

FOI and procurement — how do they interact?

Paul Gibbons, aka FOIMan, summarises the FOI implications of each stage of a typical procurement process.

Paul is a Member of the Examination

Board for the Practitioner Certificate in Freedom of Information (www.foiqualification.com)

Public authorities buy things. Like any other organisation, they need stationery, IT equipment and software, furniture, buildings to work in and so on. They need services such as power, telecommunications, plumbing, advice and training. In some cases, they decide to pay other organisations to help them to deliver the public services that they were established to provide.

The process of buying — procurement, — is bound to involve the exchange of information between an authority and companies or other bodies that wish to sell the product or service that is being procured. Those bodies will need to explain what they are selling, cost of provision, and answer other questions that their client may have.

Public authorities will record information about the service that they are buying, how much they have spent on it, whether they are satisfied with the service received and so on. Procurement activities are characterised by the documents that record them: 'invitations to tender (ITT)', 'pre-qualification questionnaires (PQQ)', 'contracts', 'terms and conditions', 'pricing schedules', 'purchase orders' and 'invoices' amongst them.

Inevitably then, the Freedom of Information Act ('FOIA') affects procurement activities. Not only is there a huge amount of information captured by public authorities about their purchases, but one of the avowed aims of FOIA was to improve the accountability of public spending. It is hard to argue against the proposition that there is a public interest in these activities being scrutinised.

Another inevitability of procurement processes though is that they involve outside bodies — very often bodies that are not as used to public scrutiny, at least to the standards required by FOIA. Those bodies — usually businesses, but sometimes charities — will often be unhappy about information about them, or supplied by them, being given to others. Often, that reticence is a kneejerk reaction of the kind that many public officials have been guilty of themselves in the past: *it's MY information, why should I share it?*

Just as often though, they have a good point, as disclosure of information could

aid their competitors or damage their business in some other way. Sometimes, it could even be damaging to the public authority itself (and therefore the public, since it's our money that is being spent) if information about its purchasing activities is released: it could affect a public authority's ability to get the best deal, or to ensure that a service is delivered effectively.

Procurement is an essential part of public life, and therefore a common subject of FOI requests. It is important therefore to understand how FOIA should interact with the process of purchasing goods and services. This article summarises the FOIA implications of each stage of a typical procurement process.

Tendering

When a public authority wants to buy a service, it obviously has to let potential suppliers know. Depending on the value of the contract and other factors, it will do this in various ways, from contacting a supplier directly to advertising the opportunity in various public forums. (There are legal requirements that may affect this, but they are not the focus of this article.)

One of the classes/categories in the Information Commissioner's model publication scheme is 'What we spend and how we spend it'. Each of the categories is fleshed out in the Commissioner's definition documents, and to take one example — the one aimed at 'principal local authorities' — it is expected that authorities publish their 'procurement procedures'. This is expanded further as including 'details of procedures for acquiring goods and services' and 'contracts available for public tender'. English councils can look to the Local Government Transparency Code (2015) for further instruction as to what to publish about tenders. Usefully, it provides criteria for when details of invitation to tender should be published:

'Local authorities must publish details of every invitation to tender for contracts to provide goods and/or services with a value that exceeds £5,000.'

The Scottish Commissioner's model scheme has a specific class dedicated to 'How we procure goods and services

from external providers’.

Scottish authorities are expected to publish their procurement policies and procedures and invitations to tender under this heading, as well as providing a link to their details on the Public Contracts Scotland website.

It is obviously a good idea to warn those tendering to provide services to a public authority of the potential consequences of FOIA. The old 2004 section 45 Code of Practice recommended that the authority ‘take appropriate steps to ensure that [third parties] are aware of the public authority’s duty to comply with the Freedom of Information Act, and that therefore information will have to be disclosed upon request unless an exemption applies.’

The 2018 version of the Code does not discuss this stage in procurement proceedings, but it makes sense to include such a warning in documentation provided to tenderers and to draw their attention to it.

Procurement rules generally require that during the tendering and negotiation phase of any procurement, the authority will not share information with others bidding for the contract. For example, the Public Contracts Regulations 2015 specifically state at regulation 29(16) that:

‘they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others’.

If a tenderer was to make an FOI request for information that could give them an advantage over other bidders, disclosure is therefore pro-

hibited, meaning that the information is exempt under section 44(1)(a) FOIA until the end of this phase of the process. Once a contract has been awarded, regulations are similarly clear about the obligation to be transparent.

