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Recent Developments in UK Freedom of Information

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by Alistair Maughan, Masayuki Negishi

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Freedom of Information: Public Sector Contracts are generally not exempt from disclosure under the UK Freedom of Information Act

The UK's Freedom of Information Act 2000 was enacted in order to increase the accountability of public sector organisations. The consequence for companies contracting with government bodies may be that their pricing and other sensitive information is open to scrutiny by the public—and, by extension, their competitors.

Under FOIA, public bodies must disclose copies of any information held by them that is requested by members of the public, subject to a number of exemptions. When FOIA was first put in place, it was thought that a range of exemptions would protect commercial and confidential documents (such as contracts) from disclosure. Those exemptions have been narrowed over the years by the Information Commissioner's Office (ICO) and the Information Tribunal.

A recent decision of the Information Tribunal—based on a set of facts increasingly common to most public bodies—has clarified just how narrow the exemptions are in relation to contracts. In the future, most information within a public sector contract will likely have to be disclosed if an appropriate request is made. This has implications both for public bodies and for companies entering into public sector contracts which they believe contain sensitive commercial information, especially as to pricing.

What is the case?

The case is *Department of Health -v- Information Commissioner [2008] EA/2008/0018*. This is a decision of the Information Tribunal, which is the body with the jurisdiction to hear cases regarding the scope and content of FOIA. In this case, an individual made a request under the FOIA to the UK Department of Health (DoH) requesting a copy of a contract signed in 2003 between DoH and Methods Consulting Limited (Methods). The contract related to the provision of an electronic recruitment service for the NHS. As is typical, the contract included a broad confidentiality clause in fairly standard terms.

The DoH denied the request, withholding the information requested and refusing to disclose a copy of the contract. In doing so, the DoH relied on a number of exemptions in the FOIA, including in particular Section 41 (confidential information obtained from a third party), Section 43(1) (trade secrets) and Section 43(2) (prejudicial to commercial interests).

The Tribunal disagreed with DoH and held that the contract was very largely disclosable, although there were certain limited sections to which appropriate exemptions applied. This decision is consistent with the position adopted by the ICO in its dealings with other government departments which have received similar requests.

Why is this case important?

The case is a culmination of a number of cases, including in particular *Derry City Council -v- Information Commissioner* in 2006, which have narrowed significantly the scope of public bodies(and the private sector companies which contract with them) to keep confidential the contracts which they enter into.

The case supports the ICO's position that contracts cannot be looked at as a single entity and that FOIA overrides the provisions of the standard form of confidentiality clause included in most, if not all, public sector

contracts. The general rule now is that public sector contracts should be assumed to be potentially always disclosable in response to a request under the FOIA regardless of whether that request comes from a member of the public, a journalist, or a potential competitor.

Impact on Authorities

Authorities are required to apply the individual exemptions under the FOIA to specific components of contracts; this requires an examination not just of individual schedules or clauses but of specific sentences and words within schedules. It is no longer justifiable to say: "The contract is confidential, so we can't disclose it."

Authorities must assess, in relation to each component part of the contract, whether a relevant exemption applies. This can mean withholding entire clauses or entire schedules but, in all likelihood, it means going through the contract to redact or delete specific words, phrases, or sentences which contain information covered by one of the applicable exemptions. It can be a laborious task and one which requires experienced judgement and a careful systematic approach. Unfortunately, the cost of considering and applying exemptions is not one that can be taken into account in deciding whether the cost of responding to a FOIA request exceeds the permitted threshold.

Authorities have the obligation under FOIA to take responsibility for this task, but most authorities choose to do so in consultation with the private sector contracting party. Authorities will typically allow the contractor to make suggestions for exemptions but, ultimately, the decision as to whether an exemption should be applied and words can be removed is for the authority to take. Well-advised authorities need to take care to avoid bidders or contractors unjustifiably claiming wide confidentiality or proprietary information protection over information which, when judged against the FOIA standards, is properly disclosable.

Impact on Government Contractors

For companies which regularly contract with UK government departments and other public bodies, the developing trend of cases under FOIA means that the companies need to take much greater care over the information included in contracts. Companies will need no reminding that a FOIA requestor is as likely to be a possible competitor as a private individual or journalist.

In most cases, there is relatively little choice as to whether sensitive information—such as pricing—is included in a contract. What is more controllable, however, is the audit trail which demonstrates how information comes to be included in a contract and careful record-keeping as to the nature of that information, *i.e.*, do you know where the sensitive bits are and can you quickly prove why they are sensitive?

Valid FOIA exemptions apply where data: is a trade secret; has been provided by a non-government party in confidence (*e.g.*, during a bid); or could prejudice commercial interests where disclosed. Companies entering into public sector contracts ought to have a clear record of the information that they have provided to the public body to be incorporated within the contract and also of the information which they believe constitutes a trade secret or which may be commercially sensitive.

The mere fact that a contract may have been negotiated and may contain a confidentiality clause does not make it exempt under FOIA. Bidders on government contracts should badge their data accordingly and make sure that they can quickly and rapidly identity for their government clients where the most sensitive data in a contract resides and why relevant exemptions apply.

What happened in this case?

