2015

**FOI Central Policy Unit**

**Notice No. 8**

**Requests involving third parties - A step by step guide**

Given the breadth of interaction by FOI bodies with the community, they inevitably hold records containing sensitive business, personal or confidential information. The Freedom of Information Act recognises the importance of protecting such information in the normal course from third party access. Specific protections for this purpose are set out at sections 35, 36 and 37 of the Act.

Where, exceptionally, sensitive information in these categories is under particular consideration for release in the public interest, the Act imposes a number of safeguards so as to ensure the rights of the third party involved (i.e. the business or individual to whom the information relates) are fully respected.

The purpose of this note therefore is to briefly set out for decision makers the steps involved in processing FOI requests which contain third party information (i.e. sensitive business, personal or confidential information of someone other than the requester).

**Step 1 Examine the Records** ***- Immediately on receiving the request***

* + - * 1. Examine the records coming within the scope of the FOI request to determine if they contain third party information.
        2. Separate the records containing third party information from the other records coming within the scope of the request. The other records, not impinging on third parties should be processed as an FOI request in the normal way
        3. Talk to the requester to confirm if third party details contained in the records are actually required. This must be done without disclosing the identity of the third party or details of the information involved :
      1. if the requester indicates that the third party details can be edited from the records

1. You may proceed to make your decision *(Great care should be exercised to ensure that the edited version of the record does not disclose third party information, either directly by virtue of the contents of the records or indirectly by virtue of the context in which they are released)*

BUT

ii. if the requester confirms that he or she wishes to obtain the third party information,

 Proceed to Step 2

**Step 2. Carefully consider the information involved so as to satisfy yourself as to whether or not it is exempt by virtue of being sensitive business, personal or confidential information.**

1. For this purpose it is necessary to examine the information by reference to the relevant exemptions of the Act, Information Commissioner findings and guidance from the FOI Central Policy Unit. It is essential that you are satisfied as to whether or not exemption may be claimed by virtue of the material involved being sensitive business, personal or confidential information .

2. You may find it helpful in many cases, as part of such deliberations, to undertake informal contact with the relevant third party i.e.:

1. the person to whom the record relates, in the case of business or personal information, or with
2. the supplier of the information, in the case of information given in confidence.

*Please note that there may be information relating to more than one third party in a particular record e.g. information may be given in confidence to a semi-state body by a private company and subsequently passed to a government department. In this scenario, both the state body and the private company may be third parties.*

***Where such informal contacts are being undertaken they must be done within the first few days of receiving the request***

 Where appropriate, find out the views of the third party as to whether or not the records contain exempt information i.e. are they of the view that the information is commercially sensitive, personal or given in confidence?

 *Given the* ***tight time constraints****, you may have to make contact by telephone, fax or e-mail, rather than by post. You should note carefully on your FOI file the views of the third party and where possible get those views confirmed in writing.*

 ***Even if your initial instinct is very much towards protection of the information****, informal contact may often****\**** *be useful - the third party may have supporting views on the application of the exemption which would serve to reinforce your decision. Such informal soundings may also be helpful to the internal reviewer in assessing the basis of your initial decision*

***\* Discretion should be used here. It would be inappropriate and distressing for a victim of crime to be contacted regarding an FOI request by the perpetrator where the facts argue convincingly against release***

3. Following your consideration of the material (including, where appropriate, informal contacts), you must then form a view as to whether the records do in fact contain exempt information which is commercially sensitive, personal or given in confidence:

* + - 1. **if you are of the view that the records do not contain exempt information**, you are then entitled to release the information without undertaking formal consultation under section 38.

1. You may proceed to make your decisionto release the records *(This approach* ***requires that you are fully satisfied*** *that the information is not given in confidence, commercially sensitive or personal. Where doubts arise, you will rarely, if ever, come to this decision without informal contacts. This understanding should, wherever possible be confirmed in writing by the third party).*

ii. **if you are of the view that the information is exempt**, the next step is to apply the public interest test so as to consider whether, on balance, the public interest would best be served by granting or refusing the records involved . **Such consideration of the public interest is provisional as it occurs before seeking the formal views of the third party under section 38.** From your provisional consideration of the public interest arguments the following conclusions are open to you:

1. **that you propose to refuse access to the records** i.e. that both the exemption and the public interest arguments are so heavily balanced towards protection of the records that no information gained on consultation could change this - in such case, formal consultation will not be required.

