

# FOI (Civil Procurement) Policy and Guidance

## Version 1.1

## 1 Introduction

### 1.1 Purpose

This document provides policy and guidance on how requests for civil procurement-related information under the Freedom of Information (FOI) Act [1] should be handled. It:

- provides general guidance on FOI Act procurement issues;
- states policy on the application of key aspects of the FOI Act, to inform decision making;
- summarises the initial view on disclosure positions as set out in the procurement related Working Assumptions [5].

Whilst primarily aimed at central government departments, it has application across the wider public sector wherever civil procurement is practiced.

Although the main legal considerations relevant to each disclosure decision are summarised, definitive statements regarding the legality of release or retention of every information example are not provided. The legal considerations discussed are generally distilled from the opinions already expressed in the high level guidance issued by Department for Constitutional Affairs (DCA) [4], which remains the definitive source of help in understanding the legal and general aspects of the individual exemptions. This document provides policy steers and practical guidance rather than legal advice.

Further, no attempt is made to provide a guide to the FOI Act itself, or to the associated Code of Practice [3], which are already available elsewhere ([4] and [2]). However, the aspects of the Act relevant to procurement and most likely to affect disclosure decisions are discussed.

This document represents the Government's initial view of the application of the FOI Act to public procurement information. However, the guidance given is only intended as a starting point and public authorities remain responsible for making their own judgements in individual cases, with referral to the DCA Clearing House where there may be wider considerations.

The approach is not intended to be static and will be revised as necessary in the light of experience, after the Act has been implemented fully.

## 1.2 Context

This document contributes to a wider body of FOI Act guidance. Although not structured in any formal sense, it is useful to understand the effective hierarchy of the various guidance documents. Figure 1 shows the main elements that have general application across all authorities.

Although it excludes guidance that individual authorities have produced for their own use, it does include the guidance produced by Ministry of Defence (MOD). In the same way that this guidance is applicable wherever civil procurement is practised, MOD's guidance is applicable wherever defence procurement is practised. The scope of non-MOD defence procurement is likely to be extremely limited.

Each item of guidance has a different focus, although there is substantial overlap in some areas. A summary of the purpose of each document is as follows.

*Lord Chancellor's code of practice* under section 45 of the Act [3] – focuses on the processes and practices that an authority should adopt in handling requests under the FOI Act. The Code is issued under s45 of the Act.

*DCA general guidance on exemptions* [4] – as the title suggests, focuses on explaining each of the exemptions permitted under the FOI Act and the circumstances under which they may be applied.

*Information Commissioner's Office (ICO) awareness guidance series* [2] – a set of documents providing relatively brief and straightforward awareness information on a range of topics relevant to the FOI Act. Those most relevant to civil procurement are:

- Awareness Guidance 2 – Information provided in confidence
- Awareness Guidance 3 – The Public interest test
- Awareness Guidance 5 – Commercial interest (plus annex - Public sector contracts)

*OGC Policy and Guidance on civil procurement (this document)* – applies the requirements of the FOI Act and the guidance from DCA and ICO to civil procurement information and suggests default disclosure decisions. It also includes a sample FOI Act clause for inclusion in invitations to tender.

*Model Contract Terms & Conditions* – available for a number of contract types and including FOI clauses.

*MOD awareness* – provides guidance on both the procedural aspects of handling FOI Act requests within the MOD organisation and the issues for them to consider in reaching disclosure decisions in a defence environment. It also covers issues of defence procurement, international collaborative projects and in relation to Government support for defence exports.

*Working Assumptions* – are designed to provide a helpful *initial* view for officials who are responsible for responding to requests for information. They set out some preliminary considerations of relevant exemptions and the Government's view of the public interest test for a number of categories of information. Working assumptions must be considered in the context of each individual case, where there may, of course, be wider public interest considerations. Several of the working assumptions cover procurement information.

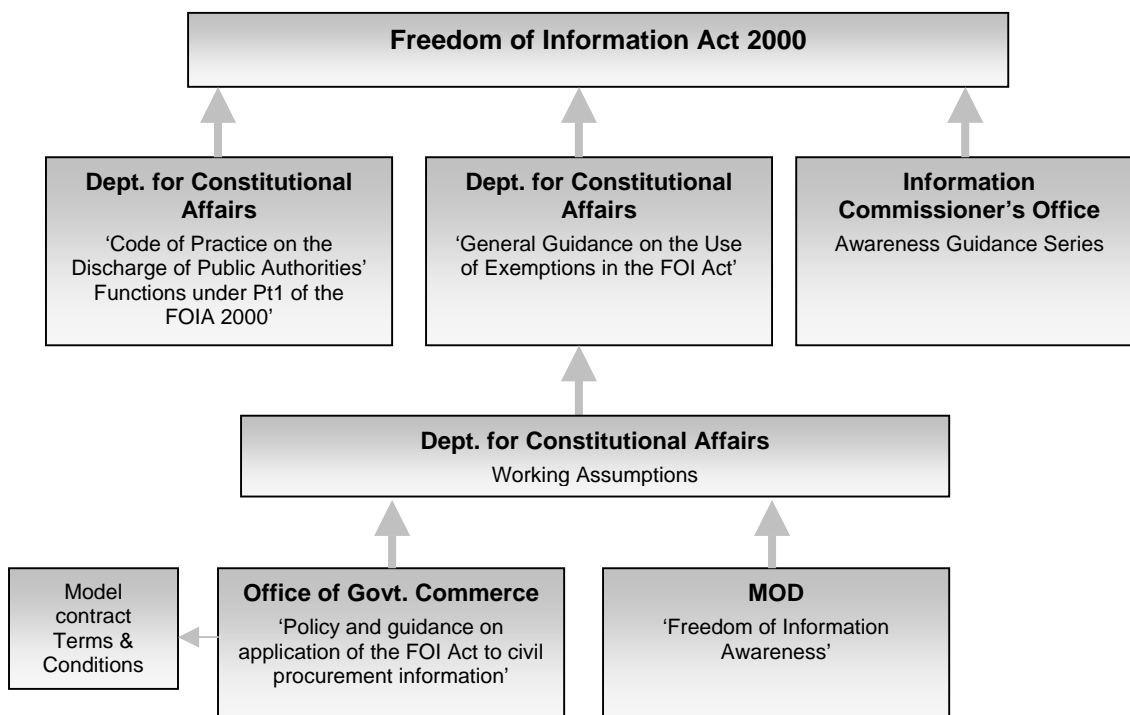


Figure 1 – The FOI guidance and policy framework

### 1.3 Scope

This document covers all classes of information related to public procurement, including what might be termed the 'contract delivery' phase (ie where the procurement is for long-term support, eg facility management, managed service, etc, and that work is underway). Although it could be argued that this phase is contract management rather than procurement, it is included for the sake of completeness and to avoid any gaps that may not be addressed elsewhere.

There are two further types of information that relate to supplier information, but not to a public authority's role as a procurer, as follows:

1. Where a public authority has a commercial arm acting as a supplier to private sector companies or the public (eg Ordnance Survey). Such an arm is likely to retain supplier or product information for competitive rather than procurement purposes.
2. Where a private sector company submits information to a public authority for commercial assistance, eg requests for help with an overseas market, grant requests, etc.

Information relating to these cases is excluded from the scope of this guidance.

## 1.4 Structure

This document is structured as follows.

### **Section 1 – Introduction**

Describing the document purpose, scope and context.

### **Section 2 - Guidance summary**

Providing an overview of the guidance and how it should be applied.

### **Section 3 – How the Act relates to procurement**

Highlighting the aspects of the FOI Act most relevant to procurement, describing the key exemptions and discussing how other legislation affects the provisions of the FOI Act.

### **Section 4 – Guiding principles**

Applying the principles of the FOI Act to the procurement environment to provide a number of drivers that inform the guidance

### **Section 5 – Disclosure guidance on procurement information**

Specifying the main elements of the guidance and providing the background rationale.

### **Annex A – Working Assumptions**

A table summarising the Working Assumptions [5] for the main classes of procurement information.

### **Annex B – Worked examples.**

A number of worked examples are provided to show how the guidance may be applied to practical situations.

## 1.5 ‘Information’ vs ‘documentation’

This guidance refers throughout to ‘information’ rather than ‘documents’. The difference is important, as the Act specifically applies to information and carries no duty to disclose specific documents. Indeed, great care should be exercised when considering whether to release a document provided by a supplier (quite apart from any FOI Act considerations, the document may be subject to copyright restrictions). However, under the Open Government Code, the Parliamentary Ombudsman has consistently ruled that a request for a particular document should be viewed as a request for all the information in that document, and that where possible, the document itself should be supplied. The Information Commissioner is likely to follow this reasoning, and therefore the actual document requested should be disclosed wherever possible. In some cases, as indicated above, it will be preferable to extract information from documents, or possibly to provide a summary, provided it satisfies the request.

It should be noted that information includes e-mails and general correspondence, including within authorities, between authorities and with suppliers. There are two key implications from this:

- e-mails which form part of the public record, should be properly 'filed' in line with good records management practice, so that they are readily retrievable;
- the language used in communications should reflect the possibility of disclosure.

## **1.6 Other supporting guidance**

Model Contract Terms and Conditions covering both general supply and IT contracts and including FOI Act provisions are available on the OGC website.

This document contains a model FOI Act clause that authorities may include in invitations to tender.

