**FOI Central Policy Unit**

**Notice No. 5**

**FOI & PUBLIC PROCUREMENT**

**1. Public Procurement**

The EU Treaties set out the principles of fairness and openness in public procurement. EU Public Procurement Directives establish particular legal obligations on Contracting Authorities where the value of the contract is over specified thresholds. **The guiding principles of openness, fairness and transparency will always apply, however, irrespective of the value of the particular contract**. These principles complement FOI and should guide all policy and practice in the procurement area.

The Freedom of Information Act 2014 means that FOI bodies are not in a position to give guarantees of confidentiality. It is suggested instead that FOI bodies should be proactive in taking measures to enable them to effectively manage the tendering process in an FOI context.

**2. Suggested Steps to meet the changed context arising from FOI**

***General Procurement Requirements .....***

1. Develop a policy setting out the information that the FOI body would wish to routinely release regarding the tender process, outside of FOI (see para. 4 on page 3)
2. Be careful not to introduce bias into the specification of requirements
3. Be specific about the criteria against which applications will be evaluated. Advertisements or tender documents should clearly indicate the following:

*(i) qualitative selection criteria* (i.e. minimum mandatory requirements) - these might include evidence of financial standing, technical capability, etc.

*(ii) award criteria*  - this may be either the lowest price or the most economically advantageous tender (i.e. using various criteria such as price, period for completion, running costs, technical merit, etc.)

1. Document carefully the decision making process in relation to the selection of the successful tender. Where feasible, allocate weighting to the award criteria.
2. Give good detailed reasons for decisions to unsuccessful tenderers.

***In anticipation of FOI* *requests ....***

1. Inform all applicants at the outset: a) about FOI when issuing requests for tenders or placing advertisements in the newspapers and b) of the FOI body’s policy regarding information it intends to release outside of the FOI Act
2. Ask applicants to identify sensitive information, when forwarding material to you
3. Always consult with the person or company concerned before making a decision on an FOI request by a third party

**3. Informing companies in advance about FOI:**

As many firms are unlikely to be familiar with the FOI Act it is suggested that information about FOI be included in a prominent position on the tender documentation.

FOI bodies can also reduce significantly the work involved in consulting with third parties on FOI requests by alerting persons in advance to its existence. The following standard statement is suggested for inclusion in tender documents:

“(i) The (FOI body name) proposes that the following information relating to this tender competition will be made available on request: ...............................

(ii) The (FOI body name) undertakes to hold confidential, any information provided by you in this (tender) subject to:

(a) disclosure of the information specified at (i) above as liable for release to the public

(b) the (FOI body name) obligations under law, including the Freedom of Information Act, which came into effect on the effective date by the FOI body.

You are asked to consider if any of the information supplied by you in this (tender) should not be disclosed because of its sensitivity, *(other than that referred to at (i) above)*. If this is the case, you should, when providing the information, identify same and specify the reasons for its sensitivity. The (FOI body name) will consult with you about sensitive information before making a decision on any Freedom of Information request received.

If you consider that none of the information supplied by you is sensitive, please make a statement to that effect. Such information may be released in response to an FOI request.”

**4. What information should routinely be made available outside of FOI?**

As a matter of course the following information should be made available:

(i) *qualitative selection criteria* (i.e. minimum mandatory requirements) - these might include evidence of financial standing, technical capability, etc.

(ii) *award criteria*  - this may be either the lowest price or the most economically advantageous tender (i.e. using various criteria such as price, period for completion, running costs, technical merit, etc.)

(iii) *detailed reasons to unsuccessful candidates* as to why their application was rejected.

Departments should note that where contracts are subject to the EU Public Procurement Directives, a written report on each contract awarded should be prepared which must be sent to the Commission at its request (Article 7(3) of 93/36/EC and Article 12(3) of 92/50/EC refer).

**5. What about details of the successful tender price?**

This is a matter for each FOI body to determine in relation to each individual product or service, having regard to the requirements of the FOI Act. The criteria to be considered may differ depending on the nature of the product or service, the number of companies or persons in a position to submit tender applications in each instance and the point in time in which the FOI request is made. In formulating an approach, Departments must have regard to:

1. the extent to which disclosure could prejudice the competitive position of the successful company
2. the extent to which disclosure could result in benefits to the Department e.g. resulting in more competitive tenders
3. the extent to which disclosure could prejudice the effectiveness of the tender process

Practice favours the release of the successful tender price in most cases.

While given that the FOI Act of 2014 is very new and as such there are no cases in the OIC which have been processed under the new Act to date the old cases may prove to be good reference when considering a request of this nature.

