressed a strong commitment to freedom of information and, at the time of publication of this guide, is in the process of consulting a wide range of additional bodies on the possibility of bringing them within the scope of the legislation. It therefore seems likely that the impact of freedom of information legislation will become even more widespread in the near future.

This guide provides an overview of UK FOI legislation and explores how businesses can use the opportunities and mitigate the risks associated with FOI requests.

References to case law are up to date as at 1 March 2012.
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1. FOI – What you need to know

1.1. The legislation

The two key pieces of legislation are the Freedom of Information Act 2000 ("FOIA") and the Environmental Information Regulations 2004 ("EIR"). The EIR apply to environmental information and FOIA applies to all other information. The legislation imposes two important obligations on public authorities.

• To put in place a Publication Scheme, setting out what information is available to the public and how it can be obtained.

• To provide information in response to a request from a member of the public.

The focus of this guide is the obligation to provide information in response to an FOI request. But businesses should be aware that a large amount of a public authority’s information is likely to be accessible through its Publication Scheme, so before making a request it is always worth checking the Publication Scheme first.

1.2 Who has to provide information under FOIA and the EIR?

FOIA sets out a list of the public authorities which must comply with it.

Public authorities subject to FOIA include:

• central and local government, including local planning authorities

• regulators like OFCOM, the CAA, Ofgem and the Financial Services Authority

• companies owned by public authorities

The EIR are slightly different – they do not set out a list of public authorities but instead provide a definition of “public authority”. The definition is wide in its scope and this means that more bodies are subject to the EIR than to FOIA. So a body or organisation may not be listed in FOIA but may still have to disclose environmental information under the EIR.

An organisation will be subject to the EIR in the following circumstances.

• If it is “under the control” of another public authority and
  (i) has public responsibilities relating to the environment;
  (ii) exercises functions of a public nature relating to the environment; or
  (iii) provides public services relating to the environment.

For this part of the definition to apply, the level of control exercised over the organisation by a public authority must be “sufficient to exert a decisive influence” over it – a contract or a degree of regulatory control will not necessarily be sufficient.

It is worth noting that privatised utility companies have been found not to be covered by the EIR (Smartsource Drainage & Water Reports Limited v Information Commissioner & 19 Water Companies – Upper Tribunal GI/2458/2010).

1.3 What sort of information can people ask for?

The right of access to information under FOIA and EIR is wide in scope. Anyone (including foreign nationals and companies) can ask for any information which is “held” by the public authority. This includes:

• information created by or obtained by the public authority at any time provided that it is held when the request is received;

• information which the public authority holds or is held by another person on behalf of the public authority, even if the information was provided to it by a different person who is not subject to FOIA or the EIR.

However, as explained below, there are certain exemptions from disclosure which allow a public authority to refuse to provide information even if they hold it.

Environmental information

Requests for environmental information are dealt with under the EIR rather than FOIA.

The definition of environmental information is very wide – it covers information about the environment itself (including the air and atmosphere, water, soil, land, landscape and natural sites) and things which affect the environment (such as energy, noise, radiation, waste or emissions and measures such as policies, legislation, plans and activities).

Examples of “environmental information” are:

• information relating to energy policy or climate change (see Information Commissioner decision FER50132239 – Cabinet Office);

• information on a planning application or proposed development or construction project which is likely to have an environmental impact – this can include financial information on the project (see Tribunal decision).
• in the context of litigation or potential litigation against public authorities in order to try to obtain further factual background, such as correspondence on a relevant issue (see Chapter 2 of this guide).

1.4 How a public authority must deal with a request

See the flowchart which summarises the procedure for dealing with an FOI request at Annex 2. The key procedural steps are explained below.

Time period for response

A public authority must respond to an FOI request promptly and in any event within 20 working days following receipt. If it intends to rely on a qualified exemption (this is explained below) it may take “such time as is reasonable in the circumstances” to give its substantive response.

The disclosure regimes under FOIA and the EIR are very similar in many ways but there are some important differences. For a summary of the main differences please see Annex 1.

Types of information which can be requested/when it can be useful

As stated above, an FOI request can be made by anyone, at any time, but here are some examples of the way in which requests might be used by businesses to obtain information from public authorities:

• to obtain information on contracts with a public authority which have an environmental impact, such as waste management contracts, water services, etc – this will potentially include the entire contract, including information on pricing and financial aspects (see Tribunal decision EA/2009/0019, McGlade v Information Commissioner);

• information on contracts with a public authority which have an environmental impact, such as waste management contracts, water services, etc – this will potentially include the entire contract, including information on pricing and financial aspects (see Tribunal decision EA/2009/0019, McGlade v Information Commissioner).

The exemptions under FOIA and the EIR are broadly similar although there are some differences between the two regimes.

1.5 Grounds for refusing to disclose information – the exemptions/exceptions

FOIA and the EIR provide specific grounds (known as exemptions/exceptions) which allow a public authority to refuse to provide information in response to an FOI request. The exemptions under FOIA and under the EIR are broadly similar although there are some differences between the two regimes.

Absolute and qualified exemptions

In FOIA there are two types of exemptions:

• absolute exemptions, which will provide a public authority with an unqualified reason to refuse disclosure without having to consider any other factors, and

Under the EIR, the public authority can extend the response period to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable to comply with the request or to make a decision to refuse to do so within the 20 working day period.

Response to request

Where a public authority does not hold the information, it will inform the applicant of this fact.

Where a public authority does hold the information, it can do one of two things.

1. Inform the applicant that it holds the information and provide it.

2. Inform the applicant that it holds the information but that it is refusing to provide it, because it considers that an exemption from disclosure applies. In some cases where an exemption applies, it will not even be appropriate to confirm or deny whether it holds the information.

Where a public authority decides to refuse to provide the information requested, it must send a notice to the applicant explaining the reasons why it is doing so.

Exemptions from disclosure are discussed in further detail below.

Consulting third parties

In accordance with a statutory Code of Practice, a public authority is generally expected to consult with third parties if it proposes to disclose information relating to them or which is likely to affect their interests, particularly where it is necessary to help determine whether an exemption would apply (eg to work out if disclosure of the information might be likely to prejudice a third party’s commercial interests). However, the public authority will ultimately take the decision as to whether or not it should disclose the information or an exemption will apply and anyone providing information to a public authority should be aware of the potential risk of disclosure.

See the flowchart which summarises the procedure for dealing with an FOI request at Annex 2. The key procedural steps are explained below.

Time period for response

A public authority must respond to an FOI request promptly and in any event within 20 working days following receipt. If it intends to rely on a qualified exemption (this is explained below) it may take “such time as is reasonable in the circumstances” to give its substantive response.
• qualified exemptions, which still allow a public authority to refuse disclosure but only if the public interest in preventing disclosure outweighs the public interest in the information being disclosed (this is known as the “public interest” test).

All the exemptions in the EIR are qualified exemptions.

The main grounds for refusing disclosure which are likely to be relevant for businesses are:

• where the information is already publicly available/ accessible by other means;
• where the information has been obtained by the public authority for the purposes of carrying out a criminal or regulatory investigation or disclosing the information is likely to prejudice such an investigation;
• where the information requested is personal information (in which case the Data Protection Act 1998 would apply instead);
• where the information has been provided to the public authority by a third party and disclosing it would be an actionable breach of confidence or the information consists of trade secrets or disclosure would or would be likely to harm legitimate commercial interests;
• where the information is legally privileged;
• where disclosure is prohibited by another legislative provision or EU law – note that this is an exemption under FOIA only – there is no equivalent exception under the EIR.

The costs threshold for complying with a request

Under FOIA, a public authority does not have to comply with the request if it estimates that, due to the volume or nature of the information requested, dealing with the request (but not considering the exemptions) will exceed the “appropriate limit” set out in Regulations (currently £600 for central government, legislative bodies and the armed forces and £450 for all other public authorities, based on a fixed rate of £25 per hour’s work per person). There is no equivalent provision in the EIR.