## **1.7 References**

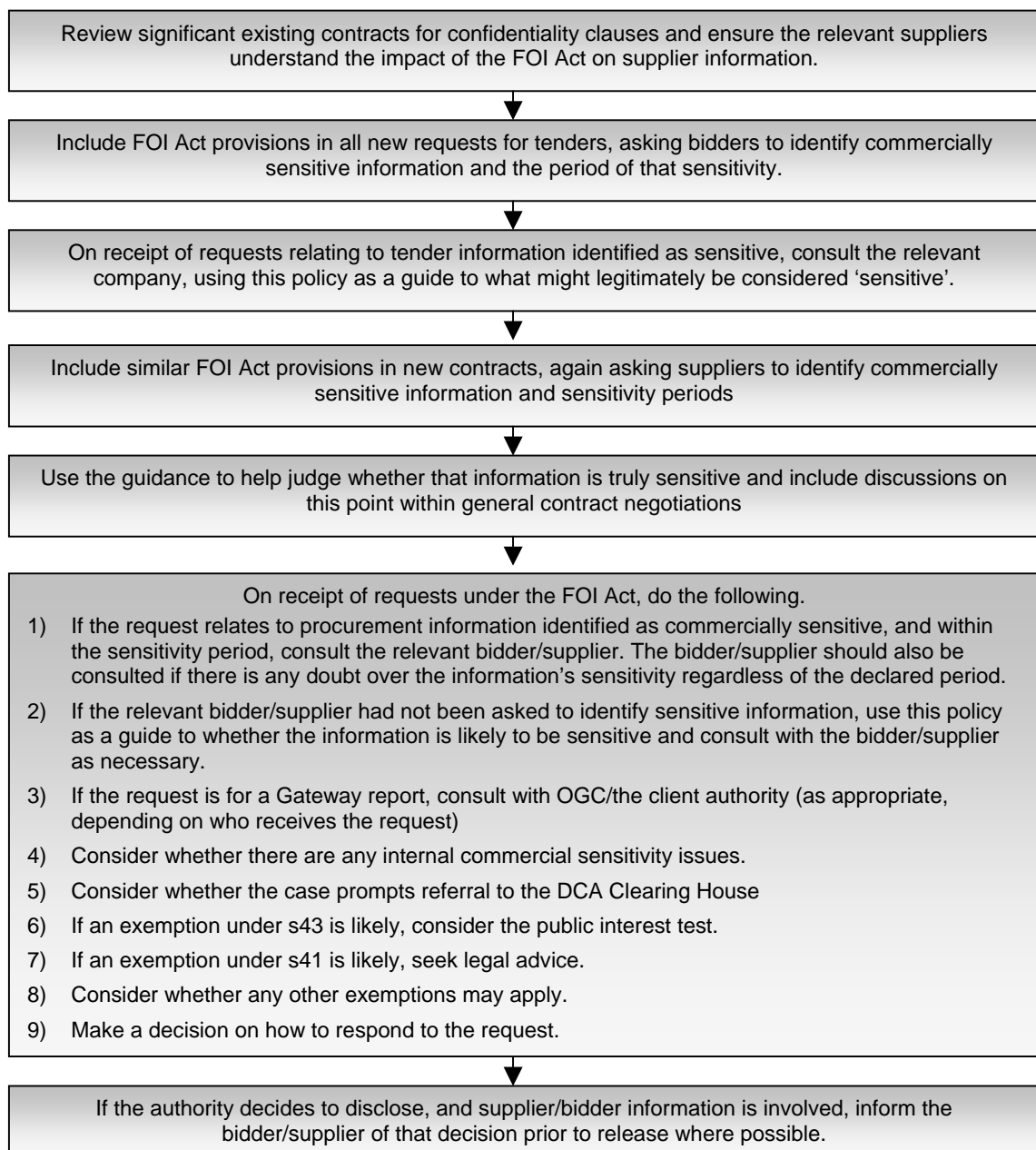
- [1] Freedom of Information Act 2000
- [2] Awareness Guidance Series (Information Commissioner's Office)
- [3] Code of Practice on the Discharge of Public Authorities' Function under Part 1 of the Freedom of Information Act 2000, Issued under Section 45 of the Act (Department for Constitutional Affairs)
- [4] General Guidance on Use of Exemptions in the FOI Act (Department for Constitutional Affairs)
- [5] Working Assumptions (Department for Constitutional Affairs)

## 2 Guidance summary

### 2.1 Guidance keypoints and how to apply them

The guidance balances the government’s commitment to achieve greater openness and accountability in civil procurement, with the need to ensure that competitiveness in the public marketplace is not harmed and preferably encouraged. By providing working assumptions for the more common items of procurement information, it should promote a consistent approach across authorities. However, it recognises the need to judge each request on its individual merits and responsibility for the final disclosure decision remains with the relevant authority.

A simple process connects the main points of this guidance and generally indicates the steps that an authority should follow in its application, as follows.



This process is only a guide and actual application will depend on the authority's own general process for handling requests under the FOI Act, the circumstances of the individual case, and the possible referral of requests to the DCA Clearing House.

The term 'commercially sensitive' or 'sensitive' is used throughout this document to mean information that could prejudice (ie be detrimental to) the information provider or public authority. The detriment might be to their financial or commercial position. It is important to note that embarrassment to an authority does not count as 'prejudice' in the terms of the FOI Act.

The intention is to be as cooperative with suppliers as possible, but without imposing an unnecessary overhead on both them and the authority. Although there will be some initial work in identifying sensitive information, this should quickly become 'business as usual', with much the same information being identified in each tender/contract and template solutions becoming the norm. The initial work should be offset by the effort saved in not needing to consult on every information request. Whether this is a valid assumption will depend largely on the actual number of requests received and practice will inevitably vary with the volume and types of request. It may be that this is only appropriate for contracts above a certain value, or those that are particularly critical or likely to be contentious (ie likely to attract information requests).

### **3 How the Act relates to procurement**

#### **3.1 How the Act in general applies**

The main features of the FOI Act as they apply to public procurement are:

- a general right of access to information about all public contracts and procurement activity held by public authorities, subject to certain conditions and exemptions;
- it applies to information which is held by another person on behalf of the authority (e.g. information or data held by an outsourcing partner);
- there is no requirement to have a particular status, such as being a losing bidder, to make a request and be given information;
- neither the identity of the requester, nor the use to which the information may be put, are grounds for withholding information (hence it is legitimate for one supplier to seek information on another purely for commercial purposes);
- it is retrospective in that it applies to all information which is 'held' by the public authority at the time a request is received and therefore also covers existing contracts and those which are completed;
- a requester may ask for an internal review of a decision to withhold information, and subsequently a requester's right of appeal is to the Information Commissioner's Office in the first instance.
- a duty imposed on public authorities to adopt and maintain a scheme for the publication of information which must be approved by the Information Commissioner (a "publication scheme");
- there is nothing to stop the use of information obtained under FOI in litigation (there is therefore the potential for requests for information under FOI to be used to gain pre-litigation disclosure of information relating to potential claims).

#### **3.2 Relevant exemptions**

The main exemptions, relevant to Civil Government procurement, are explained below. However, it should be noted that only a summary is provided and that the DCA exemption guidance [4] remains the definitive source and should be consulted if more detail is needed.

They are listed in approximate order of probable relevance. The 's' numbers relate to the section numbering in the Act. All of these exemptions, other than sections 41 and 40 (with caveats), are qualified exemptions, ie subject to a public interest test.



### *s43 – Commercial interests*

This exemption covers two main aspects: trade secrets and information likely to 'prejudice the commercial interests of any person (including the public authority) holding it'. 'Trade secrets', as defined in [4], means:

- it must be information used in a trade or business;
- it is information, which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret;
- the owner must limit the dissemination of the information, or at least, not encourage or permit widespread publication.

Hence it could cover anything that a bidder/supplier does in the course of trade that is unique to them, gives them a competitive edge and is not already commonly known or easily deducible. Apart from product-related information (eg designs) it can also cover working practices and approaches (eg a system development methodology). It should be noted that exactly what is embraced by the term 'trade secret' is subject to change as case law develops.

Prejudice to commercial interests will generally mean detriment to the ability to do business. This could involve giving commercial advantage to the competition, and/or loss of shareholder / customer / supplier confidence. The commercial interests of a public authority are also covered by this exemption, eg:

- where authorities have a revenue-earning commercial arm and are therefore subject to prejudices similar to those that could apply to private sector companies;
- the role of the authority as purchaser could be compromised, eg as suppliers could withhold sensitive information in the future (to the detriment of the purchasing process), or a reduction in the authority's ability to negotiate effectively to secure best value for money.

The impact on a bidder/supplier/authority of the disclosure of both trade secret and commercial interest information is likely to diminish over time (although this may not always be the case).

The exemption is subject to a public interest test, whereby the respective public interests in disclosure versus non-disclosure are weighed.

### *s41 – Information provided in confidence*

This exemption states that if, by disclosing information, a public authority would be subject to an actionable breach of confidence, the information should not be disclosed. By 'actionable', the Act means whether there is a reasonable prospect that a law court would rule against the authority for releasing the information. The exemption is not subject to a public interest test in the meaning of the Act, although the court may apply a public interest test in deciding whether a breach of confidence was actionable (if public interest had been pleaded as a defence). A breach is not likely to be actionable if the public interest in disclosure outweighs the public interest in keeping the confidence.

The deciding issue is whether there is a ‘duty of confidence’ between the information giver and receiver. The principal two factors here are:

- is there an agreement between the parties, implicit or explicit, that the information will be held in confidence;
- does the information have the necessary ‘quality of confidence’?

