

## Accessing confidential and commercially sensitive information under FOIA

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#### Introduction

1. The Freedom of Information Act 2000 (“FOIA”) creates a general right of access to information held by public authorities.<sup>1</sup> This paper addresses the following important question: when responding to requests for disclosure of information under FOIA, just how free should public authorities be with the confidential and commercially sensitive information which they hold?
2. Answering this question is inevitably important for public authorities. This is because their decisions on particular FOIA requests can potentially result in their being exposed not only: (a) to complaints being submitted to the Commissioner by the requester,<sup>2</sup> but also (b) to costly claims brought by third parties who are adversely affected by the disclosure. However, answering this question is also critically important for those third parties who may be adversely affected by the disclosure of confidential or commercially sensitive information. Those third parties can include businesses whose commercial interests may be significantly prejudiced by the disclosure of commercially sensitive information. They can also include individuals who may, for a variety of reasons, feel hugely exposed where the authority discloses information which they have provided in confidence.
3. It is important to note at the outset that third party individuals have something of an advantage over third party businesses so far as FOIA is concerned. This is because individuals enjoy particular protections under FOIA as a result of being ‘data subjects’ for the purposes of section 1 of the Data Protection Act 1998 (“DPA” - see further the exemption afforded under section 40 FOIA in respect of ‘personal data’). Businesses do not enjoy such protections as they cannot be ‘data subjects’ for the purposes of section 1 DPA.<sup>3</sup> This paper is not concerned with the section 40 (personal data) exemption so much as with those exemptions within Part II of FOIA which are specifically concerned with confidential and commercially sensitive information, namely sections 41 and 43 FOIA.

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<sup>1</sup> Section 1 FOIA. Section 1 provides as follows: ‘1(1) Any person making a request for information to a public authority is entitled - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him’.

<sup>2</sup> See section 50 FOIA.

<sup>3</sup> The Tribunal’s decision in *England v Information Commissioner* EA/2006/0060 neatly illustrates the differing levels of protection afforded to business as compared with individuals under FOIA. *England* was concerned with a request submitted to Bexley LBC for a list of all the vacant properties in the Bexley area. The Tribunal held that the addresses of vacant properties owned by businesses were disclosable under FOIA whereas the addresses of vacant properties owned by natural persons were exempt from disclosure under section 40 FOIA because the information requested amounted to ‘personal data’.

## **Structure of FOIA: a Brief Overview**

4. The provisions of FOIA 2000 will be engaged whenever a public authority receives a request in writing for information from a named individual.<sup>4</sup> Before responding to the request, the authority must consider the nature of the information requested. If the information is 'environmental information', then the authority's response will be governed in the first instance by the Environmental Information Regulations 2004 ("EIR") and not FOIA.<sup>5</sup> If the information requested amounts to 'personal data' which has been requested by the subject of the data in question, then the authority's response will be governed by the provisions of the DPA.<sup>6</sup>
5. In all other cases, the authority must disclose the information requested unless:
  - (1) the information is not held by the authority (section 1 FOIA); or
  - (2) the cost of complying with the request would exceed the costs limit provided for under section 12<sup>7</sup> (although note, it may be that part of the request can be responded to without exceeding the costs limit, this is something which the authority would generally be expected to explore with the requester pursuant to its obligation to provide advice and assistance under section 16 FOIA); or
  - (3) the request is either vexatious or identical/substantially similar to an earlier request made by the same individual;<sup>8</sup> or
  - (4) the information requested is exempt under one of the exempting provisions contained in Part II FOIA.
6. Part II FOIA contains two different types of exemption: absolute exemptions and qualified exemptions.
  - (1) Where an exemption is **absolute**, then provided that the information in question falls within the exemption, the bar on disclosure will be absolute.
  - (2) Where an exemption is **qualified**, information falling within that exemption will still have to be disclosed unless *the public interest in maintaining the exemption*

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<sup>4</sup> Section 8 FOIA. The individual must also provide an address for correspondence.

<sup>5</sup> See the exemption afforded under section 39 FOIA, although note, because section 39 is a qualified exemption, if the information is not disclosable under the EIR, it may yet be disclosable under FOIA where the public interest weighs in favour of disclosure.

