freedom
of information Ltd

Winning business through FOI

Using the Freedom of Information Act to maximize your competitive advantage

Contents

Introduction

Since its introduction in 2005, the Freedom of Information Act (FOIA) has had a profound effect on British public life, making politicians and officials more accountable than ever.

But did you know that the FOIA is also a great tool for business?

Smart companies are using the Act to gather vital commercial intelligence, which puts them at an advantage, whether they're chasing public sector contracts, seeking new clients, or simply want the inside track on decision making.

This booklet tells you more about the FOIA and its sister legislation and demonstrates how you can use it to enhance your competitive position. It also explains how we can help.

Part 1

FOI – the basics

The FOIA hands you the power to uncover how the UK's institutions are run. Our secretive need-to-know culture, though not completely dead and buried, has been replaced by a legal *'Right to Know'*.

The Act covers almost all of the public sector, from Government departments down to primary schools and GP practices. It applies to England, Wales and Northern Ireland, plus UK Government departments operating in Scotland. Environmental information is covered separately by the Environmental Information Regulations and organisations under the control of the Scottish Executive are subject to parallel legislation.

Using the Right to Know

To help you use FOI legislation effectively you need to understand how it works in practice. It gives you two basic rights:

- To ask almost every public organisation what information it has on any subject you specify
- If the organisation has the information, to be provided with it.

Your information request must be in writing (email will do) and include a contact postal address. You're not obliged to explain why you want the information and the organisation receiving the request has no right to ask you.

As long as the information is not legally exempt from disclosure, the organisation must tell you what it has and supply it to you within 20 working days. In most cases, even if it withholds the information, it at least has to tell you what it has. The legislation makes the destruction or alteration of records to prevent disclosure a criminal offence.

What if your request is refused?

If your request is refused, you may complain to the organisation involved, which must then carry out an internal review. If the complaint is rejected, you can appeal to the Information Commissioner, who is responsible for enforcing the FOIA and EIRs. If he finds in your favour, he has legal power to force disclosure. If the Commissioner finds against you, you can appeal to the independent Information Tribunal (formally known as the First Tier Tribunal (Information Rights)). Public authorities may also appeal to the Tribunal if the Commissioner finds against them.

Environmental information

Environmental information falls under the Environmental Information Regulations (EIRs), rather than the FOIA. The Regulations do not specify exactly what information should be classed as environmental, but among the types covered are:

- Raw data on subjects such as air and water quality levels, industrial discharge rates, soil quality and biodiversity
- Regulatory measures affecting the environment, including policies, plans, programmes and agreements
- Reports on the implementation of environmental legislation

- Economic data, including cost benefit analyses on regulatory measures
- Health & safety information, on subjects such as food and land contamination and quality of life.

There is no geographical restriction on the information, as long as it is held by one of the public authorities covered by the EIRs. It may therefore include, for example, data about UK embassies and foreign aid programmes. Unlike the FOIA, information requests may be made orally, as well as in writing.

Scotland

Scotland has its own The FOIA and EIRs, which are similar, but not identical to, the UK legislation. They are explained in more detail in Appendix 1.

Cost

Under the FOIA's Fees Regulations, there is no charge for requests that fall within the so-called appropriate cost limit, which is £600 for central government departments and £450 for all other public authorities, based on staff costs of £25 per hour. Crucially, the costs only apply to the time spent determining what information the authority holds, locating and retrieving it and, if necessary, editing or redacting it. They do not apply to time spent considering whether the information is exempt from disclosure, advising and assisting you with your request, copying the information and putting it in your preferred format, all of which can be fairly time consuming.

If the appropriate limit is breached, the authority may refuse your request, but must tell you what information would be available within the limit and invite you to narrow down the request accordingly. If you insist on having all the information, the authority may charge you the full amount, but also has the option of waiving the fees.

Unlike the FOIA, the EIRs have no appropriate cost limit and instead allow authorities to charge a *'reasonable'* amount for information. Although they can, in theory, charge you all their costs, it would be difficult for them to claim that the charges were reasonable if they strayed far from the FOIA Fees Regulations.