Guidance ([2] and [4]) discourages excessively wide and unnecessary confidentiality agreements. However, legally there is a grey area between a confidentiality agreement in the commercial sense, and an agreement that certain information has the necessary “quality of confidence and thus is exempt from disclosure under the FOI Act. In the past, commercial confidentiality agreements have tended to be wide ranging and absolute, an unequivocal promise not to disclose something. Disclosure in breach of such agreements would be a breach of contract and also possibly a breach of confidence. The FOI Act is changing the context in which such agreements operate. One of the issues public authorities have to consider when accepting information as confidential is whether they can satisfy any contractual obligations in relation to keeping that information confidential, and their statutory duties under the FOI Act. Disclosure of information accepted as confidential may result in contractual and/or common law challenge, and wrongly accepting information as confidential may result in sanctions being applied under the FOI Act. Indiscriminate classification of information as being subject to a duty of confidence is clearly contrary to the intent of the FOI Act and hence is discouraged.

It is acknowledged that in some circumstances information will only be supplied if the parties agree that a duty of confidence attaches to it, as it has the necessary “quality of confidence”. In these cases the agreement should be tightly drawn, such that only the relevant information is protected (ie blanket agreements should not be made, as it is unlikely that all the information will have the necessary ‘quality of confidence’ – ie be worthy of exemption under s41 from the general duty to disclose under the Act).

An agreement to protect commercially sensitive information, but with the proviso that the Authority may still disclose it under the FOI Act, is obviously a form of confidentiality agreement. The proviso reduces the likelihood of reliance by the supplier on a purported duty of confidence. If the information remained commercially sensitive the s43 (Commercial interests) exemption may be applicable.

It is possible that the public authority will conclude that although such information comes within the scope of exemption s43, the public interest test that attaches to that exemption weighs in favour of disclosure. If the authority subsequently releases that information, and the supplier challenges the content or the process of the authority’s decision making, the challenge may involve a claim of breach of confidence (and possibly breach of contract). These are clearly matters for legal counsel and are only raised here to illustrate the intricacies of this exemption and its relation to s43. The overall message is ‘tread warily’ and take advice if it is unclear which, if any, exemption applies.

The above points are reflected in the ‘confidentiality’ and ‘FOI’ clauses of the model contract terms and conditions (available from OGC). The confidentiality clause states that confidential information will not be disclosed, but with certain provisos. One of these provisos states that disclosure may be required under UK law, including the FOI Act and points to the relevant FOI contract clause. The FOI clause makes it clear that the authority retains the discretion to disclose the information in response to a request under the FOI Act. It also makes it clear that it may do so without the consent of the supplier. Supplementary notes indicate that the original identification of the confidential information is subject to the agreement of the authority, who should judge (using this guidance) whether the information is worthy of protection.

Entering into implied duties of confidence are more difficult to avoid, especially as long standing, consistent, and well known practices of protecting similar information may give the supplier reasonable grounds to believe that the practice will continue (discussed further under ‘Legacy material’ in 5.3).

#### *s36 – Prejudice to effective conduct of public affairs*

This exemption is likely to apply to procurement related information that if disclosed, whereas not necessarily within the scope of s43, may nonetheless prejudice the procurement (or project) process by inhibiting the free and frank provision of advice or exchange of views.

#### *s39 Environmental information*

See under 3.3.

#### *s40 Personal information*

See under 3.3.

#### *s29 – The economy*

This exemption is aimed at information that could harm the economic interests of the UK or the finances of the UK government or the devolved administrations as a whole. However, it may be relevant where disclosure could damage an authority’s financial rather than commercial position, for example in relation to a major PPP or PFI deal. It is recommended that legal advice is sought before citing this exemption as a reason for withholding information, as it is likely only to be applicable in very specific circumstances. It may also be appropriate for the DCA Clearing House to be engaged in these cases.

#### *s22 – Information intended for future publication*

This exemption applies where the authority already intends to publish the requested information at some later date. Although the date does not have to be pre-determined, the authority must have such an intention to publish. It is advisable to document decisions to publish in the future. Publication timescales must be reasonable and policies of the type ‘we will publish contracts 10 years after completion’ are unlikely to be defensible. A public interest test is applicable to the use of this exemption and so disclosure prior to planned publication may still be appropriate.

*s31 – Law enforcement*

This exemption is very complex and has a wide interpretation of what is included within 'law enforcement'. For example, it includes 'the assessment or collection of any tax or duty or of any imposition of a similar nature' and the exercise of a public authority of its functions for the purposes of 'securing the health, safety and welfare of persons at work'. It is therefore clear that it may have an impact beyond the more obvious 'front line' policing and prison service activities. From a procurement perspective, the following examples of where this exemption may be applicable are offered. However, given its complexity, where there is any doubt over whether this exemption is applicable, then legal advice should be sought.

Information relating to any system or service which facilitates:

- security or inmate handling where persons are lawfully detained;
- the law enforcement activities of police or security forces;
- fraud investigation;
- building security;
- accident investigation;
- health and safety inspections;
- immigration control;
- tax or duty collection;
- court administration.

The exemption is subject to the public interest test.

*s38 – Health and safety*

This exemption is likely to be applicable in only rare situations, principally where disclosure could endanger the safety of individuals. Examples might include information relating to access control systems in hospitals, or which enables the identification of staff working in controversial research areas.

### **3.3 The Act in relation to other regulations**

#### **Environmental Information Regulations**

Requests for environmental information held by public authorities have their own statutory framework, the Environmental Information Regulations (“EIRs”). Under the EIRs, any applicant is entitled to information caught by the definition of “environmental information” unless an exception under the regulations apply.

Until the end of 2004, the 1992 EIRs (SI 3240 of 1992) are expected to have effect. These implement the EU Directive (313/90), now replaced by Directive (4/2003). The 2004 EIRs are to take effect on 1 January 2005. They are currently in draft form.

#### **Environmental information**

Under the EIRs, environmental information is a defined term. It does not mean any information which can be subjectively described as environmental.

Under the draft 2004 EIRs, “environmental information” is defined as any information in written, visual, aural, electronic or any other material form on:

- (a) the state of the elements of the environment (such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among those elements),
- (b) factors affecting or likely to affect the elements referred to above;
- (c) measures affecting or likely to affect the elements and factors referred to above;
- (d) reports on the implementation of environmental legislation;
- (e) cost benefit analyses concerning these elements; and
- (f) the state of human health and safety in as much as they may be affected by the state of the elements of the environment or any of the matters referred to as factors as measures above.

The effect of this definition is that unless the information ultimately relates to the “elements of the environment” then will not be caught by the draft 2004 EIRs.

The definition in the draft 2004 EIRs is wider than that contained in the 1992 EIRs. There the relevant definition is information relating to the environment if, and only if, it relates to any of the following:

- (a) the state of any water or air, of any flora or fauna, of any soil or of any natural site or other land;
- (b) any activities or measures (including activities giving rise to noise or any other nuisance) which adversely affect, or likely to adversely affect anything mentioned under (a) above;

- (c) any activities or administrative or other measures (including any environmental management programmes) which are designed to protect anything mentioned under (a) above.

### **Exemptions**

Nothing in the provisions of the 1992 EIRs or the draft 2004 EIRs requires the disclosure of any information which is capable of being treated as confidential or is confidential.

A further exemption relevant to procurement is contained in the draft 2004 relating to information provided voluntarily by a third party the disclosure of which would adversely affect that third party. This would appear to cover information provided by a bidder in a procurement exercise.

### **Overall**

The general position is that although some information used in certain procurement exercises will be caught by the EIRs, there is no grounds for a view that an application under the EIRs would lead to information relevant to a procurement exercise being disclosed which would not otherwise be disclosed.

### **Data Protection Act**

In terms of comparison with the FOI Act, the Data Protection Act (DPA) applies to information held about an individual and requested by that individual. Although such a request might originally be received as a request under the FOI Act, an authority's request handling procedures should quickly identify it as exempt under the FOI Act and route it to their DPA process. This has no particular procurement aspect and so the DCA guidance on exemption s40 [4] is applicable.

Where requests are made for personal information by 3<sup>rd</sup> parties (ie where the information requested does not relate to the requester), the information is still subject to the FOI Act. However, exemption s40 states that the request should not contravene any of the 8 principles in the DPA, otherwise the information is exempt under the FOI Act and need not be disclosed. The most relevant of these principles requires that personal data be 'processed fairly and lawfully'.

Within the procurement context, the most likely reason for a disclosure of commercial information relating to identifiable individuals to be unlawful would be if it were held in confidence. TUPE information is perhaps the most obvious example where a duty of confidence is likely to exist. Personal information held in these circumstances should not, as a rule, be disclosed. It might be possible to release summary information (eg numbers of staff affected, etc), from which individuals cannot be readily identified, but seeking legal advice is advisable.

Information in CVs and simply providing the names of staff who hold certain posts (or who have done certain tasks, eg project managing a procurement) may or may not be classifiable as confidential. However, the first element (relating to fairness) of the DPA principle could be relevant in such cases. Although a somewhat vague concept, the Information Commissioner's Office guidance [2] suggests a few questions to consider when judging 'fairness' (edited list):

- would the disclosure cause unnecessary distress or damage to the individual (possibly an employee of a company targeted by special interest groups);
- would disclosure be a surprise to the individual;
- has disclosure been specifically refused by the individual?