In Chief Constable of South Yorkshire Police v Information Commissioner [2011] EWHC 44 (Admin) the Court held that, for the purposes of estimating the cost of complying with an information request with a view to relying on the exemption provided by s.12 FOIA a public authority is not permitted to count the time and cost which would be incurred in redacting exempt information from the information requested. The list of activities set out in Regulation 4(3) of the Fees Regulations is an exhaustive list of the tasks which may be counted when estimating the cost of compliance. Redacting exempt information did not fall within any of the tasks listed in that Regulation, and specifically not the task of “extracting the information from a document containing it” which is limited to extracting information not falling within the scope of a request.

Vexatious/manifestly unreasonable requests

A public authority can also refuse to respond to an FOI request which is vexatious/manifestly unreasonable (i.e. a request which causes unjustified distress, disruption or irritation, for example in the context of an obsessive campaign of requests or a longstanding dispute with a public authority).

Full list of exemptions

See the table of exemptions at Annex 3 for a full list of exemptions under FOIA and comparable exceptions under the EIR. The way in which some of these exemptions can be applied in practice is discussed further below.

1.6 What you can do if you are not satisfied with how an FOI request has been dealt with

There are several levels of review/appeal of a public authority’s response to an FOI request:

• Complain to the public authority: If an applicant is not satisfied with how his/her FOI request has been dealt with, the first step is to check whether the public authority has in place a complaints procedure, usually known as an “internal review.” If it does, this should be followed.

• Complain to the Information Commissioner: If the applicant is still not satisfied, he/she may apply to the Information Commissioner who will then decide whether or not the public authority has complied with its obligations under FOIA and/or the EIR and can publish a decision notice requiring the public authority to comply if he finds that it has acted in breach of its obligations.

• Appeal to the First Tier (Information Rights) Tribunal: A decision of the Information Commissioner can be appealed to the First-Tier (Information Rights) Tribunal (previously, the Information Tribunal, both of which are referred to generally as the “Tribunal”).

• Appeal to the Upper Tribunal: on a point of law.

• Appeal to the Court of Appeal: on a point of law.

• Appeal to the Supreme Court: on a point of law.
2. FOI requests used in court proceedings

FOI requests are increasingly being used by businesses in the context of litigation – primarily, as an additional tool leading up to and during judicial review proceedings or statutory appeals. Defendants in judicial review are subject to the duty of candour, which means that they should disclose all material facts and documents. They should also comply with the pre-action protocol, which encourages the early exchange of information. However, since judicial review procedure does not allow for automatic disclosure in the same way as other civil litigation, the use of FOI requests can be a valuable way of obtaining information for use by a claimant or prospective claimant in a challenge to a public authority’s decision.

2.1 Why and how do claimants use information requests?

In the context of judicial review proceedings, information requests are potentially valuable to claimants for a number of reasons (these are summarised in the table below).

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<td>• No restriction on when a request can be made, what the scope of the request is or restriction on the subsequent use of documents (because disclosure is deemed to be to the public at large)</td>
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<td>• Motive-blind – do not need to give reasons as to why you want the information</td>
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<tr>
<td>• Might be a quicker way of obtaining information than through other formal channels – i.e. expectation that a public authority should respond as soon as possible and in any event within 20 working days (although in practice it can take significantly longer)</td>
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<td>• Generally little or no cost involved</td>
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<td>• Onus on public authority to give reasons as to why requested information should not be provided</td>
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Pre-emptive FOI requests

As mentioned above, the opportunities for obtaining information from public bodies in the judicial review process are fairly limited. This can be particularly problematic for claimants as under the procedural rules they are required to produce their detailed grounds of challenge and supporting evidence at the outset of the claim.

An FOI request may be made at any time and there is therefore scope to use requests as a way of monitoring a decision-making process on a controversial issue as it develops. In this way, by the time there is a final decision to challenge, the claimant may have collected some useful information already. Information requests may also be used as a way of attempting to put pressure on public authorities by making them aware that their activities are being monitored.

Timing considerations

It is often said that FOI requests are of limited value to claimants in judicial review proceedings, because of the strict time limits for issuing proceedings compared with the time that may be taken by a public authority to respond to a request. A request made even very quickly following a challengeable decision may well not elicit a substantive response until it is too late to use the information in order to decide whether there are grounds for a claim, or to support the claim itself. However, claimants may use requests to bolster a claim once it has been issued. It is fairly common for the Administrative Court effectively to permit claimants to serve evidence in reply once the defendant’s detailed grounds have been filed and served.

Motive-blind opportunity to obtain information

Another advantage is that information requests can be made for “any” information held by a public authority whereas the duty of candour and any disclosure ordered by the court will only cover information which is relevant to the issues between the parties. Claimants may also request information from any public authority decision-maker which might have been involved in the decision-making process. In this way, it might be possible for claimants to obtain information which the defendant may be more reluctant to release. Information from other public authorities may shed light on the defendant’s case from a different perspective.

2.2 The exemptions for legally privileged information

The FOIA contains an exemption for information “in respect of which a claim to legal professional privilege… could be maintained in legal proceedings.” It is important to note that this is a qualified exemption, so even if information is privileged, it may still have to be disclosed, depending on the outcome of the public interest test.

Having said that, in practice, it is only in rare cases that privileged information will have to be disclosed. This is because of the very significant weight given to upholding the protection given to privileged information when carrying out the public interest test. This weighs heavily in the balance, particularly if the information is relevant to on-going or potential litigation. For an example of a case in which privileged information (an opinion from Counsel) had to be disclosed, see Tribunal decision EA/2007/0052, Mersey Tunnel Users Association v Information Commissioner. For a decision of the High Court setting out the correct approach to the exemption, see DBERR v O’Brien [2009] EWHC 164 (QB).

Under the EIR, there is no exception specifically for privileged information – however there is an exception which applies to information whose disclosure “would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.” This is frequently applied to privileged environmental information.

For some practical tips on using FOI requests to obtain useful information, please see Chapter 4 of this guide.
3. Categories of information which might be at risk of disclosure under FOI legislation

This section considers how FOI legislation is likely to apply to different categories of information likely to be of particular interest to businesses. For each type of information we have focused on the most relevant exemptions but these are not intended to be exhaustive lists – in many cases, there are several potentially relevant exemptions.

3.1 Information provided to regulators

A regulated business’s information may become subject to potential disclosure in the following circumstances:

- as a result of on-going regulatory obligations to provide information in relation to regulated business activities (e.g. companies working in the financial services, utilities, transport or telecommunications sectors which have obligations to produce reports or annual returns on their regulated activities);
- in the context of a regulatory investigation into the conduct or practices of a company, e.g. by the OFT, the FSA, HMRC, Ofcom, Ofwat or CAA;
- in the context of a criminal investigation into a company or its officers or employees, e.g. by the SFO; or
- where companies provide information on a voluntary basis, for example in making a complaint regarding the activities or conduct of a competitor to a regulator.

Potentially relevant exemptions

Statutory prohibitions on disclosure

In many cases, the legislative framework underpinning a regulatory regime will provide specific statutory prohibitions on disclosure of certain information, in which case such information would be exempt under the absolute exemption in section 44 FOIA. Relevant statutory prohibitions on disclosure include:

- sections 237 and 238 Enterprise Act 2002, which restrict disclosure of non-public information obtained by the OFT under competition legislation;
- section 348 Financial Services and Markets Act 2000, which restricts disclosure of confidential information received by the FSA under the Act;
- section 23 Civil Aviation Act 1982, which restricts disclosure of information provided to the CAA;
- section 393 Communications Act 2003, which restricts disclosure of information provided to Ofcom; and
- section 105 Utilities Act 2000, which restricts disclosure of information provided to Ofgem in relation to its regulatory functions.

It should be noted that in relation to environmental information, the EIR do not provide an equivalent exemption.

