

MOD FOI Guidance Note –Commercial Guidance Front Page

Requests for Commercial Information made under the FOI Act 2000

Commercially Sensitive Information

Delivery of enduring military capability at best long term value for money requires MOD to maintain the relationships with Industry that promotes business excellence. Disclosure of commercially sensitive information – particularly information that has been supplied by Industry – could undermine its ability to operate effectively in a commercial environment. Moreover, disclosure of market sensitive information might an unfair advantage to potential competitors for a contract.

Examples of what might be considered sensitive commercial information:

- Submissions to Ministers and Ministerial correspondence about procurement matters;
- Confidential information provided by third parties, e.g.
 - tenderers' responses against an Invitation to Tender;
 - special discounted prices;
 - contractor's cost structures;
 - performance or financial reports supplied in confidence; or
 - intellectual property.
- Information sensitive for commercial, operational or policy reasons, e.g.
 - politically controversial issues;
 - tender evaluation reports;
 - price investigation reports;
 - non-standard contract conditions that are sensitive for the contractor;
 - export licence applications;
 - technical assistance agreements and other export control documents;
 - manufacturing licences; or
 - aircraft crash reports.
- Information supplied by or relating to a third party (e.g. foreign Governments or Industry); and
- Information where disclosure could potentially cause harm (e.g. suspicions of financial weakness); financial loss or loss of earning potential to, or facilitate improper gain or advantage for, individuals or companies.

Commercial Exemptions

With regard to sensitive commercial information the FOI Act provides:

- a) an absolute exemption at s41 for 'information provided in confidence' where disclosure of the information to the public would constitute a legally actionable breach of confidence; and
- b) an exemption at 43 under 'commercial interests' subject to a Public Interest Test for information that constitutes a 'trade secret' or where disclosure would harm the commercial interests of any person.

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Release of commercial information at the wrong time can cause serious prejudice, e.g. revealing a confidential negotiation position would hinder MOD's ability to achieve value for money. Companies may also be deterred from sharing commercial information with MOD if they are unsure about whether their information would be protected.

The Public Interest Test requires balancing the relative weight of relevant public interest factors for and against disclosure and to decide on balance whether disclosure is in the public interest. Often the factors against disclosure are set out in the exemptions, e.g. for s43 it is often the extent of the harm to commercial interests.

MOD has agreed with Industry that defence companies shall be consulted in all cases where disclosure of information supplied by or related to them is being considered for disclosure under the FOI Act. After consultation, should MOD decide to disclose information against the wishes of the defence company the company shall be notified of the decision at least two working days prior to disclosure.

Authority for disclosure of commercial information under the FOI Act must be approved by a 1 Star Commercial Officer in order to establish a consistent approach across MOD. For MOD organisations that do not have a 1-Star Commercial Officer in their chain of command, authorisation for disclosure should be at 1-Star (or equivalent) level with the submission staffed through a Band B Commercial Officer.