



**Scottish Public Sector Procurement  
& Freedom of Information  
Guidance**

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# Scottish Public Sector Procurement & Freedom of Information Guidance

## 1 Introduction

### 1.1 Purpose

This document is intended to provide guidance on how requests for procurement-related information under the Freedom of Information (Scotland) Act 2002 ("the Act") should be handled. It:

- gives general advice on responding to requests for information about public sector procurement.
- Promotes a consistency of approach by offering a range of examples of casework.

Although the main legal considerations relevant to each disclosure decision are summarised, definitive statements regarding the legality of release or retention of every information example are not provided. Overall, this document provides policy steers and practical guidance rather than legal advice.

Further, no attempt is made to provide a guide to the Act itself, or to the Code of Practice on access to Scottish Executive Information (which will be superseded once the Act comes into force), which are already available elsewhere. However, the aspects of the Act relevant to procurement and most likely to affect disclosure decisions are discussed. Also, while this guidance is intended to be of assistance to others in interpreting and applying the Act in a procurement context, individual bodies remain responsible for their own judgements and actions on a case by case basis. The Code of Practice issued by Scottish Ministers under section 60 of the Act ("the S60 Code") focuses on the practices that a public body should adopt in handling requests under the Act.

The guidance is not intended to be static and it will be revised as necessary in the light of experience, after the Act has been implemented fully. It should be noted that while this guidance is based on (and broadly consistent with) guidance prepared by the UK Office of Government Commerce ("OGC"), the application of Freedom of Information legislation in Scotland will not necessarily develop and be applied in the same way as in the rest of the UK given the different legislative position in Scotland and the fact that Scotland has its own Information Commissioner.

### 1.2 Scope

This document covers all classes of information related to public procurement, including what might be termed the 'contract delivery' phase (i.e. where the procurement is for long-term support, e.g. facility management, managed service, etc, and that work is underway). Although it could be argued that this phase does not fall within a strict definition of "procurement", it is included for the sake of completeness and avoid any gaps that may not be addressed elsewhere. This document may also be appropriate for all classes of information generated as a result of the award of a Grant, where a competitive process has been followed.

There are two further types of information that relate to supplier information, but not to a public body's role as a procurer, as follows.

1. Where a public body has a commercial arm acting as a supplier to private sector companies or the public. Such an arm is likely to retain supplier or product information for competitive rather than procurement purposes.
2. Where a private sector company submits information to a public body for commercial assistance, e.g. requests for help with an overseas market, grant applications, etc.

Information relating to these cases is excluded from the scope of this guidance.

### **1.3 Contents**

This document is structured as follows.

#### **Section 1 – Introduction**

Describing the document purpose, scope and context.

#### **Section 2 - Summary**

Providing an overview of the guidance and how it should be applied.

#### **Section 3 – How the Act relates to procurement**

Highlighting the aspects of the Act most relevant to procurement, describing the key exemptions and discussing how other legislation affects the provisions of the Act.

#### **Section 4 – Guiding principles**

How the key principles set out in the Act relate to the procurement environment

#### **Section 5 – Disclosure of procurement information**

Specifying the main elements of the guidance and providing the background rationale.

#### **Annex A – Information disclosure guidance**

A table providing examples of the main classes of procurement information that public bodies may be asked to disclose, along with a typical disclose or withhold response. Notwithstanding this, public bodies must consider the merits of each request for information at the time of the request, and reach a decision based upon all relevant circumstances.

#### **Annex B – Model Disclosure Clauses**

Model clauses that public bodies may wish to incorporate into their Pre-Qualification Questionnaires (PQQ), Invitation to Tender documents and contract terms and conditions.

## **Annex C – Worked examples**

A number of worked examples are provided to show how the guidance might be applied to practical situations.

### **1.4 ‘Information’ v ‘documentation’**

This guidance refers throughout to ‘information’ rather than ‘documents’. The difference is important, as the Act specifically applies to information and carries no duty to disclose discrete documents. Indeed, care should be exercised when considering whether to release a document provided by a supplier to ensure that any potential copyright issues have been considered. Normally, it will be acceptable in copyright terms for a copy of a document to be provided under the Act if that is the best or most reasonable way of providing the information, but in many cases, where disclosure is appropriate, it will be preferable to extract information from documents or possibly provide a summary, provided it satisfies the request.

It should be noted that information includes e-mails and general correspondence, including within public bodies, between public bodies and with suppliers. There are two key implications from this:

1. important e-mails, etc, should be properly ‘filed’ so that they are readily retrievable;
2. the language used in communications should reflect the possibility of disclosure.

For simplicity, any reference to the term documents in this guidance is to be read as a reference to the information contained within them.

## **2 Summary**

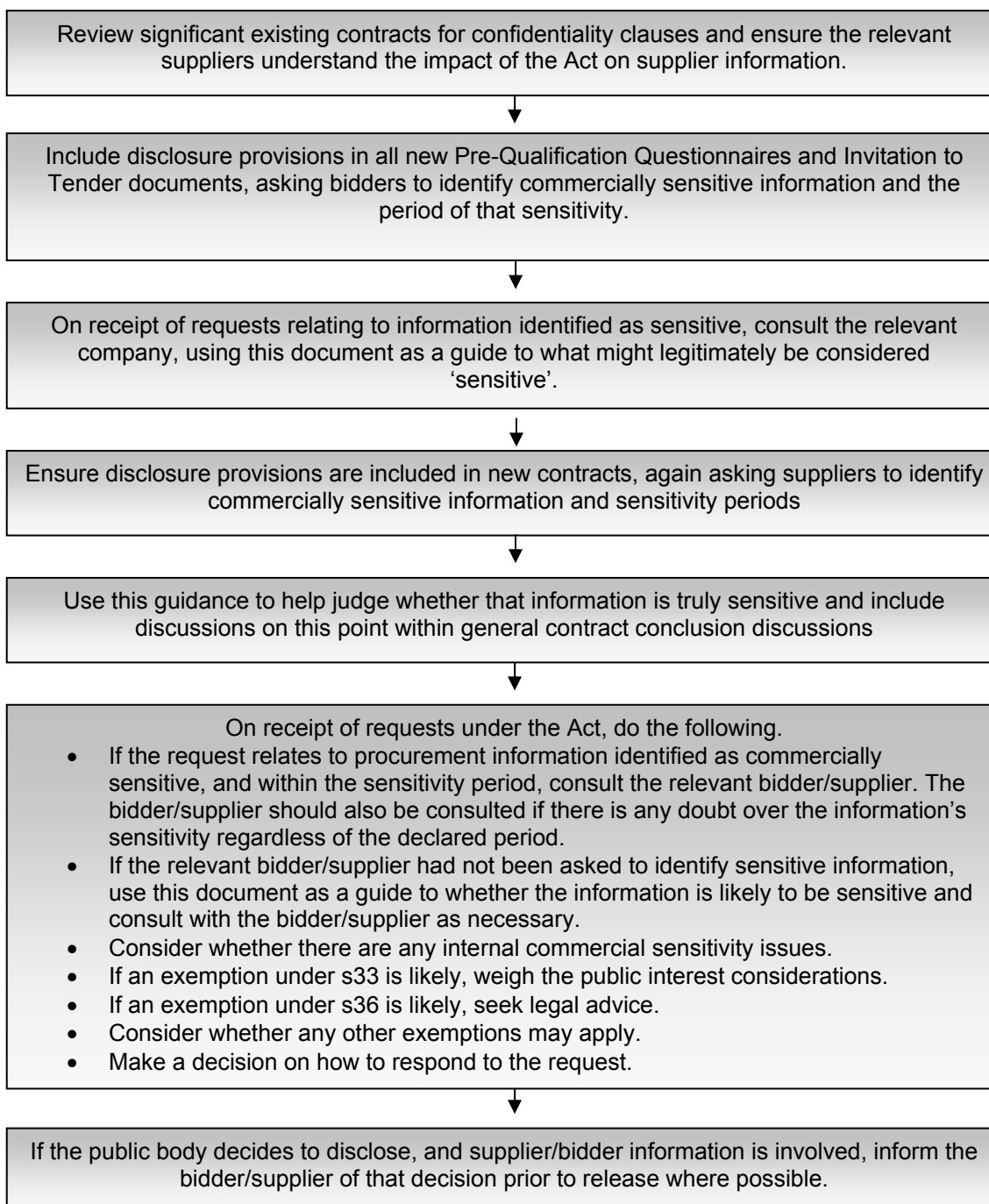
### **2.1 Keypoints and how to apply them**

The approach set out in this guidance attempts to balance the desire to achieve greater openness and accountability, with the need to ensure that competitiveness in the public marketplace is at least not harmed and preferably encouraged. By providing typical disclosure decisions for the more common items of procurement information, it should help promote a consistent approach across the Scottish public sector. However, each FOI request must be judged on its merits and responsibility for the final disclosure decision remains with the relevant public body.