Part 2

Using FOI to help your business

FOI is a fantastic tool for business, especially if your company is seeking public sector contracts. In the United States, which has had a FOIA since the 1960s, companies routinely use it in this way and majority of information requests are from the commercial sector.

Used properly, the Act can yield a wealth of information that will put you ahead of the competition.

If you're chasing public sector contracts…

The available data includes:

- Background information that shapes procurement decisions, for example, meeting minutes and internal discussion documents
- Compliance and performance data, which reveal how rivals have performed
- Clients' evaluation criteria, which show how previous bids have been evaluated and contract decisions reached.

If you're seeking other commercial intelligence…

You can get access to:

- Rivals' contracts with public authorities
- Details of their previous bids
- The prices offered and paid for goods and services.

If your business is affected by government policy…

You can obtain:

- Key strategy documents that influence the regulatory climate, such as working party and consultants' reports
- Internal correspondence
- Details of commercial lobbying by rivals and others.

Other uses of FOI

- Ensuring fair treatment. If you believe your organisation has been mistreated by a regulatory or legislative body, you can seek the information that could help you gain redress.

- Legal cases. Information held by public bodies can be utilised in civil litigation cases

- Campaigning. If you're running a campaign, FOI can yield a wealth of official facts and figures to bolster your cause.

Part 3

What restrictions are there?

Although the FOIA allows you automatic right of access to most information held by public authorities, sensitive information may remain protected. The Act has 23 exemptions, some of them absolute and others subject to a public interest test. This section describes the ones most likely to be relevant to the private sector. Appendix 2 explains the exemptions in further detail.

Commercial information

Not all commercial information has to be automatically disclosed. Section 41 of the Act exempts confidential data, while 43 exempts trade secrets and commercially prejudicial information.

Section 41 applies to information whose disclosure could lead to an *'actionable'* breach of confidence. Although it is classified as an absolute exemption, there is a well-established legal principle that the duty of confidence does not apply when there is a public interest in disclosing serious wrongdoing, or dangers to public safety. More importantly, the official guidance makes clear that information should not be considered confidential unless absolutely necessary. This has had a major impact on public sector contractors, who before the Act tended to designate all information as confidential, and ensured that contracts contained confidentiality clauses to prevent their disclosure. The official guidance states that public authorities *'should reject such clauses wherever possible'* and the Information Commissioner and Information Tribunal may overrule them, especially if they consider that the breach of confidence would not result in a legal action.

Section 43 applies to trade secrets and to information that could otherwise prejudice a company's commercial interests. Some obvious examples of trade secrets are the formulae of newly patented drugs and details of bespoke computer programmes. Prejudicial information is likely to include details of current bids for public sector contracts.

The exemption is subject to the public interest test, so, even if the information is considered to be commercially prejudicial, it might nevertheless be released if it's considered the public interest in making the information known outweighs that in avoiding the potential commercial damage. It can be difficult to draw the line between the protection of legitimate commercial interests and the public's right to know how its money is spent, however, the FOIA makes a presumption in favour of disclosure, so, if the balance is a very fine one, the information should, in theory, be disclosed.

Timing will often be an issue in respect of commercial information, as it generally becomes less commercially sensitive with time. For example, while contract bids might be highly sensitive prior to the contract being awarded, they are far less so afterwards. Likewise, trade secrets are often only of limited duration.

Policy making and public administration

The key exemptions here are contained in the FOIA's sections 35 and 36.

Section 35 applies to the UK central government and the Welsh and Northern Irish assemblies. It covers: *'(i) the formulation or development of Government policy (ii) ministerial communications, including cabinet proceedings; (iii) advice by government law officers; and (iv) the operation of ministerial offices'.* There are generally strong public interest grounds for withholding such information while policy decisions are still pending. Once decisions have been made, the Act allows for background statistical information to be released. Ministers and their officials have been reluctant to release internal communications and advice documents, but they have sometimes been overruled by the Information Commissioner and the Information Tribunal.

