Freedom of Information and Business

The impact of a Freedom of Information Act upon business as suppliers of products and services to the UK Government

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Contents

Foreword

Freedom of Information is full of surprises. One of the surprises is that it is generally used far more by business than by public interest groups or campaigning organisations. I first discovered that when, as a visiting civil servant, I studied the introduction of the new FOI laws in Australia, Canada and New Zealand. Business there had initially viewed FOI with hostility and suspicion: but, while still regarding it as a threat, they also quickly learnt to exploit its opportunities.

Jim Amos has had a distinguished career in business, mainly in the computer industry. He was a natural to undertake this study, which is written in a different style from other Constitution Unit reports. Because of his background Jim has addressed this report

Summary

This is a guide for business to the impact of a Freedom of Information Act (FOIA). It focuses on the effect that a FOIA is likely to have upon business as a supplier of products and services to government.

The Government was elected with a commitment to the introduction of a FOIA. A draft Bill has now been published. It will be the subject of discussion and amendment and it is expected to become law in 2000, with implementation possibly phased over a maximum period of five years.

It will apply to information held by public authorities. Therefore the information business has supplied and is supplying now to public authorities may be made available under the proposed FOIA unless it is 'exempt' information as defined in the Bill. 'Trade secrets' are exempt and so is information if its disclosure would be likely to 'prejudice the commercial interests of any person.' However a public authority will have the discretion to disclose exempt information after taking into account all the circumstances including the 'public interest.'

This means that if it has not already done so, it would be prudent for a company to plan now to ensure that it is managing positively the information it provides to public authorities. It would also be wise to review the sensitive information about its business that they already hold and ensure that, where justified, the confidential status of the information is properly recorded and recognised.

We have looked at the experience in the USA, which has had a FOIA since 1966, and at Canada and Australia, which introduced FOIAs in 1982. After early problems and scare campaigns in the USA

Essentially FOIA is not a threat but an issue to be managed, both to contain the risks and to win more business more economically. Businesses that trade in the USA, Canada or Australia, are accustomed to working in a FOIA environment. But they need also to consider the UK dimension. Those that do not trade substantially in these countries may find this a new subject. In both cases we suggest they start to address the subject of business information and a UK FOIA now.

This study

This study focuses in a practical way on the impact upon business of a FOIA which arises from the role of government as a purchaser of products and services. It does not therefore cover in detail the impact upon business which arises from its relations to government as the subject of regulation, licensing and taxation, or the issues that arise from the trading of government information by third parties.

However many companies relate to government in different ways, and a simple seller - buyer relationship can be affected by a problem in another area, eg. environment, health and safety, or employment law. The issues that can arise from information held as a result of regulatory or other government activities are considered.

While this study focuses upon central government as a purchaser of products and services much of the argument and many of the recommendations can be applied by companies that do business with other public authorities, such as local government,[1] educational establishments, and health authorities, all of which are included within the scope of the draft FOIA.

We cannot know exactly how FOIA will work in the UK until we have seen the precise wording of the Act that is passed, the code of practice that will be adopted for implementation, and had some years experience of the case law that will grow up around it as the boundaries are tested.
However business needs to start now to plan for the FOIA environment. This is a practical study, and it is based upon what we believe are reasonable and prudent assumptions about how FOIA will work in practice. We recommend the actions that should be taken to counter the risks and take advantage of the opportunities.

Our study is based primarily upon published government information, discussions with people in government and business with relevant knowledge, and evidence from other countries, in particular, the USA, Canada, and Australia. We have looked at the early experience of FOIAs in these countries as well as the current situation, since this may give useful pointers to the position in the UK in the period shortly after our FOIA is enacted.

Context

The prime purposes of a Fr(i)1.0(m)3.0(p23.0(s)-al)1.0(i)1..leTh5c91.9(u)3.0(s)4.0(t)-3.9(r)-7.0(a)-250.0

In the UK it is part of a wider programme of constitutional reform, which includes devolution, parliamentary reform and incorporation of the European Convention on Human Rights into UK law.

The UK FOIA will build upon the recent experience of business in the UK of the operation of The Code of Practice on Access to Government Information,[2] and EU-initiated regulations including, The Environmental Information Regulations 1992,[3] and the various Public Contract Regulations.[4] In effect the UK has been moving in the direction of greater openness without yet having a FOIA.

In a practical sense an important part of the context is provided by a number of government and EU initiatives that relate to information. These include the UK initiatives relating to better government,[5] and the better management and exploitation of government information.[6]

In January 1999, the European Commission published a long awaited Green Paper that has a number of aims relating to the better use of public sector information. These include improving the effectiveness of government and the competitiveness of European industry, providing easier access for the citizen, and encouraging the development of a growing information content and service industry.[7]

Overall, these initiatives may be expected to create a climate in which there is much greater business awareness of government information, and they are likely to ca9(ee)-1.9(n)-26c

at the experience of the USA FOIA and adopted provisions to enable companies to

In the USA, an active market has grown up to obtain and market government information. One such company in this field, FOIA Group Inc.[12] promotes its ability to obtain material such as:

> Active contract summaries, agency organisation charts, telephone directory, budget and funding documents, strategic plans, requests for information and responses, bidders lists, past contracts, modifications, engineering change proposals, performance reports, price cost intelligence including labour rates, test and demonstration reports, audit reports.

That is not to say that such information is universally available or that we expect the USA experience to translate exactly to the UK, but it shows what companies that trade in the USA are accustomed to.

Outside the area that is most directly related to contracts, a great variety of information about companies is collected and created by government across a wide spectrum of circumstances. The range includes information given by a company; as part of a request for advice; as a response to a survey or to a Green or White paper; as part of a grant application; as a condition of product approval; as a regulatory requirement; or within the context of a legal investigation.

Some of the information that is held relates to most companies, e.g. information relating to, health and safety, employment, environment. Other information is sector specific, e.g. information associated with air-worthiness certification, drinking water testing, slaughterhouse licensing. The Department of the Environment published a guide in 1996 which gives details of 54 public registers in the environment field alone which cover a very wide range of subjects including pollution, pesticides, radioactive substances and waste.[13]

Other than the official bibliographies of published material there is no overall catalogue of information holdings by government. Until that situation is remedied, people with inside knowledge of what exists and where to ask for it, will have an advantage. The federal government in Canada has started to address this question with the publication of the Info Source book.[14] This is at a very overall level, but it is an example of an attempt to publish in one place a comprehensive review of the information holdings of government departments and agencies related to their functions. The USA government is implementing its Government Information Locator Service (GILS).[15] This system, as it becomes more widely implemented, is expected to provide the overall framework within which people are able to search both the physical and electronic information resources of the federal government to find what they are looking for.