A simple process connects the key points of this guidance and generally indicates the steps that a public body should follow in its application. It appears on the following page.

This process is only a guide and actual application will depend on the general process for handling requests under the Act and the circumstances of the individual case.

The intention should be to facilitate more effective access to procurement-related information whilst being as cooperative with suppliers as possible. Public bodies should not agree to hold information in confidence unless it is genuinely confidential in nature and it will be helpful, having identified any sensitive material, to include that in an annex to facilitate disclosure of the remainder of the document should a request be made for associated information. Although there will be some initial work in identifying sensitive information, this should quickly become 'business as usual', with much the same information being identified in each tender/contract and template solutions becoming the norm. The initial work should be offset by the effort saved in not needing to consult on every information request. Whether this is a valid assumption will depend largely on the actual number of requests received and practice will inevitably vary with the volume and types of request.



### **3 How the Act relates to procurement**

#### **3.1 How the Act in general applies**

The main features of the Act as they apply to public procurement are:

- a general right of access to information about all public contracts and procurement activity held by public bodies, subject to certain conditions and exemptions;
- it applies to information which is held by another person on behalf of the public body (e.g. information or data held by an outsourcing partner);
- there is no requirement to have a particular status, such as being a losing bidder, to make a request and be given information;
- neither the identity of the requester, nor the use to which the information may be put, are grounds for withholding information (hence it is legitimate for one supplier to seek information on another purely for commercial purposes);
- it is retrospective in that it applies to all information which is 'held' at the time a request is received and therefore also covers existing and expired contracts;
- a requester's right of appeal is, in the first instance, to the public body to which the request was made (this is referred to as a review) and then to the Scottish Information Commissioner, should the requester remain dissatisfied. A supplier may seek a court interdict to prevent disclosure of information relevant to them. To exercise this right they would have to be aware that the information is about to be disclosed;
- a duty imposed on public bodies to adopt and maintain a scheme for the publication of information which must be approved by the Scottish Information Commissioner (a "publication scheme");
- there is nothing to stop the use of information obtained under the Act being used in litigation (there is therefore the potential for requests for information under FOI to be used to gain pre-litigation disclosure of information relating to potential claims).

#### **3.2 Relevant exemptions**

The main exemptions, relevant to public sector procurement, are explained below. However, it should be noted that this is not an exhaustive list of all possible exemptions, and others not mentioned here may be appropriate in particular circumstances.

They are listed in order of probable relevance (although the relative ranking of the first two is debatable). The 's' numbers relate to the section numbering in the Act. All of these exemptions, other than sections 36 and 38 (with caveats), are qualified exemptions, i.e. subject to a public interest test.

### **s33(1) – Commercial interests**

This covers two main aspects: trade secrets and information likely to prejudice substantially the commercial interests of any person (including the public body). 'Trade secrets', mean:

- it must be information used in a trade or business;
- the owner must believe that disclosure of the information would be injurious to him or of advantage to his competitors or others
- the owner believe that the information is confidential or secret, i.e. that is not already in the public domain and that this belief is reasonable.

Hence it could cover something that a bidder/supplier does in the course of trade that is unique to them, gives them a genuine competitive edge and is not already commonly known or easily deducible. Apart from product-related information (e.g. designs) it can also cover working practices and processes (e.g. a system development methodology).

Substantial prejudice to commercial interests is required before the information can be considered to be exempt under s33(1)(b). This will generally mean real or actual harm around the ability to do business. This could involve giving advantage to the competition, and/or loss of shareholder/customer/supplier confidence. The commercial interests of a public body are also covered by this exemption, e.g.:

- where public bodies have a revenue-earning commercial arm and are therefore subject to prejudices similar to those that could apply to private sector companies;
- the role of the public body as a purchaser could be compromised, e.g. as suppliers could withhold sensitive information in the future (to the detriment of the procurement process), or a reduction in the body's ability to negotiate effectively to secure best value for money.

The impact on a bidder/supplier/public body of the disclosure of both trade secret and commercial interest information is likely to diminish over time (although this may not always be the case).

The exemption is subject to a public interest test, whereby the respective public interests in disclosure versus non-disclosure are weighed. Note that 'interest' here means 'greater good' rather than curiosity.

### **s36 – Confidentiality**

This exemption states that if, by disclosing information, a public body would be subject to an actionable breach of confidence, the information should not be disclosed. By 'actionable', the Act means whether there is a reasonable prospect that a court of law would rule against the public body for releasing the information. The exemption is not subject to a public interest test in the meaning of the Act, although the court may apply a public interest test in deciding whether a breach of confidence was actionable (if public interest had been pleaded as a defence). A breach is not likely to be actionable if the public interest in disclosure outweighs the public interest in keeping the confidence.

There are essentially two circumstances in which a duty of confidence may arise:-

- i. where there is an express term in a contract or agreement, written or verbal, that confidentiality will apply or
- ii. where the nature and circumstance of the dealings between parties imply confidentiality.

There are three requirements for an action for breach of confidence:

- i. that the information must have the necessary quality of confidence,
- ii. that it must have been communicated in circumstances imposing a duty of confidence and
- iii. that there must be unauthorised use of the information to the detriment of the party communicating it.

As a general principle, confidentiality agreements are discouraged. However, legally there is a grey area between a confidentiality agreement in the commercial sense, and an agreement that certain information has the necessary “quality of confidence” and thus is exempt from disclosure under the Act. In the past, commercial confidentiality agreements have tended to be wide ranging and absolute i.e. an unequivocal promise not to disclose something. Disclosure in breach of such agreements would be a breach of contract and also possibly a breach of confidence. The Act is changing the context in which such agreements operate. One of the issues public bodies have to consider when accepting information as confidential is whether they can satisfy any contractual obligations in relation to keeping that information confidential, and their statutory duties under the Act. Disclosure of information accepted as confidential may result in contractual and/or common law challenge, and wrongly accepting information as confidential may result in the public body breaching the S60 Code of Practice. Indiscriminate classification of information as being subject to a duty of confidence is clearly contrary to the intent of the Act and must be avoided.

It is acknowledged that in some circumstances information will only be supplied if the parties agree that a duty of confidence attaches to it, as it has the necessary “quality of confidence”. In these cases the agreement should be tightly drawn, so that only the relevant information is protected (i.e. blanket agreements should not be made, as it is unlikely that all the information will have the necessary ‘quality of confidence’ and thus be worthy of exemption under s36 from the general duty to disclose under the Act).

An agreement to protect commercially sensitive information, but with the proviso that the public body may still disclose it under the Act, is obviously a form of confidentiality agreement. The proviso reduces the likelihood of reliance by the supplier on a purported duty of confidence. If the information remained commercially sensitive, the s33 (Commercial interests and the economy) exemption may be applicable.

It is possible that the public body will conclude that although the information may come within the scope of an exemption, the public interest test that attaches to that exemption weighs in favour of disclosure. If that body subsequently releases that information and the supplier challenges the content or the process of the body’s decision making, the challenge may involve a claim of breach of confidence. These are clearly matters for legal counsel and are only raised here to illustrate the

intricacies of this exemption and its relation to s33. The overall message is 'tread warily' and take advice if it is unclear which, if any, exemption applies.

The above points are reflected in the model clauses at Annex B. These state that disclosure may be required by law including the FOI Act. It is also emphasised that the public body retains the discretion to disclose the information in response to a request under the Act. It also makes it clear that it may do so without the consent of the supplier.