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Regulation 55 of the Public Contracts Regulations 2015 requires authorities to inform tenderers of the outcome of the process, and on request to provide information about the reasons a business has been unsuccessful in winning the contract, the name of the successful tenderer, as well as keep them up-to-date on the progress of contract negotiations. Authorities have no more than 15 days to answer such requests. Practitioners should bear in mind that procurement rules will affect whether, and when, information about the process should be disclosed.

Agreeing a contract

Once a preferred bidder has been identified, a contract will have to be agreed. From a FOIA perspective, this is an important stage in the process.

A contract can be used to identify specific information that the business may have concerns about, but also to ensure their cooperation in respect of future FOI requests. The contract is particularly important when it comes to situations where a business will be providing public services on behalf of the authority.

It is common for third parties to seek confidentiality clauses in contracts. The section 45 Code of Practice is clear at paragraph 9.11 that ‘authorities should carefully consider whether these agreements are compatible with their obligations under

the Act’. It will be necessary to consider whether disclosure of the information would meet the common law definition of an actionable breach of confidence, in particular whether it has ‘the nature of confidence’. An example of when it might be appropriate to accept a confidentiality clause is where the authority needs information to deliver a public service and the provider would not hand it over without such assurances. The Code also stresses that contractors should be made aware of the limits on enforcing confidentiality clauses, and of the importance of ensuring that as much other information about the contract can be disclosed as possible.

There will be occasions when contractors hold information on behalf of public authorities. The most obvious example of this is when a company provides storage for the authority’s records. In these circumstances, it is essential that contracts are clear about which records are held on behalf of the authority, and which relate solely to the contractor’s own business, perhaps by listing records subject to FOIA in a schedule to the contract (paragraph 9.4 of the section 45 Code). Paragraph 9.5 of the section 45 Code suggests ‘appropriate arrangements’ that should be put in place (either as part of the contract or in a separate memorandum of understanding):

- how and when the contractor should be approached for information, including contact points;
- how quickly information should be provided to the public authority when a request has been received (it is common for a five working day deadline to be cited);
- how disagreements over ownership of information will be resolved;
- how internal reviews and appeals will be handled;
- how the authority expects the contractor to maintain records held on its behalf (this is also a requirement of paragraph 13.1 of the Section 46 Code); and
- how and when the public authority

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will consult the contractor about disclosure of information in its custody.

There is often controversy over the transparency or otherwise of public sector contracts, and there has long been pressure to extend FOIA to private sector bodies that provide public services. The government's answer to this (so far) has been that contracts are the appropriate way to ensure that outsourcing does not result in gaps in FOIA's coverage.

Transparency about contracts

Public authorities are obliged to be transparent about contracts under the Public Contracts Regulations already mentioned. Both the UK and Scotland Information Commissioners require details of contracts to be provided in publication scheme guides. The UK Commissioner outlines different thresholds for different sectors, with local government expected to publish details of contracts valued at over £500, but central government only expected to do the same in relation to contracts valued at over £10,000. The Scottish Commissioner simply expects a register of awarded contracts that went through a formal tendering process to be published, with no value specified.

The UK Commissioner's requirements on councils appear more onerous than the Local Government Transparency Code, which only requires details of contracts over £5,000 to be published. That said, the Code expects a lot to be published about these contracts, including details of the service provided, the department responsible, and the sort of business (small or medium enterprise or voluntary organisation for example) providing the service. The Code (in common with the Information Commissioner) also expects spending on Government Procurement Cards over £500 to be published.

There has been increasing emphasis by the government on transparency

of contracts. Procurement Policy Notes ('PPN') are guidance issued by government to the public sector (or 'in-scope organisations'). PPN 02/17 issued in December 2017 states that it is 'government policy... to adopt and encourage greater transparency in its commercial activity'. It outlines transparency rules for the public sector including those set out above. In addition, PPN 13/15 and PPN 01/17 establish and update transparency principles which stress the importance of pro-active and reactive release of information about contracts.

Answering requests about procurement

The duty to answer requests will fall on the public authority, whoever holds the information. Depending on what has been included in the contract, there may be a contractual obligation on the public authority to consult the contractor if disclosure relates to them or is likely to affect their interests. Even if there isn't, the Section 45 Code of Practice (paragraph 3.2) suggests that consultation is a good idea.

The organisation that provided the information will have a better understanding of its sensitivity than the authority in many cases, and will be able to advise on the issues. It is also worth noting that the Commissioner and tribunals are unlikely to accept an argument that disclosure would prejudice a supplier if there is no evidence that they have been consulted (see, for example, *Derry City Council v IC*, EA/2006/0014). Ultimately though, it will be the public authority's decision as to whether or not information ought to be disclosed (see paragraph 3.4 of the Code).