This is a key question in the UK and we note that the responses to the Green Paper, Crown Copyright in the Information Age,[16] have highlighted the issue. We understand that this area is now being looked at within government. It is also an issue in the context of internal government effectiveness and it may therefore need to be addressed not simply to help the public, but to enable the government to develop more efficient and effective information systems.

Which companies will be affected?

All companies that trade in the UK will be affected to some degree. They are all subject to government regulation and as a result, information about them is held by government, more of which may become available as a result of FOIA. This study focuses upon the effect of this upon suppliers of products and services to government.

All suppliers will be affected. The larger suppliers with the widest range of links and contractual relationships with government will have the largest range of information questions to manage. If they are long term established suppliers with a high market share, their interests may be mostly defensive.

If they are not in this category and are keen either to grow their share or to enter this market, they may be expected to use FOIA positively to gain intelligence to help them plan how best to succeed. According to how easy the FOIA regime becomes to use and the growth and competence of information consultant services, smaller companies may find it easier to enter the market.

We understand that suppliers are increasingly being considered by government procurement departments to fall into four main categories:

1. Strategic partners: major PFI contractors who provide for example, major outsourcing services, transport schemes, built and serviced facilities for an increasing range of government activities, often working in consortiums.
2. Strategic suppliers: eg. long term suppliers of IT solutions and consulting services.
3. Competitive purchase suppliers: eg. who provide relatively high value items, such as vehicles and computers, but whose market share may change quite rapidly according to the competitiveness of their products.
4. Suppliers of essentially commodity items, eg. PCs, stationery, furniture.

All of these wish to grow profitably their share of the government spend. This amounted to about £63bn in 1996. It had grown 250% over the previous 10 years and now represents over 8% of UK GDP.[17] The European Commission estimates that public procurement represents about 11% of the GDP of the EU as a whole.[18]

What is the current position?

Information is made available currently within a framework of rules and practice defined by EU-initiated regulations and by the Code of Practice on Access to Government Information.

EU-initiated regulations and initiatives

EC Procurement Directives

These have been implemented in UK law by Treasury regulations.[19] Four sets of regulations implemented from 1991-5 create a legal framework to which public authorities and utilities must adapt their contract award procedures. They apply above given threshold values and define criteria for specification of requirements, selection of

tenderers and award of contracts. There are provisions for publication in the Official Journal of the EC (OJEC). Unsuccessful tenderers are entitled to be told the name of the successful tenderer and, since October 1998, the characteristics and relative advantages of the winning tender.[20] The price should be published in the OJEC unless it is regarded as commercially confidential, which is not defined. It is expected that increasing levels of openness will be required, albeit at a slow rate of movement.

Environmental Information Regulations 1992: also known as Freedom of Access to Information on the Environment

These regulations implement an EC directive of 1990 and are incorporated into UK law as the Environmental Information Regulations. They potentially have a very broad scope since they cover any information which relates to the environment, including activities that could affect it adversely. Information to which any, 'commercial or industrial confidentiality attaches..,'[21] is protected. There is no evidence that these regulations have been widely used by business. However they were used in the Birmingham Northern Relief Road case [22] and this is thought to have stimulated the policy change described in the Department of the Environment, Transport and the Regions (DETR) Press Release in July 1998.[23] This announced that with certain limited exceptions, contracts placed with DETR in the future would be available on request.

There is a trend for EU-initiated environmental and health and safety regulations to require greater openness than current UK law. An example is the Genetically Modified Organisms (Contained Use) Regulations 1992,[24] which require the maintenance of public registers of consents and enforcement actions. This overrides the restrictions on disclosure of Section 28 of the Health and Safety at Work Act 1974.

EU initiative on the exploitation of Public Sector Information

EU sponsored initiatives in this category include, the INFO 2000[25] programme, driven by DG XIII, which aims to exploit Europe's public sector information under the banner of developing a European information content industry. While the main purpose of this is to encourage the development of a value-added information industry with focus upon 'multi-media', it will include measures to make access easier to government information across the EU. It is difficult to judge now the timescales when business may see a practical result of these initiatives and programmes. However it makes clear the trend towards greater openness.

UK Code of Practice on Access to Government Information

This was first introduced in 1994 and revised in 1997. It has encouraged departments to make available an increasing range of information, including for example, internal guidance manuals, advice from specialist committees, together with a range of background material on decisions and consultative papers. On occasion this has included contract details and inspectors reports. The HSE, for example, now makes more details of their enforcement actions available. Where previously they would simply refer to enforcement action taken under a particular clause, they now include a 200 word summary of the details of the incident. MAFF now publish the HAS (Hygiene Assessment System) scores for each slaughterhouse by name in the UK.[26]

The announcement by DETR referred to above, explicitly cites the commitment of the government to freedom of information and in effect describes a degree of openness about contracts at a level likely to be broadly similar in its effect to that specified in the FOIA.[27]

In theory therefore a great deal of the type of information which business would like to access or to protect is available now. In theory the assumptions we make about the type

obstructiveness he had found.[35] However there is some recent evidence of change towards greater openness, with the changes implemented by DETR, the HSE and MAFF, which are referred to above, as examples of this.

The draft Freedom of Information Bill

The draft Bill was published on 24th May 1999. It will now be the subject of discussion and amendment. It is expected that the Bill, as revised, will be proposed for legislation

‘consultations with persons to whom the information ... relates or persons whose interests are likely to be affected by the disclosure.’

the inclusion in public contracts of terms relating to the disclosure of information.

procedures for dealing with complaints.

advice to persons who propose to make requests but not to providers of information.

3. If the arguments of a company as to why its information should be exempt are not accepted by the public authority, will it be able to appeal and what is the route for this?

   Appeal in the first instance is through the process established by the public authority

We should recognise the difference between an item of information that is legally available as a result of the FOIA, and information that is usefully available because it can be easily identified, questions about its confidentiality have been resolved and it is quickly accessible. While a pressure group may go to a great deal of time and expense to acquire some specific information even if it takes a long time, a company is much less likely to do this. A Netherlands government paper[38] distinguishes between: Openness, when access is open in the legal sense; Access, which is the actual possibility of acquiring the information; and Accessibility, which means it can easily be found, and it is reliable, clear, affordable and usable. We may expect a mixed picture in terms of practical availability as departments develop their internal systems with differing priorities and complexities, and increasingly, over time, material is published on the Web.