Entering into implied duties of confidence are more difficult to avoid, especially as long standing, consistent, and well known practices of protecting similar information may give the supplier reasonable grounds to believe that the practice will continue.

### **s38 - Personal information**

This is discussed more fully under paragraph 3.3 of this document.

### **s33(2) – The economy**

This exemption is aimed at information that could harm the economic interests of the UK or the finances of the UK government or the devolved administrations as a whole. However, it may be relevant where disclosure could damage a public body's financial rather than commercial position, for example in relation to a major PPP or PFI deal. It is recommended that legal advice be sought before citing this exemption as a reason for withholding information, as it is likely only to be applicable in very specific circumstances.

### **s27 – Information intended for future publication**

This exemption applies if the public body, or anyone else, intends to publish the information within a period of 12 weeks from the date of the request for the information. The intention to publish within the 12 week period must have been held at the time the request was made. A body cannot decide on receipt of the request that it will avoid disclosure by publishing the information; the intention must pre-date the request for the exemption to be relied upon. The exemption is subject to the public interest test.

### **s35 – Law enforcement**

This exemption will generally be particularly relevant to public bodies with a law enforcement role, which includes both police forces and prison authorities. It will protect information where disclosure would damage policing or security arrangements. The exemption is subject to a public interest test.

### **s39 – Health, safety and the environment**

This exemption is most likely to be relevant where the information requested is environmental information – environmental information will be considered against the regulatory framework contained in related regulations rather than the FOI framework, although in most instances procedures will align with FOI. Environmental information is considered under paragraph 3.3 of this document. Otherwise this exemption is likely to be applicable in relatively rare situations, principally where disclosure could endanger the safety of individuals. Examples might include information relating to access control

systems in hospitals, or which enables the identification of staff working in controversial research areas.

**s36 – Prejudice to effective conduct of public affairs**

This exemption is unlikely to be applicable in most procurement situations, but should not be discounted where information is potentially sensitive for reasons other than those covered under other exemptions.

## The Act in relation to other regulations

### Environmental Information Regulations

Any procurement information that has an environmental element becomes exempt from the Act, but subject instead to the provisions of the Environmental Information Scotland Regulations 2004 (EIRs), which also come into effect in January 2005. The EIRs specify what type of information is likely to be covered, and includes information on (summary only):

- the state of elements of the environment and interaction between them;
- the state of human health and safety, conditions of human life, the food chain, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment and interaction between them;
- substances, energy, noise, radiation or waste affecting or likely to affect the state of the elements of the environment and interaction between them;
- measures (including policies and plans) and activities affecting or likely to affect, or intended to protect the state of elements of the environment and the interaction between them;
- emissions discharges and other releases into the environment;
- cost benefit and other economic analysis used in environmental decision-making.

Only the information specific to environmental issues will be subject to the EIRs and all 'surrounding' information would remain subject to the Freedom of Information (Scotland) Act.

The disclosure requirements under the EIRs are broadly similar to those of the Act. However, they are not identical and where disclosure is needed under the EIRs reference should be made to the regulations, to the associated guidance and the code of practice to be issued under section 62 of the Act.

### Data Protection Act

In terms of comparison with Act, the Data Protection Act ("DPA") applies to information held about an individual and requested by that individual. Although such a request might originally be received as a request under Freedom of Information, a public body's request handling procedures should quickly identify it as exempt under Freedom of Information legislation and route it to their DPA process.

Where requests are made for personal information by 3<sup>rd</sup> parties (i.e. where the information requested does not relate to the requester), the information is subject to Freedom of Information legislation. However, the exemption at s38 states that the request should not contravene any of the 8 principles in the DPA, otherwise the information is exempt under the Freedom of Information (Scotland) Act and need not be disclosed. A key principle is that personal data be 'processed fairly and lawfully'.

Within the procurement context, the most likely reason for a disclosure of commercial information relating to identifiable individuals to be unlawful would be if it were held in confidence. TUPE information is perhaps the most obvious example where a duty of confidence is likely to exist. Personal

information held in these circumstances should not, as a rule, be disclosed. It might be possible to release summary information (e.g. numbers of staff affected, etc), from which individuals cannot be readily identified, but seeking legal advice is advisable.

Information in CVs and simply providing the names of staff who hold certain posts may or may not be classifiable as confidential. However, the first element (relating to fairness) of the DPA principle could be relevant in such cases. It is therefore suggested that a few questions to consider when judging 'fairness' could be:-

- would the disclosure cause unnecessary distress or damage to the individual (possibly an employee of a company targeted by special interest groups);
- would disclosure be a surprise to the individual;
- has disclosure been specifically refused by the individual?

Note that disclosure of information that names an individual may expose that individual to attention, and that such attention may be considered outside the expectations or responsibilities of that individual. For example, staff are not generally expected to cope with a high level of scrutiny and exposing them to that scrutiny could be unfair and potentially stressful to the individual. Although this aspect may not be strictly within the scope of exemption s38, it should nonetheless be a consideration when balancing the public interest in disclosure, though the weight to be placed on this consideration will vary.

Wherever there is doubt over disclosure, legal advice should be obtained.

### **Procurement Directives**

The public procurement Directives relating to works, supplies and services and implemented in the UK by various Regulations apply to contracts of certain types and above published value thresholds. They require information falling into the following categories to be published in the Official Journal of the European Union:

- basic information to be published in contract award notices e.g.
  - number of tenders received
  - name of winning bidder
  - price or range of prices paid
  - a description of the subject of the contract
  - where appropriate, value or proportion of contract likely to be subcontracted.
- debriefing information to be made available to unsuccessful tenderers upon written request (e.g. reasons for rejection and characteristics and relative advantages of the winning tender).

The Freedom of Information (Scotland) Act provides for much wider disclosure of information beyond these categories. The procurement Directives provide for certain discretions not to disclose information, notably in relation to contract award notices and debriefing when disclosure would prejudice:

- legitimate commercial interests
- law enforcement
- public interest
- fair competition.

The practical effect will be that such discretion will need to be exercised subject to the Freedom of Information (Scotland) Act. In the case of any claimed prejudice to commercial interests this would require consideration of the public interest test. It will also be significant that seeking redress under the Freedom of Information (Scotland) Act will be much simpler than under the procurement Directives and will be at no cost to the applicant. This could encourage interested parties more readily to contest decisions not to disclose information requested.

The current UK Regulations implementing the EC Directives provide for compliance by the contracting authorities within a contractor's reasonable confidentiality requirements. The wording of the Services Regulation (SI 1993/3228) states that a public body "shall comply with such requirements as to confidentiality of information provided to it by a services provider as the services provider may reasonably request". A provider cannot be reasonable in a request that requires the contracting body to enter into a contractual term that would break the law. The Regulations are therefore presumed to be compatible with Freedom of Information legislation and vice versa. The Freedom of Information (Scotland) Act sets the boundaries of what "the service provider may reasonably request" and what the contracting body can agree to, in respect of treating information as confidential.

The new public sector Directive (2004/EC/18) which consolidates the current individual Directives for services, works and supplies contracts, states at Article 6:

"Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Article 35(4) and 41, and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, such information includes, in particular technical or trade secrets and the confidential aspects of tenders."

It can be seen from Article 6 that the presumed compatibility with the procurement Directive and national law on confidentiality is spelt out, it also shows the link between the definition of what is confidential (procurement) information, and national law.

The Directive has to be transposed into national legislation by 31<sup>st</sup> January 2006. It is expected that the new Scottish Statutory Instrument (SSI) will follow a similar approach to that set in the current UK Statutory Instruments (which remain in effect until repealed by the new SSI).

It might be useful to consider a working example:

- Bidder x states that they are relying on the public procurement regulations to designate their bid as being confidential. In accordance with Freedom of Information (Scotland) Act obligations the contracting body could only regard those parts of the bid that are *properly* designated as confidential, as being confidential. This would involve a consideration of the exemptions applicable under the Act against the information bidder x was providing.
- Bidder y and competitor z make an information request about bidder x's bid. The contracting body must disclose the information they hold which is not subject to an exemption and rely on the exemptions in the Freedom of Information Act (s33/s36 probably) to refuse to disclose information that bidder x asked be designated as confidential.