<sup>6</sup> Such information is absolutely exempt from disclosure under FOIA pursuant to section 40(1) FOIA.

<sup>7</sup> See further the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI 2004/3244). Note, the Government is shortly to produce its response to consultations on new draft Regulations relating to the costs limits applicable under FOIA. If the regulations are brought into force, this will result in authorities much more frequently being able to rely on the section 12 costs exemption as a basis for refusing disclosure.

<sup>8</sup> Section 14 FOIA.

*outweighs the public interest in disclosing the information*' (section 2(2)(b) FOIA).  
This is the so-called 'public interest test'.

7. It is important to bear in mind that, on an application of the public interest test, if the public interest scales are evenly balanced, the information will not be exempt from disclosure. It is only if the balance of the public interest tips in favour of the exemption being maintained that the authority can lawfully conclude that the information should not be disclosed (*DFES v Information Commissioner EA/2006/0006*, paragraph 65).
8. The question whether a particular exemption is absolute or qualified is answered by section 2(3) FOIA. Section 2(3) identifies all the absolute exemptions contained in Part II, the remainder are all qualified exemptions.
9. When handling requests for information which is confidential and/or commercially sensitive, apart from the exemption afforded under section 40 in respect of 'personal data', the exemptions which are most frequently going to be in issue are those contained in section 41 (exemption in respect of confidential information) and section 43 (exemption where disclosure would or would be likely to prejudice commercial interests). For present purposes, it is important to note that:
  - (1) section 41 is an absolute exemption; whereas,
  - (2) section 43 is a qualified exemption.
10. So far as the time for compliance is concerned, the authority has twenty days within which to respond to a request made to it under FOIA.<sup>9</sup> However, where the public authority considers that the information may be exempt under one of the qualified exemption provisions and it is not in a position properly to weigh up the public interest within the twenty day period, in effect the authority may take '*such further time as is reasonable in the circumstances*' before taking a decision on whether to disclose the disputed information.<sup>10</sup>
11. It should be noted here that the fact that information is exempt from disclosure under FOIA does not mean that the authority otherwise has no *power* to disclose the requested information. FOIA does not itself prohibit the disclosure of information which is exempt. It merely ensures that authorities are not *obliged* to disclose exempt information under FOIA. It follows that authorities may retain residual powers to disclose information, despite the fact that it is exempt information under FOIA. However, importantly, in exercising any residual powers which they have, the authority should be mindful of relevant

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<sup>9</sup> Section 10(1) FOIA.

<sup>10</sup> See section 10(3).

considerations, including, for example, whether disclosure might result in a well founded claim for breach of confidence or breach of contract being brought against the authority.

12. When considering whether information is exempt from disclosure under FOIA, regard should be had to the various 'Awareness Guidances' issued by the Commissioner's Office. Particularly relevant for present purposes are:
  - (1) FOIA Awareness Guidance No. 2 - on Information Provided in Confidence;<sup>11</sup> and
  - (2) FOIA Awareness Guidance No. 5 - on Commercial Interests.<sup>12</sup>

### **Rights of Third Parties Under FOIA**

13. Importantly, FOIA does not itself afford any rights to third parties who may be affected by the disclosure. Thus, for example, FOIA does not itself oblige public authorities to consult with affected third parties prior to disclosure of confidential or commercially sensitive information (although the failure to consult may constitute a breach of the Code of Practice issued under section 45 of FOIA). Nor, further, does FOIA afford third parties the right to complain to the Commissioner if they are unhappy about any particular disclosure which has been made (although third parties can apply to be joined as additional parties by the Information Tribunal if the Commissioner's decision is subsequently appealed to the Tribunal).<sup>13</sup>
14. It follows that, where third parties wish to challenge the way in which an authority is responding or has responded to particular requests made under FOIA, they must seek a remedy outside the four corners of FOIA. Most obviously, they must challenge the authority's decision by:
  - (1) mounting a claim for judicial review; and/or
  - (2) making an application for injunctive relief; and/or
  - (3) mounting a civil claim for damages (for example for breach of confidence or breach of contract).
15. That the broad right to access information under FOIA has not been matched by any equivalent statutory right on the part of third parties to control the extent of that access is

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<sup>11</sup> [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_2\\_-\\_information\\_provided\\_in\\_confidence.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_2_-_information_provided_in_confidence.pdf).