Section 36 applies to the release of information that might prejudice the *'effective conduct of public affairs'.* Such information is exempt if *'in the reasonable opinion of a qualified person disclosure would, or would be likely to'* either: (a) *'prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown'*; or (b) *'inhibit: (i) the free and frank provision of advice; or (ii) the free and frank exchange of views for the purpose of deliberation; or would otherwise prejudice the effective conduct of public affairs.'*

Public authorities must evaluate the impact of the information's disclosure, rather than its actual content. In reality it is often difficult to separate the two, but there may be situations in which the very fact of disclosure will discourage officials, or advisors, from giving candid views and advice, no matter how uncontroversial their opinions. However, it is not enough that disclosure would result in embarrassment.

According to official guidance, some of the public interest considerations that may weigh in favour of disclosure are:

- That open policy making may lead to increased trust and engagement between citizens and government
- That citizens can be satisfied that decisions are taken on the basis of the best available information
- That the information would expose wrongdoing on the part of government.

Some of the factors which may weigh against are:

- That politicians and officials need space in which to develop their thinking and explore options in communications and discussions with others

- There needs to be a free space in which it is possible to 'think the unthinkable' and use imagination, without the fear that policy proposals will be held up to ridicule

- Ministers and official need to be able to think through all the implications of particular options. In particular, they need to be able to undertake rigorous and candid assessments of the risks to particular programmes and projects.

In the end it's all about effort

Public bodies are often reluctant to part with information and, unless vigorously challenged, will frequently withhold it on dubious grounds.

So, the more you know about the FOI legislation, the more you get.

Which is where we come in….

Part 4

Freedom of Information Ltd – helping you to win business

Using the Right to Know to its full potential can be complex and time consuming. Freedom of Information Ltd will do the work for you. The UK's only FOI research agency, we're able to quickly locate, access and present the information to help you in areas such as:

- Customer intelligence and marketing. We can locate critical information on public sector clients; their requirements and the criteria they apply when awarding and evaluating contracts.

- Competitor intelligence. While genuine commercial secrets are exempt from disclosure, we can unearth details of previous rival bids for public contracts, the prices paid for goods and services and much else.

- Policy making. We can get you the inside track on the policy decisions that affect your business.

- Ensuring fair treatment. If you suspect your organisation has been mistreated by an official body, we can seek the information that could help you gain redress.

Why clients use us

- Skill. Getting the most out of FOI requires a detailed knowledge of its theory and practice. Our experience and know-how enables us to battle effectively and deliver the best results.

- Anonymity. Companies chasing public sector contracts, or negotiating with government, are generally reluctant to jeopardise sensitive relationships by making information requests. The UK's FOI legislation enables us to make requests on clients' behalves, thus guaranteeing their anonymity.

- Value for money. Using the legislation effectively can be a considerable drain on staff time. We offer the most cost effective solution, charging a fraction of lawyers' rates.

Case studies

1. Market intelligence

A social work personnel agency, which supplies staff to local authorities, wished to get a picture of the potential market in its target region.

We applied to a number of local authorities in the region and obtained details of staffing levels, vacancy and sickness rates, and the numbers of agency staff employed, during the previous 12 months.

2. Competitor intelligence

A company that provides specialist professional services to education authorities had recently lost out on a number of contracts to rivals. They were keen to know why and how they might improve their bids in future.

We were able to obtain their rivals' bid documents and internal evaluation reports, which demonstrated how the various bidders – including the client – had been assessed.

3. Locating private sector clients

An environmental services company operating a compliance scheme under statutory waste regulations wanted to effectively market its services to all the businesses covered by the regulations.

We obtained the complete register of around 6,000 limited companies and plcs, along with the names and contact details of the compliance officers within each.

4. Lobbying and policy making

An innovative consumer health products company believed that its industry regulator was considering rule changes, suggested by rival companies, which would severely hamper its business.

We requested minutes of the regulator's relevant working group, its correspondence with the Department of Health, details of meetings with rivals and the rivals' written submissions to the regulator.