The date from which the proposed FOIA will apply is not yet clear. The draft Bill specifies that it will be within five years from the date it becomes law. However it may be implemented earlier and progressively. There is no limit on retrospection. The definition is information 'held' by public authorities. That is a powerful reason to start now to plan for a FOIA environment. Australia has the strongest restriction on retrospection, limiting this to five years before the Act. Access in New Zealand is fully retrospective.

This chart, Summary Information Matrix, summarises the key information relating to contracts and shows the assumptions we are making currently about what type of information is likely to be protected, available and subject to question. These assumptions are broad brush but do seek to highlight the difference between secret and validly commercially confidential information which the FOIA will protect, and contract related material which, with allowance for timing and any special circumstances, and in some cases consideration on a case by case basis, is likely to be

What are the Risks?

In general a company will find that its customers and competitors will be able to find out more information about it more easily. This may include details of the contracts it has with public authorities and its performance in satisfying them. Also where it is the subject of, for example, enforcement orders under environment and health and safety regulation, the details of these may become more fully and easily available than at present.

When a business wins a government contract

Competitors will learn the price of the contract the business won, possibly in detail, and may be able to estimate its costs and profit, together with at least some knowledge of its methodology.
They may find out the contractual levels of performance to which it is committed.
They will find out the reasons why it was evaluated the winner rather than one of them.
They may find out the results of regular performance reviews, so they will be able to see how well/badly it is doing.

They may be able to make use of this information to their advantage.
The effect will vary. In some industries where there is frequent interchange of staff between the main players and a changing pattern of project partnerships, this may not represent a large change. In many cases these things become known over time. FOIA may have the result of making such information more quickly and easily available. However timing may be of crucial importance.

When it loses

It is not clear that competitors will be able to find out the detail of the losing bids. However it would be wise to plan on the basis that they will. In the USA this is now restricted to reduce the administrative burden of line by line examination of bids to delete confidential information.[39] In Sweden they are generally available.
Probably they will find out how the losing bid of a business was ranked compared to theirs and be able to deduce the main areas of strength and weakness in the bid. Again this may not represent a large change.

What about tangential risks?

The government may hold information about a company that is not directly related to the item of business it is bidding for, but which could damage its position if it became known. Examples might include the fact that it has been the subject of a report, investigation or enforcement notice, relating to product safety, environmental impact, trading standards, market dominance, employment law, transfer pricing to avoid taxation, etc. Some examples of this type of information are available now and for example, used and circulated by EIRIS to clients who wish to engage in ethical investment. Greater levels of detail about the circumstances may be provided which could cause difficulties to a company engaged upon a bid.

Whether any new and more detailed information becomes available is a judgement of whether the claim of a business that disclosure would ‘prejudice’ its commercial interests is considered valid and would outweigh any ‘public interest’ in disclosure. Appeal is firstly in accordance with the process of the authority, then to the Information

sometimes take on commitments without as complete an understanding of the costs and obligations as they need. This is generally seen as a result of the limitations of internal systems rather than policy on confidentiality. However FOIA may be one of a number of catalysts to provide stimulation for the production of information that is needed.

5. Is it really understood how the department will decide upon the winning bid?
   It may be useful to check out how previous bids were evaluated by the department and by other departments. A USA FOIA consultancy has explained that they look for how the 'trade-offs' to achieve 'best value' have actually been made.[45]

The information that is needed has not changed as a result of FOIA. The people responsible for competitive intelligence have always looked for this type of information. FOIA provides a new and valuable additional resource to find out the information that is needed. It may provide a faster and lower cost route to better information. Depending on circumstances and how close a company is to the other main players in the market it may not provide so much. However the USA experience in particular shows that it is worth checking out.

After receipt of tender

A company should request all relevant background material, partly to ensure that its competitors do not get something it has failed to get.
As a result of the information gained it can make a better assessment of what it needs to

The issue of the management of information provided to public authorities is a particular case of the wider issue of the effective management of information assets. There has been increasing openness under the Code in the UK, and global companies can use the most open regime to find out about their competitors. This means that the

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NHS 8.0 38.7
Other 4.5 11.5

[18] Commission Communication, , 11th March 1998, page 1.

[19] See note 3 above.

[20] EC , which came into effect in October 1998 and implements a WTO agreement.

[21] Statutory Instrument, 1998 No. 1447, , 2. (2) (e)

[22] CO/4553/98. The case is subject to appeal.

[23] , 23rd July 1998, DETR Contracts to go Public - Hayman. 'If there are good reasons why, exceptionally, certain parts of contracts should remain confidential, these will need to be specified by tenderers and negotiated during the tendering process.'

[24] , implement EC Directive 90/219/EEC.

[25] INFO 2000, Draft 4 year work programme 1996-1999, produced by European Commission DGXIII, 9/5/96

[26] MAFF, , ISSN 1369-

APPENDICES

to

Freedom of Information and Business

Contents

AUSTRALIA

Summary

There has been a high level of personal use of the FOIA, combined with a low level of business interest and use. There is no strong evidence that the FOIA either causes concern for business or produces major benefits. Most business use has focused upon protection of data, but it is now widely accepted that there

When asked specifically whether he knew of any examples where confidential business information had been disclosed, Mr Guardini (for CAI) could only refer to one example where an agency had failed to invoke reverse FOI, the business was not therefore advised, but had been able to retrieve the situation.[3]

CRA Ltd. (a mining company), explained that they had objected to release of information in three areas and had won their cases with the AAT but had spent money to achieve this. These related to documents about the settlement of a USA anti-trust case (Westinghouse request), about diamond mining and marketing arrangements (Argyle Request) and exports of bauxite and alumina to assist a tax dispute (Comalco request). They were concerned that the burden of proof falls on supplier of information. They were devising guidelines about the type and volume of information supplied to government.[4]

The Political Reference Service, Sydney, referred to lack of use of the FOIA by the business community, 'due to the fact that business, like lots of other people in Australia, does not know what

In 1994, **The Australian Law Reform Commission** (ALRC), was asked to review the scope and

Notes

CANADA

Summary

There was initial business concern inspired by prejudiced reports from the USA. The response from business was largely defensive. The larger established suppliers were considered to have better access to information from their public sector customers than they could obtain with freedom of information legislation. Business use has grown, with contract information increasingly available and there is extensive use to obtain licensing and regulatory information. Details of contracts placed by Public Works and Government Services Canada (PWSGC), including price and reason for selection, have been published on the Contracts Canada Web site since 1st April 1997. The trend is for more contract details to be provided.