<sup>12</sup> [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_5\\_-\\_commercial\\_interests001.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_5_-_commercial_interests001.pdf).

<sup>13</sup> See rule 7 of the Information Tribunal (Enforcement Appeals) Rules 2005 (SI 2005/14). There is no guarantee that such an application will be allowed by the Tribunal. However, the Tribunal will usually be inclined to allow joinder applications made by third parties where it is of the view that the third party has important evidence to give about how their interests will be affected by the disclosure *and* the existing parties are not well placed to adduce that evidence.

obviously unfortunate for those third parties who are adversely affected by disclosures made under FOIA. However, this lack of any statutory right of control means that it is particularly important for third parties who provide information to public authorities to think very carefully about the terms on which they are prepared to disclose information. This is a subject which will be revisited towards the end of this paper.

### **Sections 41 and 43**

16. Apart from the exemption afforded under section 40, the exemptions which are most commonly prayed in aid by authorities in respect of confidential and/or commercially sensitive information are sections 41 and 43.

#### **Section 41: Confidential Information**

17. Section 41 FOIA provides as follows.

*'41. - (1) Information is exempt information if-*

*(a) it was obtained by the public authority from any other person (including another public authority), and*

*(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

*(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.'*

18. Section 41 is an absolute exemption. As such it does not call for an application of the public interest test.
19. Information will be exempt under section 41 only if the following requirements are met:
- (1) the information has been obtained by the authority from another person; and
  - (2) disclosure of the information would constitute 'a breach of confidence actionable by that or any other person'.

Information From Another Person

20. Importantly, not all confidential information held by the authority will have been obtained by the authority from another person. It is only the latter type of information which falls within the ambit of section 41. It will not always be easy to determine whether confidential information held by a public authority has been obtained 'from another person' such that it falls within the ambit of section 41. For example, would section 41 be engaged in respect of a 'confidential' agreement between a third party contractor and the authority? Would it be engaged in respect of notes of an interview conducted 'in confidence' by the authority with an employee?
21. In answering these questions, regard should be had to the case of *Derry City Council v Information Commissioner* EA/2006/0014 ("*Derry City Council*") – the Tribunal's decision in *Derry City Council* is the leading decision on the application of sections 41 and 43 FOIA. In that case, a request was made for disclosure of an agreement which Ryanair had entered into with Derry City Council with respect to the use by Ryanair of Derry City Airport. The information held by the Council falling within the ambit of this request consisted of a 'Heads of Agreement' fax which had been sent to Derry City Council by Ryanair. The 'Agreement' which was marked 'private and confidential' incorporated the terms on which Ryanair were permitted to use Derry City airport and included certain financial terms which were required by Ryanair as part of the overall agreement ("the financial information"). The Council withheld the entire document (including the financial information) on the basis that it was exempt from disclosure under section 41 (reliance was also placed on section 43). Following an intervention by the Commissioner, the Council decided that section 41 and section 43 exemptions could not be maintained in respect of much of the agreement. Accordingly, it disclosed that information. However, it persisted in its refusal to disclose those parts of the agreement which incorporated the financial information. The Tribunal reached the following conclusions on whether the financial information was exempt under sections 41 and 43:
- (1) the information contained within the agreement amounted merely to a record of the terms which had been mutually agreed between Ryanair and the Council. As such, it did not incorporate information provided 'from any other person' for the purposes of section 41. (The Tribunal went on to observe that the position might have been different if the agreement had incorporated 'technical information' relating to the third party contractor, particularly if such information was contained in a separate schedule). Accordingly, section 41 was not engaged.
  - (2) the Tribunal went on to comment that, even if the information had been provided by Ryanair, the section 41 requirements would not be made out because, given not least the age of the information in question, there would be no 'actionable' claim for breach of confidence which could be advanced by Ryanair;

