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There is undoubtedly much to celebrate in the UK's new freedom of information regime. As I note in the Preface to my book, *Freedom of Information Manual*, "... in times of insecurity we must be at our most vigorous defending our freedoms, because that is when governments take steps to limit them, pleading necessity ... the Freedom of Information Act is a welcome counterweight to a trend which seems increasingly to be tipping the scales towards government interference and control." (Turle, 2006).

Whilst I still stand by those words, I also sympathise with the supplier community. With the advent of the Freedom of Information Act 2000 (FOIA), supplier information in the hands of public authorities is now a treasure trove of contract bids, tender evaluations, performance reviews and pricing details, and those companies supplying to government are almost unanimous in condemning the new rules for not protecting them. The White Paper, *Your Right to Know* (Cabinet Office, 1997), which foreshadowed the Act, appeared to recognise the importance of protecting companies from harmful disclosure. It even included a mechanism for third parties to appeal public authority decisions to disclose, if disclosure could cause "substantial harm". No such provision made it into the Act, however, so suppliers are left at the mercy of their public authority customers when decisions are made about releasing information.

With this in mind, suppliers need to know what options they do have to prevent disclosure. In this article I look at the operation so far of the two FOIA exemptions

which are of most interest to suppliers: s.41, which applies to confidential information, and s.43, which deals with information which is commercially sensitive. Both exist in recognition of the principle that open government should take account of legitimate commercial interests. The interpretation of these exemptions is therefore of paramount importance to companies supplying to government. In Part 2 of this article (to follow in the next issue of *Open Government*), I will look at what other avenues companies should explore in order to protect themselves.

### **The s.41 exemption – information provided in confidence**

It is curious that until February this year, there had not been a single Decision Notice from the Information Commissioner dealing with the FOIA exemption under s.41. The Derry City Council decision in February was the first, and since then a rash of cases have appeared in quick succession. While we are still waiting for the first Tribunal judgment, we at least now have eight Commissioner Decisions for reference. There have also been a number of cases in Scotland examining the equivalent exemption in the Freedom of Information (Scotland) Act 2002.

Of the eight Commissioner decisions since February, three are of particular interest to suppliers. These are the cases involving Derry City Council (FS5006753, 21 February), Boston Borough Council (FS50064581, 6 April) and Pembrokeshire County Council (FS0067633, 6 June).

The Derry City Council case concerned a request for the Council's contract with Ryanair for its use of Derry Airport. The Council refused the request, applying a blanket exemption on the basis of s.41. On appeal, the Information Commissioner

ordered the Council to disclose. Even a cursory reading of the transcript makes it clear why Derry's claim for confidentiality was doomed from the first. It applied the exemption to the entire document when it should at least have considered whether some parts of it could be redacted. It failed to take account of the absence on or within the document of any indication that it was confidential. It also took no account of the age of the document (six years) nor the fact that much of the information it contained was already in the public domain.

The Boston Borough Council case focused on a report prepared by the company responsible for developing and managing a local sports arena. The report related to the project history, the company's work in initiating the development, and the council's financing of it. It also contained information about the company's future plans, together with those of a third company to whom part of the running of the arena had been subcontracted. The Council claimed that the report had been provided to it in confidence and that disclosure would give rise to an actionable breach, thereby engaging s.41. In his decision, the Commissioner accepted that the report had been supplied on the mutual understanding that it was confidential and that it would not be passed to others or used for purposes other than those contemplated at the time it was written. The Commissioner also agreed that the information itself was worthy of protection because it comprised sensitive information of a commercial, legal and financial nature (it included, for example, information about the company's plans for recovering its construction costs, disclosure of which would have been likely to prejudice that activity). The report itself was marked "private and confidential". The information having met the legal requirements for confidentiality protection, the Commissioner went on to consider whether the Council

had any defence to a claim for a breach (which would mean that the s.41 exemption could not apply).

The report had not been widely distributed and its details were not common knowledge – there was thus no question of its confidentiality having been waived. The Commissioner also considered whether there could be any public interest defence to a claim. There were clear public interest factors favouring disclosure, mostly notably local community debate about the construction and management of the arena, and the level of public funding which the Council was providing. At the same time, the Commissioner accepted that disclosure could prevent reclamation of some of the public funds already used to support the project, and could have direct consequences for the project's viability and the financial position of the companies managing it, which in turn could be detrimental to the Council because it might have to provide additional funding as a result to support the arena in its early trading years. Balancing all these factors, the Commissioner held that the public interest in withholding the report outweighed the factors favouring disclosure.

The Pembrokeshire case is of particular interest because part of the information at issue was a list of contracts, provided as evidence of past experience, to support a tender. The Decision Notice therefore provides guidance about the Commissioner's view of the status of client and customer lists (something which all suppliers, in my experience, guard very closely). The Commissioner decided that such information was not sensitive and did not merit protection under s.41. The reasons for this were as follows:

- There was no evidence that when originally supplied (in July 2000) the information had been provided in confidence. The Council argued that it could not

have anticipated a freedom of information request five years before the fact, but the Commissioner was not persuaded that this gave rise to any duty of confidentiality.