1. You may proceed to make your decision to refuse the records

1. **that the information is exempt but, on balance, there may be stronger public interest arguments favouring release of the information**

 Proceed to Step 3.

**Step 3. Formal Consultation Procedures** - ***This must be initiated within 10 working days of receiving the request. In certain circumstances the Act provides for an extension of this period to 20 working days. These are where the amount of records to be considered and/or the number of third parties that must be consulted is such that compliance with the initial 10 working day period is not reasonably possible. The requester must be notified of such extension and the reasons therefor prior to the expiry of the initial ten day period.***

You have now decided that the third party information in the record is exempt i.e. that it is commercially sensitive, personal information or information received in confidence, but that public interest arguments may favour release, subject to such views on the matter as the third party may provide.

* + - * 1. **within 10 working days of receiving the request**, notify the relevant third party(ies) in writing, of -

 the request (but not necessarily the name of the requester )\*see note at page 7

 details of the records concerned - enclose copies of the records concerned, where possible

1. details of the exemption under consideration (it may be useful to enclose a copy of the actual exemption and the definition of “personal information”, if appropriate)
2. your preliminary view that the records should be disclosed in the public interest together with details of the public interest criteria under consideration.
3. their right to make a submission on the matter. You may seek their views on both the reasons why they believe the information to be exempt and also any relevant public interest arguments
4. the 15 working day deadline for making of a submission in reply to you

 that any submission will be carefully considered before the final decision is made, and

 that they will be advised of any decision to release the information - 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

***Identifying the appropriate person:*** *If you are consulting with a company or organisation, it is important to identify the appropriate person to whom the notification should be addressed*

***Proof of delivery:*** *You may opt to use Registered Post/ courier service, etc. if you wish to be assured of receipt of the notification by the third party. The decision maker has discretion in this regard. Its use may, in some circumstances, have the advantage of highlighting for the third party the urgency of the matter*

b. Advise the requester that you have initiated formal consultations and that the time for making a decision will now be extended by 15 working days. This may be included in the acknowledgment letter to the requester.

**Step 4. Making the Decision** - ***Within 10 working days of receipt of submissions (or within 10 working days of the expiry of the time limit available to the third party to make a submission)***

* + - * 1. Within 10 working days of receipt of submissionsfrom the third party *(or within 10 working days of the expiration of the time limit available to the third party)* carefully consider such submissions as may have been received in the light of
      1. the relevant exemption provision and
      2. public interest considerations

b. Objectively assess the likely effects of disclosure - the submissions may lead to a **reconsideration of the weight previously assigned to the public interest either through a reassessment of the strength of the exemption or through identification of new public interest factors.**

c. Consider the results of any other enquiries made to ascertain the public interest in disclosing or withholding the information (e.g. consultation with colleagues, FOI network, Commissioner findings, departmental policy, etc.)

d. weigh the various public interests arguments:

 You may proceed to make your decision

**Step 5. Notifying of the Decision**

Inform the third party and the requester of the decision:

* + - 1. **If the decision is to grant the request** (where the third party has objected):

a) advise the third party of

 the decision

 his or her rights of appeal *(i.e.* ***directly to the Information Commissioner*** *- Internal review is not available to requests involving section 38 consultation)*

 the time limit for making such appeal i.e. within 10 working days

b) advise the requester of

 the decision and that the information must be withheld until the time for appeal to the Commissioner has expired

The requester should also be notified, in all cases, of his or her rights of appeal *(i.e. directly to the Information Commissioner*) and the time limit for making such appeal i.e. within 10 working days