- (3) whilst disclosure of the information may be damaging to the Council's interests such that section 43 was engaged, the public interest still weighed in favour of disclosure. (Notably, Ryanair was not a party to the appeal and, hence, did not have an opportunity to set out its case under section 43).
22. Applying the Tribunal's logic to the scenario where a request is made for notes of a confidential interview conducted by a public authority with one of its employees, it would seem that:
- (1) the authority would not be able withhold the entire interview under section 41;
- (2) however, section 41 may well be engaged in respect of those parts of the interview which include:
- (a) information specifically imparted by the interviewee; or
- (b) information imparted by the interviewer which incorporates information provided by the interviewee or some other third party interviewee.

#### Actionable Breach of Confidence

23. Information, even where it is provided by another person, will not be exempt under section 41 merely because it is confidential. It must also be information the disclosure of which would give rise to an 'actionable breach of confidence'. Determining whether a breach of confidence is 'actionable' entails considering two key questions.
- (1) Will a breach of confidence be 'actionable' merely because a claim for breach of confidence could be mounted by a third party or will it be 'actionable' only if the claim is bound to succeed?
- (2) Will a breach be actionable if disclosure is in the public interest?
24. With respect to the former question, it would seem, in light of the decision in the *Derry City Council* case, that it is not sufficient for there to be an arguable case for breach of confidence: the breach of confidence claim must actually be capable of made out in order to be 'actionable'.
25. In determining whether the claim would be made out, regard should be had to the classic statement of the requirements for a breach of confidence contained in *Coco v AN Clark (Engineers) Ltd (Ch D)* [1968] F.S.R. 415. In that case, Megarry J stated that three requirements had to be satisfied before a court will protect information as being legally confidential:

*'In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene M.R. in the Saltman case on p. 215, must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.'*

26. It is important to note here that the developing law on privacy has impacted on the law of confidence. In particular, following the decision of the House of Lords in *Campbell v MGN Limited* [2004] 2 WLR 1232, information which is private probably also now falls to be regarded as confidential (see in particular per Lord Nicholls, para. 14; see also the more recent decision of the High Court in *HRH Prince of Wales v Associated Newspapers* [2007] Ch 1685, which concerned disclosure of the Prince of Wales' diaries).
27. However, it is not merely the principles outlined in *Coco v Clark* which fall to be considered when an authority is seeking to determine whether the disclosure would give rise to an 'actionable breach of confidence' under section 41. A further critical consideration will be whether the public interest in disclosure effectively overrides the obligation of confidence so as to ensure that there is no actionable breach of confidence. Where there is such an overriding public interest, there will be a valid public interest defence against any claim for breach of confidence and, hence, the claim will not be actionable for the purposes of section 41 (see *Derry City Council*).
28. It is important to point out here that a distinction must, however, be drawn between: (a) the section 2(2)(b) public interest test which applies where qualified exemptions are in issue and (b) the public interest defence available in respect of breach of confidence claims.
- (1) In the former case, disclosure must be effected unless the public interest in maintaining the exemption positively outweighs the public interest in disclosure.
- (2) In the latter case, the question is whether there are overwhelming public interest considerations which warrant the duty of confidence being overridden. In other words, the public interest in disclosure must positively outweigh the public interest in upholding confidences in order for the defence to be made out.
29. Context is likely to be critical when determining whether the public interest defence would be made out in respect of a particular disclosure under section 41. This is highlighted by the Commissioner in his Awareness Guidance No.2 on Confidential Information:

*'In a medical context, confidentiality is important because it reinforces the bond of trust between patients and doctors, without which people may be reluctant to seek medical advice. In a banking context, confidences are*

*respected in order to maintain trust in the banking system as a whole. Examples of cases where the courts have required disclosure in the public interest include those where the information concerns misconduct, illegality or gross immorality.'*