In Financial Services Authority v Information Commissioner [2009] EWHC 1548 (Admin) the High Court considered 2 requests to the FSA for information identifying firms which had been investigated by it. The key issue was whether information about the identities of the firms was “confidential information” within the statutory prohibition in s.348 FSMA. The Court found that when taken in the context of the FOI request, information identifying the firms in question manifestly related to their business and as such fell within the scope of s.348 FSMA. It could therefore be withheld under s.44 FOIA. For further examples of the use of the s.44 FOIA exemption, see Tribunal decisions EA/2009/0049, PricewaterhouseCoopers v Information Commissioner – (statutory bar on disclosure in the Commissioners of Revenue & Customs Act 2005) and EA/2009/0067, Morrissey v Information Commissioner & Office of Communications (s.393 (1) Communications Act 2003).

3.1.1 Criminal investigations or proceedings or law enforcement exemptions

Information may be withheld under the exemptions relating to criminal investigations and proceedings and law enforcement under sections 30 and 31 FOIA or Reg. 12(5) (b) EIR. Both sections 30 and 31 are subject to the public interest test.

Section 30 FOIA will apply to any information held in the context of an investigation into a potential criminal liability, for example, by the police and SFO investigations, criminal cartel investigations by the OFT or criminal investigations by HMRC, the FSA or the Environment Agency. This exemption applies to information held for the purposes of an investigation “at any time” and so can apply even after the investigation has been concluded.

Where section 30 FOIA does not apply, section 31 FOIA may apply instead. This exemption is wider in scope and allows information to be withheld if it would be likely to prejudice various law enforcement functions including:

- a public authority’s ability to exercise its functions to determine whether a person has failed to comply with the law (section 31(1)(g) and 31(2)(a)) or whether statutory regulatory action should be taken (section 31(1)(g) and 31(2)(c)); or
- any civil proceedings brought by or on behalf of a public authority arising from such an investigation (section 31(1)(h)).

Where the information concerned is environmental, Reg. 12(5) (b) EIR (which applies where disclosure would prejudice the ability to conduct an inquiry of a criminal or disciplinary nature) is applied in practice in a similar manner to sections 30 and 31 FOIA.
In regulatory cases, the main issue in relation to s.31 FOIA has been whether a public authority can produce persuasive evidence that disclosure of the information would be likely to cause the alleged prejudice to its functions. For example in Information Commissioner decision FS0168527 – Civil Aviation Authority, it was held that s.31 was not engaged because the CAA had failed to demonstrate a real and significant risk of prejudice arising from disclosure of information relating to audit reports about a particular airline. However, on appeal it was held that the information could be withheld under s.44 FOIA as it fell within a statutory bar in s.23 Civil Aviation Act 1982. See also Tribunal decision EA/2008/0061, FSA v Information Commissioner.

### 3.1.2 Confidentiality and commercial sensitivity

The exemptions on commercial sensitivity and confidentiality under sections 41 and 43(2) FOIA/Reg. 12(5) (e) EIR may also be relevant (these are dealt with in more detail below and in Annex 4).

### 3.2 Information relating to public tenders or contracts with public authorities

Many businesses provide commercial services to public authorities or participate in tender processes for contracts to provide such services. Information relating to the tender process, the decision to award the contract to a particular bidder or the terms and conditions of a contract with a public authority, including financial or pricing information, could be subject to disclosure in response to an FOI request.

The Office of Government Commerce (now part of the Cabinet Office) has issued guidance on FOI requests in the context of civil procurement exercises – this includes a set of working assumptions, which provide a default position on the disclosure of different types of information at different stages of a procurement exercise. If a public authority is proposing to disclose information relating to a procurement exercise and a business wishes to object, it is always worth checking what the OGC guidance says first.

#### Potentially relevant exemptions

Because of the importance of this group of exemptions for businesses, we have in Annex 4 provided some short summaries of relevant cases.

### 3.2.1 Confidentiality

Information relating to the tender process/contract may be exempt from disclosure on the basis that it has been provided to the public authority by a third party under a legal duty of confidence (section 41 FOIA/Reg. 12 (5) (e) EIR). Where the test under section 41 FOIA is satisfied, it provides an absolute exemption. It is important to note that by virtue of EIR Reg. 12 (9) the exemptions in EIR Regs. 12 (5) (d) to (g) may not be relied on to withhold information relating to “emissions”.

### What is meant by “confidential information”?

In order for this exemption to apply it is necessary to show that disclosing the information would be an “actionable breach of confidence” under the following test (derived from Coco v A N Clark (Engineers) Ltd [1969] RPC 41):

- the information has the necessary quality of confidence, meaning it is not otherwise accessible (ie not generally available in the public domain) and is more than trivial;
- the information was imparted in circumstances importing an obligation of confidence, meaning that the recipient of the information has agreed to treat the information as confidential or has notice that the information is confidential (for example, a document is marked as “confidential” or “restricted”); and
- disclosure would result in detriment to the confider.

There are a number of possible defences to an action for breach of confidence, including that the public interest in disclosure of the particular information in question outweighs the general public interest in protecting confidential information. For this reason, there may be a balancing of the public interests for and against disclosure in s.41 FOIA cases, but it is important to note that the test is effectively reversed when compared with that which applies to qualified exemptions under FOIA, because where balancing is required in respect of qualified exemptions disclosure shall be given unless the public interest in withholding information outweighs the public interest in disclosure.

**Will a bidder’s information be confidential during a tender process?**

Information provided by a bidder during a tender process which is on-going will normally be considered confidential until the tender process has been completed.

### Will a bidder’s information be confidential once the tender process has been completed?

Once a contract has been concluded there is less of an expectation that it will remain confidential unless it can be established that it is still of commercial significance (eg pricing or financial information which might affect future tenders).

**Will this exemption apply to information in contracts with a public authority?**

The section 41 exemption will not generally apply in respect of information in a contract with a public authority. This is because the public authority will not be considered as having obtained such information from another person. Instead, it will be seen as the joint product of commercial negotiations between the two parties.

In certain cases, the exemption might still apply in respect of certain information in a contract which has in fact been provided to a public authority by the other party and does not form part of the negotiated terms, for example...
technical information which is included in a schedule to an agreement (Tribunal decision EA/2006/0014, Derry City Council v Information Commissioner).

Confidentiality under the EIR

Unlike s.41 FOIA, the equivalent exception under the EIR (Reg. 12(5) (e)) is not expressly restricted to information obtained by a public authority from another person. However, it has been suggested that a public authority cannot “self-generate” confidentiality in its own information because in those circumstances the second part of the Coco v Clark test would not be met (see Tribunal decision EA/2010/0153, Chichester District Council v Information Commissioner, which is under appeal to the Upper Tribunal).

3.2.2 Commercially sensitive information/trade secrets

Section 43(2) FOIA provides a specific exemption for information where disclosure would be likely to prejudice the commercial interests of any person, which can include the public authority or a third party. This is similar to the exemption under Reg. 12(5) (e) of the EIR, albeit this only relates to confidential commercially sensitive information (there is little difference in practice as to how this exemption is applied, since where information is not confidential, it is unlikely to prejudice the commercial interests of the person to whom it relates to disclose it).

Types of information which may be considered to be commercially sensitive include:

- non-public information relating to costing, pricing structures or financial models (eg profit margins, benchmarks, discounts, financial performance or management accounts);
- information relating to specific methods, techniques or systems setting out how the work will be delivered;
- detailed technical information;
- information on arrangements with suppliers or customers (especially pricing information); or
- information on financing arrangements.

When might this exemption apply?

There is a relatively high threshold to be met in order to demonstrate that the disclosure of information would be likely to prejudice commercial interests for the purposes of this exemption. To persuade a public authority that the exemption applies, you must be able to explain why it is likely that disclosing the information would give rise to a “real and significant risk” of some harm/detriment to your commercial interests (or those of another party) (Tribunal decision EA/2005/0005, John Connor Press Associates Limited v Information Commissioner). If you get over that hurdle, you will need to explain why the public interest test would be satisfied, ie why the public interest in withholding the information would outweigh the public interest in disclosure – for example, because if this information is disclosed, it would impede your ability to compete in future tenders, making you less likely to try to win them in the future.