Appendix 1: FOI in more detail

Enforcement

The Information Commissioner has responsibility for enforcing the FOIA and EIRs, and their sister legislation the Data Protection Act. If he believes a public authority has breached the legislation, he can issue so-called practice recommendations, which set out the corrective measures the authority should take. If you believe your information request has been dealt with incorrectly by an authority, you can appeal to the Commissioner. In response he can issue three types of notice against the authority:

- Decision notices. If he finds in favour of the applicant he can issue a Decision Notice, setting out the necessary steps for compliance with the Act, plus a deadline.

- Information notices. If he needs more information about the disputed request he can issue an Information Notice to demand the necessary details.

- Enforcement notices. If the authority does not comply with the Decision Notice the Commissioner can issue an Enforcement Notice, which again must specify the action required and a deadline.

If the authority fails to comply with any of the notices, the Commissioner can write to the High Court, which can then declare the authority in contempt of court. Either party can appeal against decision notices, but only the public authority can appeal against information or enforcement notices.

The appeals are considered by the First-tier Tribunal (Information Rights), generally known as the Information Tribunal. Subject to appeal to the courts on a point of law, or to judicial review, the Tribunal's decision is final.

Third party information

Much information held by public authorities was originally submitted by third parties, such as private contractors and special interest groups. This information is covered by the FOIA and can therefore be released, as long as there is no breach of legal confidence, the Data Protection Act, or any other law. There is no legal obligation on authorities to consult with third parties before releasing such information. However, the official guidance recommends consultation if the authority is unsure whether it should be released. Third parties have no right of veto over release and no automatic right of appeal to the Information Commissioner or Tribunal against a decision to release.

Ministerial veto

Decisions of either the Commissioner or the Tribunal may be overridden by a cabinet minister, but only if: (i) the issue is whether the disclosure should take place in the public interest; and (ii) the information is held by central government or an authority specified by order. The veto is supposed only to be used in exceptional circumstances and the Information Commissioner has made clear that all such decisions should be subject to parliamentary scrutiny.

Data Protection

FOI and data protection are closely interrelated and define our twin rights of access to information and protection of personal data.

Whereas the FOIA and EIRs allow you access to a vast range of information on public issues, the Data Protection Act (DPA) gives you a right of access to personal data and protects it from others. As a general rule, any information you can access about yourself under the DPA cannot be released to others under the FOIA and EIRs. However, some personal information might be disclosed to third parties if it is deemed not to breach the data protection principles set out in the DPA (see FOIA section 40 exemption in Appendix 2) .

The DPA applies to both public and private sector bodies, so you can apply to any organisation or company for personal data they hold on you. This is known as a subject access request. The authority has 40 calendar days to respond, compared with 20 working days for FOIA requests.

Prior to the FOIA, the DPA allowed you access to electronic data and formally structured manual files, such as medical and financial records. However, the FOIA amended the DPA, extending your right of access to 'unstructured' personal data held manually by public authorities. This new right might have obliged authorities to hand over every piece of paper concerning the subject, were it not for a 2003 Court of Appeal judgment, in the case of Durant vs the Financial Services Authority, which significantly narrowed the definition of personal data, effectively excluding any document which does not have the subject as its main focus and which could not impact on his or her privacy. The judgment also ruled that the right of access to manual files applies only to those that are both formally structured and organised for the simple retrieval of personal data.

Scotland

The Freedom of Information (Scotland) Act 2002 is similar, though not identical, to the UK Act. Passed by the Scottish Parliament, it applies to over 10,000 public authorities under the control of the Scottish Executive, but not to UK government departments operating in Scotland.

There are a number of differences between the Scottish and UK acts, some subtle and some substantial. The most important ones are:

- The Data Protection Act. The Scottish Information Commissioner is not responsible for implementation of the Data Protection Act, which remains the responsibility of the UK Information Commissioner.

- Qualified exemptions. In Scotland the public interest test applies if disclosure could 'substantially prejudice' the interests specified in the Act. The UK act uses the term 'prejudice', which makes it easier for public authorities to justify non-disclosure. (For more details of exemptions, see Appendix 2.)

