

# **Commercial Policy Group Guideline No 10**

The Freedom of Information Act 2000

and

Environmental Information Regulations 2004

Issue No 1 Dated 06/02/06



# **The Freedom of Information Act 2000 and Environmental Information Regulations 2004 CPG Guideline No 10**

## **Background**

1. The Freedom of Information (FOI) Act entered fully into force on 1 January 2005 and has created a statutory right of access to recorded information held by MOD including that in MOD's possession prior to that date. Information held by MoD that was supplied by or relates to Industry is also subject to requests for disclosure under the Act.
2. There are exemptions in the FOI Act that may be used by MOD to decline requests for disclosure of Industry's information. These include an absolute exemption that covers "information provided in confidence" by a third party where disclosure would constitute an actionable breach of confidence. A further exemption relates to "commercial interests", under which information can be withheld subject to the public interest test if its release would be damaging to the commercial interests of MOD, Industry or any third party, or if the information is a trade secret.
3. The Environmental Information Regulations 2004 (EIRs) are an update of previous regulations covering requests for environmental information. Unlike the FOI Act, the EIRs cater for oral requests. It is possible that commercial information may fall under their scope if it relates to cost benefit and other economic analysis used in environmental decision-making. The EIRs do have a public interest tested "exception" that allows, amongst other exceptions, a public authority to refuse to disclose information to the extent that its disclosure would adversely affect "intellectual property rights" or "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."
4. This Guideline seeks to clarify some of the basic principles and processes applicable to MOD's handling of requests for information under the FOI Act or EIRs. It develops the principles set out in DG Commercial letter of 9 December 2004 to Industry that outlined how MOD intended to handle commercially sensitive information originating from Industry under the FOI Act, which is attached at Annex A to the Guideline.

**Stan Porter**  
**Director General Commercial**  
**Ministry of Defence Co Chairman**

**Guy Griffiths**  
**Chief Operating Officer MBDA**  
**Industry Co Chairman**

**Date: 6 February 2006**

## **THE FREEDOM OF INFORMATION ACT 2000 AND ENVIRONMENTAL INFORMATION REGULATIONS 2004**

1. Information is made available to MOD and Industry throughout the contracting process, from initial expressions of interest through to the discharge of the contract, and occasionally beyond. The safeguarding of information which if disclosed would prejudice the commercial interests of any person has long been an essential feature of MOD procurements.
2. MOD and Industry affirm their long-standing custom and practice that information disclosed by one of them to the other will be held in confidence provided the information has the necessary quality of confidence.
3. MOD and Industry are aware of their legal obligations to each other, as there are likely to be confidentiality provisions such as DEFCON 531 in contracts. In some cases, separate confidentiality agreements will have been entered into to govern the supply to MOD of Industry information that is particularly sensitive.
4. This Guideline applies to all information that falls within the scope of the Freedom of Information Act 2000 (the Act) and the Environmental Information Regulations 2004 (the Regulations) regardless of whether Industry has applied a privacy marking to the information. However, markings indicating the origin of a document are important if MOD is to implement effectively this Guideline. If other FOI related marks or legends appear they cannot affect any rights or duties established by law or contract (such as DEFCON 531).
5. MOD and Industry acknowledge and accept:
  - (a) that MOD is required to comply with the provisions of the Act and the Regulations;
  - (b) that in circumstances where a request for information relating to a Contract and/or Contractor is made under the Act or Regulations, MOD must adhere to the requirements of the Act or Regulations as the case may be in determining disclosure of the information requested; and
  - (c) that in responding to a request, the decision whether or not to disclose information in order to comply with the provisions of the Act or the Regulations is a matter in which MOD must exercise discretion .
6. MOD is required to follow any related Codes of Practice or guidelines issued from time to time by the MOD, DCA or DEFRA in complying with its obligations under the Act or Regulations.
7. There are exemptions and exceptions in the Act and Regulations that can be used to prevent release of information when it would cause harm. These include an exemption in the Act that covers "information provided in confidence" by a third party where its disclosure would result in an actionable breach of confidence. MoD will respect this confidentiality in relation to information supplied prior and subsequent to the implementation of the FOI Act, provided that the information remains confidential in nature.