Note that disclosure of information that names an individual may expose that individual to attention, and that such attention may be considered outside the expectations or responsibilities of that individual. For example, junior grade staff are not generally expected to cope with a high level of scrutiny and exposing them to that scrutiny could be unfair and potentially stressful to the individual. Although this aspect may not be strictly within the scope of exemption s40, it should nonetheless be a consideration when considering the public interest in disclosure, though the weight to be placed on this consideration will vary.

### **Procurement Directives**

The public procurement Directives relating to works, supplies and services and implemented in the UK by various Regulations apply to contracts of certain types and above published value thresholds. They require information falling into the following categories to be published in the Official Journal of the European Union:

- basic information to be published in contract award notices e.g.
  - number of tenders received
  - name of winning bidder
  - price or range of prices paid
  - value of the tenders received (or the highest and lowest tender value)
  - a description of the subject of the contract
  - where appropriate, value or proportion of contract likely to be subcontracted.
- debriefing information to be made available to unsuccessful bidders on request (e.g. reasons for rejection and characteristics and relative advantages of the winning tender).

The FOI Act provides for much wider disclosure of information beyond these categories. The procurement Directives provide for certain discretions not to disclose information, notably in relation to contract award notices and debriefing when disclosure would prejudice:

- legitimate commercial interests
- law enforcement
- public interest
- fair competition.

The practical effect will be that such discretion will need to be exercised subject to the FOI Act. In the case of any claimed prejudice to commercial interests this would require consideration of the public interest test. It will also be significant that seeking redress under the FOI Act will be much simpler than under the procurement Directives and will be at no cost to the applicant. This could encourage interested parties more readily to contest decisions not to disclose information requested.

The current regulations implementing the EC directives provide for compliance by the contracting authorities within a contractor's reasonable confidentiality requirements. The wording of the services regulation states, "as the services provider may reasonably request." A provider cannot be reasonable in a request which requires the contracting authority to enter into a contractual term which would break the law. The regulations are therefore presumed to be compatible with the FOI Act and vice versa. The FOI Act sets the boundaries of what "the service provider may reasonably request" and what the contracting authority can agree to, in respect of treating information as confidential.

The new public sector Directive which consolidates the three individual directives for each of services, works and supplies, (2004/18/EC – 31 March 2004), states at Article 6:

"Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and bidders set out in Article 35(4) and 41, and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, such information includes, in particular technical or trade secrets and the confidential aspects of tenders."

It can be seen from article 6 that the presumed compatibility with the procurement directive and national law on confidentiality is spelt out, it also shows the link between the definition of what is confidential (procurement) information, and national law.

The directive has to be transposed into national regulations by end January 2006. It is expected that the new regulations will follow a similar approach to that set in the previous regulations (which remain in effect until repealed by the new regulations).



It might be useful to consider a working example:

Bidder x states that they are relying on the public procurement regulations to designate their bid confidential. In accordance with FOI Act obligations the contracting authority could only accept those parts of the bid which are properly designated as confidential, as confidential. This would involve a consideration of the exemptions applicable under the FOI Act to the information bidder x was providing.

Bidder y and competitor z make an information request about bidder x's bid (once the contract has been awarded). The contracting authority must disclose the information they hold which is not subject to an exemption and rely on the exemptions in the FOI Act (s43/s41 probably) to refuse to disclose information that bidder x asked be designated as confidential.

## **4 Guiding principles**

### **4.1 Introduction**

This guidance has been developed in accordance with three guiding principles, which have been derived from existing guidance and applied to the procurement environment. The first two further the Government's intention to raise the public's confidence in the processes of government, whereas the third recognises that the public good is also served by maintaining a healthy competitive market.

### **4.2 Transparency in the use of public funds**

The public can only be reassured that authorities are spending taxpayers' money wisely if they have visibility of:

- how much money is being spent;
- with whom that money is being spent;
- exactly what services, goods or works that money is buying;
- what redress is available if those services, goods or works are below an agreed standard.

### **4.3 Demonstrable diligence in managing contractors to ensure best value for money**

Procurement activities, including contract delivery, can only hope to be successful if they are properly managed by the authority. This implies that the authority should not only establish effective controls in line with best practice, but must also be seen to exercise those controls in practice. These activities should therefore be open to public scrutiny to ensure:

- project management and procurement best practice principles are being applied;
- suitable checks and balances are in place to ensure proper monitoring of project performance;
- those checks and balances are being actioned diligently;
- intervention on the part of the Authority is happening where necessary.

#### **4.4 Protection of the relationship between public and private sectors**

This guidance recognises that there is a strong public interest in encouraging the wider involvement of the private sector in public procurement, to increase competition. Value for money can be best obtained where there is a healthy competitive environment, coupled with mutual trust and respect between private and public sectors. It is not the intention of the FOI Act to undermine a contracting authority's commercial relationships with industry. Several of the exemptions support the protection of interests and relationships arising in commercial contexts. Were this not the case, there would be a risk that:

- companies would be discouraged from dealing with the public sector, fearing disclosure of information that may damage them commercially, or
- companies would withhold information where possible, making the choice of the best contractor more uncertain as it would be based on limited and censored data.

This guidance therefore endeavours to:

- ensure bidders/suppliers are aware of the implications of the FOI Act when they submit information;
- appropriately invoke exemptions that protect bidders/suppliers' legitimate commercial concerns;
- encourage consultation with bidders/suppliers where there is doubt whether requested information could be damaging to those suppliers.

## 5 Disclosure policy on procurement information

### 5.1 Definition of procurement phases

For the purposes of this guidance, procurement has been considered under five phases, with the relevant information grouped accordingly. Part of the rationale in defining these phases is to help clarify the period during which certain information should not be disclosed. It will be apparent in this guidance that the withholding of information is often only justifiable whilst a particular activity is in progress. The choice of phases therefore aligns with the activities that dictate the sensitivity of the information involved and are described below. It is acknowledged that not all procurements map to these phases, eg OJEU Restricted procedure and those below the OJEU thresholds. The information types will be the same regardless of the procurement approach, but the information sensitivity period may need to be amended to reflect alternative procurement phases.

#### *General procurement information*

Strictly, this is not a procurement phase as it does not necessarily have a chronological relationship to the other four phases. However, it is convenient to consider it as such. It groups information that is not necessarily specific to a particular procurement activity, but may be used for all procurements or simply to inform procurement in general. Typically, it includes three types of information:

- information on suppliers compiled from widely available sources (eg product catalogues, press stories, financial surveys);
- information on suppliers compiled from knowledge gained within the public authority through their supplier dealings (eg performance over several contracts, approved suppliers lists). Also includes derived information (eg opinions drawn from data);
- information obtained from suppliers that is not generally available (eg future product information, research plans, funding sources).

#### *Initiation phase*

This phase covers information developed by the authority during the planning for, and initiation of, a particular procurement activity up until an intention to procure is ready for issue. Typically, the phase will therefore start with a vision or strategy document and end with a draft OJEU notice or Invitation to Tender (ITT).

#### *Tendering phase*

This phase covers information produced and received by the authority as part of the tendering activity, up until the notification of the preferred supplier. Typically, the phase will therefore start with an issued OJEU notice or ITT and end with a preferred supplier being selected.

#### *Contract negotiation phase*

This phase covers information produced and received by the authority whilst the final contract is being negotiated, up until the contract is signed. Typically, the phase will therefore start with the preferred supplier being notified and the results announced, and end with the signing of the contract.

*Contract delivery phase*

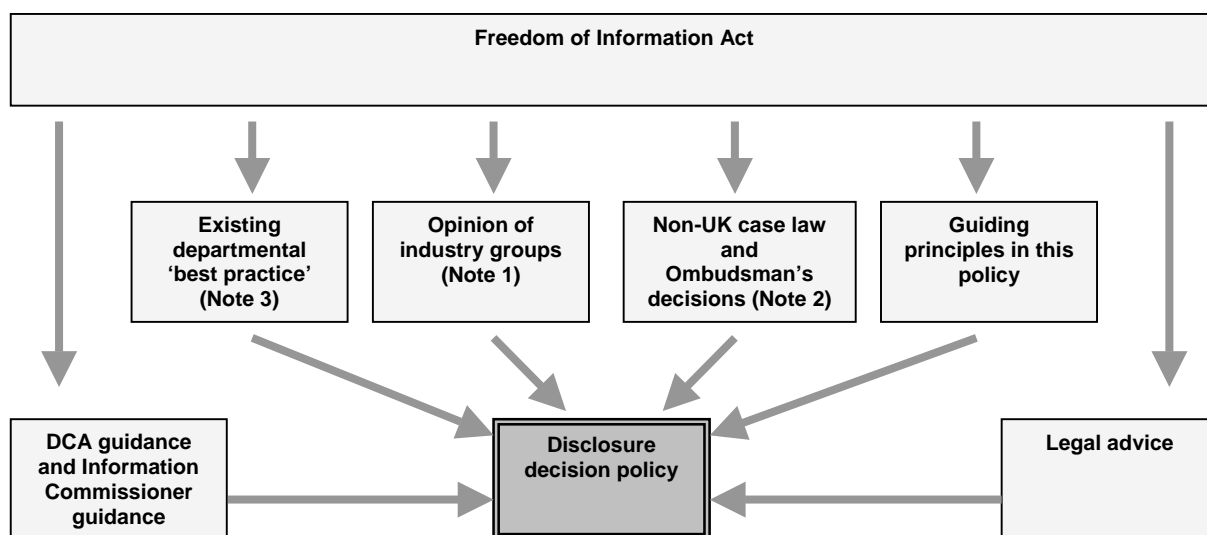
This phase covers the period when the work specified in the contract is actually underway, up until all work related to the contract has finished. Typically, the phase will therefore start with the first chargeable activity being started and end with the production of a post implementation report (or once all products and/or services have been delivered).