30. It will be apparent from all of the above that applying section 41 poses complex challenges for public authorities. Particularly in cases where it is unclear whether the breach of confidence would or would not be actionable, public authorities face something of a 'hobson's choice' when seeking to decide whether information is exempt under section 41.
- (1) If the authority decides in favour of disclosure, it risks claims being brought against it for damages for breach of confidence either:
- (a) by the person who provided the information; or possibly also
- (b) by the person who is the subject of the information (this will particularly be the case where the information in question can be said to be private).
- (2) If the authority decides against disclosure, it risks complaints being made to the Commissioner by the person making the request.
31. The problems become even more acute in circumstances where the authority has given an express warranty to the third party along the following lines: '*As far as practicable, your confidentiality will be respected, but it cannot be guaranteed in all circumstances*'. This form of warranty is one which, in one shape or another, seems regularly to surface in the local authority context, particularly, in the context of investigatory interviews conducted in the course of disciplinary/grievance processes or where the authority is obtaining information in the context of consultations on planning matters. The equivocal nature of this particular form of warranty may make it very difficult for the authority to ascertain whether the information provided by the third party falls within the ambit of section 41.
32. It may be that, where such a warranty is given, information provided by the third party can still be treated as falling within the scope of section 41. This would be on the basis that the warranty which has been given is subject to an implied obligation that disclosure would be effected only on a limited basis - for example: disclosure of notes of interviews made in the course of disciplinary or grievance investigation would only be made to local authority officers or employees for the purposes of determining the disciplinary case or resolving the grievance; information provided by consultees in connection with a planning matter would only be disclosed once the authority had taken a decision to allow or refuse the particular application.
33. However, each case will turn on its own particular facts and inevitably the equivocal nature of the warranty will add a further layer of complexity to the analysis under section 41 (cf.

*Dainton v Information Commissioner & Lincolnshire CC EA/2007/20*, a case decided under the EIR).

### **Section 43: Prejudicial to Commercial Interests**

34. Section 43 FOIA provides as follows

*'43. - (1) Information is exempt information if it constitutes a trade secret.*

*(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*

*(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).'*

35. The section 43 exemption is a qualified exemption and, hence, calls for an application of the public interest test.

36. In deciding whether section 43 is engaged, the authority must consider, first, whether the information is sufficiently sensitive such that it amounts to a 'trade secret' - see section 43(1) and see also the analysis of the concept of a trade secret in the leading case on confidential information *Faccenda Chicken Ltd v Fowler* [1984] ICR 589 and in the Court of Appeal [1986] ICR 297. If the information amounts to a trade secret then, it will be exempt from disclosure, subject to an application of the public interest test.

37. If the information falls short of being a trade secret, then the authority must go on to consider whether its disclosure would, at the very least, 'be likely to prejudice the commercial interests' of any person, including the public authority (section 43(2)). There are a number of important points to note here.

(1) Applying section 43(2) requires the public authority to engage in the speculative activity of trying to predict the likely consequences of disclosure of particular information.

(2) Particularly where the interests at stake are those of a third party (for example a third party contractor), it may be difficult if not impossible for the authority to assess the risks of disclosure without first consulting with the relevant third party. This will particularly be the case where the request is made in respect of commercial information which, as a result of the passage of time, may have ceased to be sensitive (for example tender information provided some years before the request was made).