Whether this exemption will apply is highly dependent on the specific facts of the case. In general, it is more likely to apply if disclosure of the information is likely to affect a company’s competitiveness in future procurement exercises or to affect the competitiveness or viability of on-going transactions/projects.

The following factors are likely to be relevant in assessing whether information is to be considered as commercially sensitive, such that disclosure would be likely to prejudice a person’s commercial interests:

- how current the information is;
- whether the information is specific to a particular company/business or reflects general industry practice;
- whether disclosure would weaken the company’s competitive position in the market;
- whether disclosure could damage a business’s reputation or adversely affect its relationship with its customers or suppliers; and
- whether disclosure would affect its ability to raise finance or implement its business plans.

This exemption is generally applied quite restrictively. If you try to claim that the entirety of a contract or all information relating to a bid should be withheld on this basis, you are unlikely to be successful. It is better to focus on protecting information which is truly confidential/commercially sensitive.

Trade secrets

Section 43(1) FOIA provides a specific exemption against disclosure for “trade secrets” as opposed to other types of commercially sensitive information. There is no statutory definition of a “trade secret”. In accordance with general case law, a “trade secret” can be described in a broad sense as information used in a trade or business which the owner limits dissemination of and disclosure of which is liable to cause real or significant harm to the owner (Lansing Linde v Kerr [1991] 1 WLR 251). It has also been described more restrictively as “something technical, unique and achieved with a degree of difficulty and investment” (Tribunal decision EA/2008/0018, Department of Health v Information Commissioner).

1. Note that the potential prejudice must be more than trivial and “real, actual or of substance” (Tribunal decision EA/2005/0026 & 30, Hogan & Oxford City Council v Information Commissioner)
Potentially relevant exemptions

Exemptions which might apply to protect consultation responses from disclosure include:

- the exemptions to protect confidential and commercially sensitive information (sections 41 and 43(2) FOIA and Reg. 12(5) (e) and 12(5) (f) EIR), and

- the exemptions to protect personal privacy in relation to personal information (section 40 FOIA/Reg. 12(3) and 13 EIR).

3.4 Information relating to planning procedures and proposed developments

As part of the procedure for obtaining planning permission or relevant consents to proceed with a development, a company will have to provide information on the proposed development to the local planning authority and/or other relevant planning authorities. FOI considerations may arise in this context, since FOI requests may be seen as a way for other people who are interested in the outcome of the planning process, particularly those who oppose the development, to obtain non-public information in order to seek to influence the planning process.

Potentially relevant exemptions

Information relating to potential developments or construction projects is likely to be considered “environmental information” falling under the EIR rather than information falling under FOIA, and we therefore focus here on the exemptions under the EIR. See section 1.3 for a more detailed discussion of “environmental information” and the EIR.

3.4.1 Confidential/commercially sensitive information

Information on proposed developments which is provided to a planning authority by a developer or another third party such as a consultant may contain confidential and/or commercially sensitive information. The exemption under Reg. 12(5) (e) EIR (or section 43(2) FOIA where applicable) may therefore be used to resist disclosure of this information. See Annex 4 for some examples of relevant cases.

In order to demonstrate that the exemption under Reg. 12(5) (e) applies, it is necessary to show:

- that the information is commercial or industrial, for example, viability reports which often contain details of costs, revenues, valuations and finances relating to the development;

- that the information is subject to confidentiality as provided by law (under statutory provisions or at common law);

- that the confidentiality is provided to protect a “legitimate economic interest”;
• that disclosure would adversely affect such confidentiality/legitimate economic interests, for example because disclosure could harm the viability of the project and assist competitors; and

• that the public interest in withholding the information outweighs the public interest in disclosing it.

As a general principle, planning processes are expected to be open, public and transparent. It can therefore be difficult to establish that the public interest test is satisfied, particularly where the development concerns land owned by the planning authority, where there is a need for “particular scrupulousness” (see Tribunal decision EA/2010/0012, Bristol City Council v Information Commissioner).

3.4.2 Legally privileged information

Where a planning authority seeks legal advice as to the application of planning law, especially concerning a potential breach of planning law or of its own obligations, this would generally be covered by the exemption for legally privileged information under Reg. 12(5) (b). The Tribunal has held that this exception will apply to cover information protected by legal professional privilege, particularly where a public authority is likely to be involved in litigation (Tribunal decision EA/2009/0001, Mersey Tunnel v Information Commissioner). However, it should be noted that the public interest in protecting privileged material will generally decrease over time, potentially to the point where the public interest balance is tipped in favour of disclosure.

3.5 Information relating to services provided by public authorities

Some public authorities, such as certain publicly owned companies or executive agencies which fall under the scope of FOIA and/or the EIRs, will provide commercial services as well as or as part of fulfilling their statutory duties. Examples include:

• the BBC (although its activities relating to journalism, art and literature are specifically excluded from the scope of FOIA),

• the Post Office,

• museums,

• universities, etc.

Potentially relevant exemptions

If the information in question is caught under FOI legislation, disclosure may be exempt because the information is confidential or commercially sensitive (sections 41 and 43(2) FOIA, Reg. 12(5) (e) EIR).

Note that under these exemptions a public authority can point to prejudice to its own commercial interests as a justification for withholding information from disclosure, as well as prejudice to third parties.

3.6 Information relating to tax

HMRC is subject to FOI legislation. However, a request for information relating to taxes paid by a particular company or individual is likely to be exempt from disclosure under section 44 FOIA due to the effect of sections 18 and 23 Commissioners for Revenue and Customs Act 2005. These provisions restrict disclosure of information received by HMRC where disclosure would:

• specify the identity of the person to whom the information relates; or

• enable the identity of such a person to be deduced (which would evidently be the case where there has been a request for disclosure relating to a named person).

This exemption has also been found to apply in relation to information voluntarily supplied to HMRC and correspondence with HMRC as part of negotiations for a Memorandum of Understanding between HMRC and certain tobacco manufacturers who would have been identifiable in this context (Information Commissioner decision FS50074331 – HMRC).

In cases of more generic requests or requests relating to HMRC policy or practice more generally, there is also an exemption under section 31(1)(d) FOIA in respect of disclosure which would be likely to prejudice the assessment or collection of taxes or duties. This exemption applies more widely than to taxes or duties collected by HMRC and has been successfully invoked, for example, by the DVLA in relation to car registration and by the BBC in respect of TV licensing.

3.7 Personal information

Particular considerations arise where information requested includes “personal data” which would be subject to the Data Protection Act 1998 (the “DPA”). The interaction between the DPA and FOI legislation is a complex and technical area of law and it is beyond the scope of this guide to set out the legislative framework in detail. In summary, both FOIA and the EIR effectively make the FOI regime subject to the principles governing the handling of personal information under the DPA.

What is personal data?

“Personal data” is widely defined and will generally include any recorded information in any form relating to a living individual who can be identified from the data. Whether information constitutes personal data will depend on the context and whether the information is sufficiently personal (eg biographical) and focused on the individual.

How is personal data dealt with under FOI?

There are two limbs to this:

• There is an absolute exemption where an applicant requests disclosure of his/her own personal data under FOIA or the EIR, as the DPA is the correct regime for dealing with such requests (section 40(1) FOIA, Reg. 5(3) EIR).
In addition, where a request is made for personal data which does not relate to the applicant, ie personal data of a third party, disclosure of the personal data is only permitted where it would also be permitted under the DPA (section 40(2) FOIA, Regs. 12(3) and 13 EIR). In effect, what this means is that personal information will be exempt from disclosure under FOIA and the EIR if it would breach the data protection principles in the DPA to disclose this information.

**When is disclosure of third party personal information permitted?**

Generally, disclosure of third party personal information will only be permitted in accordance with the first data protection principle. Where the personal information is not “sensitive” (discussed below), this means that:

- personal data must be “processed” (including dealing with disclosure) “fairly” and “lawfully”;
- disclosure is only permitted if at least one of the conditions in Schedule 2 of the DPA is met.