8. Another exemption in the Act covers "commercial interests", under which information can be withheld if its release would be damaging to the commercial interests of any person, or if the information is a "trade secret". This exemption is subject to the public interest test where MoD would have to weigh the harm arising from disclosure against the likely benefits to the general public. In all but the most unusual cases commercially sensitive information falling into these categories should be protected from disclosure where there is a reasonable prospect of genuine harm occurring.

9. MOD will inform the affected company as soon as practicable what information has been requested where a request for information under the Act or Regulations has been received by MOD and the requested information was provided by or related to the affected company. Where there is an audit requirement for MOD or the affected company, MOD will inform the affected company in writing.

10. MOD will inform in writing the affected company if a request under the Act or Regulations for information provided by or related to the affected company is passed to another public authority by MOD.

11. To the extent permitted by the time for compliance under the Act or Regulations, MOD will consult affected companies in all cases where disclosure of information supplied by or related to them is being considered under the Act or Regulations.

12. Consultation will generally take place with the prime contractor if the requested information was supplied under a prime contract from MoD. The prime contractor should, where practicable, identify whether or not the requested information originates from a subcontractor or other third party and, if so, consult with that subcontractor or third party if there is time. MOD will consult a subcontractor directly, given the limited time for consultation, where it is readily apparent that information requested has been provided by that subcontractor. The prime contractor will be copied all correspondence with the subcontractor on that matter. Otherwise, consultation will take place with the company that supplied the requested information to MoD or about whom the requested information refers.

13. MOD will consult the affected company about the requested information to clarify the nature and status of the information and its views on disclosure of the information in order to inform the MOD decision on disclosure. If the affected company wishes to make a case for non-disclosure, it should provide objective clarification and reasons for non-disclosure which MoD can take into account when making its decision on whether to disclose the requested information or a redacted version of it; a simple, unreasoned objection will not help MOD's consideration. The affected company will be expected to justify why an exemption applies, what harm is likely to arise from disclosure and any other relevant matters to the exemption.

14. MOD will also seek to confirm with the affected company whether an explicit or implicit obligation of confidence applies to any of the information unless it is obvious that such an obligation applies. That company's view on whether there are obligations of confidence is not conclusive; the existence of an obligation of confidence is a decision for MOD to make as part of the consideration of the request for information. If it is established that an obligation of confidence to an affected company exists, the affected company to whom the obligation is owed will be asked by MoD if they will consent to release.

15. MOD and Industry acknowledge that it is in the interests of the affected company to provide a prompt response to the consultation. However, MOD will draw no adverse inference from any lack of response. In the absence of a timely response, Industry accepts that MOD will have to make a decision on disclosure on the information available to it.

16. MOD, in any event, shall provide prior notification to the affected company of any decision to disclose the information provided by or relating to the affected company.

17. To the extent permitted by the time for compliance under the Act or Regulations, MoD will notify the affected company in writing as soon as reasonably practical in all cases where a decision on disclosure of information supplied by or related to them is subject to a request for an Internal Review by MoD, an appeal to the Information Commissioner or an appeal to an Information Tribunal. MoD will notify the affected company without delay and in writing of any decision or order to disclose information provided by or relating to the affected company.

18. Further information on MOD's FOI procedures, exemptions and public interest test can found in the FOI topic and Guideline to DEFCON 531 in the Commercial Manager's Toolkit at [www.ams.mod.uk](http://www.ams.mod.uk).