- (3) Where such circumstances obtain and the authority fails to consult, whilst this will not amount per se to a breach of the obligations under FOIA, it may well found a claim for judicial review brought by the third party. Such a claim would most obviously be brought on the basis that the failure to consult was *Wednesbury* unreasonable, particularly having regard to the requirements of the Code of Practice.
- (4) Section 10(3) of FOIA specifically affords authorities a degree of flexibility when it comes to responding to requests for information where qualified exemptions are engaged. That flexibility creates an important window of opportunity to consult with affected parties.
- (5) Whilst consultation will often be an important part of the process of determining whether the disclosure will be prejudicial to commercial interests, the final decision must be taken by the authority. In practice, what this means is that, whilst the authority should take into account any information provided by the third party as to the commercial sensitivity of the information and the likely impact of disclosure, it should not automatically accept that information at face value. Rather, the authority must ensure that it conducts its own evaluation of all the evidence, albeit that it may be reasonable for the authority to place significant weight on the evidence provided by the third party.
- (6) Importantly, a public authority is not entitled to conclude that section 43 is engaged where there is merely a remote or fanciful risk of prejudice to public interests. As the Tribunal found in *John Connor Press Associates Limited v Information Commissioner* EA/2005/0005 and *Hogan and Oxford CC v Information Commissioner* EA/2005/0026, there must be a 'real and significant risk of prejudice' rather than just a remote possibility of prejudice (see further *OGC v Information Commissioner* EA/2006/0068, para. 40).
- (7) When assessing whether there is a significant risk of prejudice, the age of the information is likely to be an important consideration. The reason for this is that the sensitivity of commercial information will often, although not always, deteriorate as time passes - see further for example *Derry City Council* and *John Connor Press Associates Limited v Information Commissioner* EA/2005/0005. See also the Commissioner's decision in a case involving DEFRA (Decision Notice FS50101105, 23 April 2007). In the *DEFRA* case, the disputed information included information about a successful tenderer's costs mechanism. DEFRA withheld the information relying on section 43. The Commissioner found that the information was not exempt under section 43. In so finding, he relied heavily on the fact that 2.5 years had elapsed between the submission of the tender and the request. It may be that a different result would have obtained if the tenderer had

itself been afforded the opportunity of addressing the Commissioner on the impact of the disclosure on its business.

- (8) Some of the difficulties attendant on deciding whether disclosure would be likely to prejudice commercial interests are illustrated by another recent decision by the Commissioner in a case involving the *Medicines and Healthcare Products Regulatory Agency*, an executive agency of the Department of Health (Decision Notice FS50076806, 22 January 2007).
- (a) In that case, the Agency had received a request for a copy of an investigation report which contained allegations of malpractice made against a third party. The Agency had itself investigated the allegations and concluded that they were unfounded. The Agency withheld those parts of the report which included the allegations under section 43.
- (b) The Agency concluded that the disclosure would be damaging to the commercial interests of the third party because of the serious nature of the allegations. It also concluded that the public interest weighed in favour of the exemption being maintained because its own investigations had resulted in the Agency finding that the allegations were not well founded.
- (c) The Commissioner took a rather different view of the matter. He concluded that the Agency had erred in concluding that section 43 was engaged because in his view there was no significant risk of prejudice to commercial interests. In arriving at this decision, the Commissioner took into account in particular the following matters: (a) at the time the request was made, the allegations were five years old; and (b) the Agency had already found some years before that the allegations were unproven (i.e. this was a factor which, before one ever got to the public interest test, militated against section 43 being engaged). The Commissioner went on to order disclosure of the information.
- (d) Of course a little information can be a dangerous thing and the fact that allegations may be old and/or rejected by the public authority, would not in itself necessarily prevent the recipients of certain information seeking to use the allegations to stir up trouble for the third party. However, to the extent that this was a valid concern in the Agency case, it is one which the Commissioner considered could be satisfactorily addressed by the relevant authority providing the requested information along with an explanation that the allegations were old and had been disproved by the Agency. Query whether this constitutes a satisfactory way of addressing this particular concern given that neither the authority nor the

Commissioner can ensure that the recipient of the information will himself only seek to disclose the allegations alongside the neutralising explanatory information.

38. Even where the evidence indicates that disclosure would be likely to prejudice the commercial interests of the authority or the third party, this does not mean that it is exempt from disclosure under section 43, the information will only be exempt if:
- (1) its disclosure would or would be likely to prejudice commercial interests of the authority or a third party; and
  - (2) having regard to all the competing public interests, the public interest weighs in favour of the exemption being maintained.
39. Importantly, the fact that disclosure would or would be likely to prejudice commercial interests does not create any presumption that the public interest weighs in favour of non-disclosure. However, the more sensitive the information, the more the disclosure is likely to be adverse to the commercial interests of the authority or the third party; and, by extension, the stronger the public interest will need to be in order to justify the disclosure. But even where information is very sensitive and disclosure will obviously be commercially damaging to the authority or a third party, there may yet be public interest considerations which operate so as to require disclosure.
40. To take just one example, it may be that disclosure of the sums paid by a public authority to a particular law firm in respect of a particular piece of litigation would prejudice the commercial interests of that firm by assisting a competitor to undercut the firm's prices in a future competitive tender. However, it may be that the public interest nonetheless weighs in favour of disclosure because: (a) there is a current public debate as to whether the authority is facing a budgetary crisis as a result of an overspend on legal fees; and (b) disclosure of the information will help members of the public to understand whether the authority is making effective use of its resources in this regard.
41. In view of the risks that an authority may not fully understand the implications of the disclosure of commercially sensitive information relating to third parties, it is particularly important that third parties take such opportunities as are afforded them to educate the authority as to those implications. This is a matter which is revisited below.