In practice, this means that a public authority must consider whether it would be unfair to disclose the personal information in the circumstances, weighing up the individual’s reasonable expectations to privacy against any legitimate public interest in disclosure (see, eg Tribunal decision EA/2007/0060, House of Commons v IC & Leapman, Brooke and Thomas as upheld by the High Court [2008] EWHC 1084 (Admin)).

Disclosure is likely to be fair and therefore permissible provided that:

- there is a legitimate public interest in disclosure;
- disclosure in accordance with the FOI request is necessary to meet this public interest (which means that it is proportionate and there are no alternative means for obtaining the information which would cause less interference with the individual’s right to privacy);
- disclosure would not cause unwarranted harm to the interests of the individual; and
- the public interest in disclosure would outweigh the likely harm caused to the individual.

Note that there are further qualified exemptions to disclosure under the FOIA and EIR although in practice it is rare for these to be used.

**Is the individual’s consent to disclosure necessary?**

The consent of the individual to the disclosure is not necessary for disclosure to be permitted as a result of an FOI request provided the above test is met. However, if consent had been given, it is likely that disclosure would be permissible and if consent was expressly refused this would be something that the public authority should take into account and would increase the likelihood of disclosure being unfair.

**Sensitive personal data**

Special considerations apply where data is “sensitive personal data” (as defined in s.2 DPA).

Sensitive personal data covers information relating to: racial or ethnic origin, political opinions or religious beliefs, membership of a trade union, physical or mental health or conditions, sexual life and the commission or alleged commission of any offence or any proceedings for any offence committed or alleged to have been committed (including the sentence).

Disclosure of sensitive personal data is not permissible unless, in addition to the other conditions for disclosure outlined above, one of the conditions for disclosure set down in Schedule 3 of the DPA applies. The most relevant conditions which would permit disclosure of sensitive personal data are:

- the individual has consented to the disclosure by the public authority; or
- the information has already been made public by the individual.

In Tribunal decision EA/2010/0054, Professor Prem Sikha v Information Commissioner & The Commissioners of HM Treasury, the Tribunal ordered the disclosure of previously unpublished information contained in a draft report produced by PWC in 1991 into the collapse of BCCI. The information, which had previously been redacted from the published version of the draft report, consisted of the names of a number of companies and individuals and the identity of a foreign state. In relation to the identification of the companies and individuals, the Tribunal held that the exemption in s.40 (2) did not apply to much of the withheld information. In particular, the Tribunal overruled the Commissioner’s finding that in the circumstances of this case, the names of companies and organisations could be regarded as personal data for the purposes of the exemption. It also held that when considering whether to identify individuals, the question should turn on their seniority and the evidence of how they performed at the relevant time. In ordering the disclosure of many of the withheld names, the Tribunal noted that they had held senior positions and had been involved in unlawful transactions or attempts to conceal the financial consequences of such transactions.
4. Practical tips

In this section we set out some practical tips for protecting information provided to public authorities, followed by some hints on how to use FOI requests to get hold of useful information.

4.1 How to protect your information from disclosure

- Have effective information management procedures to deal with information provided to public authorities. This should include, for example:
  - guidelines alerting staff to FOI considerations which can arise if information is provided to public authorities; and
  - ensuring that records are kept of information provided to public authorities.
- Do not rely on blanket confidentiality clauses – these are unlikely to be enforceable.
- Instead, when providing information to public authorities consider what information is truly confidential or commercially sensitive, i.e. it would be harmful to your business if it is disclosed, and focus on protecting this information.
- Make clear what information being provided is confidential/commercially sensitive:
  - Label it, e.g. “Confidential”, “Restricted”, “Commercial in Confidence”
  - Include it in a separate document, e.g. a separate annex or schedule
  - Explain in a cover letter the reasons you consider it to be confidential/commercially sensitive and why you do not want it to be disclosed
- Try to negotiate consultation rights, so that you will have the right to be informed before disclosure of any information is made to a third party. This will give you some time to take any action necessary to protect your position, such as applying for an injunction.

Remember: ultimately, it is the public authority’s decision whether it will provide information in response to an FOI request. In practice, even with consultation rights, there is little you can do to prevent a public authority disclosing your information, short of taking legal steps such as seeking an injunction. Where information is highly sensitive, consider whether it is necessary to provide it to a public authority at all.

4.2 How to use the legislation to get hold of information

- Check whether information is already publicly available, e.g. through a public authority’s publication scheme or on its website.
- Ensure a request for information to a public authority is made in writing – as well as being a requirement under FOIA, it will also assist in keeping track of what has been requested and the time the request has been made.
- Avoid requests of a general nature, which might be too time consuming and hence expensive for a public authority to respond to under the costs threshold. Invite the public authority to let you know if compliance with the request in full would exceed the costs threshold, so that you can narrow the request if possible.
- Try to be as specific as possible about the information being requested, e.g. specify as many details about the type of information you want as possible, such as the names of the people or departments involved, the relevant time period, etc.

Remember: if your request is refused you can ask for an internal review of the decision, and if you are still not satisfied you can apply to the Information Commissioner for a reconsideration of the decision. However it is worth noting that the Commissioner’s investigations commonly take up to a year to be resolved, and sometimes longer.
## Annex 1 Main differences between FOIA and the EIR

<table>
<thead>
<tr>
<th></th>
<th>FOIA</th>
<th>EIR</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of information which is covered</strong></td>
<td>Any information held by a public authority (apart from environmental information which will be dealt with under the EIR)</td>
<td>Environmental information held by a public authority (as defined in regulation 2)</td>
</tr>
<tr>
<td><strong>Format of request</strong></td>
<td>Request must be in writing</td>
<td>Request can be made orally as well as in writing</td>
</tr>
<tr>
<td><strong>Who must comply with an FOI request?</strong></td>
<td>Specific list of public authorities set out in FOIA (including central and local government, local planning authorities, regulators and publicly owned companies)</td>
<td>A wider definition than under FOIA, the EIR definition also covers any bodies carrying out functions of public administration and bodies under the control of a public authority which have responsibility relating to the environment</td>
</tr>
<tr>
<td><strong>Exemptions to disclosure</strong></td>
<td>Both <strong>absolute</strong> exemptions and <strong>qualified</strong> exemptions (ie exemptions only apply if public interest test satisfied)</td>
<td>Similar exemptions as under FOIA, but not identical</td>
</tr>
<tr>
<td></td>
<td></td>
<td>All exemptions subject to the public interest test (ie all exemptions are <strong>qualified</strong>)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Certain exemptions do not apply if information requested relates to emissions</td>
</tr>
<tr>
<td><strong>Deadline for responding to request</strong></td>
<td>20 working days, or extension if needed to decide whether public interest test is met in respect of a qualified exemption</td>
<td>20 working days, or extension of up to 40 working days if the complexity and volume of information requested means that it would not be practical to comply within 20 working day limit</td>
</tr>
<tr>
<td><strong>Cap on cost of complying with request?</strong></td>
<td>Yes – public authority does not have to comply if cost of compliance would exceed the &quot;appropriate limit&quot; (£600 for central government, legislative bodies and the armed forces and £450 for all other public authorities)</td>
<td>No (although excessive cost may be a relevant factor in determining whether a request is &quot;manifestly unreasonable&quot; within Reg. 12 (4) (b))</td>
</tr>
</tbody>
</table>
START

Is the information requested "environmental" information?

Yes → Does the public authority hold the information?

No → Consider under the FOIA

Yes → Must inform the applicant that it holds the information but is refusing to provide it due to exemption (with reasons) promptly and within 20 working days (Possible "reasonable" extension if need to consider public interest test for qualified exemption)

No → Must inform the applicant that it does not hold the information (with reasons) promptly and within 20 working days (Possible "reasonable" extension if need to consider public interest test for qualified exemption)

Does the public authority hold the information?

Yes → Must inform the applicant that it holds the information but is refusing to provide it due to exemption (with reasons) within 20 working days (Possible extension to 40 working days in cases of large volume/high complexity)

No → Must inform applicant that it does not hold the information within 20 working days (Possible extension to 40 working days in cases of large volume/high complexity)

Consider under the EIR

Does the public authority hold the information?