Legislation summary

Federal Access to Information Act (AIA) came into force in July 1983.
As with the Australian FOI, concern about USA practice caused provisions for 'reverse FOI' to be included. There is a requirement to provide written notice to any supplier of information whose confidential business information is later requested. The third party has a right of appeal to the Federal Court.
An Information Commissioner appointed by Parliament, acts as a specialist Ombudsman to investigate complaints that government has denied rights under AIA. He can only recommend release. He relies on persuasion but can ask for a Federal Court review.
The provision that governs treatment of third-party information does not always include a harm test. Sections 20(1)(a) trade secrets, and 20(1)(b) confidential information, do not require evidence of harm, if information is a trade secret or has been supplied in confidence it is exempt from disclosure.

Early reaction

The concern felt about the USA FOIA was expressed in a **Financial Times article in August 1983.**[1]
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which failed to take preventive action to address the AIA, might find it had become an open book to its competitors.
In their view the amount of information submitted by the private sector to government was staggering. They suggested that other companies might be shocked by the number of their employees who came into contact with government departments on a regular basis.
Trade secrets, and company confidential records seemed to be well protected by the AIA, so why should business be concerned? The reason was that definitions were not precise. It was hard for someone outside the organisation to know whether information would cause harm if it was released.
Practical advice was included, stressing the importance of standardising procedures and suggesting that companies should use the AIA themselves, eg. to find out about possible legislation and competitors.

In 1985, two years after the AIA had been implemented, a study of the impact upon business was carried out by for an **LLM Thesis by Ms Longworth.**[4] This provides a very useful insight into the early operation of the Act.
She concluded that early 'hype' about risks was either exaggerated or misleading. AIA was being used minimally by business requesters. The main users were the media, lawyers and academics. In the first 21 months there had been 3702 requests in total, with 47 government institutions subject to the Act receiving none.
The most obvious reason for low business use was that the law was much more generous to information submitters compared to FOIA in the USA. Officials had a wide discretion to interpret the exemptions in a conservative way. Small firms had originally viewed AIA as an opportunity. It was now seen that effective use was in large part a function of company size and resources.
The Information Consultant industry had not grown as in the USA. The reason was that the small requester market, combined with the need for detailed knowledge of government systems and procedures, required significant resources. Also copyright protection was a constraint.
The most active area of business use related to government tenders and contracts.
Longworth's survey revealed a predominantly defensive reaction to AIA with little active use. Officials had a policy of encouraging companies to designate the confidentiality status of submissions and of consulting about the 'mosaic' effect. (This might enable a requester, by piecing together items of information from several sources to assemble information which, if requested as a whole, should have been exempt)
Canada had a small, concentrated market which inhibited companies from using AIA to spy on competitors. They expected to be identified and subject to retaliation. They were concerned not to get a reputation for an activity that might be seen as espionage. Large companies already had better channels to government information with regard to policy making than AIA would give them.
Consultation and consensus were the dominant characteristic of governmentxem-.2(e)-1.6(r)-3.9(i)6.nant cls 1 0 0

There was initial business concern as a result of alarmist reports from the USA. This stimulated some defensive action. This was followed by growing low key business use, with no reports of harm, and some reports of frustration with officials who were not motivated to implement the Act.

Current situation

At about the ten year point, in 1994, a report, **The Access to Information Act: A Critical Review,**[7] was prepared for the Information Commissioner. This painted a sober picture of the AIA as it was being used at that time. The report stated that the Act was in danger of losing relevance as the system faced the challenges of the information society. Lack of clarity in ministerial leadership had slowed down progress on information policy issues and had served to send signals to an already reluctant and nervous bureaucracy that openness was not the order of the day. The AIA had stultified and was threatened with losing its relevance. ' It has come to express a single request, confrontational approach to information provision.'
The report made a number of recommendations for reform, including the proposal that a Canada Information Network should be mandated to serve as a focal point for locating and accessing government information sources and services as these became increasingly available in electronic form.

A more positive view of the AIA was given in a speech in 1994 by the Minister of Public Works and Government Services, **The Access to Information Act: Ten Years On.**[8] This referred to the long tradition of secrecy, and explained that it was understandable why open government in Canada was a concept still in its early childhood.
However some court decisions had started to set some precedents in favour of disclosure. Federal judges had ordered disclosure of information about a company's application for a government grant or benefit, details of a winning tender, information about government approval of a drug, safety information gathered by government inspectors about an airline and inspection reports on meat packing plants.

> ... about 43% of all requests come from the corporate sector ... Businesses file 4000-5000 requests a year; many of them, not surprisingly trying to determine the missing ingredients in their bids for government business or to find out what the government needs and wants. Unlike media requesters, businesses were not anxious to propelatii eccess fiudings ito the

There was a gnd measre ofnglieointherest inosiess users aeudiring information that could

> ... the fault lies ... not in the law. It must be placed at the feet of governments and public servants who have chosen to whine about the rigors of access.
>
> ... public servants who would be profoundly insulted to be considered anything but law-abiding ... sometimes have no hesitation in playing fast and loose with access rights: destroying an embarrassing memo, conducting only the most cursory searches for records, inflating fees to deter a requester, delaying the response until the staleness of the information blunts any potential damage or embarrassment and by simply refusing to keep proper records.
>
> There are now no penalties for those who break the access law.
>
> The problem of delay in answering access requests is pervasive, serious and chronic.[12]

However the report went on to say that the use of the Federal Court as a delaying tactic by government, was, by and large, a thing of the past, although four cases in this category were cited.
Some important cases relevant to contracts were summarised.
Third Party motives (11-98). In this case a failed bidder for a Public Works and Government Services Canada (PWGSC) contract for audio visual equipment requested details of the contract that had been placed. The contract winner objected. The ruling stressed that simple assertion of harm did not satisfy the test. If the department wished to exempt information at the request of the third party, it had an obligation to take reasonable steps to verify the third party's rationale.
Transparent bidding (12-98). In this case, disclosure of some unit prices had been refused to a losing bidder. The PWGSC procurement office had mistakenly omitted the unit-prices-will-be-disclosed clauses from the Request for Proposals (RFP). The refusal was upheld. Also the commissioner was satisfied with the claim that unit prices in this case satisfied the tests for confidentiality under clause 20. The commissioner praised the PWGSC for re-considering its previous position on unit prices and from March 31st 1997, directing its contracting authorities to include in all RFPs for standing offers for goods and services, a clause informing bidders that the unit prices of the winning bid would be disclosed.

