

# Caveat venditor - freedom of information

The freedom of information act poses many challenges for public sector organisations. Procurement teams must ensure they have a thorough understanding of the regulations and a clear policy for handling requests.

In January 2005, a new labour initiative introduced the right to know policy known as the Freedom of Information Act (FOIA). The idea behind the act is to promote transparency and accountability within the UK public sector. The act is very broad and applies to all information "held" by the authority. Interestingly, it has been made retrospective so it is applicable to any information 'held' before January 2005.

It is important to understand the definitions of *information* and *held* in this context. Information is defined as recorded in any form, from paper files to electronic documents, emails and telephone messages. Held is specifically defined as a public authority holding the information itself or if the information is held on its behalf by a third party ie a collaborative partner or a service provider.

The right to know in theory allows any person the right to ask a public authority whether it holds specific information. This can cause some issues for example a contractor could ask to see documents which contain competitors pricing and other confidential information. Another example, journalists could ask to see potentially damaging documentation which they may use for personal gain.

There are of course some exemptions, 23 to be precise, but in general the rule is that the authority can refuse to disclose the information and in fact refuse to disclose whether they have the information at all, providing they can show that withholding the information outweighs the public interest of revealing the information.

Authorities will have some hard decisions to make if presented with a FOIA request. It may mean, that when doing business with a public authority in the UK, an organisations confidential information becomes disclosed, despite any contractual obligations.

Information of any sort belonging to private sector companies doing business with public authorities may be subject to right to know under the FOIA, unless an exemption applies.

One of the exemptions is that of information provided in confidence. At first glance, this looks like it would sort the problem, however, the act makes it quite clear that this refers to information which is inherently confidential and which would be invoked in common law. It is not the same as that which is deemed to be confidential due to a contractual agreement. Caveat venditor, let the supplier beware, it may happen that an authority will have to declare information in breach of contract under the FOIA.

Trade secrets are a different issue and FOIA provides an exemption for trade secrets or if its disclosure would prejudice any commercial interests. The Authority still has to declare if they hold the information though. In practical terms, any supplier doing business with the public authority should declare anything which they feel will cause a loss of competitive edge if disclosed. This will ensure at the very least that the public authority will consider it. Remember though under this act the public authority has the last say.

The prejudice test has already been mentioned. This includes:

- Does the information relate to, or could it impact on a commercial activity?
- Is that commercial activity conducted in a competitive environment?
- Would disclosure cause damage to reputation or business confidence?
- Whose commercial interests are affected?
- Is the information commercially sensitive?
- What is the likelihood of prejudice being caused?

The Information Commissioner (IC) is directly responsible for ensuring compliance with the FOIA. If the Commissioner decides that an authority has failed to comply, the IC will issue an enforcement notice requiring immediate compliance. If the authority fails to comply they will be deemed to be in contempt of court.

To ensure that authorities do comply with the FOIA, the IC has ten top tips to aid compliance with the Freedom of Information Act.

- **Be positive.** Greater transparency is overall beneficial for the running of our society
- **Be active.** Use publication schemes proactively. Proactive publication saves time, effort, resources and money
- **Anticipate requests.** Don't wait to be asked
- **Why not?** The FOIA presumes disclosure. Public authorities should meet people's requests unless there is a good reason within the FOIA not to. Organisations do not have to withhold information if an exemption applies
- **Get talking.** A dialogue between the requester and the public authority can help you resolve requests more quickly
- **Don't fear precedent.** All decisions should be made on their own merits and on a case-by-case basis at the time of the request
- **Give clear reasons.** If you are turning down a request, write a clear refusal notice. Properly drafted and fully explained refusals can help avoid reviews and complaints
- **Give more if it helps.** Supply additional information where it is useful, such as an explanation of the data you are supplying
- **Help yourself.** Look at the Information Commissioners Office ([www.ico.gov.uk](http://www.ico.gov.uk)) guidance for more information on freedom of information, as well as information on data protection.

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A practice paper on the FOIA can be found on the CIPS website at [www.cips.org](http://www.cips.org)

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