Yes → Must inform the applicant that it holds the information and provide it within 20 working days (Possible extension to 40 working days in cases of large volume/high complexity)

No → Is it third party information?

Yes → Third party to be consulted in accordance with the Code of Practice

No → Consider under the FOIA

Is it third party information?

Yes → Must inform applicant that it does not hold the information

No → Is the information requested "environmental" information?

Yes → Consider under the FOIA

No → Do any absolute or qualified exemptions apply?

Yes → Must inform the applicant that it holds the information but is refusing to provide it due to exemption (with reasons) within 20 working days (Possible extension to 40 working days in cases of large volume/high complexity)

No → Is the information requested "environmental" information?

Yes → Must inform the applicant that it cannot confirm or deny whether it holds the information within 20 working days

No → Must inform applicant that it does not hold the information within 20 working days

Consider under the FOIA

Is the information requested by a third party?

Yes → Third party to be consulted in accordance with the Code of Practice

No → Do any absolute or qualified exemptions apply?

Yes → Must inform the applicant that it does not hold the information

No → Must inform the applicant that it holds the information

Would it be contrary to international relations, defence, national security, public safety or personal data exceptions, exemption to confirm that the information is held?

Yes → Must inform applicant that it does not hold the information

No → Must inform the applicant that it holds the information and provide it within 20 working days (Possible extension to 40 working days in cases of large volume/high complexity)

Would it be contrary to exemption to confirm that the information is held?

Yes → Must inform the applicant that it does not hold the information

No → Must inform the applicant that it holds the information but is refusing to provide it due to exemption (with reasons) within 20 working days (Possible extension to 40 working days in cases of large volume/high complexity)

Do any exemptions apply? (All exemptions are qualified)

Yes → Must inform the applicant that it does not hold the information

No → Must inform the applicant that it holds the information and provide it within 20 working days (Possible extension to 40 working days in cases of large volume/high complexity)
# Annex 3: table of exemptions under FOIA and EIR

<table>
<thead>
<tr>
<th>FOIA provision</th>
<th>Exemption</th>
<th>Absolute/qualified</th>
<th>Nearest equivalent EIR exemptions*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 12</td>
<td>The cost of compliance exceeds &quot;appropriate limit&quot;</td>
<td>N/A</td>
<td>None, although might be able to rely on exemption that the request is manifestly unreasonable (Reg. 12(4) (b)), although high burden to prove, or potentially exemption that request is too general despite having provided advice and assistance (Reg. 12(4) (c))</td>
</tr>
<tr>
<td>Section 14</td>
<td>The request is vexatious or is a subsequent identical/ substantially similar request</td>
<td>N/A</td>
<td>Might be able to rely on exemption that the request is manifestly unreasonable (Reg. 12(4) (b)) – higher burden to prove than &quot;vexatious&quot;.</td>
</tr>
<tr>
<td>Section 21</td>
<td>The information is accessible by other means</td>
<td>Absolute</td>
<td>Reg. 6(1) (b) – public authority does not have to make information available if it is already publicly available and easily accessible to the applicant in another form or format</td>
</tr>
<tr>
<td>Section 22</td>
<td>The information is held with a view to publication at a future date</td>
<td>Qualified</td>
<td>Might be able to rely on exemption that the material is still in the course of completion, comprises unfinished documents or incomplete data (Reg. 12(4) (d))</td>
</tr>
<tr>
<td>Section 23</td>
<td>The information was supplied by or relates to security forces (eg MI5, MI6, GCHQ, SOCA)</td>
<td>Absolute</td>
<td>Disclosure would adversely affect national security or public safety (Reg. 12(5) (a))</td>
</tr>
<tr>
<td>Section 24</td>
<td>The information required to be withheld for the purpose of safeguarding national security</td>
<td>Qualified</td>
<td>Disclosure would adversely affect national security (Reg. 12(5) (a))</td>
</tr>
<tr>
<td>Section 26</td>
<td>Disclosure would/would be likely to prejudice the defence of the British Islands or any colony or the capability, effectiveness or security of relevant armed forces</td>
<td>Qualified</td>
<td>Disclosure would adversely affect defence (Reg. 12(3) (a))</td>
</tr>
<tr>
<td>Section 27</td>
<td>Disclosure would/would be likely to prejudice international relations or is confidential information obtained from another State, international organisation or court</td>
<td>Qualified</td>
<td>Disclosure would adversely affect international relations (Reg. 12(5) (a))</td>
</tr>
<tr>
<td>Section 28</td>
<td>Disclosure would/would be likely to prejudice relations between the UK government and devolved administrations</td>
<td>Qualified</td>
<td>None, although could consider whether request involves disclosure of internal communications (Reg. 12(4) (e))</td>
</tr>
<tr>
<td>Section 29</td>
<td>Disclosure would/would be likely to prejudice economic interests of the UK or financial interests of the UK government or devolved administrations</td>
<td>Qualified</td>
<td>None, although could consider whether request involves disclosure of internal communications (Reg. 12(4) (e))</td>
</tr>
</tbody>
</table>

* All EIR exemptions are qualified
<table>
<thead>
<tr>
<th>FOIA provision</th>
<th>Exemption</th>
<th>Absolute/qualified</th>
<th>Nearest equivalent EIR exemptions*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 30</td>
<td>Information has been held for the purposes of a criminal investigation or proceedings or was obtained in connection with certain criminal/civil investigations or proceedings and relates to obtaining information from confidential sources</td>
<td>Qualified</td>
<td>Disclosure would adversely affect the course of justice or ability of a public authority to conduct an inquiry of a criminal or disciplinary nature (Reg. 12(5) (b))</td>
</tr>
<tr>
<td>Section 31</td>
<td>Disclosure would/would be likely to prejudice law enforcement interests and activities (including regulatory investigations and proceedings, tax control and immigration)</td>
<td>Qualified</td>
<td>Disclosure would adversely affect the course of justice, ability of a person to receive a fair trial or ability of a public authority to conduct an inquiry of a criminal or disciplinary nature (Reg. 12(5) (b))</td>
</tr>
<tr>
<td>Section 32</td>
<td>Information forms part of a court record</td>
<td>Absolute</td>
<td>None, although public authorities acting in a judicial capacity are automatically excluded from scope of the EIR (Reg. 3(3))</td>
</tr>
<tr>
<td>Section 33</td>
<td>Disclosure would/would be likely to prejudice exercise of public audit functions</td>
<td>Qualified</td>
<td>None, although could consider whether request involves disclosure of internal communications (Reg. 12(4) (e))</td>
</tr>
<tr>
<td>Section 34</td>
<td>Information must be withheld to prevent an infringement of parliamentary privilege</td>
<td>Absolute</td>
<td>EIR do not apply to either House of Parliament to the extent required in order to avoid an infringement of parliamentary privilege (Reg. 3(4))</td>
</tr>
<tr>
<td>Section 35</td>
<td>Information relates to the formulation or development of government policy and ministerial communications</td>
<td>Qualified</td>
<td>Request involves disclosure of internal communications, including between government departments (Reg. 12(4) (e) and 12(8))</td>
</tr>
<tr>
<td>Section 36</td>
<td>Disclosure would/would be likely to prejudice effective conduct of public affairs</td>
<td>Qualified (absolute where relates to information held by House of Commons/House of Lords)</td>
<td>Might be able to rely on exemption where disclosure of internal communications, including between government departments (Regs. 12(4) (e) and 12(8))</td>
</tr>
<tr>
<td>Section 37</td>
<td>Information relates to communications with the Queen or Royal Family</td>
<td>Absolute where relates to Queen, heir to throne or second in line to throne, otherwise qualified</td>
<td>None, although could consider whether request involves disclosure of internal communications (Reg. 12(4) (e))</td>
</tr>
<tr>
<td>Section 38</td>
<td>Disclosure would/would be likely to endanger health and safety of any individual</td>
<td>Qualified</td>
<td>Disclosure would adversely affect public safety (Reg. 12(5) (a))</td>
</tr>
<tr>
<td>Section 39</td>
<td>Environmental information falling under scope of EIR</td>
<td>Absolute – EIR apply instead</td>
<td>N/A – though note that there is an exemption where disclosure would adversely affect the protection of the environment to which the information relates (Reg. 12(5) (g)) (this exemption cannot apply where the information relates to emissions)</td>
</tr>
<tr>
<td>Section 40(1)</td>
<td>Information which constitutes personal data of applicant</td>
<td>Absolute (to be dealt with under DPA 1998)</td>
<td>Equivalent exemption in Regs. 12(3) and 13</td>
</tr>
</tbody>
</table>