***You must retain the records until this two week period has expired****. You cannot proceed to release the records without first checking with the Office of the Information Commissioner if an appeal has been lodged. You should also allow a few days leeway for postage delays, etc.*

ii. **If the decision is to refuse the request**

a) advise the third party of the decision

b) advise the requester of

 the decision

 his or her rights of appeal *(in this case also appeal is* ***directly to the Information Commissioner*** *- Internal review is likewise not available to the requester where the request involves section 38 consultation)*

 the time limit for making such appeal *(here also the time limit* ***is 10 working days****)*

Please note: Irrespective of whether the decision is to grant or refuse the request, once consultation under section 38 has taken place:

1. **there is no right of internal review for any party\*, and**
2. **appeal to the Information Commission by any party\* must be made within 10 WORKING DAYS of the notification of the decision**

*\*party includes the requester and the third parties consulted under section 38*

**What happens if .......**

***You receive no response from the third party within the 15 working day deadline:*** you may proceed to make your decision. However, it would be prudent to make contact with the person by phone to confirm that he/she does not intend to make a submission before finalising your decision. It may also be possible that they have not received your notification. You should also allow some leeway for postage delays, etc.

***The third party wishes to know the name of the applicant:*** There is discretion in the Act as to whether the identity of a requester is revealed to a third party. It is generally desirable to give the requester an opportunity to comment before his or her identity is disclosed to the third party. Discretion needs to be exercised here. It should have regard to the individual request involved, whether formal consultation under section 38 is proposed and whether such consultation would be assisted by the disclosure of the name of the requester.

***You are unable to consult:*** Where you have decided that formal consultation under section 38 is required but you are unable to contact relevant third parties, you may request the permission of the Commissioner to proceed to a decision. In this regard, the following procedures should be adopted after all reasonable steps have been undertaken to locate the third party:

1. Write to the Office of the Information Commissioner, and include details of:
2. reasons for wishing to consult with the third party
3. detail all efforts made to make contact with the third party
4. the relevant records (enclose copies)
5. indicate what your proposed decision will be regarding the third party records and the rationale for the decision

The Commissioner may either consent to non-compliance with the consultation requirements or advise you of additional steps to be taken (Section 38(6) and (7) refer).

***The number of persons to consult and/or the amount of records to be considered is excessively large:*** The section allows for an extension of the period for initiating consultation with third parties from 10 working days to 20 working days in such cases. The requester should be informed of the extension and the reasons therefor. Provided steps are taken early, this should be sufficient time for the FOI body to contact all relevant third parties. Section 38(2) requires notification to be issued to the persons concerned ‘in writing or such other form as may be determined’. The Minister may introduce guidelines in the future determining other forms of notifications in very exceptional circumstances (e.g. newspaper advertisement) if cases were to continue to emerge whereby it was impossible to individually contact persons due to their large number.

***You propose to seek payment of a deposit:*** Section 38(2) refers specifically to "not later than 10 working days after the receipt of the request". However, if you seek a deposit under section 27(4) from the requester, this allows the clock to stop until the deposit is received. Section 27(4)(b) also provides that the process of searching for the records should not be commenced until the deposit is received. This would effectively prevent you from consulting until such time as the deposit is received, as you realistically would not know either the third parties involved or the exact nature of the records. It may be reasonable in those circumstances to postpone consultation until the deposit is received.

***You wish to consult at internal review stage:*** You may consult with third parties at internal review stage. This, however, cannot be a formal consultation under section 38. There are two important limitations placed on the consultation procedure at internal review stage:

1. the third party does not have the right to appeal your decision directly to the Information Commissioner
2. the three week extension under section 38 is not available - such extension applies at the initial decision stage only. Therefore you must make your decision ***within the normal 15 working day period*** allowed under section 21.

In the light of 1. above, it would not seem to be in the spirit of the Act to release third party information at internal review stage, against the wishes of the third party. The rights available to third parties are considerably stronger when formally consulted under section 38 at the initial decision stage. The third party should not be disadvantaged because consultation did not take place prior to making the initial decision.