- The Council did provide evidence of a retrospective assertion of confidentiality, from October 2004, but the Commissioner was not persuaded that this engaged s.41.
- The Council claimed that the party behind the request had an acrimonious relationship with ORA Ltd (the company whose customer list was at issue) and that disclosure of customer details would result in an approach to ORA's customers in order to challenge the company's credentials and those of its Managing Director, Dr Ryan. In relation to this, the Commissioner held that the evidence did not support the contention that approaches would take place, nor did it establish what the detrimental effect on ORA or Dr Ryan would be. Further, in the Commissioner's view:

"If such approaches did take place and they were designed merely to find out whether work was undertaken with those organisations, then the disclosure would, if anything, serve the interests of a greater transparency in relation to the Council's relationship with ORA Ltd and Dr Ryan. Whilst this may represent a detriment to Dr Ryan in the event his claims prove to be untrue, this is not the sort of detriment the Commissioner believes is needed to establish a duty of confidentiality. If there was a real prospect of direct prosecution or intimidation of Dr Ryan, this would amount to a significant detriment, but this was not established ...".

There have been a number of decisions by the Scottish Information Commissioner on s.36 of the Freedom of Information Scotland Act 2002 (the equivalent, north of the border, to s.41 of FOIA). One case is of particular interest because it concerns a public procurement: Decision 028/2005 – Ms Cartlidge and the Scottish Executive.

The information at issue in that case was a breakdown of the cost of a digital television pilot involving the Scottish Executive. Ms Carlidge also asked for the names of any private sector companies involved in the project, and information about the costs of the contract.

The Scottish Executive released the name of the company involved in the project, Thunderchief Pictures Limited, and some details of the cost breakdown. It refused to disclose other costs information on the ground that this was covered by a contractual confidentiality restriction which brought it within s.36. The Commissioner held that s.36 did apply, although not simply because of the existence of the contract clause. Evidence presented in the case included an email from the company to the Executive claiming that release of the information would considerably damage its commercial interests as it would enable competitors to undercut it in any future tender. The Commissioner observed that:

“information contained in concluded or terminated contracts decreases in sensitivity with the passage of time. Having considered the contract between the Executive and Thunderchief (which terminated in April 2004, only eight months before the information request), I consider that not enough time has passed in this case to sufficiently degrade the commercial sensitivity of the information to the extent that no damage would be done to Thunderchief’s interests should the information be released...”

One other point worthy of note is the injunction threatened against Birmingham City Council earlier this year by American gaming company, Las Vegas Sands. According to reports, the threat was made when Birmingham notified the company that it was

about to disclose financial and contractual information relating to a proposal for a super-casino at Birmingham City Football Club. In the event, the Council agreed not to disclose pending a High Court judicial review, but the judicial review application was thrown out (Birmingham Post, 2006).

### **The s.43 exemption – commercial interests**

Government statistics indicate that on average about one in five cases cite s.43 as a basis for non-disclosure. Along with s.41, it is consistently one of the three most common exemptions applied whenever information is refused. There have been a number of Decision Notices in which s.43 has featured, the most significant being the National Maritime Museum case which was appealed to the Information Tribunal in January (John Connor Press Associates Limited v The Information Commissioner, EA/2005/0005).

The National Maritime Museum had received a request for documents and correspondence relating to payments to Conrad Shawcross, an artist whose work the Museum was exhibiting as part of an ongoing series called Continuum. The Museum disclosed a copy of their contract with Shawcross, together with three invoices submitted by him and various budget statements and emails relating to the contract. However, all financial details were redacted on the basis that disclosure could prejudice the Museum's negotiations with the proposed next artist in the series.

John Connor Press appealed to the Information Commissioner, whose Decision Notice was published in June 2005. Readers will be aware that the Commissioner agreed with the Museum that the public interest in protecting its bargaining position "during

active and contemporaneous negotiations for a project of a similar nature" overrode, for the time being, the public interest in disclosure. Releasing the financial details of the negotiations which had immediately preceded the current and ongoing negotiations could, in the Commissioner's view, prejudice the Museum's ability to get value for public money. The Commissioner noted however that the likelihood of prejudice would diminish with time and with the conclusion of the active negotiations, to the point where the balance of the public interest would shift towards disclosure.

John Connor Press appealed the Decision Notice on two grounds: first, that the Commissioner had wrongly decided that s.43 was relevant, and secondly, that even if s.43 did apply, the public interest in disclosure outweighed the likely prejudice to the Museum's commercial interests. The Tribunal overturned the Commissioner's ruling, deciding that the words "likely to prejudice the commercial interest of any person" in s.43(2) required a "real and significant risk" of prejudice, which the evidence in the case did not support. In particular, the contract information which the Museum had already disclosed "reduced very materially the value of the financial information that was withheld."

The Tribunal observed that even with the financial details redacted, the contract contained a substantial amount of information which would be of considerable value to any prospective exhibitor. For example, the Museum had disclosed the fact that it had contributed to Mr Shawcross's costs of exhibiting (and that other organisations had similarly contributed), that copyright in the artwork had been retained by Mr Shawcross, and that the Museum's contribution would be refunded if the work was sold within three years of the exhibition. The Tribunal concluded that the evidence put before the Commissioner had been insufficient to justify his upholding the exemption. The most significant element of the case is that the sensitivity of the

information which the Museum had sought to protect was held by the Tribunal to have been diminished by the Museum's disclosure of other, less sensitive, information. This could have alarming implications. It means that information which is not protected by an exemption (and must therefore be disclosed) may diminish the sensitivity of other, exempt, information to such a degree that it thereby emerges from exemption under s.43.

With the Tribunal and the High Court adopting a strict approach to both the confidentiality and commercial interests exemptions, and the Commissioner warning suppliers they must learn to live with an enhanced risk of disclosure, the lie of the legal landscape is starting to look perilously rocky. In my follow up article in the next issue, I will be looking at ways suppliers can protect themselves, whether before, during or after the FOIA request lifecycle.

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