**5.2 Balancing factors in determining disclosure policy**

If a public authority considers it may be inappropriate to release requested information, the first consideration is whether an exemption is likely to apply. If one does, and dependent on whether the exemption is qualified, then the authority would consider any public interest aspects. The procurement related Working Assumptions summarised in this policy have been derived by balancing a number of factors that will influence both the likely applicability of an exemption, and the public interest test. In most cases, the latter will be heavily dependent on the circumstances of the individual case at the time. However, some general indicators are possible, eg whether disclosure is likely to improve the transparency of public accountability. Supplier views on the sensitivity of information may have an impact on the applicability of the exemptions in s41 and s43, and knowledge of those views has been an important factor in determining the initial view of disclosure in this guidance.

The factors that are not included are those that are specific to the particular request, ie any sensitivities surrounding that procurement activity, supplier or information item (which is why the final decision remains with the authority).

The factors that have been considered in determining the initial view of disclosure in the Working Assumptions and summarised in this guidance are illustrated in figure 2.



*Figure 2 – Inputs to the disclosure decision policy*

### Notes on Figure 1

1. Industry bodies were consulted during the development of this guidance. However, although their views have been noted and taken into account as appropriate, the resultant guidance is not necessarily wholly consistent with those views. Their inclusion in the consultation process must not be taken as meaning that they have approved or otherwise disclosed in the instance of any specific request (ie consultation with suppliers may still be necessary for individual requests). However, the decision on whether information should be disclosed always lies with the public authority.
2. Case law from other jurisdictions is available regarding FOI requests, principally from Ireland and Australia. As the wording of the equivalent Acts in these countries differs from the UK version (and case law applies to specific cases), these decisions must be treated with caution. However, they at least provide an indication of how specific issues (eg where the balance of public interest falls in certain circumstances) would be weighed in a dispassionate courtroom environment. The Parliamentary Ombudsman's decisions are relatively few and based on the preceding Code of Practice on Access to Government Information.
3. The term 'existing departmental best practice' is used to describe disclosure policies already developed unilaterally by public authorities, where those policies meet the intentions of the Act. Such existing policies have been considered as setting a good precedent, which this guidance has sought to embody.

### **5.3 Information produced under legacy contracts**

The FOI Act is retrospective, meaning that information produced or received prior to the implementation of the Act can be requested. This guidance likewise in general applies to all civil procurement information, regardless of its age. However, the default disclosure decisions given in the guidance must be treated with much greater caution when applied to legacy information. The meaning of 'legacy' is here used to apply to both:

1. information produced or received prior to the Act taking effect on 1 January 2005, either under either an extant or expired contract;
2. information produced or received after 1 January 2005 under a contract raised prior to that date.

Each of these circumstances have different implications, with each suggesting a contradictory decision outcome. There are two main considerations, as follows.

1. Information produced under legacy contracts is likely to be covered by 'pre-FOI' confidentiality agreements (ie where there may be an *explicit* duty of confidence), and where the supplier has a traditional expectation that information will be protected (ie where there may be an *implicit* duty of confidence). This is further discussed under section 5.7.
2. The commercial sensitivity of information often decreases with age, hence legacy information is less likely to be subject to commercially-based exemptions (ie commercial interests may be less subject to prejudice and information may have a lower 'quality of confidence'). This is discussed further under section 5.6.

Applying these considerations to the two types of legacy information, two general rules can be deduced.

1. Disclosure of contemporary information produced under legacy contracts will require greater care to avoid either a breach of confidence or breach of contract action.
2. Disclosure of legacy information produced under legacy contracts is less likely to be subject to relevant exemptions.

Note that in the former case, a test of confidentiality (though not the only one) is whether the provider of the information has an expectation of confidentiality based on the precedent of how the information has been treated previously. If the supplier has no reason to believe that ‘the rules have changed’, then their right to confidentiality is likely to increase the longer the confidentiality of the information remains undisputed. This is difficult to quantify in any meaningful way, but it is worth noting the following milestones in the implementation of the FOI Act.

1994 – First publication of the Code of Practice on Access to Government Information

1997 – Publication of a revised version of the Code of Practice on Access to Government Information

2000 – Enactment of the Freedom of Information Act

2002 – Publication of the Lord Chancellor’s Code of Practice

2004 – Publication of the DCA guidance on exemptions

2005 – Full implementation of the Freedom of Information Act

Section 5.7 discusses the need to review legacy contracts for confidentiality agreements and take appropriate action with the relevant contractors.

## 5.4 Working assumptions

Annex A of this guidance contains a summary of the disclosure information contained in the procurement related Working Assumptions.

One of the considerations in assigning a working assumption for particular information is whether the company to which the information relates is likely to consider that information sensitive, and hence whether they are likely to identify it as such when requested by the authority (see section 3.7). This likelihood has been judged through consultations with private industry. The views of industry have been used with caution as indicated in the following explanations.

Note that even where a bidder/supplier has agreed with the authority that information is sensitive, in the event of a request under the FOI Act the authority would still need to consider the nature of the information requested for itself and whether an exemption applies. The authority may then need to weigh the public interest considerations at the time of request. The bidders/suppliers views on these matters, and any time limits that the supplier/bidder has associated with information sensitivity, will be among the authority's considerations.

The categories of initial disclosure recommendations used in the Working Assumptions and summarised in Annex A are as follows.

*Disclose* - indicates that in most cases the information in question is not considered sensitive and should generally be disclosed if requested. Where the information is judged by the authority to be possibly contentious or sensitive (and specifically if the relevant bidder/supplier has identified it to the authority as sensitive) then the bidder/supplier should be consulted before a final decision is reached, this decision always remains with the authority (see section 5.7). The authority should also consider if any other exemptions may apply (eg security matters or law enforcement).

*Not to be released* – indicates that in most cases the information will be considered commercially sensitive and disclosure should generally be refused, citing the exemptions indicated in the Working Assumption and giving an explanation as to how it applies to the particular facts. This category will particularly apply to information identified as commercially sensitive by a bidder/supplier and agreed as such by the authority. In this case, the authority would still need to re-assess the sensitivity of the information at the time of request. Additionally, if the 'Commercial interests' exemption is being considered, the authority would need to weigh the public interest considerations in reaching its final decision, using the information in the Working Assumptions as the starting point, though there will of course be wider considerations in each case.

However, unless the request is for that specific information item alone, it will generally be possible to remove the item in question from a more general request (eg where a contract is requested, disclosing all but the supplier profit margin).

It should also be noted that information will only be withheld for an appropriate time and this information should be notified to the requester where possible (see section 3.6).

As for disclosure, the decision to withhold ultimately rests with the authority holding the information, although in some cases this decision will be informed by discussions with the DCA Clearing House.



## 5.5 General guidance on disclosing that information is held

This policy focuses on the disclosure of requested information. However, the other consideration under the Act is whether to disclose the fact that certain information is, or is not, held by the authority (ie the ‘neither confirm nor deny’ position). For procurement information, there are very few cases where the withholding of this knowledge is likely to be justifiable, and the policy is therefore in favour of disclosure. The main exceptions are likely to be as follows.

- 1) Where acknowledgement that information is held implicitly reveals additional information that would otherwise be withheld. Two possible examples are:
  - i. if the authority decided that bidders’ identities should be withheld, acknowledging whether a tender from company x is held would clearly conflict with that decision;
  - ii. if an agreement has been reached that information on penalties incurred will be considered confidential, acknowledging that a penalty notice is held could be counter to that agreement.
- 2) Where ‘Security’ or ‘Health and Safety’ exemptions apply (eg in the case of enquiries of the type ‘do you hold a specification for security system y’).
- 3) Where the authority holds information on company re-structures that is not yet in the public domain. Clearly, declaring whether such information is held would confirm/deny speculation and be likely to have commercial implications for the relevant companies.

## 5.6 General guidance on time limits for withholding information

Most procurement information is only sensitive for a definable period of time. Hence even where it is necessary to withhold information at the time of request, the guidance is to allow the disclosure of all information after the expiry of the minimum possible time. This time period will vary widely depending on the type of procurement information in question. The sensitivity of price information may decrease after a relatively short period, whereas ‘trade secret’ information may be sensitive for much longer. Where a request for disclosure is refused at the time but could be satisfied at some definable future date, this may be notified to the requester with the suggestion that they reapply. However, a definite commitment to disclose at a certain date cannot be made, as a firm decision on disclosure can only be reached at the time the repeat request is made.

The working assumption for each procurement phase indicates what this period should be in some cases. However, these are only intended as a guide and authorities must apply their own judgement depending on the particular circumstances.

For some information, a timescale indication of ‘Withhold in phase’ is used. This indicates that information should be withheld only whilst the particular procurement phase is in progress. This is usually applicable where the only justifiable exemptions are ‘Commercial interests’ and ‘Information provided in confidence’, and where the sensitivity of the relevant information falls sharply once the work of that phase is complete. The exact point at which that occurs will need to be judged case-by-case. While there is a possibility that tender evaluations may need to be reviewed internally, or even the entire tendering process re-run, then that phase cannot be said to be complete.

A further consideration is whether an appeal against the choice of preferred supplier is likely. Likewise, a procurement will not be truly finished until all the associated work has ceased. This will generally not occur until at least a post implementation review (or equivalent) has been held and all outstanding issues resolved.