* All EIR exemptions are qualified
<table>
<thead>
<tr>
<th>FOIA provision</th>
<th>Exemption</th>
<th>Absolute/qualified</th>
<th>Nearest equivalent EIR exemptions*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 40(2)</td>
<td>Information which constitutes personal data of any person other than applicant, where disclosure would not be permitted under the DPA 1998</td>
<td>Generally absolute (ie where relates to breach of data protection principles), though qualified in certain cases (rarely used in practice)</td>
<td>Equivalent in exemption in Regs. 12(3) and 13</td>
</tr>
<tr>
<td>Section 41</td>
<td>Information obtained by the public authority from another person and disclosure would constitute an actionable breach of confidentiality</td>
<td>Absolute</td>
<td>Disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest (Reg. 12(5) (e)) Possibly also exemption for disclosure which would adversely affect the interests of the person who provided the information where that person has provided the information voluntarily and on the basis that disclosure would not be made and consent withheld (Reg. 12(5) (f)) NB the exemptions in 12 (5) (e) and (f) cannot be relied on where the information relates to “emissions”</td>
</tr>
<tr>
<td>Section 42</td>
<td>Information covered by legal professional privilege (ie legal advice privilege or litigation privilege)</td>
<td>Qualified</td>
<td>No exact equivalent, though can generally rely on exemption where disclosure would adversely affect the course of justice (Reg. 12(5) (b))</td>
</tr>
<tr>
<td>Section 43(1)</td>
<td>Information constituting a trade secret</td>
<td>Qualified</td>
<td>Disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest (Reg. 12(5) (e)). Note that this exemption cannot apply where the information relates to emissions. Note also exemption from disclosure which would adversely affect intellectual property rights (Reg. 12(5) (c))</td>
</tr>
<tr>
<td>Section 43(2)</td>
<td>Disclosure would/would be likely to prejudice commercial interests of any person (including public authority)</td>
<td>Qualified</td>
<td>Disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest (Reg. 12(5) (e)). This exemption cannot apply where the information relates to emissions.</td>
</tr>
<tr>
<td>Section 44</td>
<td>Disclosure is prohibited by/under any enactment, is incompatible with any EU obligation or would constitute/be punishable as a contempt of court</td>
<td>Absolute</td>
<td>None – note Reg. 5(6) which provides that “Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply”.</td>
</tr>
</tbody>
</table>

* All EIR exemptions are qualified
Annex 4: confidential and commercially sensitive information

Cases on confidential/commercially sensitive information

Information Commissioner Decision FS50380505 – Lincolnshire County Council

The complainant requested copies of all tender applications for the council’s contract to provide services to the sensory impaired. The Commissioner found that council had not been entitled to withhold all the information under sections 43(1) and (2) FOIA. The council was required to: (a) disclose all sections of the successful tender application other than the apportionment of costs within the pricing schedules. The disclosure must include the successful bidder’s capability statement and the total budget costs for each of the pricing schedules. This decision is under appeal.

Information Commissioner Decision FS50296349 – BBC

The complainant requested a copy of all contracts and relevant documents in force at the time of his request between the BBC and Capita Business Services Ltd (“Capita”) and the BBC and iQor/Revenue Management Services Ltd (RMS) which related to the enforcement of the television licensing system and the collection of television licence fees. Although a redacted copy of these two contracts was provided to the complainant, he remained dissatisfied with the redactions made. The Commissioner determined that section 43(2) was engaged in relation to the commercial interests of RMS and the BBC as disclosure would be likely to be prejudicial to either party. He also accepted that section 43(2) was engaged in relation to the commercial interests of Capita and the BBC. However, he considered that the public interest in maintaining the exemption did not outweigh the public interest in disclosing the information in the case of both contracts. He therefore ordered that the requested information be disclosed.

Information Commissioner Decision FS50084359 – Plymouth City Council

A request was made for information relating to a contract between a number of PCTs, the Department of Health and a Service Provider company in respect of the provision of an independent treatment centre at which NHS patients would be treated privately for certain types of procedures. The request covered the contract itself and related correspondence and other documents. The Commissioner ordered the disclosure of most of the information sought. Some of the information in the contract was capable of falling within section 41 as it was information provided by the Service Provider to the PCT rather than negotiated and agreed. Most of the information set out in the Service Provider’s financial models (covering overheads, cashflow, investment, financing, tax liability, profit and loss accounts and balance sheets) was held to be exempt under section 41. However, information relating to the volume of procedures to be carried out by the Service Provider each year and the price payable for the service was held to fall outside section 41 and section 43(2) and had to be disclosed. Most of the remaining information was withheld on the basis of the exemption in section 43(2). This included information relating to financial penalties payable by the Service Provider for performance failures, sums payable on termination, default interest rates, insurance requirements and a detailed business case for the treatment centre which assessed the bids which had been made for the contract. The Commissioner held that most of that information should be disclosed. Having undertaken a very detailed consideration of the likelihood of any prejudice to the commercial interests of the PCT, the Department of Health and the Service Provider, he concluded that the exemption was not engaged by the vast majority of the information as there was not a sufficient likelihood of prejudice. The only information which the Commissioner agreed engaged section 43(2) was information in the business case relating to the bidders’ financing strategies. He also held that the greater public interest lay in protecting such information from disclosure.

Nottinghamshire County Council v Information Commissioner – EA/2010/0142

The council (NCC) entered into a PFI contract, with Veolia Environmental Services (Veolia) to outsource certain waste management functions in order to enable NCC to discharge its statutory waste management obligations. The complainant asked to see the contract and related documents. NCC provided the majority of the requested information, but withheld some citing Reg. 12(5) (e) EIR. The Commissioner decided that the exception was engaged, but that the public interest in disclosure should prevail. The 2nd Additional Party (UK Coal Mining) appealed the Commissioner’s decision on the basis that disclosure of the withheld information would prejudice its commercial interests. The First Tier Tribunal (FTT) held that the information requested by the complainant had no bearing on the environment, and consequently that the request fell firmly within the FOIA regime. The FTT allowed the 2nd Additional Party’s appeal under section 43(2) FOIA (commercial interests), holding that the contractual documents could be supplied to the complainant with the commercial and financial information redacted. This decision is under appeal.

Chichester District Council v Information Commissioner – EA/2010/0153

A request was made for information about a valuation produced by the Council relating to land which it owned and proposed to sell as part of a development. The valuation had been prepared by a Council Officer. The Council refused to disclose the information on the basis that it would have a prejudicial effect on its ability to sell the land for the best possible price. At the time of the request, outline planning permission had been sought but not granted and the land had not yet been put on the market. The valuation was produced in 2007 but the Council claimed that it was still an accurate reflection given that land prices had remained relatively static. The Tribunal ordered that most of the information should be disclosed. The Tribunal found that the exemption for confidential information could not apply because the information had been generated internally by the Council and so there was no duty of confidentiality provided by law which could be enforced by a third party. The Council could not “self-generate” confidentiality. This decision is under appeal.

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**BBC & One Transport Ltd v Information Commissioner – EA/2010/0150**

The Tribunal upheld an appeal by the BBC against the Information Commissioner’s decision requiring it to disclose the sum paid by the BBC to a taxi company in a particular year. It was held that the BBC was entitled to withhold the information under section 43(2) FOIA. The Tribunal was satisfied on the evidence that there was a real and significant risk that prejudice would occur to the BBC and/or the taxi company by disclosure - the taxi company had shown that a competitor, armed with the disputed information, could work with other information already in the public domain to unravel its pricing mechanism and detailed information about its bidding process. It was not in the public interest to disclose the information as the evidence showed that disclosure would amongst other things prevent the BBC from ensuring future tenders were conducted in a fair, open environment. In reaching its decision the Tribunal took account of the OGC guidance on disclosure of civil procurement information.