- Exemption for parliamentary privilege. The UK act provides an absolute exemption on the release of information covered by parliamentary privilege. Since the Scottish Parliament has no such concept, no equivalent exemption applies in Scotland.

- Right of appeal. There is no Scottish Information Tribunal, so the Scottish Information Commissioner is the final arbiter. Applicants and public authorities can appeal against decisions of the Commissioner on points of law to the Court of Session. This is the equivalent to an appeal to the High Court under the UK Act.

- Ministerial veto. The UK Act allows any minister to veto a decision of the Information Commissioner to disclose information on the grounds of public interest. The Scottish act gives less room for manoeuvre, with only the First Minister able to exercise a veto. The veto only applies to a narrow band of exemptions and only then if the information is deemed to be of 'exceptional sensitivity.'

- Time limit on public interest questions. If a public authority has to decide whether the public interest test should apply, the UK Act allows the authority more time to respond to a request for information than the normal 20 working days. The Scottish Act is stricter, insisting on the 20 working day limit. However, the Scottish Act recognises that the time limits could be extended if further details are required to locate information.

- Cost. In Scotland there is an upper cost limit to the authority of £600, based on a rate of £15 per hour. Requests costing the authority under £100 to fulfil are free to the applicant, while requests costing between £100 and £600 may be charged at 10 per cent of the cost, meaning a maximum charge of £50.

Scotland has its own EIRs, which, like the UK EIRs and the FOIA, came into force in January 2005. The EIRs cover all Scottish public authorities, plus the relevant private companies, and have a similar scope and range of exemptions as the UK regulations.

Appendix 2: Exemptions

Sections 21 to 44 of the FOIA detail 23 categories of information that are exempt from automatic disclosure, however, this does not necessarily mean that such information should not be released. The exemptions divide into two types; qualified and absolute, with the qualified ones sub-dividing into prejudice tests and class exemptions.

Some of the exemptions overlap, for example, information might be exempt because it affects the country's defence – see section 26 of the Act - and, by extension, national security – see section 24.

Sometimes only part of the information contained in a document will be exempt. In those circumstances an authority can release the document with the exempt sections blanked out.

Qualified exemptions

These are sometimes known as balanced, or public interest test, exemptions. All require a judgement to be made on whether the public interest in releasing the information outweighs that in withholding it. A separate judgement must be made on whether it is in the public interest to confirm or deny what information is held. In some cases an authority will judge it to be in the public interest to confirm what it has, but not to release it.

The public interest is, of course, a rather vague concept, but the Information Commissioner has issued helpful guidance. It states:

> *'Generally speaking, the public interest is served where access to the information would*
>
> - *further the understanding of, and participation in, the debate of issues of the day*
> - *facilitate the accountability and transparency of public authorities for decisions taken by them*
> - *facilitate accountability and transparency in the spending of public money*
> - *allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions*
> - *bring to light information affecting public safety.'*

Prejudice test exemptions

These require an initial judgement to be made on whether release of the information will prejudice the interests specified. This is known as the prejudice test, or harm test. If it's judged that there is such prejudice the public interest test must be applied, but, if it's not, the public interest test is unnecessary and the information should be released.

The word *'prejudice'* in the FOIA has been controversial, drawing criticism from open government campaigners. The Government's original white paper on freedom of information used the term *'substantial harm'*, which would have made it more difficult to refuse

disclosure, but this was diluted to 'prejudice' by the then Home Secretary Jack Straw. The Scottish FOIA, however, uses the term *'substantially prejudice'*.

The prejudice test exemptions apply to information concerning:

- The country's defence – section 26.
- International relations – section 27. This also covers confidential material obtained from other governments.
- Relations within the UK – section 28. This covers relations between the UK Government, the Scottish Parliament and the Welsh and Northern Irish Assemblies.
- The country's economic interests – section 29.
- Law enforcement – section 31. This includes information that might prevent the detection of a crime or the apprehension of offenders. It could therefore include details of internal investigations that may lead to criminal prosecutions.
- Audit functions – section 33. This applies to those public authorities with the power to audit the activities of others.
- The effective conduct of public affairs – section 36. This applies to all public authorities except the Houses of Parliament, which under the same section have an absolute exemption. (There is further discussion of this exemption in Part 3.)
- Health and safety – section 38. This applies to information whose release could prejudice the health and safety of the public or employees.