## **4 Guiding principles**

### **4.1 Introduction**

This guidance has been developed in accordance with three guiding principles, which have been derived from existing guidance and applied to the procurement environment. The first two further the Government's intention to raise the public's confidence in the processes of government, whereas the third recognises that the public good is also served by maintaining a healthy competitive market.

### **4.2 Transparency in the use of public funds**

The public can only be reassured that public bodies are spending taxpayers' money wisely if they have visibility of:

- how much money is being spent;
- with whom that money is being spent;
- exactly what services, goods or works that money is buying;
- what redress is available if those services, goods or works are below an agreed standard.

### **4.3 Demonstrable diligence in managing contractors to ensure best value for money**

Procurement activities, including contract delivery, can only hope to be successful if the public body properly manages them. This implies that the public body should not only establish effective controls in line with best practice, but must also be seen to exercise those controls in practice. These activities should therefore be open to public scrutiny to ensure:

- project management and procurement best practice principles are being applied;
- suitable checks and balances are in place to ensure proper monitoring of project performance;
- those checks and balances are being actioned diligently;
- intervention on the part of the public body is happening where necessary.

### **4.4 Protection of the relationship between public and private sectors**

This guidance recognises that the public interest is served by encouraging the wider involvement of the private sector in public procurement, to increase competition. Value for money can be best obtained where there is a healthy competitive environment, coupled with mutual trust and respect between private and public sectors. It is not the intention of the Act to jeopardise a public body's commercial relationships with the private sector. Several of the exemptions support the protection of interests and relationships arising in commercial contexts. Were this not the case, there would be a risk that:

- companies will be discouraged from dealing with the public sector, fearing disclosure of information that may damage them commercially, or

- companies will withhold information where possible, making the choice of the best contractor more uncertain as it would be based on limited and censored data.

This guidance therefore endeavours to:

- ensure bidders/suppliers are aware of the implications of the Act when they submit information;
- invoke exemptions that protect bidders/suppliers' legitimate commercial concerns;
- encourage consultation with bidders/suppliers where there is doubt whether requested information could be damaging to those suppliers.

## **5 Disclosure of procurement information**

### **5.1 Definition of procurement phases**

For the purposes of this guidance, procurement has been considered under five phases, with the relevant information grouped accordingly. Part of the rationale in defining these phases is to help clarify the period during which certain information should not be disclosed. It will be apparent in this guidance that the withholding of information is often only justifiable whilst a particular activity is in progress. The choice of phases therefore aligns with the activities that dictate the sensitivity of the information involved and are described below. It is acknowledged that not all procurements map to these phases, e.g. OJEU Restricted procedure and those below the OJEU thresholds. The information types will be the same regardless of the procurement approach, but the information sensitivity period may need to be amended to reflect alternative procurement phases.

#### **General procurement information**

Strictly, this is not a procurement phase as it does not necessarily have a chronological relationship to the other four phases. However, it is convenient to consider it as such. It groups information that is not necessarily specific to a particular procurement activity, but may be used for all procurements or simply to inform procurement in general. Typically, it includes three types of information:

- information on suppliers compiled from widely available sources (e.g. product catalogues, press stories, financial surveys);
- information on suppliers compiled from knowledge gained by the public body through its supplier dealings (e.g. performance over several contracts). Also includes derived information (e.g. opinions drawn from data);
- information obtained from suppliers that is not generally available (e.g. future product information, research plans, funding sources).

#### **Initiation phase**

This phase covers information developed by the public body during the planning for, and initiation of, a particular procurement activity up until an intention to procure is ready for issue. Typically, the phase will therefore start with a vision or strategy document and end with a draft OJEU notice or Invitation to Tender (ITT). It should be noted that, in certain circumstances, it may be in breach of EU procurement law to disclose detailed information regarding a proposed contract award procedure prior to despatch of a contract notice to OJEU.

#### **Tendering phase**

This phase covers information produced and received by the public body as part of the tendering activity, up until the notification of the preferred supplier. Typically, the phase will therefore start with an issued OJEU notice or ITT and end with a preferred supplier being selected.

### **Contract conclusion phase**

This phase covers information produced and received by the public body whilst the final contract is being concluded, up until the contract is signed. Typically, the phase will therefore start with the preferred supplier being notified and the results announced, followed by any necessary clarification of points of detail, and will end with the signing of the contract.

### **Contract delivery phase**

This phase covers the period when the work specified in the contract is actually underway, up until all work related to the contract has finished. Typically, the phase will therefore start with the first chargeable activity being started and end with the production of a post implementation report (or once all products and/or services have been delivered).

## **5.2 Balancing factors in determining disclosure guidance**

There are many factors that will affect a public body's decision on whether to disclose information, and the approach taken by this guidance is to balance most of those factors to draw a generalised conclusion in each case. The main consideration is clearly whether an exemption under the Act is likely to apply. As supplier views on the sensitivity of information will have an impact on the applicability of the main exemptions (s36 and s33), knowledge of those views has been an important factor in determining the typical disclose or withhold decisions in this guidance.

The factors that are not included are those that are specific to a particular request, i.e. any sensitivities surrounding that procurement activity, supplier or information item (which is why the final decision remains with the public body).

## **5.3 Information produced under legacy contracts**

The Act is retrospective, in that even information produced or received prior to the implementation of the Act can be requested. Likewise, this guidance applies in general to all procurement information, regardless of its age. However, the typical disclose or withhold decisions given in the guidance must be treated with much greater caution when applied to legacy material. The meaning of 'legacy' here is used to apply to both:

1. information produced or received prior to the Act taking effect on 1 January 2005, either under either an extant or expired contract;
2. information produced or received after 1 January 2005 under a contract raised prior to that date.

Each of these circumstances has different implications, with each suggesting a contradictory decision outcome. There are two main considerations, as follows.

1. Information produced under legacy contracts may possibly be covered by 'pre-FOI' confidentiality agreements (i.e. where there may be an *explicit* duty of confidence), and where the supplier has a traditional expectation that information will be protected (i.e. where there may be an *implicit* duty of confidence). This is further discussed under section 5.6.

2. The commercial sensitivity of information often decreases with age, hence legacy information is less likely to be subject to commercially-based exemptions (i.e. commercial interests may be less subject to prejudice and information may have a lower 'quality of confidence'). This is discussed further under section 5.4.

Applying these considerations to the two types of legacy information, two general rules can be deduced.

1. Disclosure of contemporary information produced under legacy contracts will require greater care to avoid either a breach of confidence or breach of contract action.
2. Disclosure of legacy information produced under legacy contracts is less likely to be subject to relevant exemptions.

Note that in the former case, a test of confidentiality (though not the only one) is whether the provider of the information has an expectation of confidentiality based on the precedent of how the information has been treated previously. If the supplier has no reason to believe that 'the rules have changed', then their right to confidentiality is likely to increase the longer the confidentiality of the information remains undisputed. This is difficult to quantify in any meaningful way, but it is worth noting the following milestones in the implementation of the FOI Act.

1994	Publication of the UK's Code of Practice on Access to Government Information
1997	Revised version of the Code of Practice on Access to Government Information published
1999	Publication of Code of Practice on access to Scottish Executive Information
2000	Introduction of the Freedom of Information Act
2002	Introduction of the Freedom of Information (Scotland) Act
2003	Revised version of the Code of Practice on access to Scottish Executive Information published
2003	The Lord Chancellor's Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information Act published
2004	The Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act published

Although it is arguable that suppliers should therefore have been aware of the implications of open government since 1994, the likelihood is that private sector awareness has only been awakened in 2004.