Note that this category of time limit may need to be re-interpreted if the procurement approach is other than a standard, negotiated, OJEU process.

In other cases it would be unwise of this policy to attempt to predict a likely timescale in which sensitivity will have decreased to the point that disclosure is possible. However, a consideration might be where the information impacts a supplier's short-term financial position, eg in the case of penalties incurred by a supplier within that financial year. Until that impact becomes apparent in published accounts, the information would likely be considered commercially sensitive. Consultation with the private sector indicates that sensitivity will have lapsed after 2 years in such cases, but the authority should check with the supplier if a request is received.

## **5.7 Working with suppliers**

### **General issues**

It is important for suppliers and potential suppliers to understand how the FOI Act will affect them. Many, in particular smaller companies, may not be aware of the implications. They will benefit from being able to find out more easily information about opportunities and the performance of competitors. The main area of risk for them would arise when information about them, which they may have expected to remain confidential in line with previous custom and practice, is made available.

To meet the aims of the guiding principle of 'protection of the relationship between private and public sectors', a four pronged approach is needed, as follows.

- 1) Inform potential bidders of the implications of the Act and request that they highlight information that they would justifiably prefer to be withheld.
- 2) Enshrine in contractual arrangements with suppliers the rules to be applied by both the authority and the contractor in disclosing information.
- 3) Review legacy contracts for confidentiality agreements that may be unsustainable under the Act and liaise with the contractors as necessary.
- 4) Consult, where appropriate with bidders and suppliers before disclosing information.

These points are discussed in more detail in the following sections.

### **Inclusion of FOI conditions in procurement documentation**

At the outset of any procurement, the conditions of procurement should clearly explain that information provided to the authority by the bidder may be subject to disclosure under the FOI Act. General FOI Act guidance is clear in discouraging the acceptance of confidentiality agreements by authorities, unless unavoidable, and this applies equally to terms included in tender documentation and contracts. The conditions of procurement should clarify that the authority will not implicitly accept such terms, and that any other such markings, whilst being noted, may have little weight if the information is requested. This was discussed in more detail in section 3.2 (s41).

However, as the authority should be trying to recognise the bidder's legitimate commercial concerns, the conditions of procurement should encourage bidders to identify information that is truly sensitive. This information will be useful to the authority as it will highlight where consultation is needed in the event of a request. The bidder should also be asked to justify the sensitivity of the information and how long it is likely to remain so. This may not be appropriate for all tenders and contracts, particularly if the volume of tenders/contracts makes it impractical. In this case, the criteria applied to contract review detailed under 'Reviewing legacy contracts for confidentiality agreements' should be considered.

A possible model provision for inclusion as part of the conditions of the procurement is given below, but authorities are free to define their own versions.

*“Authorities are committed to open government and to meeting their legal responsibilities under the Freedom of Information Act 2000. Accordingly, all information submitted to a public authority may need to be disclosed by the public authority in response to a request under the Act. We may also decide to include certain information in the publication scheme which we maintain under the Act. If you consider that any of the information included in your tender is commercially sensitive, please identify it and explain (in broad terms) what harm may result from disclosure if a request is received, and the time period applicable to that sensitivity. You should be aware that, even where you have indicated that information is commercially sensitive, we may be required to disclose it under the Act if a request is received. Please also note that the receipt of any material marked ‘confidential’ or equivalent by the public authority should not be taken to mean that the public authority accepts any duty of confidence by virtue of that marking. If a request is received, we may also be required to disclose details of unsuccessful tenders.”*

### **Inclusion of FOI conditions in contracts**

Contract clauses should carry forward the FOI Act provisions included in the procurement conditions, but may also be expanded to include the disclosing of information by the contractor. Although not strictly a consideration under the FOI Act (as it only applies to public authorities), it is sensible to tackle all these issues under a single 'disclosure of information' (or similar) clause. Such clauses will be particularly relevant where the contractor is designated a 'public authority' for the purposes of the particular contract.

To provide reassurance to suppliers, it is recommended that a provision be included in the contract to the effect that the authority will follow the Code of Practice [3] with respect to consulting with the contractor on any request for information, identified as commercially sensitive, under the FOI Act.

Model terms and conditions including FOI Act provisions are available from OGC.

### **Reviewing legacy contracts for confidentiality agreements**

Most authorities will have existing contracts that pre-date the FOI Act, often by many years. These contracts may have wide reaching confidentiality agreements that are unsupportable under the provisions of the Act. As discussed elsewhere in this document, information covered by a confidentiality agreement will only be exempt (under either s41 or s43) if the information is truly commercially sensitive. In these cases the authority should consult with the relevant suppliers to:

- a) advise them that information covered by the contract may need to be disclosed under the FOI Act, irrespective of any confidentiality agreements;
- b) agree procedures for consultation in the event that an information request is received.

It may impractical to review every extant contract if large numbers are involved, in which case a more pragmatic approach is needed. It would then be sensible to restrict the review to contracts that are:

- large value
- critical to the authority's function
- controversial
- otherwise likely to attract information requests.

### **Consultation with suppliers on disclosure requests**

DCA and Information Commissioner guidance indicates that consultation with suppliers, where requests involve information provided by the suppliers, should be the norm. Although this is a good general principle, most requests for procurement information will have some supplier implications and so potentially the overhead in consulting on all cases could be significant. Whilst this may be a fact of life for the authority, it should be recognised that suppliers will also carry an overhead in responding to the authority.

This policy therefore advocates a more pragmatic approach to consultation. Where bidders/suppliers have been given the opportunity to identify sensitive material and have done so (and any declared period of sensitivity has not expired), then clearly consultation is needed if the request relates to that information. However, if it does not, then consultation is likely to be unnecessary. If the bidder/supplier has not identified any sensitive information, then strictly consultation should likewise be unnecessary. However, as a courtesy in such cases, it is recommended that bidders/suppliers are notified that a request has been made and given the opportunity to comment as appropriate. They then have a 'do nothing' option if the request is of no concern to them.

As discussed in section 5.3, legacy material will have been provided prior to any understandings on information sensitivity being agreed. Therefore requests for legacy material that could have some commercial sensitivity should involve consultation with bidders/suppliers.

Over time, it is likely that disclosure precedents will be set and bidders/suppliers will come to understand what information will be subject to release. Consultation is therefore likely to have a high initial resource impact that will lessen once the effects of the Act become established.

Note that a special case for consultation is in the event of a request for a Gateway review report. Such a request may be made to either OGC or the client authority. It is unclear if OGC would be obliged to respond to such a request (ie whether or not it is held on behalf of the client authority under the terms of the Act), but the policy assumes that this is the case. To ensure a consistent approach is taken, and reduce the risk of a duplicate request being refused by one party but satisfied by the other, the policy is therefore that each party will consult with the other in the event of a request to either party. It will also be appropriate for the DCA Clearing House to be involved in these cases.

Even when a supplier or third party has indicated that information should be withheld and the public authority agree, that does not mean that the public interest test will weigh in favour of withholding information. The public interest test needs to be considered in each case.

## **5.8 Impact of policy on publication schemes**

All requests should be considered on their own merits, with this guidance informing that consideration. However, some types of procurement information are sufficiently free of any commercial sensitivity, or exposure to any other exemptions, that entry onto the public authority's publication scheme as a matter of routine is justified. This will help to ease the effort involved for public authorities in clarifying the information being requested and help to emphasise the authority's commitment to the spirit of the Act.

There are a number of benefits that arise if an authority publishes, in its FOI Act publication scheme, information which is relevant to its procurement activities. These include the following.

- It is easier for suppliers to do business with the authority. This reduces their costs and encourages new suppliers, including SMEs, to enter the market.
- Authorities save the time and cost spent handling individual requests.
- Authorities can decide what information to publish as part of a systematic management process, as compared to responding to individual requests to tight timescales (note that where it is intended to make information available under the Publication Scheme in due course, the exemption 'Information intended for future publication' may be relevant).

## **5.9 Working assumptions**

A summary of the working assumptions is given in Annex A.

Annex B provides worked examples to illustrate how the policy would work in practice .

## Annex A – Information disclosure policy

Please note that this Annex is only intended as a summary of the information included in the procurement specific Working Assumptions, which provide authorities with a starting point when making their own disclosure decisions, based on the circumstances of the particular case. It should not be used without first reading the relevant Working Assumptions and the guidance text in sections 2 and 5.