The **PWGSC Supply Manual,**[13] makes clear that after a contract or standing order has been awarded, some requests for contract information can be handled by contracting officers on a routine basis. This

been

USA

Summary

There was a great deal of early hostility to the Freedom of Information Act (FOIA) in the USA. This came from within government and also from business as they became concerned about the protection given to business information. Part of this reaction was based upon misinformation. For example there was a report that the Japanese had used the FOIA to get the design of the space shuttle nose cone.[1] This was shown to be untrue.
However the failure of the 1966 Act to include provisions for business to be consulted before release of its data, was soon recognised as a serio

Early reaction

Considerable concern was expressed both by business and by agencies, about the effect the FOIA was having in making confidential information available which could cause harm both to US companies and to the USA economy. As a result a subcommittee of the House of Representatives held hearings and in July 1978, published a report, Freedom of Information Act, Requests for Business Data and Reverse-FOIA lawsuits.[3]

House of Representatives Report, Freedom of Information Act, Requests for Business Data and Reverse-FOIA Suits

This was a substantial review of the operation of FOIA in relation to business data. Firms that had submitted confidential documents to Federal Agencies had expressed concern about their release. Numerous disputes and court cases had arisen over the release of such information. The committee found that the major problem concerned the procedure by which agencies decided what to release or withhold. It concluded however, that there had been no major abuses.

Most difficulties had been procedural rather than substantive. Committee recommendations included:-

- notice be given to the submitter about pending release of information.
- submitter should mark confidential records. This would not be binding on the agency but would assist.
- agencies should adopt substantive disclosure rules providing for disclosure of classes of documents.

Reverse FOIA lawsuits had developed as a result of a lack of statutory guidance. They represented a last resort for business and other less drastic measures had developed:

1981 with the title, Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4. [7]

Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4

In his report, Professor Stevenson argued that as the use of FOIA by business had grown there had been a parallel increase in the concern of business that their information would go to competitors. One manifestation of this was the growing number of reverse FOIA suits. There had also been criticism of the performance of agencies and of release through inadvertence.

He posed the question, how serious was the problem? It was difficult to answer because there were very few documented instances of improper disclosure. Even among those cases that were mentioned, many were of dubious accuracy or had no relationship to FOIA.

eg. The Sikorsky Aircraft Division of United Technologies, had withdrawn from a bid giving FOIA risks as one of the reasons in a press release. The view of the contracting officer was that this was a 'smokescreen'. They already had a great deal of work and knew their price would be too high.

Professor Stevenson had advertised in the Federal Register, asking for information about businesses which had suffered competitive harm as a result of improper release under FOIA. He had received 19 replies to his notice.

In five cases it was reasonably clear that information that fell within Exemption 4 (business information), had been disclosed. Three of these were the result of sloppy information handling by FTC. None of the government personnel interviewed could recall any instance in which serious competitive harm resulted .

One of largest groups of complaints involved instances of disclosure by inadvertence, unrelated to FOIA.

Professor Stevenson's main conclusion was that it was the perception of the results of FOIA that was the problem. There was a need for agencies to improve procedures to alter the perception that business secrets were not safe with government. A rule was needed to require that notice be given before information marked confidential was released, submitters should be assured a right to appeal, and senior officials should be personally involved with decisions.

He stressed the value of class determinations; i.e. certain classes of information would be routinely released and submitters told in advance. The Food and Drug Administration (FDA) had used this most widely. His overall conclusion was:

> ... exemption 4 probably achieves more satisfactory results in practice than the vociferous criticism from business would seem to indicate. That criticism ... evidences a great deal of suspicion and uncertainty that is, itself, quite real. ... the perception that business secrets are not safe in the hands of the government is itself reason enough to attempt to rationalise agency procedures in order to provide greater guarantees that competitively sensitive business information will not be improperly disclosed pursuant to FOIA requests.
> ... there appears at least equal cause for concern that business information escapes to competitors through means other than FOIA, often simply as a result of sloppy administrative practices.
> The best way for agencies to attack both sets of problems is to assign information management a higher priority.[8]

This study was criticised by the business community, and a further study was commissioned from James T O'Reilly, Professor of Law at the University of Cincinnati, and senior counsel for Procter & Gamble. His report , Regaining a Confidence: Business Confidential Data and Statutory Protections,[9] was published in November 1981.

Regaining a Confidence: Business Confidential Data and S Q q BT 06

Narrow interpretations of the exemptions made it very difficult to protect such information. However it had a valid claim to protection.
He wanted the focus of the Act redirected towards oversight of the activities of Government and away from revealing information about private interests.

Both reports were regarded as thorough and scholarly and in fact agreed on most of the reforms that were needed. Overall, O'Reilly wanted greater changes to secure stronger submitter rights to protection.

Senate FOIA Hearings in 1984[11]
The Senate Committee heard evidence from business about their concerns, and included a discussion of procedural changes that would permit business to receive notice in advance of disclosure.
The **Monsanto** case was rehearsed by Mr Rader for Senator Hatch:

> Several months ago a US business was greatly damaged by the release ... of a valuable trade secret ... the formula of a widely used herbicide ... it is now possible that foreign companies can replicate the trade secret and deprive our US company of a major share of its export market. The result ... may be the loss of countless American jobs to foreign corporations. Mr Rader.[12]
>
> This was clearly a trade secret ... it clearly did not have to be released under FOIA ... the fault was not with the law. The fault was with the fact that ... it was administered in an extremely poor fashion. Senator Leahy.[13]

Procter & Gamble: Mr O'Reilly, senior counsel, gave evidence about their experience. He was concerned about the confusion that existed amongst submitters as to what would happen to their confidential information. Lack of uniformity amongst the agencies caused concern. He explained that each agency treats business information according to its own standards, with the FDA the least likely to accord procedural rights. He wanted at least minimal uniform standards to apply across the agencies.
General Electric Company: made a submission detailing their concern about engineering designs and blueprints being obtained under FOIA, giving foreign governments free access to their technology. GEC had recently taught a valuable technology to a foreign company under licence. This company now claimed they did not owe GEC anything because the data was available under FOIA.