## **5.4 Disclosure decision options**

Annex A of this document provides suggested typical responses to requests to disclose information. One of the considerations in assigning a typical response is whether the company to which the information relates is likely to consider that information sensitive, and hence whether they are likely to identify it as such when requested by the public body. Note that even where a bidder/supplier has

agreed with a public body that information is sensitive, in the event of a request for disclosure, the public body would still need to consider the nature of the information requested for itself and whether an exemption applies. The public body may then need to weigh the public interest considerations at the time of request. The bidders/suppliers views on these matters, and any time limits that the supplier/bidder has associated with information sensitivity, will be among the public body's considerations. Typical responses are expressed as one of two categories:-

**Generally disclose** - indicates that in most cases the information in question is not considered sensitive and should be disclosed if requested. Where the information is judged by the public body to be possibly contentious or sensitive (and specifically if the relevant bidder/supplier has identified it to the public body as sensitive) then the bidder/supplier should be consulted before a final decision is reached. The public body should also consider if any other exemptions may apply (e.g. security matters or law enforcement).

**Generally withhold** – indicates that in most cases the information will be considered sensitive and disclosure should be refused, citing the exemptions indicated and giving an explanation as to how it applies to the particular facts. This category will particularly apply to information identified as sensitive by a bidder/supplier and agreed as such by the public body. In this case, the public body would still need to re-assess the sensitivity of the information at the time of request. Additionally, if the 'Commercial interests and the economy' [s33] exemption is being considered, the public body would need to weigh the public interest considerations in reaching its final decision. However, unless the request is for that specific information item alone, it will generally be possible to remove the item in question from a more general request (e.g. where a contract is requested, disclosing all but the supplier profit margin).

However, the timing of the request is likely to have a bearing on the public body's decision-making process. Information relating to a particular procurement phases may be withheld if the request for it is made during that procurement phases, whereas if the request is made after the procurement phase, the information may be disclosed. This is usually applicable where the only justifiable exemptions are 'Commercial interests and the economy' [s33] and 'Confidentiality' [s36], and where the sensitivity of the relevant information falls sharply once the work of that phase is complete. The exact point at which that occurs will need to be judged on a case-by-case basis. While there is a possibility that, for example, tender evaluations may need to reviewed internally or even the entire tendering process re-run, then that phase cannot be said to be complete. Likewise, a procurement will not be truly finished until all the associated work has ceased. This will generally not occur until at least a post implementation review (or equivalent) has been held and all outstanding issues resolved. To reflect the fact that information may be 'time-sensitive', Annex A contains a sub-decision of Generally Withhold, which is "**Generally withhold if in phase**". This sub-decision signifies that typically information relating to a particular phase in the procurement process should be withheld if the request for it is made during that phase whereas typically that same information may be disclosed if the request is made after the procurement phase had ended.

As in the case of disclosure, responsibility for a decision to withhold ultimately rests with the public body holding the information.

## 5.5 General guidance on disclosing that information is held

This guidance focuses on the disclosure of requested information. However, the other consideration under the Act is whether to disclose the fact that certain information is, or is not, held by the public body. Under section 18 of the Act, if a public body considers that it would be contrary to the public interest to reveal whether the information exists or not (even if it does hold the information) then the public body can refuse the request but need not disclose that it holds the information nor give any explanation as to how the public interest in maintaining the exemption outweighs the public interest in disclosing it. For procurement information, there are very few cases where the withholding of this knowledge is likely to be justifiable, and the guidance is therefore in favour of disclosure. The main exceptions are likely to be as follows:

- where acknowledgement that information is held implicitly reveals additional information that would otherwise be withheld. For examples, if the public body decided that bidders' identities should be withheld, acknowledging whether a tender from company x is held would clearly conflict with that decision;
- where 'Security' or 'Health and Safety' exemptions apply (e.g. in the case of enquiries of the type 'do you hold a specification for security system y').
- where the public body holds information on a company that is not yet in the public domain. Examples of information includes details of a company's re-structuring plans, details relating to re-financings, information relating to a possible take-over or merger, and information relating to a company's financial strength/weakness. Clearly, declaring whether such information is held could confirm/deny speculation and be likely to have commercial implications for the relevant companies.

## 5.6 Working with suppliers

### General issues

It is important for suppliers and potential suppliers to understand how the Act may affect them. Many, in particular smaller companies, may not be aware of the implications. They may benefit from being able to find out more easily information about opportunities and the performance of competitors. The main area of risk for them would arise when information about them, which they may have expected to remain confidential in line with previous custom and practice, is disclosed.

To meet the aims of the guiding principle of 'protection of the relationship between private and public sectors', a four pronged approach is needed, as follows.

1. Inform potential bidders of the implications of the Act and request that they highlight information that they would justifiably prefer to be withheld. There should be no guarantee that information will be viewed as being confidential unless it is genuinely of a confidential nature and the general approach will be to agree to confidentiality clauses only exceptionally.
2. Enshrine in contractual arrangements with suppliers the rules to be applied by both the public body and the contractor in disclosing information.

3. Review legacy contracts for confidentiality agreements that may be unsustainable under the Act and liaise with the contractors as necessary.
4. Consult, where appropriate with bidders and suppliers before disclosing information.

These points are discussed in more detail in the following sections.

### **Inclusion of FOI conditions in procurement documentation**

At the outset of any procurement, the conditions of procurement should clearly explain that information provided to the public body by the bidder may be subject to disclosure under the Act. General Act guidance is clear in discouraging the acceptance of confidentiality agreements by public bodies, other than in exceptional circumstances, and this applies equally to terms included in tender documentation and contracts. The conditions of procurement should clarify that the public body will not implicitly accept such terms, and that any other such markings, whilst being noted, may have little weight if the information is requested.

However, as the public body should be trying to recognise the bidder's legitimate commercial concerns, the conditions of procurement should encourage bidders to identify information that is truly sensitive. This information will be useful to the public body as it will highlight where consultation is needed in the event of a request. The bidder should also be asked to justify the sensitivity of the information and how long it is likely to remain so. This may not be appropriate for all tenders and contracts, particularly if the volume of tenders/contracts makes it impractical. In this case, the criteria applied to contract review detailed under 'Reviewing legacy contracts for confidentiality agreements' below should be considered.

### **Inclusion of FOI conditions in contracts**

Contract clauses should carry forward the Act provisions included in the procurement conditions, but may also be expanded to include the disclosing of information by the contractor. Although not strictly a consideration under the Act (as it only applies to public authorities), it is sensible to tackle all these issues under a single 'disclosure of information' (or similar) clause. Such clauses will be particularly relevant where the contractor is designated a 'public body' for the purposes of the particular contract.

To provide reassurance to suppliers, it is recommended that a provision be included in the contract to the effect that the public body will consult with the contractor on any request for information, identified as commercially sensitive, under the Act.

### **Reviewing legacy contracts for confidentiality agreements**

Most public bodies will have existing contracts that pre-date the Act, often by many years. These contracts may have wide reaching confidentiality agreements that are unsupportable under the provisions of the Act. As discussed elsewhere in this document, information covered by a confidentiality agreement will only be exempt (under either s36 or s33) if the information is truly commercially sensitive. In these cases the public body should consult with the relevant suppliers to:

- advise them that information covered by the contract may need to be disclosed under the Act, irrespective of any confidentiality agreements;
- agree procedures for consultation in the event that an information request is received.

It may be impractical to review every extant contract if large numbers are involved, in which case a more pragmatic approach is needed. It would then be sensible to restrict the review to contracts that are:

- large value
- critical to the public body's function
- controversial
- otherwise likely to attract information requests.

### **Consultation with suppliers on disclosure requests**

Although as a general principle, consultation with a supplier, where a request involves information provided by that supplier, should be the norm (the s60 Code of Practice deals with this at paras 47-48). Most requests for procurement information will have some supplier implications and so potentially the overhead in consulting on all cases could be significant. Whilst this may be a fact of life for the public body, it should be recognised that suppliers will also carry an overhead in responding to the public body.

This guidance therefore recommends a more pragmatic approach to consultation. Where bidders/suppliers have been given the opportunity to identify sensitive material and have done so (and any declared period of sensitivity has not expired), then clearly consultation is needed if the request relates to that information. However, if it does not, then consultation is likely to be unnecessary. If the bidder/supplier has not identified any sensitive information then strictly, consultation should likewise be unnecessary. However, as a courtesy in such cases, it is recommended that contractors/bidders/suppliers are notified that a request has been made and given the opportunity to make representations if they so wish. They then have a 'do nothing' option if the request is of no concern to them.