**Zacharides v Information Commissioner – EA/2010/0162**

A request was made for progress reviews submitted by UK Athletics to the UK Sports Council pursuant to a funding agreement over a particular period. The information was withheld under section 41 FOIA (confidential information) and the Information Commissioner upheld that decision. On appeal to the Tribunal, it was accepted that the information had the necessary quality of confidence - the Sports Council had undertaken not to disclose it and there was now a contract in place containing a confidentiality clause. The Tribunal then considered whether there could be any public interest defence to a claim for breach of confidence which was sufficient to outweigh the presumption of confidentiality. It concluded that there was not and that the information should not be disclosed.

**Elmbridge Borough Council v Information Commissioner – EA/2010/0106**

The Tribunal upheld the Commissioner’s decision requiring the Council to disclose a viability report submitted by a developer in support of a planning application. The report contained details on costs, revenues, values and finances associated with the development. The Council had withheld the information, relying on the exemptions in Regs. 12(5) (e) and (f) of the EIRs and claiming that the information was commercially sensitive and would be prejudicial to the developer if disclosed. The Tribunal found, as the Commissioner had, that the exemptions were not engaged because the Council had not provided independent and objective evidence of the alleged prejudice. The Tribunal found that the “evidence” in support of the exemptions was no more than assertions and speculation by the developer and other interested parties. They had failed to establish that on the balance of probabilities disclosure of the information would harm the developer’s economic interests.

**Staffordshire County Council v Information Commissioner – EA/2010/0015**

The requester, who lived near a quarry, asked for copies of the annual mineral returns submitted for the last 10 years in respect of that quarry, including details of the sales and reserves for each year. The information was collected annually by the completion of a form by each quarry operator on a voluntary basis. The forms were marked “strictly confidential” and were sent with a letter promising to treat any data provided with the strictest confidence. The Information Commissioner had held that Regs. 12 (5) (e) and (f) of the EIRs were engaged but required disclosure in the public interest. On appeal, the Tribunal found that if the information was disclosed, this might lead to quarry operators refusing to submit the information, which would not be in the public interest. There was a real risk that the quarry operator could bring a successful breach of confidence claim against the local authority.

**Bath & North East Somerset Council v Information Commissioner – EA/2010/0045**

The Tribunal allowed in part the Council’s appeal against the Commissioner’s decision that it should disclose (i) a developer’s financial model and (ii) independent viability reports prepared for the Council, in the context of a co-operation agreement between the developer (Crest Nicholson) and the Council relating to a major development on a brownfield site in the centre of Bath. Under the terms of the agreement, Crest had agreed to work on an “open book” basis, so that the Council could look at the financial assumptions underlying the proposals. As part of that process Crest provided the Council with its detailed financial models which included commercially sensitive information relating to fees, cash flow and anticipated land values etc. It was common ground that this information fell within the exemption but, overruling the Commissioner, the Tribunal held that the models could be withheld in the public interest. In relation to the viability assessments, these should be disclosed subject to the redaction of commercially sensitive information. In support of the public interest in non-disclosure, the Tribunal was persuaded that disclosure would have prejudiced Crest’s negotiating position and given its competitors a material advantage at a time when it was in active discussions regarding a comprehensive restructuring of its finances. There would also have been a prejudicial commercial impact on the scheme as a whole and on the Council’s commercial interests, because any litigation ensuing if the information was disclosed would incur costs for the Council and bring uncertainty to the future of the scheme.


The Tribunal held that section 41 FOIA did not apply to information relating to the state of buildings at Higher Education Institutions which they had voluntarily contributed to a database of such information. The HEFCE confirmed that the requested information was held on the database but refused to disclose it on the basis that most of it had been received from third parties who had an expectation of confidentiality. The Tribunal considered first
the meaning of “actionable” within the exemption, namely whether section 41 is engaged if a breach of confidence claim would be merely arguable, or if it is necessary to establish that the claim would succeed on the balance of probabilities. It found that “actionable” in this context means one can take action and win, taking into account whether any public interest defence to the claim is available. Having found that the information had the necessary quality of confidence, it considered whether detriment is an essential element of a breach of confidence claim. It found that the test in Coco v Clark applied and that the HEFCE must prove that detriment would flow from disclosure in order for section 41 to be engaged. In this case, it was satisfied that such potential detriment did exist. The final issue was whether a public interest defence to the claim would be available. The Tribunal found that, applying the test of proportionality defined by the Cast of Appeal in HRH Prince of Wales v Associated Newspapers Ltd the factors in favour of disclosure substantially outweighed those in favour of maintaining confidentiality and the HEFCE would therefore have a valid public interest defence to any breach of confidence claim brought against it following disclosure. Section 41 was therefore not engaged.

Department of Health v Information Commissioner – EA/2008/0018

A request was made for a copy of the contract entered into (following a competitive tendering process) by the Department of Health ("DOH") with Methods Consulting Ltd to set up a recruitment service website for the NHS. The contract was withheld, on the basis of section 41 (confidentiality) section 43 (commercial prejudice and trade secrets) and section 44 (statutory bar on disclosure by virtue of a provision in the Public Contracts Regulations). The Information Commissioner ordered the DoH to disclose the contract and the DoH appealed. On section 41, the Tribunal rejected the DoH’s argument that all the information in the contract had been “obtained” by the DoH from Methods – the DoH had attempted to argue that the drafting process had not been collaborative and that effectively Methods had submitted the terms to the DoH without any real negotiation. The Tribunal found that the contract terms were mutually agreed and not obtained by either party. On that basis, section 41 could not apply. Neither did section 44. The DoH had argued that Reg. 30 Public Service Contracts Regulations 1993 operated as a statutory bar on disclosure. Reg. 30 provides that a contracting authority “shall comply with such requirements as to confidentiality of information provided to it by a service provider as the service provider may reasonably request.” The Tribunal found that for the same reasons that section 41 did not apply, the contract information had not been “provided” by Methods to DoH so section 44 was not engaged. The Tribunal then considered whether section 43(1) (trade secrets) applied to any of the information but found that any of the disputed material which could constitute a trade secret would fail more comfortably within the scope of section 43(2). Given that both section 43(1) and (2) are subject to the same public interest test and that the arguments advanced in support of the public interest in protecting the information were the same in each case, the Tribunal instead considered the applicability of section 43(2). Breaking down the contract, it held that some of the information engaged the exemption while some did not.

Robin Williams v Information Commissioner & Cardiff & Vale NHS Trust – EA/2008/0042

This case arose from a request for information about the sale of an NHS hospital site to a developer, covering a broad range of information including the tender process, choice of preferred bidder and negotiations for sale. Information was withheld on the basis of section 43(2) (commercially sensitive information). The Information Commissioner upheld the Trust’s decision. On appeal, the Tribunal found that the section 43(2) exemption was engaged by withheld information consisting of appraisals of companies bidding for the site and individuals associated with those companies. The appraisals, prepared by King Sturges, a firm of property agents, were as to the financial health of the companies and their intentions in making the bids. It was argued that disclosure would involve a real and significant risk of prejudice to the commercial interests of the developers (through reputational damage) and King Sturges (on the basis that they would lose the trust of those in the field if it were known that information shared with them might become public). The Trust would also suffer the loss of confidence of the property market on the ground that it could not maintain the integrity of any particular transaction. However, the Tribunal held that the public interest in disclosure was outweighed by the public interest in maintaining the exemption. There was a strong public interest in the Trust being able to obtain and rely upon the professional opinions of property agents in their private sector transactions. Without this there was less chance of a public authority achieving the best price and therefore the most efficient use of public resources. Equally, there was a public interest in there being private sector companies prepared to do business with public sector entities without fear of disclosure of the kind of information which could damage their commercial interests.
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