The committee also heard evidence that contrary to what the business community claimed, the agencies were extremely deferential to industry assertions of competitive harm. This was particularly true in the light of the Trade Secrets Act which provided criminal penalties against agency personnel who disclosed 'trade secrets.'[14]

House of Representatives, FOIA Hearings in 1984[15]
These hearings followed the same lines as the Senate hearings above but heard different testimony.
Burt Braverman: from a Washington DC law firm, explained that in the early years commercial information was well protected. However in 1974, National Parks & Conservation Association v Morton set a new standard, Courts discarded the 'customarily treated as confidential' standard and looked to the question of 'substantial competitive injury'. This National Parks test was accepted by courts over next 10 years. The effect was to make the protection considerably more narrow.
Polaroid Corporation: F de Lima, Vice President and Secretary, explained that Polaroid had attempted to audit the handling of its secrets in governments hands. The Environment Protection Agency (EPA) had collected Polaroid chemical trade secrets which it needed to administer the Toxic Substances Control Act. Polaroid had filed an FOIA request. Over 1 month later they got a response and an apparently unlawful disclosure of a Polaroid secret to another Federal agency had occurred. Further they learned that EPA might have disclosed Polaroid secrets to over 300 people employed by over 40 Federal contractors and subcontractors, but they could not learn exactly because some contractors claimed that

> Statistically valid data not available; many companies do not hear of damaging releases; firms inhibited from reporting; there may be a very high level of damage from a single disclosure, eg. Monsanto; and little damage from a large number of small disclosures.
> * Is there any data on the motivation behind the requests?
> No survey and no statistical data; motivation cannot be easily ascertained since agencies cannot inquire; the value must bear a relation to cost and firms spend hundreds of thousands of dollars each year with lawyers and search firms to obtain competitors data; companies ask for competitors information to keep track of technology, to determine how to bid competitively against them next time, to learn about agency attitudes and strategies that may affect the private sector, to assess possibilities for obtaining licenses, contracts etc. and to make sure that agencies are treating parties similarly situated on an equal basis.[16]

Public Citizen Health Research Group: Sidney M Wolfe MD, Director: addressed the question of what were the examples in which there had been disclosure and harm to the company as a result of the FOIA?
He explained that a simple way to answer is to ask the agencies to list the complaints they have had under FOIA. At FDA there were 9 out of 70,000 (1 in 8000). He guessed that the most important determinant of disclosures may in fact be human error. Those mistakes could not be condoned, but he suggested they may happen regardless of which agency is involved.
Information Consultants Inc. (ICI): Martin Beer, President, in a letter dated 9th Jan 1984, explained that they had found the FOIA to be a vital tool to uncover misconduct by federal agencies and to protect the rights of small businesses. Using FOIA, ICI were able to obtain documents which showed that Small Business Administration (SBA) had committed a more serious violation of its own procedures than its official correspondence admitted. This led to SBA terminating an illegal contract.
Without FOIA their only alternative would have been to sue the government. However the cost of such a suit is prohibitive for a small business

Overall

There were some significant early problems with lack of well managed processes and clear mistakes. It was quickly recognised that the lack of 'reverse FOIA' procedures was a weakness in the legislation. However there was very little evidence of harm, apart from the Monsanto case which was frequently referred to. In any case what was revealed was in fact clearly protected by the FOIA exemption and so not a result of a gap in the law, but of the law being wrongly administered.
Some businesses complained strongly about the risks they perceived. There was positive use by business and agencies seeking information to help them grow their businesses, both by finding out more about future requirements and procurement practices and checking out the performance of their competitors. In the business community there was a major problem of perception and a questionable one of improper release. However a serious issue was lack of effective implementation with variable standards.

Current situation

The turning point in the attitudes of business in the USA towards FOIA can be dated to the early days of the Reagan administration. In line with his philosophy of reducing the level of government intervention in the economy he sought to give greater assurance that business information would be protected. The previous FOIA guidelines, issued by the Carter administration to the Department of Justice, had ordered agencies not to withhold information 'even if there is some arguably legal basis for doing so,' and had committed the Department of Justice to defend 'FOIA suits only when disclosure is demonstrably harmful to the public.'[17]

In 1981, the Reagan Attorney General, William French Smith, revoked the previous guidelines and began a policy of defending:

> all suits challenging an agency's decision to deny a request submitted under the Freedom of Information Act unless it is determined that: (a) the agency's denial lacks a substantial legal

basis; or (b) defense of the agency's denial presents an unwarranted risk of adverse impact on other agencies' ability to protect important records.[18]

FOIA Updates

The Office of Information and Privacy (OIP) in the Department of Justice, is regarded as having done a very good job in providing a focal point for policy, training and advice about the implementation of the Act. Its FOIA Updates,[19] published on the web, are an authoritative source of information about FOIA in the USA. In 1997, several subjects of relevance to business were addressed:-

Protection of contractor proposals[20]

Under new provisions that were included in the National Defense Authorisation Act for Fiscal Year 1997, agencies were prohibited from releasing under FOIA any proposal submitted by a contractor unless that proposal was set forth or incorporated in a contract. The intent of Congress was to alleviate the administrative burden faced by agencies in processing FOIA requests. It allowed agencies to

speculative basis to get information to sell to new clients. The volume of requests was stable and they were now accepting electronic requests.
Patricia Riep-Dice, Freedom of Information Act Officer, **NASA,** explained that they generally got about 3000 FOIA requests a year. These were divided between HQ and 9 centers. About 80% of these were commercial, and of these, about 80% were in the name of the company who wanted the information. About 5% come from 'FOIA Clearing Houses' where the company can be anonymous. Most of the requests were for contracts, proposals, modifications to contracts and RFPs (Requests for Proposals). Most requests came between 6 months and a year before a re-bid was due, presumably so that potential bidders could plan their campaigns.
99% of all contracts are releasable and 99% of all proposals (ie bids from companies) are denied. They had backlogs from time to time but these did get cleared and the situation should improve with increasing availability of material electronically, in the electronic FOIA reading rooms. They expected centers to put the releasable parts of contracts on line. This would save time when they sometimes get 20 or 30 requests for a contract.