Legacy material will have been provided prior to any understandings on information sensitivity being agreed. Therefore requests for legacy material that could have some commercial sensitivity should involve consultation with contractors/bidders/suppliers.

Over time, it is likely that disclosure precedents will be set and contractors/bidders/suppliers will come to understand what information will be subject to release. Consultation is therefore likely to have a high initial resource impact that will hopefully lessen once the effects of the Act become established.

## **5.7 Impact of this guidance on publication schemes**

All requests should be considered on their own merits, with this guidance informing that consideration. However, consideration should be given to the types of procurement information that could be included in the public body's publication scheme. One of the considerations here is the public interest in doing so – some contract information will be significant and may well be of considerable public interest. Inclusion in the scheme will help to ease the effort involved for public bodies in clarifying the information being requested and help to emphasise the public body's commitment to the spirit of the Act.

There are a number of benefits that arise if a public body publishes, in its publication scheme, information that is relevant to its procurement activities. These include the following:

- It is easier for suppliers to do business with the public body. This reduces their costs and encourages new suppliers, including SMEs, to enter the market.
- Public bodies save the time and cost spent handling individual requests
- Public bodies can decide what information to publish as part of a systematic management process, as compared to responding to individual requests to tight timescales (note that where it is intended to make information available under the Publication Scheme within a period of twelve weeks from the date of the request, the exemption 'Information intended for future publication' may be relevant).

The Scottish Executive's own publication scheme is published on the internet at the following address:  
<http://www.scotland.gov.uk/about/LPS/LPS-CPS/00019260/sepublicscheme.aspx>

## Annex A

### Disclosure decision options

Please note that this Annex is only intended as starting point in assisting public bodies in making their own disclosure decisions, based on the circumstances of the particular case. It should only be used once the guidance in this document has been read

#### General procurement information

Information type	Discussion	Possible exemption	Typical Disclose/Withhold decision
Information on suppliers compiled from widely available sources (e.g. product catalogues, press stories)	Already in the public domain, so an exemption under the Act applies. However, requesters could be directed to the original information sources to satisfy their information need.	25	Generally withhold
Information on suppliers aggregated from knowledge gained within the public body through their supplier dealings (e.g. performance over several contracts). Also includes derived information (e.g. opinions drawn from data)	If the aggregated information is critical of a supplier and released, it could (but may not) damage commercial interests. If it were known that only information relating to suppliers generally performing well would be disclosed, a refusal to disclose aggregated information on a particular supplier would effectively identify them as performing badly. Anonymised information may generally be disclosed.	33	Generally withhold (except for anonymised information)
Information obtained from suppliers and not generally available (future product info, research plans, financial details).	This information will generally have been specifically requested by the public body and supplied with a reasonable expectation it would not be made public. Otherwise, companies may refuse to divulge the information, to the probable detriment of the public interest.	33, 36	Generally withhold

#### Initiation information (start of procurement planning up to readiness to issue of Pre-Qualification Questionnaire/Invitation to Tender documentation)

Information type	Discussion	Possible exemption	Typical disclose/withhold decision
All vision, strategy and planning documentation, inc Business Cases	The key document in this phase is the Business Case (strategic outline, outline or full). NHS guidelines for PFI/PPP contracts mandates the publication of Business Cases within a month of their final approval, but allows for the possible redacting of information. However, non-PFI work may operate in a different environment and direct correlation may not be appropriate. In some cases, information may be subject to release as a managed process for early supplier involvement. Only disclosure outside of this process is detrimental.	33	Generally withhold if in phase (unless part of a managed process for early release of information)
Requirements information	Early disclosure of requirements, unless part of the procurement strategy, could prejudice the tendering process and give unfair advantage to some suppliers. In some cases, information may be subject to release as a managed process for early supplier involvement. Only disclosure outside of this process is detrimental.	33	Generally withhold if in phase

**Tender information (release of Pre-Qualification Questionnaire and Invitation to Tender documents up to selection of preferred bidder)**

Information type	Discussion	Possible exemption	Typical disclose/withhold decision
All project management documentation, with the following exceptions	This covers the typical documentation generated during management of selection when run as a project (e.g. Prince 2 products). Demonstrates procurement was properly managed, but release during tendering could damage process.	33	Generally withhold if in phase.
Project Issue and Risk logs	These may contain critical info about tenderers	33	Generally withhold if in phase.
All information received from tenderers	This covers tender documents, correspondence, negotiation notes, etc	33, 36	Generally withhold if in phase
All evaluation information	Covers evaluation reports	33	Generally withhold if in phase

**Contract conclusion information (successful bidder notified up to contract signature)**

Information type	Discussion	Possible exemption	Typical disclose/withhold decision
Tender information received from unsuccessful bidders	This covers tender documents, (inc prices). Non-UK case law indicates not in public interest to disclose, although note that exemption would not apply to any information not prejudicial to commercial interests	33, 36	Generally withhold, except for non-sensitive information
Tender evaluation information on unsuccessful bidders (inc ranking)	Although commercially non-sensitive information could be disclosed, the public interest in favour of disclosure of sensitive information is generally weaker than that for winning bidders	33	Generally withhold, except for non-sensitive information
Identity of unsuccessful bidders	Non-UK case law says no exemptions apply (unless security/H&S related).	33, 39	Generally withhold if in phase.
Evaluation information for successful bidders	Non-UK case law decided in favour of public interest disclosure.	33	Generally withhold if in phase.
Tender information received from successful bidder, with the exceptions below	General tender information, including total tender price (but not supplier's costing information, see below). Note that if cost information could be deduced from price information (e.g. consultancy, where total price = days * day rate), then consultation may be needed before a decision on disclosure is reached.	33, 39	Generally withhold if in phase.
Payment terms	Non-UK case law is unclear what this covered in the particular case	33	Generally withhold if in phase.
Information on the supplier's approach to the work	Non-UK case law here is unclear, but this is assumed to only apply where the supplier has a unique approach that could be considered a 'trade secret'.	33	Generally disclose except for information agreed as 'trade secret'
Financial models	For more complex work, detailed models of how the cash flow for both the public body and supplier would be managed over the life of the contract (e.g. recovering low initial capital charges through incentivised support work).	33	Generally withhold
Price breakdown	Price breakdowns could reveal details of the supplier's costing information.	33	Generally withhold
CVs and reference sites	CV's are likely to come under the Data Protection Act. Reference site information was probably supplied to the bidder in confidence.	33, 36	Generally withhold

Information on supplier's costing mechanisms	This covers information relating to profit margins, day rates (where used to calculate a fixed price), overhead costs, etc. This may give advantage to a competitor.	33, 36	Generally withhold
Information relating to Contract negotiation	Covers correspondence, meeting minutes, e-mails, contract change notices, etc. Decision will depend on sensitivity and content, and should not comprise suppliers negotiations with sub-contractors or the public body's negotiations with any third parties.	33	Generally disclose except for information agreed as commercially sensitive, with time limits

**Contract delivery information (from start of work to completion)**

Information type	Discussion	Possible exemption	Typical disclose/withhold decision
All project management documentation, with the following exceptions	This covers the typical documentation generated during management of contract when run as a project (e.g. Prince 2 products). Demonstrates project was properly managed.	None	Generally disclose
Project Issue and Risk logs	The project should be able to explore issues freely and cooperatively between parties. Disclosure would damage this freedom, to the detriment of the project.	33	Generally withhold.
Exception reports	These may contain critical info about suppliers. Disclosure could prejudice process (due to a reluctance to raise/accept)	33	Generally withhold if in phase
Lessons learnt report	These may contain critical information about suppliers. Disclosure could prevent candour and hence restrict valuable info.	33	Generally withhold
Contract information (general)	Non-UK case law indicates that it is in the public interest to disclose <b>all</b> contract information, including total contract price and performance indicators, although commercially sensitive information may need to be removed in some cases.	33, 36, 39	Generally disclose (unless security/H&S related), but see below for exceptions
Contract information requiring particular attention:			
Service level agreements	Information provides key indicator that proper management is in place. Strong public interest element, probably low commercial impact	33, 36, 39	Generally disclose
Performance measurement procedures	As above, with possibly even lower commercial impact		Generally disclose
Incentive mechanisms	Information provides key indicator that proper management is in place. Details of the mechanisms may be considered sensitive by suppliers, but there is a strong public interest element in disclosure. Summary information should be considered.	33, 36	Generally disclose
Criteria for recovering sums	Stronger commercial argument, since it would indicate financial risk to which company is exposed. Subsequent knowledge of performance would mean financial impact could be deduced, possibly affecting company's financial position	33, 36	Generally withhold
Pricing mechanisms	Covers milestone payments, price variation mechanisms (e.g. fee rate increases per year). Case law supports release of this information, based on public interest in disclosure.	33, 36	Generally disclose
Dispute resolution procedures	Information provides key indicator that proper management is in place. Strong public interest element, probably low commercial impact		Generally disclose

