



Contracting with the Scottish Information Commissioner

Information for prospective contractors

Introduction

1. This note provides you with some information about the implications of entering into a contract with the Scottish Information Commissioner. It is important that you read this note and keep it in a safe place for future reference.

Background

2. The Scottish Information Commissioner is responsible for promoting and enforcing the Freedom of Information (Scotland) Act 2002 (the Act) and the Environmental Information (Scotland) Regulations 2004 (the Regulations). Both laws give people (members of the public, companies, etc.) the right to access information held by Scottish public authorities. They also require public authorities to publish information proactively. The FOI legislation is fully retrospective and covers existing as well as future contracts.
3. The Commissioner is also a Scottish public authority. This means that she must comply with the FOI laws and Codes of Practice.
4. The right to access information is subject to a number of exemptions. The Commissioner does not, for example, have to release information where its disclosure:
 - (i) would substantially prejudice someone else's commercial interests
 - (ii) would be an actionable breach of confidence.
5. Even where an exemption does apply, the information may still have to be disclosed if it is in the public interest to do so.
6. Personal information will only be released in limited circumstances.

What this could mean for you

7. The FOI legislation will affect you in two main ways if you enter into a contract with the Commissioner:
 - (i) The Commissioner cannot accept confidentiality terms and conditions in a contract which you might normally impose in contracts with other organisations.

- (ii) Details about your dealings with the Commissioner (including details of the contract you enter into with the Commissioner) may be published or released in response to an information request.

Terms and conditions

8. You may want to provide information to the Commissioner only on the basis that it will remain confidential and will not be disclosed if an information request is made for it. However, the Commissioner can agree to accept information in confidence only where the information is genuinely sensitive and therefore exempt from release. The Commissioner will not usually accept a condition in a contract which says that information must not be released without your prior approval.
9. Even if the Commissioner agrees to accept some information in confidence, the information may be disclosed at some point in the future. For example, information may be confidential at the time of entering into a contract, but it may no longer be confidential after the end of the contract. When a request is made to the Commissioner, she has to decide whether to release the information at the time the request is made.
10. As will be seen below, if you do want the Commissioner to treat information in a tender or a contract as confidential, you must alert the Commissioner **at the time of providing it**. It is important that you explain in detail:
 - (i) Exactly what information you consider to be confidential
 - (ii) Why you think the information is sensitive
 - (iii) How long the information will remain sensitive
 - (iv) Which exemptions in the Act or exceptions in the Regulations apply and why.
11. If the Commissioner accepts that some information should be withheld it may be moved to an annex of any contract to make its special status clear.

Request for information about you

12. The Commissioner may receive a request for any information she holds about her dealings with you. For example, she may be asked for the contract, any tenders submitted, correspondence between you and the Commissioner, or notes of meetings.
13. In most cases, the Commissioner aims to respond to any requests by disclosing the information. As set out above, FOI laws do allow the Commissioner to refuse to provide information in response to a request, but only in limited circumstances. For example, under the Act, information may be withheld if its disclosure would substantially prejudice your commercial interests. Under the Regulations, environmental information may be withheld if disclosure would substantially prejudice the confidentiality of commercial or industrial information.
14. The Commissioner will advise you that a request has been made only if she thinks it appropriate to do so. For example, she may contact you if the primary focus of the requested information is you as a business or individual, or where she is aware that disclosure could significantly affect you. If you did not tell her at the time of providing the information that you do not want it to be disclosed, the Commissioner may not contact you.

15. If the Commissioner does contact you about a request, it is very important that you respond **as soon as possible**, as she **must** respond in full to the request for information within 20 working days. If you do not respond to the Commissioner, it is likely that the information will be released. If you do not wish some or all of the information to be released, you must tell the Commissioner in detail why you do not want the information to be released.
16. Any views you give will be taken fully into account, but it is the Commissioner who is responsible for deciding whether to release the information.

Further information

17. Further information about the Act and the Regulations and what they might mean for you can be found on the Commissioner's website or contact us (details below).

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