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CSR/02(321/04)

09 December 2004

## **FREEDOM OF INFORMATION ACT 2000: COMMERCIAL INFORMATION**

You will be aware that the Freedom of Information (FOI) Act 2000 enters fully into force on 1 January 2005 and will create a statutory right of access to recorded information held by public authorities. All information held by MoD, without distinction as to the originator, will be subject to the Act and liable to disclosure unless covered by an exemption. I am writing to you to outline how MoD intends to handle commercially sensitive information under the FOI Act with particular regard to information originating from industry.

The foundation of MoD's commercial relationship with industry is trust that information will be held in confidence, which permits a uninhibited exchange of information. Given the amount and sensitivity of industry's information held by MoD, the management of requests for industry's information held by MoD has always featured prominently in our implementation. We have developed a number of approaches, terms and conditions over the years with the aim of providing assurance on these issues. We have been discussing the implications of the FOI Act with representatives of industry and have sought to address their concerns within the confines of the Act.

There are a number of categories of exemption which prevent release of information when it would cause harm. These include an exemption that covers "information provided in confidence" by a third party where its disclosure would result in an actionable breach of confidence. MoD will, of course, respect this confidentiality in relation to information supplied prior and subsequent to the implementation of the FOI Act, provided that the information remains confidential in nature. This is to acknowledge that material can become less sensitive over time.

Another exemption covers "commercial interests", under which information can be withheld if its release would be damaging to the commercial interests of any person,

or if the information is a "trade secret". This exemption is subject to the public interest test where MoD would have to weigh the harm arising from disclosure against the likely benefits to the general public. In all but the most unusual cases commercially sensitive information falling into these categories should be protected from disclosure where there is a reasonable prospect of genuine harm occurring.

I should explain that a Non Disclosure Agreement, Confidentiality clause or similar undertaking does not automatically lead to non disclosure of information in the event of a request under the FOI Act. Each request has to be considered against the terms of the exemptions in the FOI Act.

In order to establish, as far as practicable, a consistent approach to the handling of requests for the disclosure of information, I have introduced a requirement that authorisation for disclosure of commercial information under the FOI Act must be approved by a MoD 1-Star Director Commercial, Director Logistics Procurement or equivalent. MoD branches handling complex disclosure cases should also consult the FOI desk officers in the Commercial Services Group, Directorate Commercial Law and Intellectual Property Rights Group. By this means, officials with the appropriate knowledge, experience and seniority will be instrumental in setting the precedents that will guide future disclosures of commercial information. Whilst working within the framework of the Act, they will not take lightly their responsibility to protect commercially sensitive information where release would cause harm.

MoD has agreed with industry representatives for all cases where it is considering disclosure of industry's information that industry will be consulted to ascertain the degree of harm that would arise from disclosure. We will normally approach the company with whom the contract, against which the information was provided, was placed. However, where it is clear to MoD that the information to which the disclosure request relates is owned by another party, MoD will approach that party. Your views will be an important factor in our disclosure decisions and will also play a part in defending our decisions in the event of any appeal. Should MoD decide to disclose against the wishes of industry, then the company will be given prior notification of the disclosure. This will allow the company to make further representations to MoD or seek a legal remedy such as a declaration of its rights from the High Court.

Further details can be found on the commercial aspects of implementing the FOI Act in the Commercial Managers Toolkit, which forms part of the Acquisition Management System on the internet (see [www.ams.mod.uk](http://www.ams.mod.uk) then click on "CMT" then "Guidance" then "Topic Guidance" then "Freedom of Information").

The nature of our business means that rarely does MoD and its suppliers have a more pressing common interest than in the operation of the FOI Act. We both need to work together to ensure the very basis of our relationship is not compromised. MoD places a high value on your trust and confidence that the commercially sensitive information you share with us will be protected from disclosure when it can be clearly demonstrated that release would cause harm to your interests. Our case for doing so will be strengthened if we can demonstrate that we are complying with the spirit of the Act by avoiding unnecessary secrecy.

I have written in similar terms to the CEOs of our major suppliers and to the Trade Associations. I am content for this letter to be given whatever further distribution you judge appropriate.