Invoicing arrangements	Probably no commercial impact, so exemptions unlikely to apply. However, if they did, it is difficult to see any public interest in non-disclosure.		Generally disclose
Contract mgt arrangements	Information provides key indicator that proper management is in place. Strong public interest element, probably low commercial impact		Generally disclose
Exit strategies and break options	Information provides key indicator that proper management is in place. Strong public interest element, probably low commercial impact		Generally disclose
Sub-contractor details	Covers their identity, management arrangements, flow-down of contract conditions		Generally withhold (except for their identity)
Assessing or reporting on contract performance	This covers information relating to performance against SLAs, KPIs benchmarks, etc. Mostly relevant to longer term service provision. Overall, likely to be in public interest to release, but financial sensitivity for supplier needs to expire.	33	Generally withhold if in phase.
Information on sums recovered	Where contracts have liquidated damages clauses, the information possible is a) have damages been imposed, b) the amounts involved. The former could arguably be disclosed, but the likelihood is that the latter could then be deduced from other information. The latter is probably commercially/financially damaging (but beware if covered under EIRs), but only for a definable period.	33, 39	Generally withhold if in phase.
Information on project progress	Covers progress review minutes, reports, correspondence. More relevant to start/end projects. Disclosure may be in public interest, but supplier reputation could suffer if major project known to be delayed (with fall in share price, loss of bids in progress, etc). Also, important that such information is put in context (e.g. delay may be due to new requirements or other valid reasons).	33	Generally disclose
Product/service verification procedures	Covers details of test documentation, e.g. strategy, procedures, acceptance plans. Also covers building acceptance/commissioning plans. Possible 'trade secret' and IPR issues, esp. for service companies. Release of detailed procedures to competitors effectively enables re-use by them, possibly giving them competitive advantage.	39	Generally disclose except where 'trade secrets' agreed
Product/service verification results	Covers results from above activities. Same comments as above, as procedures may be deduced from results	39	Generally disclose except where 'trade secrets' agreed
Contract change information	Same arguments as for contract. Disclosure of all information likely to be in the public interest	33, 39	Generally disclose

## **Annex B**

### **Model Disclosure Clauses**

#### **Wording for inclusion into Pre-Qualification Questionnaires**

All information submitted to the Scottish Ministers may need to be disclosed and/or published by the Scottish Ministers. Without prejudice to the foregoing generality, the Scottish Ministers may disclose information in compliance with the Freedom of Information (Scotland) Act 2002, (the decisions of the Scottish Ministers in the interpretation thereof shall be final and conclusive in any dispute, difference or question arising in respect of disclosure under its terms), any other law, or, as a consequence of judicial order, or order by any court or tribunal with the authority to order disclosure.

Further, the Scottish Ministers may also disclose all information submitted to them to the Scottish or United Kingdom Parliament or any other department, office or agency of Her Majesty's Government in Scotland or the United Kingdom, and their servants or agents. When disclosing such information to either the Scottish Parliament or the United Kingdom Parliament it is recognised and agreed by both parties that the Scottish Ministers shall if they see fit disclose such information but are unable to impose any restriction upon the information that they provide to Members of the Scottish Parliament, or Members of the United Kingdom Parliament; such disclosure shall not be treated as a breach of this agreement.

Accordingly, if you consider that any of the information included in your Pre-Qualification Questionnaire is commercially confidential please identify it and explain (in broad terms) what harm might result from disclosure and/or publication. It should be remembered though, that, even where you have indicated that information is commercially sensitive, Scottish Ministers may disclose this information where they see fit. Receipt by the Scottish Ministers of any material marked 'confidential' or equivalent should not be taken to mean that the Scottish Ministers accept any duty of confidence by virtue of that marking.

Scottish Ministers may publish, on the Scottish Executive website, the names and contact details of companies who have been issued with a Pre-Qualification Questionnaire

#### **Wording for inclusion into ITT/ITN documents**

All information submitted to the Scottish Ministers may need to be disclosed and/or published by the Scottish Ministers. Without prejudice to the foregoing generality, the Scottish Ministers may disclose information in compliance with the Freedom of Information (Scotland) Act 2002, (the decisions of the Scottish Ministers in the interpretation thereof shall be final and conclusive in any dispute, difference or question arising in respect of disclosure under its terms), any other law, or, as a consequence of judicial order, or order by any court or tribunal with the authority to order disclosure.

Further, the Scottish Ministers may also disclose all information submitted to them to the Scottish or United Kingdom Parliament or any other department, office or agency of Her Majesty's Government in Scotland or the United Kingdom, and their servants or agents. When disclosing such information to either the Scottish Parliament or the United Kingdom Parliament it is recognised and agreed by both parties that the Scottish Ministers shall if they see fit disclose such information but are unable to impose any restriction upon the information that they provide to Members of the Scottish Parliament, or Members of the United Kingdom Parliament; such disclosure shall not be treated as a breach of this agreement.

Accordingly, if you consider that any of the information included in your bid is commercially confidential please identify it and explain (in broad terms) what harm might result from disclosure and/or publication. It should be remembered though, that, even where you have indicated that information is commercially sensitive, Scottish Ministers may disclose this information where they see fit. Receipt by the Scottish Ministers of any material marked 'confidential' or equivalent should not be taken to mean that the Scottish Ministers accept any duty of confidence by virtue of that marking.

The Scottish Ministers may publish, on the Scottish Executive website, the names and contact details of companies who have been issued with an Invitation to Tender document.

### **Wording for inclusion in Contract conditions**

All information submitted to the Scottish Ministers may need to be disclosed and/or published by the Scottish Ministers. Without prejudice to the foregoing generality, the Scottish Ministers may disclose information in compliance with the Freedom of Information (Scotland) Act 2002, (the decisions of the Scottish Ministers in the interpretation thereof shall be final and conclusive in any dispute, difference or question arising in respect of disclosure under its terms), any other law, or, as a consequence of judicial order, or order by any court or tribunal with the authority to order disclosure. Further the Scottish Ministers may also disclose all information submitted to them to the Scottish or United Kingdom Parliament or any other department, office or agency of Her Majesty's Government in Scotland or the United Kingdom, and their servants or agents. When disclosing such information to either the Scottish Parliament or the United Kingdom Parliament it is recognised and agreed by both parties that the Scottish Ministers shall if they see fit disclose such information but are unable to impose any restriction upon the information that they provide to Members of the Scottish Parliament, or Members of the United Kingdom Parliament; such disclosure shall not be treated as a breach of this agreement.

## **Annex C**

The following worked examples illustrate how the guidance may work in practice. It is not feasible to offer examples of all possible situations, but those offered demonstrate some of the rationale underlying the working assumptions whilst highlighting where exceptions may be relevant. It must be emphasised that the examples are invented to represent generic cases and the outcomes should therefore not form the basis of the decisions in a particular 'real' case (i.e. they are not taken from case law and should not be considered as 'precedence setters').

### **Example 1**

**Information requested :** Price quoted in all tenders received for procurement of a licensing system.

**Timing of request :** Prior to contract award

**Working Assumption :** Not to be released

**Discussion :** In this example, all the four have identified within their tenders that release of pricing information would damage their commercial interests. Additionally, the release of any tender information during the selection and award stages would prejudice the procurement process, delaying the procurement exercise and possibly requiring re-tendering. This would involve the public body in greater expense, and hence prejudice its own commercial interests. The Act requires the same treatment of information requests regardless of the identity of the requester. Hence it is possible that a bidder (or potential bidder) would receive the information and this could affect bids submitted in terms of either content or price, reducing the value for money achieved.