### **Other Exemptions**

42. When responding to requests made under FOIA it is essential that public authorities consider the full range of exemptions available in Part II. This is because, even if the requested information is not exempt under one particular exempting provision, it

may yet be exempt under another provision. A failure to consider that other exemption may result in costly litigation for the authority.

43. So far as confidential and/or commercially sensitive information is concerned, other exemptions which may be applicable include:

(1) the section 42 exemption – qualified exemption applies where the information amounts to information:

*‘in respect of which a claim to legal professional privilege or in Scotland, to confidentiality of communications, could be maintained in legal proceedings’*

(2) the section 44 exemption - absolute exemption applies where the disclosure:

*‘(a) is prohibited by or under any enactment;*

*(b) is incompatible with any Community obligation; or*

*(c) would constitute or be punishable as a contempt of court’*

#### **Section 42: Legal Privilege**

44. The section 42 exemption in respect of legally privileged information is a qualified exemption. Thus, where it is requested, legally privileged information must be disclosed, unless the public interest in maintaining the exemption outweighs the public interest in disclosure. The principle of legal privilege is, of course, commonly regarded as one of the keystones of our domestic legal process (see *Three Rivers DC and ors v Governor and Company of the Bank of England (no 6)* [2004] 3 WLR 1274). In the circumstances, it seems somewhat counter-intuitive that there could ever be disclosure of information which was genuinely privileged. However, it is clear that section 42 does permit such a result, although in leading case on section 42, namely *Bellamy v Information Commissioner* EA/2005/0023, the Tribunal has made clear that because of the central importance of legal professional privilege to our legal system, there is already a strong public interest against disclosure built into the exemption.

45. Information as to the legal costs incurred by a public authority can potentially constitute information which is at once privileged and commercially sensitive. It may be privileged because it reveals in effect the unfolding relationship between a client and his lawyer. It may also be commercially sensitive because of the uses to which the information, if disclosed, may be put, particularly if it is requested by persons who are themselves the opposing party in the litigation in question. The advantages afforded by the section 42 exemption are that:

- (1) in contrast with the section 43 exemption, it will usually be far easier for the authority to decide whether or not the exemption is engaged; and
  - (2) where the exemption is engaged (because the information is genuinely subject to legal professional privilege), the authority will be off to a good start on an application of the public interest test because of the strong public interest against disclosure built into the exemption.
46. However, importantly, it cannot simply be assumed that all bills of legal costs will be exempt from disclosure under section 42.
- (1) In light of the decision of the Tribunal in *Husbands v Information Commissioner* EA/2006/0048, it is clear that, whereas bills which disclose, in effect, the nature of the interactions between the authority and their lawyers may be subject to the exemption, the global sums expended by the authority will not generally fall within the ambit of section 42. This is because such global information does not generally tend to reveal the unfolding nature of the client/lawyer relationship and, hence, is not in truth legally privileged information. It follows that global sums will usually be disclosable under FOIA, unless section 43 can be relied upon as an alternative to section 42
  - (2) Furthermore, even if the information is genuinely privileged, depending on the circumstances, there may yet be public interest considerations which are sufficiently strong to warrant disclosure. Such public interest considerations may arise, for example, where serious questions have been raised as to whether an authority is breaching the fiduciary duties it owes to tax-payers by agreeing to pay exorbitant legal fees.