### 1. General procurement information

Item	Information type	Discussion	Working Assumption decision
1	Information on suppliers compiled from widely available sources (eg product catalogues, press stories)	Already in the public domain, so clear exemption applies. However, requesters could be directed to the original information sources to satisfy their information need.	Not to be released
2	Information on suppliers aggregated from knowledge gained within the authority through their supplier dealings (eg performance over several contracts). Also includes derived information (eg opinions drawn from data)	If the aggregated information is critical of a supplier and released, it could (but may not) damage commercial interests. If it were known that only information relating to suppliers generally performing well would be disclosed, a refusal to disclose aggregated information on a particular supplier would effectively identify them as performing badly. Anonymised information may generally be disclosed.	Not to be released (except for anonymised information).
3	Information obtained from suppliers and not generally available (future product info, research plans, financial details).	This information will generally have been specifically requested by the authority and supplied with a reasonable expectation it would not be made public. Otherwise, companies may refuse to divulge the information, to the probable detriment of the public interest.	Not to be released
4	Gateway review reports	Refer to the Gateway review information Working Assumption.	Refer to the Working Assumption

**2. Initiation information (start of procurement planning up to readiness to issue bid documentation)**

Item	Information type	Discussion	Working Assumption decision
1	All vision, strategy and planning documentation, inc Business Cases	The key document in this phase is the Business Case (strategic outline, outline or full). NHS guidelines for PFI/PPP contracts mandates the publication of Business Cases within a month of their final approval, but allows for the possible redacting of information. However, non-PFI work may operate in a different environment and direct correlation may not be appropriate. In some cases, information may be subject to release as a managed process for early supplier involvement. Only disclosure outside of this process is detrimental.	Not to be released in phase. (unless part of a managed process for early release of information). Disclose when bid documentation issued
2	Requirements information	Early disclosure of requirements, unless part of the procurement strategy, could prejudice the tendering process and give unfair advantage to some suppliers. In some cases, information may be subject to release as a managed process for early supplier involvement. Only disclosure outside of this process is detrimental.	Not to be released in phase
3			
4			

**3. Tender information (release of tender documents up to selection of preferred bidder)**

Item	Information type	Discussion	Working Assumption decision
1	All project management documentation, with the following exceptions	This covers the typical documentation generated during management of selection when run as a project (eg Prince 2 products). Demonstrates procurement was properly managed, but release during tendering could damage process.	Not to be released in phase. Disclose when contract let
2	Project Issue and Risk logs	These may contain critical information about tenderers	Not to be released in phase. Decide by case thereafter
3	All information received from tenderers	This covers tender documents, correspondence, negotiation notes, etc	Not to be released in phase (thereafter, see table for following phase)
4	All evaluation information	Covers evaluation reports	Not to be released in phase (thereafter, see table for following phase)



**4. Contract negotiation information (successful bidder notified up to contract signature)**

Item	Information type	Discussion	Working Assumption decision
1	Tender information received from unsuccessful bidders	This covers tender documents, (inc prices). Non-UK case law indicates not in public interest to disclose, although note that exemption would not apply to any information not prejudicial to commercial interests.	Not to be released, except for non-sensitive information
2	Tender evaluation information on unsuccessful bidders (inc ranking)	Although commercially non-sensitive information could be disclosed, the public interest in favour of disclosure of sensitive information is generally weaker than that for winning bidders.	Generally disclose, except for sensitive information
3	Identity of unsuccessful bidders	Non-UK case law says no exemptions apply (unless security/H&S related).	Generally disclose (unless security/ H&S related)
4	Evaluation information for successful bidders	Non-UK case law decided in favour of public interest disclosure.	Generally disclose
5	Tender information received from successful bidder, with the exceptions below	General tender information, including total tender price (but not supplier's costing information, see below). Note that if cost information could be deduced from price information (eg consultancy, where total price = days * day rate), then consultation may be needed before a decision on disclosure is reached.	Generally disclose (unless security/H&S related)
6	Payment terms	Non-UK case law is unclear what this covered in the particular case	Generally disclose after contract signature
7	Information on the supplier's approach to the work	Non-UK case law here is unclear, but this is assumed to only apply where the supplier has a unique approach that could be considered a 'trade secret' (see section 3.2 for definition).	Generally disclose except for information agreed as 'trade secret'
8	Financial models	For more complex work, detailed models of how the cash flow for both the authority and supplier would be managed over the life of the contract (eg recovering low initial capital charges through incentivised support work).	Not to be released
9	Price breakdown	Price breakdowns, without knowledge of the underlying financial model, could be misleading and need proper presentation.	Not to be released (until no longer sensitive)
10	CVs and reference sites	CV's are likely to come under the Data Protection Act. Reference site information was probably supplied to the bidder in confidence.	Not to be released
11	Information on supplier's costing mechanisms	This covers information relating to profit margins, day rates (where used to calculate a fixed price), overhead costs, etc. This may give advantage to a competitor.	Not to be released
12	Information relating to Contract negotiation	Covers correspondence, meeting minutes, e-mails, contract change notices, etc. Decision will depend on sensitivity and content, and should not comprise suppliers negotiations with sub-contractors or the public authority's negotiations with any third parties.	Generally disclose except for information agreed as commercially sensitive, with time limits

**5. Contract delivery information (from start of work to completion)**

Item	Information type	Discussion	Working Assumption decision
1	All project management documentation, with the following exceptions	This covers the typical documentation generated during management of contract when run as a project (eg Prince 2 products). Demonstrates project was properly managed.	Generally disclose
2	Project Risk logs	The project should be able to explore issues freely and cooperatively between parties. Disclosure would damage this freedom, to the detriment of the project.	Not to be released in phase. Decide by case thereafter
3	Exception reports	These may contain critical info about suppliers. Disclosure could prejudice process (due to a reluctance to raise/accept). See discussion under item 2.	Not to be released in phase
4	Lessons learnt report	These may contain critical information about suppliers. Disclosure could prevent candour and hence restrict valuable info.	Not to be released
5	Contract information (general)	Non-UK case law indicates that it is in the public interest to disclose <b>all</b> contract information, including total contract price and performance indicators, although commercially sensitive information may need to be removed in some cases.	Generally disclose (unless security/H&S related), but see below for exceptions
6	Contract information requiring particular attention:		
7	Price breakdown	See under tender information in previous table	Not to be released (until no longer sensitive)
8	Service level agreements	Information provides key indicator that proper management is in place. Strong public interest element, probably low commercial impact	Generally disclose
9	Performance measurement procedures	As above, with possibly even lower commercial impact	Generally disclose
10	Incentive mechanisms	Information provides key indicator that proper management is in place. Details of the mechanisms may be considered sensitive by suppliers, but there is a strong public interest element in disclosure. Summary information should be considered.	Generally disclose
11	Criteria for recovering sums	Stronger commercial argument, since it would indicate financial risk to which company is exposed. Subsequent knowledge of performance would mean financial impact could be deduced, possibly affecting company's financial position	Generally disclose, but not full details
12	Pricing mechanisms	Covers milestone payments, price variation mechanisms (eg fee rate increases per year). Case law supports release of this information, based on public interest in disclosure.	Generally disclose

**6. Contract delivery information (from start of work to completion) - continued**

Item	Information type	Discussion	Working Assumption decision
1	Dispute resolution procedures	Information provides key indicator that proper management is in place. Strong public interest element, probably low commercial impact	Generally disclose
2	Invoicing arrangements	Probably no commercial impact, so exemptions unlikely to apply. However, if they did, it is difficult to see any public interest in non-disclosure.	Generally disclose
3	Contract mgt arrangements	Information provides key indicator that proper management is in place. Strong public interest element, probably low commercial impact	Generally disclose
4	Exit strategies and break options	Information provides key indicator that proper management is in place. Strong public interest element, probably low commercial impact	Generally disclose
5	Sub-contractor details	Covers their identity, management arrangements, flow-down of contract conditions	Not to be released (except for their identity)
6	Assessing or reporting on contract performance	This covers information relating to performance against SLAs, KPIs SPAs, benchmarks, etc. Mostly relevant to longer term service provision. Overall, likely to be in public interest to release, but financial sensitivity for supplier needs to expire.	Generally disclose once any financial sensitivity has expired
7	Information on sums recovered	Where contracts have liquidated damages clauses, the information possible is a) have damages been imposed, b) the amounts involved. The former could arguably be disclosed, but the likelihood is that the latter could then be deduced from other information. The latter is probably commercially/financially damaging (but beware if covered under EIRs), but only for a definable period.	Not to be released until any financial sensitivity has expired
8	Information on project progress	Covers progress review minutes, reports, correspondence. More relevant to start/end projects. Disclosure may be in public interest, but supplier reputation could suffer if major project known to be delayed (with fall in share price, loss of bids in progress, etc). Also, important that such information is put in context (eg delay may be due to new requirements or other valid reasons).	Generally disclose
9	Product/service verification procedures	Covers details of test documentation, eg strategy, procedures, acceptance plans. Also covers building acceptance/commissioning plans. Possible 'trade secret' and IPR issues, esp. for service companies. Release of detailed procedures to competitors effectively enables re-use by them, possibly giving them competitive advantage.	Generally disclose except where 'trade secrets' agreed
10	Product/service verification results	Covers results from above activities. Same comments as above, as procedures may be deduced from results	Generally disclose except where 'trade secrets' agreed
11	Contract change information	Same arguments as for contract. Disclosure of all information likely to be in the public interest	As for contract

## Annex B – Worked examples

The following worked examples illustrate how the policy may work in practice. It is not feasible to offer examples of all possible situations, but those offered demonstrate some of the rationale underlying the working assumptions whilst highlighting where exceptions may be relevant. It must be emphasised that the examples are invented to represent generic cases and the outcomes should therefore not form the basis of the decisions in a particular ‘real’ case (ie they are not taken from case law and should not be considered as ‘precedence setters’). The term ‘provisional decision’ is used to describe the initial outcome of the decision process, which will always be subject to any escalation mechanism or referral to the DCA Clearing House.

Help with defence related examples is included in the guidance produced by MOD.