Weighing these factors, the public body decides that exemption s33 [commercial interests] applies and that there is a strong public interest in non-disclosure. As no public funds have yet been committed, the counter-balancing public interest in disclosure is weak and the public body therefore decides to withhold the information.

**Provisional decision :** Withhold, citing s33.

## **Example 2**

**Information requested :** Total price of awarded contract for a licensing system, together with a full price breakdown for every element.

**Timing of request :** Post contract award, within first year of implementation

**Working Assumption :** Total price : Generally disclose  
Price breakdown : Not to be released

**Discussion :** In this example, the tender was conducted as an OJEU exercise and, in line with EC Procurement Directives, the total contract price should be disclosed. The supplier argued during discussions prior to contract award that they consider the total price confidential, as it may prejudice a bid for a similar system they are submitting elsewhere. However, the public body rejected this stance as the slight commercial harm that the supplier may suffer is insufficient to justify an exemption, and in any case is outweighed by the strong public interest, on transparency grounds, in disclosure.

Close inspection is needed of the price breakdown to assess the prejudice to the supplier of releasing detailed information. The supplier stated during the tendering phase that all price breakdown information is considered confidential. The public body decides, after consultation with the supplier, that the prices of the top-level deliverables can be released (e.g. total hardware price, total support price, total training price, etc).

However, the public body decides that any further level of breakdown would reveal information that is genuinely likely to damage the supplier's commercial interests (e.g. price of individual workstations would reveal bulk-buy arrangements negotiated by supplier, training breakdown would reveal man-day rates for training consultants, etc). The public body judges that the public interest in disclosing this information is not outweighed by the public interest in upholding the supplier's concerns.

**Provisional decision :** Disclose total contract price and top-level breakdown  
Withhold detailed price breakdown, citing s33

### **Example 3**

**Information requested :** Technical details of a new patient monitoring network within a PFI/PPP hospital, together with the approach to determining the amount of monitoring to be provided in the NHS wards, compared to the private wards.

**Timing of request :** Post contract award, within first year of implementation

**Working Assumption :** Generally disclose, except for trade secret information

**Discussion :** In this example, the supplier has asked for both types of the information requested to be treated as confidential, as in both cases there are trade secret issues. The operating software underlying the network is a proprietary product of the company and releasing any details would provide advantage to competitors. The algorithms used to determine the monitoring required are likewise proprietary, but have been in use for some years and similar algorithms are generally available.

The public body decides that in both cases s33 is relevant. It is judged that there is little public interest in disclosing technical details of the network, when weighed against the public interest in protecting the supplier's position, and that therefore these should be withheld. However, the harm that the supplier would suffer from releasing details of the algorithms is outweighed by the public interest in being reassured that the approach used is equitable.

**Provisional decision :** Withhold technical details of network, citing s33  
Disclose algorithms for monitoring.

#### **Example 4**

**Information requested :** The incentive mechanism included in the contract for the refurbishment of government offices over a four year period, together with the value of any sums recovered in years 1-3.

**Timing of request :** Post contract award, in fourth year of contract.

**Working Assumption :** Incentive mechanism : Generally disclose  
Sums recovered : Not to be released

**Discussion :** The incentive mechanism provides for sums being recovered if the refurbishment slipped against the agreed project plan. Sums recovered would be based on a percentage of the relevant stage payment, with the percentage increasing in defined increments determined by the number of days slippage. The supplier wants the incentive mechanism to be confidential, as they feel that revealing their financial risk would affect their share price and harm their commercial interests. They are also concerned that disclosing actual sums recovered by the public body would likewise affect their market position, until their accounts are officially published.

The public body acknowledges that in both cases s33 is relevant. However, incentive mechanisms are a key element for managing risk and performance, and there is a strong public interest in opening such mechanisms to scrutiny. In this case, revealing all the details of the incentive mechanism could enable the sums recovered to be deduced. As the degree of harm to the commercial interests of the supplier would be greater if actual sums were revealed, which is not outweighed by the public interest in disclosure, it is decided that limited details of the mechanism should be disclosed (e.g. remove one of the calculation elements).

As the commercial sensitivity of sums recovered reduces significantly once accounts are published, the supplier acknowledges, after consultation, that the sums for years 1 and 2 can be disclosed, but withheld for year 3.

**Provisional decision :** Disclose incentive mechanism and sums recovered for years 1 and 2, with some information removed  
Withhold sums recovered for year 3, citing s33

### **Example 5**

**Information requested :** Total amount of money spent by the public body with supplier X over the last 10 years, broken down into price per contract and scope of the work in each case.

**Timing of request :** Immaterial

**Working Assumption :** Generally disclose

**Discussion :** The public body only holds information covering the last 8 years. Their response is therefore limited to data covering 8 years. Releasing the total sum spent does not significantly harm the supplier's commercial interests and there is a strong public interest in disclosure.

The price per contract has been made available on the public body's web site for the past 3 years and under the Act the public body is not obliged to supply information already publicly available (exemption s25 'Information otherwise accessible'). Contract prices earlier than the 3 years (back to 8 years) are not commercially sensitive and the public body decides these should therefore be disclosed.

The scope of the contracts has likewise been publicised for the past 3 years. However, there have been a number of exceptions where the contract has related to work for law enforcement agencies and these have not been published. Exemption 35 (Law enforcement) is considered to apply in these instances and the public body does not see any significant overriding public interest in disclosure. These are excluded from the information to be disclosed, making it clear that the list is not complete for the reasons stated.

**Provisional decision :** Inform requester that information older than 8 years is not held  
Withhold contract prices and scopes for the last 3 years, citing s25, but direct requester to where information is already available  
Withhold the scopes for certain contracts not already published, citing s35  
Disclose total money spent with supplier over 8 years  
Disclose contract prices and scopes not already published in last 8 years (excluding those covered by s35)

### **Example 6**

**Information requested :** The reasons for choosing supplier Y to undertake a new road building programme.

**Timing of request :** One year after contract award.

**Working Assumption :** Generally disclose.

**Discussion :** The procurement exercise involved a full selection and award process, including the production of an Evaluation Strategy (ES), Evaluation Plans (EPs), Evaluation Models (EM) and an Evaluation Report (ER). An Evaluation Moderation meeting was held to refine the evaluation scores for the award phase. To answer the request, whilst avoiding releasing information not immediately pertinent to the request, the public body decides to respond by compiling a dossier of relevant information. The information chosen comprises the following:

- overall procurement procedure, drawn from the ES
- selection criteria for the PQQ phase, drawn from the EP for the phase
- EM template used for the PQQ phase
- ER for the PQQ phase, with the following removed:
  - losing entrants' names (to anonymise information)
  - all information relating to an entrant's financial status
  - all information relating to an entrant's previous performance.

Note that although information is made anonymous, the losing entrants may have been named elsewhere and the public body considers it too easy to connect information with the relevant bidders.

- selection criteria for the award phase, drawn from the EP for the phase
- EM template used for the award phase
- ER for the award phase, with the following removed:
  - losing bidders names (to anonymise information)
  - all price information for losing bidders
  - price breakdown information identified as sensitive by winning bidder

- information identified as commercially sensitive by losing bidders (e.g. a new road surface formulation speeds application in the case of one bidder)
- information agreed as commercially sensitive with winning bidder.

Note that although information is made anonymous, the losing bidders may have been named elsewhere and the public body considers it too easy to connect information with the relevant bidders. Note that in some cases, information is removed that has been identified as sensitive by the supplier, but not necessarily agreed as sensitive by the public body. To save time, the public body judges that the information in question is not strictly needed to properly meet the request and therefore consultation with all losing bidders is not needed; they pragmatically 'err on the side of caution'. Likewise, the guidance indicates that losing bidder prices are not generally disclosed and again, prices are not needed to demonstrate 'due process' in this case.

a summary of the overall findings of the evaluation moderation meeting (minutes were not kept of the meeting).

**Provisional decision :** Disclose compiled dossier of information