The contract between DoH and Methods was agreed in 2003 and the service to which it related commenced in January 2005. In that same month, a private individual made a request under FOIA to DoH asking for a copy of the contract. After delaying for quite some time, DoH eventually refused to provide a copy of the contract on the basis that (it claimed) the contract fell primarily under the exemptions in Sections 41 and 43 of FOIA.

There are a couple of dozen FOIA exemptions but, in fact, sections 41 and 43 of FOIA are the most common exemptions typically applied to requests for disclosure of contracts, although a number of other potential exemptions might apply depending upon the nature of the services to be provided. For example, entities in the policing and security services often rely upon law enforcement grounds (Section 31). Also, certain data in a contract may relate to individuals in their work capacity, and authorities often take the view that the Section 40 (2) (Data Protection) exemption applies to giving specific data about named individuals.

So, the fact that it focused on the scope of the Sections 41 and 43 exemptions made this DoH case typical of many cases in this area.

Section 41 (Information obtained in confidence)

The exemption in Section 41 of FOIA is in three parts:

- is "information obtained by a public authority from another person"—which really means, in this context, the other contracting party?
- would disclosure amount to a breach of confidence?
- since this exemption is a qualified one, does the public interest favour disclosure?

It is now well-established that a contract itself is not "information obtained by a public authority from another person": it is a negotiated document. Equally, most authorities—although, perhaps not surprisingly, fewer contractors; recognise that not all information provided during a bidding process has the necessary characteristics of confidence to fall within this exemption. Many bidders continue to claim confidentiality protection over the most generic types of information.

In this case, DoH argued that much of the sensitive information in the contract had been obtained from Methods, either because it had been compiled by Methods following the contractual negotiations or because it was based upon the technical specifications and details of methodologies being provided by Method. DoH relied on the *Derry City Council* case in which the Tribunal clarified that where contracts contained technical information, then, depending upon the circumstance, material of that nature could still be characterised as confidential information "obtained" by the public authority from the other party, and therefore could be redacted in any disclosed version.

Unfortunately, on the facts of the DoH case, the Tribunal held that the contract schedules had not been "obtained" from Method. The fact that the document was jointly negotiated was highly relevant. Even though some of the data may have been initially provided by Methods in its bid, the DoH had undertaken a detailed review of the all the proposals and made suggestions and changes to the specifications, and modifications taken from the invitation to tender and subsequent discussion. This was found to invalidate DoH's suggestion that the information was obtained from Methods.

Interestingly, the Tribunal commented that, as a point of general principle, it considers that, for the ICO or the Tribunal itself to wade through all the evidence of a negotiation, working out who had an original idea and at what point it was tinkered with sufficiently that it became someone else's idea, would be an impossible task. The Tribunal it feels that, even in a case such as this where there are minutes of meetings, it was still impractical to designate ownership to each clause. Worryingly, this could be taken as a sign that the Tribunal is trying to rule out Section 41 exemptions completely in cases involving negotiated contracts. This presents practical problems for the parties to a contract unless they made a very clear note, at the time of entering into a contract, of where data has been clearly provided by the contractor and has found its way into the eventual contract.

Section 43 (trade secrets and commercially sensitive information)

Section 43(1) of FOIA provides that information is exempt if it constitutes a trade secret. A trade secret implies the information is more restricted than information that is merely "commercially sensitive". The implication is that something needs to be technical, unique and achieved with a degree of difficulty and investment—the recipe for Coca-Cola being the classic example. In this case, the Tribunal did not feel the need to try to decipher whether any information fell within the trade secret category, primarily because of the approach taken to the alternative category of "commercially sensitive information".

Section 43(2) of FOIA relates to commercially sensitive information. Information is exempt if its disclosure under the Act would prejudice the commercial interest of any person. Ultimately, after a long analysis, the Tribunal accepted that there is merit in the argument that disclosure of certain information, particularly around Methods' pricing, would reduce Methods' commercial advantage and might diminish the number and quality of companies willing to tender for public sector work.

Unfortunately for the parties, most of the contract ultimately was not found to be potentially prejudicial to Methods commercial interests and therefore had to be disclosed. It is clear that the Tribunal applied a narrow definition to "prejudicial to commercial interests".

The exemption under Section 43(2) is one of the hardest exemptions for authorities to judge. Often,

information such as details of how pricing has been formulated, a winning bidder's solution, and service levels on offer may prejudice the contractor's commercial interest if publicly disclosed. In each case, the authority has to balance the public interest in favour of and against disclosure. Many contractors take a very wide view of what might be commercially sensitive and against their interests if disclosed. Authorities have to tread a fine line between balancing their contractor's interests and the interests of compliance with their statutory duty under the FOIA.

In the DoH case, the only sections that the Tribunal sanctioned to be withheld under this exemption were:

- certain sections of the service requirement that had been provided by Methods and which demonstrated a truly novel approach;
- sections stating what level of marketing expertise Methods was prepared to commit to the project;
- detailed pricing information, although not the general structure of the pricing mechanism itself;
- key working assumptions applied by Methods in the calculation of its solution; and
- list of security standards that might be useful to those wishing to sabotage or hack the system.

This section of the case illustrates the difficult job that authorities face in trying to make a decision as to what aspects of a contract are genuinely commercially sensitive to a bidder. The prevailing principle at the moment is that the assumption ought to be that very few things are genuinely commercially sensitive, unless a special argument can be made in all the circumstances of the case.

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