#### **Section 44 – Statutory Prohibitions**

47. The application of the exemption afforded under section 44 will generally be more straightforward. If the disclosure is prohibited under statute, then:
- (1) the information will be absolutely exempt from disclosure under FOIA; and
  - (2) the authority will be acting unlawfully if it discloses the information.
48. Statutory prohibitions on disclosure may arise in particular in respect of requests made of public authority regulators. See further for example section 348 of the Financial Services and Markets Act 2000, which imposes restrictions on the disclosure of confidential information by the Financial Services Authority.

49. Another important prohibition is contained within the Public Contracts Regulations 2006. Regulation 43 of those Regulations provides as follows:

*'43. —(1) Subject to the provisions of these Regulations, a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.*

*(2) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders.'*

50. In cases where the Regulations apply,<sup>14</sup> regulation 43 effectively bars the authority from disclosing any information which the 'economic operator' (e.g. a tenderer) '*reasonably designates as confidential*'. Where this bar applies under regulation 43, the information will be exempt from disclosure under section 44 FOIA

### **Precautionary Measures**

51. The fact that third parties have no statutory right under FOIA to require authorities to take their views into account makes it all the more important for third parties who are providing information to public authorities to take precautionary measures with a view to safeguarding their position.
52. Most obviously such measures would include those set out below.
- (1) the third party should expressly confirm to the authority in writing that they regard the information they are providing as confidential and/or as commercially sensitive;
  - (2) the third party should confirm in writing which particular type of information it regards as commercially sensitive. If some information is regarded as amounting to a trade secret, this should be expressly confirmed;
  - (3) the third party may seek to confirm to the authority in writing what concerns they would have about the information being disclosed to a third party;
  - (4) the third party should seek to secure a promise (ideally with contractual force) from the authority that the authority will consult with the third party whenever it is asked to disclose confidential or commercially sensitive information which is either: (a) about the third party; or (b) provided by the third party.

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<sup>14</sup> See regulation 5(1): '*Subject to paragraph (3), these Regulations apply whenever a contracting authority seeks offers in relation to a proposed public supply contract, public works contract, Part A services contract, framework agreement or dynamic purchasing system other than a contract, framework agreement or dynamic purchasing system excluded from the application of these Regulations by regulation 6 or 8.*'

53. Notably, the Commissioner's Awareness Guidance No.3 on Commercial Interests specifically encourages authorities: (a) to have discussions with their suppliers as to the types of information disclosure of which third party contractors would regard as damaging to their interests; and (b) to agree the circumstances in which the authority will consult with the third party contractor in the event that it receives a request under FOIA.
54. However, importantly, taking such steps offers no guarantee that the information which the third party wishes to protect will be treated as exempt by the public authority under FOIA. Indeed, particular caution must be exercised by authorities when they are considering any contractual promises which they have made to third parties with respect to the disclosure of confidential or commercially sensitive information. The reason for this is that public authorities are not permitted to contract out of their obligations under FOIA. Certainly, both the Commissioner and the Tribunal will readily strike down a public authority's decision under FOIA if the authority has placed undue reliance on a contractual promise made to a third party, particularly if that reliance comes at the expense of a proper evaluative exercise being undertaken by the authority with reference to specific exemptions. It is worth noting here that the Code of Practice issued under section 45 FOIA contains the following passage about contract terms with commercial organisations:

*"When entering into contracts public authorities should refuse to include contractual terms which purport to restrict the disclosure of information held by the authority and relating to the contract beyond the restrictions permitted by the Act. Public authorities cannot "contract out" of their obligations under the Act. Unless an exemption provided for under the Act is applicable in relation to any particular information, a public authority will be obliged to disclose that information in response to a request, regardless of the terms of any contract."*

55. As the Commissioner's Awareness Guidance No.2 makes clear these injunctions apply equally to confidential information as they do to information which is commercially sensitive.

### **Conclusion**

56. In conclusion, it is clear that there will often be very complex issues at stake where public authorities are handling requests made under FOIA for confidential and/or commercially sensitive information. As with so many other issues arising under FOIA, it is difficult to devise hard and fast rules which can routinely serve to minimise the risk of litigation. However, it would seem that for many third parties part of the answer will lie devising effective early warning systems.

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