- Commercial interests – section 43. (Further details in Part 3.)

Class exemptions

These require the public interest test alone and apply to:

- Material intended for future publication – section 22. This applies to, for example, draft reports. Public authorities refusing to release information for this reason will have to argue it is reasonable to expect the applicant to wait for publication.

- National security – section 24. This excludes information from, or relating to, national security bodies such as MI5, MI6 and GCHQ, which is covered by an absolute exemption.

- Investigations and proceedings by public authorities – section 30. This is intended only for bodies such as the police, the Crown Prosecution Service and HM Revenue & Customs, which have statutory powers to investigate and prosecute.

- The formulation of government policy – section 35. (Further details in Part 3, above.)

- Communications with the Queen, and relating to honours – section 37.

- Environmental information – section 39. This is covered by the EIRs, which allow access to environmental information, subject to a range of exemptions.

- Personal information – section 40. Most personal information is subject to an absolute exemption under section 40 of the FOIA. However, some information could, in theory, be released, subject to the public interest test. This clause interacts with the complex

provisions of the DPA's section 10 and requires specialist interpretation. The type of information that might be released includes personal information relating to an official's public role.

- Legal professional privilege – section 42. This applies to, for example, internal legal advice documents.

Absolute exemptions

If the information requested falls into one of the following eight categories a public authority may deny your information request without having to make a judgement on whether it would be in the public interest to do so. The authority is also relieved of its duty to confirm or deny what information it has.

- Information accessible by other means – section 21 of the Act. This exemption is designed to spare public authorities unnecessary work. It applies to information already published, for example, via the authority's website.

- Information from state security bodies such as MI5, MI6 and GCHQ - section 23. This is an obvious exemption designed to protect the secrecy of these organizations.

- Court records – section 32. The release of court records remains at the discretion of the courts themselves.

- Information covered by parliamentary privilege – section 34. As there is no strict legal definition of parliamentary privilege, this is a rather grey area. Broadly, it covers information relating to the proceedings of both houses of Parliament. However, much of this information is routinely published, most obviously the transcripts of proceedings in Hansard. Background reports and data presented to Parliamentary committees tend to be covered by privilege.

- Information that could prejudice the effective conduct of public affairs – section 36. This only applies to information held by the House of Lords or House of Commons. If it is held by other public authorities it is subject to the public interest test. (See also above and Part 3.)

- Personal data – section 40. Such information is covered by the Data Protection Act and is generally only available to the person who is the subject of the information. (See also above.)

- Information provided in confidence – section 41. (Further details in Part 3.)

- Information whose disclosure is legally prohibited – section 44. There are three types of prohibitions: other UK legislation, for example, section 6 of the Human Rights Act 1998 and section 21 of the Local Government Finance Act 1992; EU obligations, including various commercial regulations; and the common law of contempt of court.

EIRs

The EIRs' exemptions – known as exceptions - are narrower than the FOIA's; there are fewer of them, and, crucially, they are all subject to the public interest test. The harm test applied in some of these qualified exemptions is also more stringent. Information can only be withheld if it would *'adversely affect'* the subjects specified, rather than simply *'prejudice'* them. Taken together these factors mean that, in theory, it is easier to access information under the EIRs than the FOIA.

The ‘adversely affect’ test applies to information involving:

- International relations
- Defence and national security
- Public safety
- The course of justice, including court proceedings and internal inquiries
- Intellectual property rights
- Legal confidentiality of any proceedings within a public authority
- Commercial confidentiality designed to protect legitimate economic interests
- Voluntarily supplied information from people who have not consented to its disclosure
- The environment to which the information relates.

The other main balanced exemptions concern:

- Requests that are 'manifestly unreasonable’ or ‘too general'
- Incomplete or unfinished information such as draft reports or other work in progress

- Internal communications from within the authority
- Personal data that does not breach the DPA.

To find out more…

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