Evidence from Commercial Users of FOIA

A number of commercial users of FOIA have also given us their views.
Harry Hammitt,[24] of **Access Reports Inc.** (publishers of a specialist FOIA newsletter), gave a very helpful overview from his perspective. There was some anecdotal evidence that sensitive information had been disclosed, but almost invariably that information was disclosed by mistake and not because the government decided it was not protected. Generally speaking government agencies were very good at protecting bona fide confidential business information and the case law was pretty well settled. There had been some arguments of late having to do with unit prices -- specific prices within an overall contract -- but the general principle was set, that prices the government agrees to pay for items or services were disclosable after a contract was awarded.
There was an executive order that required agencies to contact business submitters if the agency was contemplating disclosing information and that allowed the business to weigh in on the merits of disclosure and present its arguments.
There was a perception in some quarters of the business world that FOIA made life harder. Of course it depended on what side of the fence you were on, since the business community was by far the greatest user of FOIA to get information about the business climate for various agencies. He thought that on balance the ability to learn more about the regulatory climate through making FOIA requests was a greater value to business than the possibility that truly sensitive information would be disclosed.
Jeff Stachewicz, President, FOIA Group Inc.,[25] told us that many of the Fortune 500, together with smaller companies and universities had used his services at one time or another. His company specialised in FOIA rather than competitive intelligence in general. They therefore typically had more expertise in understanding the legislation than most of the agency staff, who varied considerably in competence. They could afford to be more aggressive in pushing for documents than a company pressing its customer agency in its own name. The bulk of the requests were related to contracts and business opportunities. eg. details of capacities and pollution licences for new plants. Universities had also used FOIA to get information to position themselves for grants.
Typically companies used FOIA to get a better insight into the requirements of the agency and into the likely pricing of their competitors. Price was often the main factor in the award of government contracts

to develop an understanding of who was doing the work, what type of work they were doing, who they were doing it for and what were their fees.
They also acted as a third party to make blind requests for their clients. Information released varied from departme

A FOIA Agency case study from the USA: Pompan, Murray, Ruffner & Werfel

Introduction

We were looking for a specialist FOIA agency who would be prepared to explain how they operated to help their clients obtain information using the FOIA to support their business activities. A senior FOIA officer in one of the major USA government departments suggested that we approach **Pompan, Murray, Ruffner & Werfel,** a law firm, based in Alexandria VA, who specialise in FOIA work. Jacop B Pompan, Senior Partner, produced this paper at our request, and we are very grateful for the insight that it provides. It is included as a real example of how a specialist agency works. It is not suggested that it is typical, since we have spoken to a number of specialist FOIA agencies, with different policies, areas

We find that there is no standard at all with respect to how the government responds to a FOIA request. Some activities have an attorney handle the response. Sometimes it is a fairly low-level clerk. Sometimes it is just a summer replacement who is working between semesters at the local university. The result is that one never knows what to expect. We have been refused data by the government at one location, which is systematically released at another location of the same Agency.

Client Identification:
Our general approach is not to identify the client. Oftentimes the government personnel will ask why we want the data. When we get that question, we know we are dealing with someone who has not the foggiest idea of the law, the regulations, or the process. We do not want to identify the client because we know that government technical and contracting people do not like to have contractors penetrating their database -- it is a rather normal human reaction.
If awards are being made on price alone, without any technical evaluation, we sometimes are not too concerned about client anonymity. The reason, of course, is that the agency must generally award to the low bidder. To the extent that the contracting people get increased discretion to evaluate offerors on non-cost factors, we become more concerned with the identification of the client.

FOIA and reverse FOIA of proposals:
When our client wins an award, other companies want to get their hands on our technical and price proposals. Of course, we regularly submit FOIAs for the technical and price proposals of companies who have won contracts that our clients lost. The agencies do not release these proposals without first going to the company that submitted it. Sometimes we get a lot of information from this exercise, and sometimes the proposals are greatly redacted. Sometimes the agency refuses to release anything.
The agency will almost always go back to the original contractor and ask him whether he has any objections to the release. The contractor will "knee-jerk" the answer and say YES, do not release!! We then will argue that the information should be released. One danger is that if the client's competitor knows who is asking for his data, then he knows who his competitor is, and sometimes that knowledge is important.
For example, sometimes a client knows its competitors for a contract, but very often our client is trying to penetrate a new government agency and a new requirement. The client does not want the current incumbent contractor to know who is targeting his "rice bowl." So, whenever we ask for any data which originated from another company, we take great pains to disguise the origin of the request.

Litigation:
We have never litigated a denial of a request. In the first place, we do not think it is ever wise to litigate against your customer and that is what an FOIA litigation is. Litigation is expensive -- no one makes any money except the lawyers, and it is very damaging to the relationship of the client to the Agency. So, we make the requests and then we try very hard to get as much as we can (or to give away as little as we can) without even the hint of litigation. That is one very important place where your relationship with the FOIA official of the agency is critical.

Delaying the release:
Sometimes release of data to a competitor is inevitable. We very recently had a case in which our client won a contract for the maintenance of certain electronic equipment. About two years later, the solicitation was out for the re-bid of that and it was really important to mainta-4.6(e)9.1(r) 516.92 T43.7(a)-1.6(nd)-239

Practical questions of implementation within the US Department of Defense

Introduction

We thought it would be helpful to provide an insight into the kind of practical implementation questions that still arise in the USA over 30 years after the Freedom of Information Act became law in 1966. The Office of the General Counsel in the US Department of Defense (DoD), kindly provided us with a selection of real questions and answers that have arisen recently. These cover both privacy and freedom of information, but we have made a selection of questions and answers most relevant to business use. Apart from shortening the material in some cases, the questions and answers are unedited. Each question comes from one of the DoD FOIA co-ordinators. The questions and answers are then circulated to some 100 plus FOIA co-ordinators world-wide.

Questions and Answers

been recognized for research data developed at great expense by drug co's. If that research data was then given to a competing drug company, that company could use it in support of its own drug approval application and it wouldn't have had to incur the cost of developing the info itself. It could then get its product to the market sooner, or offer it at a reduced price.) In your case, the sticking point--it seems to

constructive denial for purposes of seeking judicial action. That goes for the Initial Denial Authority (IDA) and for us on appeal.
Although the general rule of administrative law is that all administrative remedies must be fully exhausted before one can sue, the FOIA provides an exception. Under 5 U.S.C. Section 552(a)(6)(C), a FOIA requester is "deemed to have exhausted his administrative remedies" when an agency fails to meet the statutory time limits. Thus, when an agency does not respond to a FOIA request within 20 working days, the requester can seek immediate judicial review, even when the requester has not filed an administrative appeal.
Department of Justice guidance says that requesters can treat an agency's failure to comply with the FOIA's specific time limits as full, or constructive exhaustion of administrative remedies.

13. Definition of Agency Record

European Union

Finland followed in 1951, Denmark in 1950 and France and The Netherlands in 1978 (amended in 1991), and most recently Ireland, where its law came into force in 1998.

We asked people within the EU, about public access to government information in the context of information about government contracts that might be used to assist companies to compete more effectively. The idea of seeking information about government contracts held by private companies was hard for our respondents to grasp. Outside the Nordic countries, the concept of such information being available and used by private sector companies seemed culturally alien.

