



# Commercial Briefing

## Freedom of Information – the impact on the private sector

*Since January 2005, every person has had the right, under the Freedom of Information Act to request access to information held by public authorities. The rights of access are wide and whilst there are numerous exemptions which mean that information requested need not always be disclosed, the legislation is aimed at accessibility and transparency to help create a greater culture of openness within the public sector.*

*Whilst public bodies are therefore directly subject to the legislation, there are important considerations and issues which businesses should be aware of when dealing with public sector organisations. In this bulletin we look at the basics of the freedom of information legislation, its impact on business and some of the opportunities and risks private sector entities should know about.*

## What information can be requested and from whom?

The basic answer is that any individual can request any information from a public body. Most public sector organisations are subject to the legislation, including local and central Government, universities and schools, the Police Force, the National Health Service and so the list goes on. In fact, somewhere in the region of one hundred thousand organisations are subject to the Act.

It is also significant that there is no need for the information requested to have come into existence since the legislation came into force in January 2005. This means that a request can be made for all manner of information which predates the Act and this makes the scope for requests very wide indeed.

Another key point is that the request can be made for any information *held* by a public body, so the information does not necessarily need to relate to the organisation to which the request is made. This has real significance when information is held by the public sector but which relates to another organisation. For example, where a company performs services on behalf of a public body, a request for information held by the public sector organisation but which relates to the services which the company is providing, may be caught and

## Key recommendations

- Any company engaged in commercial activity with the public sector must be aware of the issues arising on disclosure of information and the potential impact of the legislation.
- Keep a record of disclosures of commercially valuable information made to public sector organisations.
- Ensure that disclosures are made under the protection of suitable confidentiality arrangements, always

would need to be considered in the context of a freedom of information request.

Each request for information must be considered on its own facts and the response received will very much depend on what exactly is being requested. It is also notable that anyone making a request must neither give a reason for the request nor an explanation of what the information would be used for once made available, in other words, motive is irrelevant.

## Exemptions from disclosure of information

Obviously not all information which is the subject of a request should be disclosed. There are 23 exemptions which public authorities should consider and which may mean that information requested need not be disclosed. Some of the exemptions are very specific, either to particular sectors or to particular categories of information.

However, two of the exemptions which are commonly relied upon and which are particularly relevant to the public/private relationship are the confidential information and commercial interests exemptions.

## Confidential information

Information which is confidential should not usually be disclosed in response to a request. However, this exemption only applies where there is a relationship of confidence arising, that is where the information in question is truly confidential in nature. This can have important consequences for any organisation disclosing information to a public body under some kind of commercial relationship. There is a common misconception that as long as information is disclosed under a "confidentiality" banner it will in fact become confidential.

Whilst it is very important to make sure that disclosures are indeed made under the protection of confidentiality and non-disclosure arrangements, don't assume that this is always enough to prevent a public body from disclosing information which it would otherwise be required to disclose. Care should be taken when sharing commercial information to ensure that the flow of that information is properly managed and that records are maintained detailing things such as the categories of information disclosed, its recipients and when it was provided.

## Commercial interests

Another exemption commonly relied upon and one with significant impact on public/private sector arrangements states that information will be exempt from disclosure if it would in some way cause damage to the commercial interests of an organisation. The point here is that it need not necessarily be the commercial interests of the public body which risk some form of harm. It is enough that disclosure may be detrimental to the commercial interests of any organisation for example, a private sector body which may be working closely on a project with the body in receipt of the request.

**being aware that public sector bodies face a constant battle to maintain the right balance between assessing and preserving confidentiality and obligations of greater openness under the Act.**

- **Consider whether there are any potential opportunities to make a request for information which could be of real value to your business.**

- **Ensure that staff who may come across these issues are properly trained, for example contract managers and those working in procurement departments.**

Damage to commercial interests can arise in a number of ways and whilst the consequences are in many cases potentially of a financial nature, damage to reputation or a loss of goodwill may well be reasons for which this exemption is relied upon in any given case.

## **An opportunity for business?**

Despite the difficulties which businesses can face, increasingly we are seeing companies make use of the legislation in a bid to gain access to commercially useful information. The past few months have seen a number of high profile requests made which have been widely reported in the press for example, the disclosure of key information from the Metropolitan Police regarding the investigation of the Jean Charles de Menezes shooting.

Away from the headlines however, there are also great opportunities for those dealing with the public sector to obtain valuable information. For example, those in the property and construction industries may be interested in trying to find out about possible developments in and the strategies behind planning policies from local authorities. Similarly, they may also be interested in the disclosure as a result of a freedom of information request last year by Nirex of a list of 537 previously undisclosed sites deemed suitable for storing nuclear waste.

As another example, information from the Health and Safety Executive about enforcement and compliance records of particular organisations may prove valuable when considering potential commercial arrangements or corporate transactions. In fact, the Health and Safety Executive has consistently received hundreds of requests each month since the legislation came into force and has one of the better levels of openness according to DCA figures.

It is also worth knowing that the duty on public bodies is twofold. The actual disclosure of information is in fact the second phase of the process. Not only do organisations have to consider whether to disclose information but they also have a duty to state whether they *hold* the information. This duty to confirm or deny can prove very valuable in its own right.

## **Summary**

Although the disclosure obligations fall squarely on public bodies, there are clearly important considerations for the private sector in particular, those dealing with public organisations. Any entity involved in some kind of commercial arrangement with a public body should be mindful of the risks but also the opportunities which the freedom of information legislation may present.

To discuss how Berg Legal can assist you with these issues, please contact either Stephen Foster, Head of our Corporate and Commercial Department at [stephenf@berg.co.uk](mailto:stephenf@berg.co.uk) or Luisa D'Alessandro who is an Associate in the team at [luisad@berg.co.uk](mailto:luisad@berg.co.uk). Alternatively you can call Stephen or Luisa on 0161 833 9211.

**berg legal** 35 peter street manchester m2 5bg  
t. 0161 833 9211 f. 0161 834 5566 e. [help@berg.co.uk](mailto:help@berg.co.uk)  
dx 14379 manchester 1 [www.berg.co.uk](http://www.berg.co.uk) Regulated by the Law Society

The information and opinions contained in this document are not intended to be comprehensive, nor to provide legal advice. No responsibility for its accuracy or correctness is assumed by Berg Legal, or any of its partners or employees. Professional legal advice should be obtained before taking, or refraining from taking, any action as a result of the contents of this document.



INVESTOR IN PEOPLE