In a decision letter dated 25 June 2001 the Information Commissioner provided a summary of his views regarding records relating to tenders, including pricing. In general, the Information Commissioner takes the view that when a contract is awarded, successful tender information loses confidentiality with respect to price and the type and quantity of the goods supplied. He has also taken the view that the public interest favours the release of such information, but points out that exceptions may arise. Further details of the Information Commissioner’s approach to tenders are contained in Appendix I

**6. Can details of pricing structures, product specification, etc. be protected from third party access under FOI?**

Yes. The provision of the FOI Act (section 36) requires that such information be protected where any of the following circumstances apply:

1. the record contains trade secrets of a person other than the requester concerned, or
2. the record contains financial, commercial, scientific or technical or other information

(i) whose disclosure could reasonably be expected to result in a material

financial loss or gain to the person to whom the information relates,

or

(ii) could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation,

or

1. information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

Where the FOI body wishes to release such information, it may only do so in the following circumstances:

1. where the person or company concerned consents to release
2. where the information or information of a similar type is generally available to the public e.g. where the Minister would give such information in answer to PQs
3. where the person or company has been advised, at the time that the information is received, that the information will be released
4. where the department believes that the public interest would be better served by disclosing rather than by refusing to disclose the information. In this instance, the views of the persons or company concerned must be sought in advance of a decision being made. Where the company refuses to agree to disclosure of the information, the matter will fall for decision by the Information Commissioner. Consultation procedures required under the FOI Act are outlined in Appendix II.

**7. Compliance with Public Procurement Procedures**

The national public procurement website [www.etenders.gov.ie](http://www.etenders.gov.ie/) should be consulted for up to date public procurement guidance, including guidance on disclosure of information.

**Appendix I**

The Information Commissioner has made a number of significant decisions in relation to tenders including **Decision of 31/03/1999 (Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd and The Office of Public Works) and Decision of 25/06/2001 (Mr. Mark Henry and the Office of Public Works(.** The full text of these decisions can be accessed at [www.oic.gov.ie](http://www.oic.gov.ie/)

In the latter decision, the Information Commissioner provided the following a general summary of his views regarding records relating to a tender competition:-

* FOI bodies are obliged to treat all tenders as confidential at least until the time that the contract is awarded.
* Tender prices may be trade secrets during the currency of a tender competition, but only in exceptional circumstances would historic prices remain trade secrets. As a general proposition, tender documents which would reveal detailed information about a company's current pricing strategy or about otherwise unavailable product information could fall within the scope of section 27(1)(a) of the FOI Act even following the conclusion of a tender competition.
* Tender prices generally qualify as commercially sensitive information for the purposes of sections 27(1)(b) and (c) of the FOI Act. Depending upon the circumstances, product information can also be considered commercially sensitive under section 27(1)(b).
* When a contract is awarded, successful tender information loses confidentiality with respect to price and the type and quantity of the goods supplied. The public interest also favours the release of such information, but exceptions may arise (*see* *Telecom Eireann and Mr Mark Henry*, Case Number 98114, published on 13/01/2000).
* Other successful tender information which is commercially sensitive (for example, details of the internal organisation of a tenderer's business, analyses of the requirements of the FOI body, or detailed explanations as to how the tenderer proposed to meet these requirements) may remain confidential. Disclosure in the public interest ordinarily would not be required, unless it were necessary to explain the nature of the goods or services purchased by the FOI body.
* Unsuccessful tender information which is commercially sensitive generally remains confidential after the award of a contract, and the public interest lies in protecting that information from disclosure. No tender-related records are subject to either release or exemption as a class; therefore, each record must be examined on its own merits in light of the relevant circumstances.

**Appendix II**

**Consultation Process in Summary**

1. a careful inspection of the contents of the records involved to determine if they concern the interests of a third party

1. an initial assessment as to whether disclosure in the public interest may be considered

1. if the initial assessment tends towards disclosure in the public interest, identification of the third parties with whom consultation is required in accordance with section 38.

1. if the initial assessment tends towards refusal, consideration of consultation with relevant third parties to determine if they have views on release or disclosure which may not have formed part of your initial decision making.

1. take all reasonable steps to locate and make contact with relevant third parties

1. within 2 weeks[[1]](#footnote-1) (or 4 weeks if the number of records to be considered or the number of third parties to be consulted in such that compliance with the initial 2 week time period is not reasonably possible), notify them in writing of -
2. the request (but not the necessarily the name of the requester) and enclosing copies of the records concerned, where possible
3. that the decision maker is considering a preliminary decision to disclose the information and details of the public interest criteria under consideration. Details of the exemption under consideration should also be explained.
4. the third party’s right to make a submission within 3 weeks
5. that any submission will be carefully considered before the final decision is made, and
6. the third party will be advised of any decision to release the information
7. that if the decision is to grant the request against the wishes of the person consulted, that person shall have the right to seek independent review of the decision by the Commissioner before any information is released
8. within 2 weeks of receipt of submissions (or within 2 weeks of the expiration of the time limit available to the third party) critically analyse the submissions received in the light of the relevant exemption provision and public interest considerations

1. if unable to consult, request the permission of the Commissioner to proceed to a decision

1. objectively assess the likely effects of disclosure

1. consider the results of any other enquiries made to ascertain the public interest in disclosing or withholding the information

1. weigh the various public and private interests involved

1. inform the third party and the requester of the decision. If the decision is to grant the request, advise a) the third party of his or her rights of appeal and b) the requester that the information must be withheld until the time for appeal to the Commissioner has expired.

1. In the FOI Act a week is 5 consecutive working days i.e. the term excludes a Saturday, a Sunday and a public holiday. Cognate words (2 weeks, 3 weeks etc.) should be read accordingly). [↑](#footnote-ref-1)