In the area of contracts, the common view is that EU Procurement Directives address the matter fully, and in the area of environmental information, EU Environmental Directives do the same. The idea that any national legislation might require more to be made available is not regarded as likely.

However the question of the availability of public information is a current and actively debated subject. The focus for this is the recently published EU Green Paper on public sector information.[2] It is useful to consider this in more detail since it is likely to form an important part of the framework within which companies can access and make use of public information in the EU.

Public Information in Europe

The Green Paper, Public Sector Information in the Information Age, was produced by DGXIII and published in January 1999. It had its origins in concern for the future competitiveness of European industry, and the view that the USA had gained advantages from its active policy of access to and commercial exploitation of public sector information. Earlier drafts of the Green Paper referred to an estimate that 1 million new jobs would be created in the 10 years from 1996 in the multi-media content

United Kingdom	12,550	6,300	50%	2,100	33%
EC Institutions	1,800	400	22%	310	78%
Total EU	**84,000**	**40,000**	**48%**	**24,000**	**60%**

* Based upon pre-

there were many claims to keep prices secret. Now they are generally made available unless the circumstances are exceptional.

Sweden’s compliance with EU Procurement Regulations is a separate matter. In effect these regulations require a minimum level of open

The current position in the United Kingdom

Summary

The new Freedom of Information Act in the UK will build on a series of earlier initiatives which are gradually opening up access to government information, including information supplied by business. After a long history of blanket confidentiality being applied to information about companies, information is increasingly being made available but in a patchy and not always predictable way. The effect of a number of EU-initiated regulations, the UK Code of Practice on Access to Government Information, and a more open policy by the government, has been to produce significantly greater openness in recent years.

More information about companies, their products and their contracts with public authorities, is available now than was the case a few years ago. This has faced companies both with new risks and opportunities. However companies have not generally become sufficiently aware of the issues to give greater priority to the management of the information they provide to public authorities. By comparison, USA based multi-nationals seem to be fully alert to the risks and opportunities. This was probably stimulated initially by the USA FOIA in 1966, which was perceived at the time to cause a high level of business risk. The matter quickly reached the agenda of senior management with policies implemented to contain the risks and exploit the opportunities.

UK companies and even some multi-nationals based outside the USA have not had the same motivation to give the matter priority, and we do not expect the proposed UK FOIA to provide the same level of business risks as the early USA FOIA. However the introduction of a UK FOIA is expected to provide a far greater focus for management attention than the Code of Practice.

In the UK there are issues for government and business to resolve. For government it is to meet the challenge of greater demand and greater exposure, with a need for systematic training to ensure smooth implementation of the FOIA. For business it is recognition that the subject demands priority attention from senior management so that the risks are managed and the opportunities grasped.

Introduction

Legislation for Freedom of Information is being proposed in the context where there are a number of current initiatives and proposals that relate to the use and exploitation of government information. These include, the UK White Paper on Modernising Government,[1] The EU Green paper on Public Sector Information in the Information Society,[2] the UK Green Paper, Crown Copyright in the Information Age,[3] and the Treasury paper, Selling Services into Wider Markets.[4] These, taken together, promote the better use of public information to:

* improve the quality of government.
* make it easier for citizens and business to relate to government.
* generate growth and employment from the value-added resale of public information.
* generate more revenue for government from the exploitation of its information assets.

As a result, the information government holds is, over time, likely to be more clearly indexed, and more available, increasingly on the Web, both directly from government and from re-sellers.

The UK FOIA will therefore be introduced into an environment where far more information, including information about companies, will be readily available, and companies may be sensitised to the

These directives require little information, and that which is specified, is often not provided. There is however concern within the Commission, and a wish to improve the transparency of public procurement with a higher level of compliance with directives.[9]

EU Environmental Directives

These are implemented in UK law as The Environmental Regulations 1992, also known as Freedom of Access to Information on the Environment. Their scope is very broad, since they cover any information that relates to the environment, including activities that could affect it adversely. Information to which any 'commercial or industrial confidentiality attaches...' is protected.[10]

Since the regulations apply to a wide number of public bodies, no regular statistics of use have been maintained. However we were told of a special analysis that was carried out, relating to the first five years of operation of the regulations. This showed some 16,000 requests and 62 refusals. There is some evidence of business use.

The Environment Agency explained to us that they operate a process to check if claims for confidentiality are valid and if so whether they are outweighed by the public interest. They place enforcement notices on public registers, and have given out waste return details, sometimes giving the content but refusing volume information, according to their judgement of a confidentiality claim. Many requests relate to the Integrated Pollution Control Index. One example of a business request was for details of burner type and chimney stack discharges from power stations, from which it is thought a supplier could deduce the total amount of coal used, to help judge how to price the next bid.

Over the last few years, The Environment Agency has become more aware of the commercial value of the data they hold. We understand they have agreements with at least two large value-added re-sellers, which generate significant revenue. One example of value-added use, is the provision of information about environmental issues within a defined distance from a proposed property development. Another is an analysis of the Flood Risks Register to provide a service to insurance companies.

The Department of the Environment, Transport and the Regions (DETR), now publish some 54 registers of environmental information.[11] These include enforcement notices relating to pesticides issued by the Health and Safety Executive (HSE), and registers relating to pesticide evaluation, air pollution control, radioactive substances, waste management, and works discharges.

A case brought under the Environment Regulations, known as the Birmingham Northern Relief Road case,[12] is thought to have stimulated the policy change towards greater openness of Government contracts that was made public in a DETR press release in July 1998.[13] This announced that subject to certain limited exceptions, in future contracts placed with DETR would be made available.

Health and Safety law and regulations

There is an overlap between environmental and health and safety issues. Control of pesticide use and radioactive substances are two examples. Health and safety inspectors acquire a great deal of sensitive company information in carrying out their tasks. Under Section 28 of the Health and Safety Act 1974, they are prohibited from releasing information obtained as a result of the use of statutory powers.

However a growing number of EU Directives and Regulations are being introduced to cover health and safety issues. The Health and Safety Act must be interpreted in the light of these subsequent provisions, which usually include provisions for openness. The legal interaction is sometimes quite complex. For example, The Environmental Regulations 1992, override the constraints of Section 28 of the UK Act, but then impose confidentiality, but not in precisely the same way.ith DETR woul w-2.(l)-4(t)-254.6(om)17.0(e)-(r)-254

5) The Department of Transport, Vehicle Inspectorate refused to provide details of its correspondence with a manufacturer about a safety defect. They had however given some information

[7] Published in Administrative Law Review Vol. 34 1981
[8] Ibid., page 261
[9] Final Report.

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