Providing advice on disclosures of procurement documentation can be difficult for practitioners. However, there is assistance available to them. Aside from the PPNs described above, there is valuable guidance in the form of the Office for Government Commerce's ('OGC') FOI (Civil Procurement) Policy & Guidance, Volume 2 (2008). Alt-

hough now over a decade old and no longer actively maintained, it provides a useful starting point for any practitioner seeking to ascertain whether procurement documentation ought to be disclosed or not. A search online should unearth it from the National Archives' web archive.

In particular, the OGC guidance incorporates a table setting out working assumptions in relation to the various categories of document that a public authority would be likely to hold in relation to any procurement. For example, it advises that tender information received from the successful bidder will generally be disclosed, with the exception of:

- financial models (for which the commercial interests exemption should be considered);
- price breakdowns (as above);
- CVs (which may be exempt as personal data); and
- information on the supplier's costing mechanisms (which again, might be protected using the commercial interests exemption).

The OGC guidance is to be approached with caution given its age, and practitioners will need to consider the facts as relevant to the particular case. The guidance should be supplemented with the Information Commissioner's guidance, in particular the guidance on the commercial interests exemption (section 43). Decisions of the Commissioner and the tribunals will also assist when attempting to reach a view on whether procurement information can be disclosed.

Relevant exemptions

Absorbing the guidance and the concerns of suppliers and colleagues, practitioners are likely to find themselves needing to justify withholding information relating to the contract. They will need to identify relevant exemptions and, where appropriate, public interest arguments.

The most obvious exemptions in the UK FOIA are section 41 ('information provided in confidence') and section 43 ('trade secrets/prejudice to commercial interests'). Suppliers will often argue that information about their services is confidential (indeed it is rare to see a page in a tender document that doesn't feature 'CONFIDENTIAL' in the header). However, section 41 will only apply to information supplied by the business and where confidentiality is not just implied, but also where the nature of the information is confidential — i.e. there are good reasons for it to be kept secret. Certainly very trivial matters will not be confidential, and information that everybody knows (such as methodology described in similar terms by every tenderer) will be unlikely to legitimately attract the protection of section 41. As discussed above, it may be the case that the authority has already agreed to keep certain information confidential, but this will need to be reviewed when a request is received, since circumstances may have changed.

'Trade secrets' can be protected by section 43(1), but the most likely exemption to apply in these circumstances will be section 43(2), the prejudice to commercial interests exemption. Practitioners will need to be able to argue that there is a commercial interest to be protected, demonstrate how that interest will be harmed (perhaps by providing competitors with information that could be used to undercut the current supplier), and also demonstrate how likely the harm is — i.e. is it more likely than not ('would') or 'a real and significant risk' but less likely than that ('would be likely'). Finally, they will have to argue why the public interest favours withholding the information rather than disclosing it (maybe because release might result in the authority having to pay more in future).

Depending on the circumstances, other exemptions may come into play. If a public authority intends to publish details of a commercial arrangement in a few months or so, the future publication exemption will be an option. Contractual and tender records will almost certainly contain personal data, such as CVs of the supplier's employees or contact details. Information about sole traders will also constitute

personal data. The exemption for personal data (section 40 FOIA) will be relevant. Often, procurement processes will have required the seeking of legal advice, so the exemption for legal professional privilege (section 42) could be applied to this. Other exemptions will apply depending on what the contract relates to. There are equivalent exemptions in the Scottish FOI Act.

Summing up

Depending on the stage reached in any procurement process, there will be different implications for practitioners. It will be essential for them to work closely with colleagues responsible for managing the authority's purchase of goods and services to ensure that obligations at each stage are met.

When contracts are first advertised, there are requirements under contract law as well as FOIA to be transparent about opportunities. However, this stage also requires discretion, since any disclosures should not give anyone tendering for business an advantage. Section 44 will be relevant where contract law places restrictions on openness.

Once a preferred bidder is identified, more can be released, and in some cases will have to be, especially to unsuccessful bidders. As the process unfolds, more and more can be released.

The new section 45 Code emphasises the importance of the contract in setting out each party's obligations in relation to FOIA. With more and more public services being outsourced to the private sector, the inclusion of FOIA clauses and schedules is essential to maintaining public scrutiny of these activities.

Once contracts are agreed, there are numerous obligations on public authorities beyond FOIA to proactively publish details of what has been agreed. Central government increasingly emphasises the importance of transparency in this area.

Finally, practitioners will undoubtedly have to answer many requests about

procurement activities and contracts. There is valuable guidance available to help them with this, and a growing body of case law.

Paul Gibbons
FOI Man
paul@foiman.com