<b>Example 1</b>	
<b>Information requested</b>	
Price quoted in all tenders received for procurement of a licensing system.	
<b>Timing of request</b> : Prior to contract award	
<b>Working Assumption</b> :	Not to be released
<b>Discussion</b>	
<p>In this example, all the four bidders have identified within their tenders that release of pricing information would damage their commercial interests. Additionally, the OGC Policy indicates that the release of any tender information during the selection and award stages would prejudice the procurement process, delaying the procurement exercise and possibly requiring re-tendering. This would involve the authority in greater expense, and hence prejudice its own commercial interests. The FOI Act requires the same treatment of information requests regardless of the identity of the requester. Hence it is possible that a bidder (or potential bidder) would receive the information and this could affect bids submitted in terms of either content or price, reducing the value for money achieved.</p> <p>Weighing these factors, the authority decides that exemption s43 applies and that there is a strong public interest in non-disclosure. As no public funds have yet been committed, the counter-balancing public interest in disclosure is weak and the authority therefore decides to withhold the information.</p>	
<b>Provisional decision</b> :	<i>Withhold</i> , citing s43.

<b>Example 2</b>	
<b>Information requested</b>	
Total price of awarded contract for a licensing system, together with a full price breakdown for every element.	
<b>Timing of request</b> : Post contract award, within first year of implementation	
<b>Working Assumption</b> :	Total price – Generally disclose. Price breakdown – Not to be released
<b>Discussion</b>	
<p>In this example, the tender was conducted as an OJEU exercise and the policy, in line with EC Procurement Directives, is that the total contract price should be disclosed. The supplier argued during contract negotiation that they consider the total price confidential, as it may prejudice a bid for a similar system they are submitting elsewhere. Although there may be rare examples where there is a strong public interest in not disclosing the total price (eg where sales to foreign governments are involved), there are no such considerations in this case. The authority rejected the supplier’s stance as the slight commercial harm that the supplier may suffer is insufficient to justify an exemption, and in any case is outweighed by the strong public interest, on transparency grounds, in disclosure.</p> <p>Close inspection is needed of the price breakdown to assess the prejudice to the supplier of releasing detailed information. The supplier has identified during contract negotiation that all price breakdown information is considered confidential. The authority decides, after consultation with the supplier, that the prices of the top-level deliverables can be released (eg total hardware price, total support price, total training price, etc).</p> <p>However, the authority decides that any further level of breakdown would reveal information that is genuinely likely to damage the supplier’s commercial interests (eg price of individual workstations would reveal bulk-buy arrangements negotiated by supplier, training breakdown would reveal manday rates for training consultants, etc). The authority judges that the public interest in disclosing this information is not outweighed by the public interest in upholding the supplier’s concerns.</p>	
<b>Provisional decision</b> :	<i>Disclose</i> total contract price and top-level breakdown <i>Withhold</i> detailed price breakdown, citing s43

<b>Example 3</b>	
<b>Information requested</b>	
<p>Technical details of a new patient monitoring network within a PFI hospital, together with the approach to determining the amount of monitoring to be provided in the NHS wards, compared to the private wards.</p>	
<b>Timing of request :</b> Post contract award, within first year of implementation	
<b>Working Assumption :</b> Generally disclose, except for trade secret information	
<b>Discussion</b>	
<p>In this example, the supplier has asked for both types of the information requested to be treated as confidential, as in both cases there are trade secret issues. The operating software underlying the network is a proprietary product of the company and releasing any details would provide advantage to competitors. The algorithms used to determine the monitoring required are likewise proprietary, but have been in use for some years and similar algorithms are generally available.</p> <p>The authority decides that in both cases s43 is relevant. It is judged that there is little public interest in disclosing technical details of the network, when weighed against the public interest in protecting the supplier's position, and that therefore these should be withheld. However, the harm that the supplier would suffer from releasing details of the algorithms is outweighed by the public interest in being reassured that the approach used is equitable.</p>	
<b>Provisional decision :</b>	
	<p><i>Withhold</i> technical details of network, citing s43</p> <p><i>Disclose</i> algorithms for monitoring.</p>

<b>Example 4</b>	
<b>Information requested</b>	
The incentive mechanism included in the contract for the refurbishment of government offices over a four year period, together with the value of any sums recovered in years 1-3.	
<b>Timing of request</b> : Post contract award, in fourth year of contract.	
<b>Working Assumption</b> :	Incentive mechanism - Generally disclose Sums recovered – Not to be released
<b>Discussion</b>	
<p>The incentive mechanism provides for sums being recovered if the refurbishment slipped against the agreed project plan. Sums recovered would be based on a percentage of the relevant stage payment, with the percentage increasing in defined increments determined by the number of days slippage. The supplier wants the incentive mechanism to be confidential, as they feel that revealing their financial risk would affect their share price and harm their commercial interests. They are also concerned that disclosing actual sums recovered by the authority would likewise affect their market position, until their accounts are officially published.</p> <p>The authority acknowledges that in both cases s43 is relevant. However, incentive mechanisms are a key element for managing risk and performance, and there is a strong public interest in opening such mechanisms to scrutiny. In this case, revealing all the details of the incentive mechanism could enable the sums recovered to be deduced. As the degree of harm to the commercial interests of the supplier would be greater if actual sums were revealed, which is not outweighed by the public interest in disclosure, it is decided that limited details of the mechanism should be disclosed (eg remove one of the calculation elements).</p> <p>As the commercial sensitivity of sums recovered reduces significantly once accounts are published, the supplier acknowledges, after consultation, that the sums for years 1 and 2 can be disclosed, but withheld for year 3.</p>	
<b>Provisional decision</b> :	<p><i>Disclose</i> incentive mechanism and sums recovered for years 1 and 2, with some information removed</p> <p><i>Withhold</i> sums recovered for year 3, citing s43</p>

<b>Example 5</b>	
<b>Information requested</b>	
Total amount of money spent by the authority with supplier X over the last 10 years, broken down into price per contract and scope of the work in each case.	
<b>Timing of request :</b> Immaterial	
<b>Working Assumption :</b> Generally disclose	
<b>Discussion</b>	
<p>The authority only holds information covering the last 8 years. Their response is therefore limited to data covering 8 years. Releasing the total sum spent does not significantly harm the supplier's commercial interests and there is a strong public interest in disclosure.</p> <p>The price per contract has been made available on the authority's web site for the past 3 years and under the FOI Act the authority is not obliged to supply information already publicly available (exemption s21 'Information accessible to applicant by other means'). Contract prices earlier than the 3 years (back to 8 years) are not commercially sensitive and the authority decides these should therefore be disclosed.</p> <p>The scope of the contracts has likewise been publicised for the past 3 years. However, there have been a number of exceptions where the contract has related to work for law enforcement agencies and these have not been published. Exemption 31 (Law enforcement) is considered to apply in these instances and the authority does not see any significant overriding public interest in disclosure. These are excluded from the information to be disclosed, making it clear that the list is not complete for the reasons stated.</p>	
<b>Provisional decision :</b>	<p><i>Inform</i> requester that information older than 8 years is not held</p> <p><i>Withhold</i> contract prices and scopes for the last 3 years, citing s21, but direct requester to where information is already available</p> <p><i>Withhold</i> the scopes for certain contracts not already published, citing s31</p> <p><i>Disclose</i> total money spent with supplier over 8 years</p> <p><i>Disclose</i> contract prices and scopes not already published in last 8 years (excluding those covered by s31</p>



<b>Example 6</b>	
<b>Information requested</b>	
The reasons for choosing supplier Y to undertake a new road building programme.	
<b>Timing of request</b> : One year after contract award	
<b>Working Assumption</b> : Generally disclose	
<b>Discussion</b>	
<p>The procurement exercise involved a full selection and award process, including the production of an Evaluation Strategy (ES), Evaluation Plans (EPs), Evaluation Models (EM) and an Evaluation Report (ER). An Evaluation Moderation meeting was held to refine the evaluation scores for the award phase. To answer the request, whilst avoiding releasing information not immediately pertinent to the request, the authority decides to respond by compiling a dossier of relevant information. The information chosen comprises the following:</p>	
<ul style="list-style-type: none"> <li>• overall procurement procedure, drawn from the ES</li> <li>• selection criteria for the PQQ phase, drawn from the EP for the phase</li> <li>• EM template used for the PQQ phase</li> <li>• ER for the PQQ phase, with the following removed: <ul style="list-style-type: none"> <li>○ losing entrants' names (to anonymise information)</li> <li>○ all information relating to an entrant's financial status</li> <li>○ all information relating to an entrant's previous performance</li> <li>○ any other information agreed as commercially sensitive.</li> </ul> <p>Note that although information is made anonymous, the losing entrants may have been named elsewhere and the authority considers it too easy to connect information with the relevant bidders.</p> </li> <li>• selection criteria for the award phase, drawn from the EP for the phase</li> <li>• EM template used for the award phase</li> <li>• ER for the award phase, with the following removed: <ul style="list-style-type: none"> <li>○ losing bidders names (to anonymise information)</li> <li>○ all price information for losing bidders</li> <li>○ price breakdown information identified as sensitive by winning bidder</li> <li>○ information identified as commercially sensitive by losing bidders</li> <li>○ information agreed as commercially sensitive with winning bidder.</li> </ul> <p>Note that although information is made anonymous, the losing bidders may have been named elsewhere and the authority considers it too easy to connect information with the relevant bidders. Note that in some cases, information is removed that has been identified as sensitive by the supplier, but not necessarily agreed as sensitive by the authority. To save time, the authority judges that the information in question is not strictly needed to properly meet the request and therefore consultation with all losing bidders is not needed; they pragmatically 'err on the side of caution'. Likewise, the policy indicates that losing bidder prices are not generally disclosed and again, prices are not needed to demonstrate 'due process' in this case.</p> </li> <li>• a summary of the overall findings of the evaluation moderation meeting (minutes were not kept of the meeting).</li> </ul>	
<b>Provisional decision</b> : <i>Disclose</i> compiled dossier of information	