

# Freedom of information: protecting commercial information in the information age

[Todd Corey](#) Nov 14 2005

An open and democratic society is partially judged by the extent to which its government, institutions and agencies provide transparency of their internal affairs. In this information age, more than 50 countries have enacted laws that entitle individuals and commercial entities, among others, to "freedom of information" (FOI) held by public authorities.



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The records of public authorities, however, are also a fertile ground from which commercial entities, community activists and journalists can extract sensitive commercial information which companies have filed, such as bids for government contracts, marketing plans, product tests, or sales forecasts. Therefore, unless there is an applicable exemption from disclosure, a public authority could be required under FOI laws to disclose to the public sensitive information that has been filed with that authority.

Requests for information can give rise to disputes about the "commercial interest exemption" which generally protects information on an organisation's ability to successfully participate in commercial activity, such as confidential business information, intellectual property or trade secrets. The UK's new FOI regime has given rise to disputes about exemptions, including the commercial interest exemption. Until a precedent has been established, however, there is a lot that can be learned from overseas jurisdictions.

This article discusses the general principles of FOI (including those of the US, European Union, Canada and UK), namely the requirements for disclosure, how information is obtained, and what information is exempt from disclosure. Finally, this article examines the recent developments surrounding the commercial interest exemption in the US, Scotland, Canada and the UK and offers general advice to commercial entities that encounter FOI issues in the UK and other jurisdictions.

## **Information which must be disclosed**

FOI generally entitles access to information, records or documents held by public authorities. FOI laws set criteria for determining what information, records or documents in the possession of a public authority must be disclosed upon request and what can be withheld. FOI laws operate in conjunction with any privacy or data protection laws that are in effect in each jurisdiction.

Most FOI laws are broadly similar throughout the world, so there are common features in many jurisdictions: in the UK (except Scotland), FOI is governed by the *Freedom of Information Act 2000*; EU Regulation 1049/2001 regulates FOI in the European Union; *the Freedom of Information Act, 5 USC* section 552 governs FOI in the US; and the *Access to Information Act* is Canada's FOI law.

## **Obtaining information from a public authority**

Information may be obtained from a public authority by making a request. In practice, many public authorities provide access to certain information through their websites.

An FOI request must generally be in writing, state the name and address of the applicant, and describe the information which is requested. Applicants are not generally required to state the reason for their request. A public authority may charge an applicant for any costs incurred in disclosing the information, depending on the data requested.

Anyone can request information held by UK or US public authorities, irrespective of their age, nationality or location. Canada and the EU place greater restrictions on their data and will only grant provide data to citizens or residents, unless access to documents has otherwise been granted by order. Applicants are usually entitled to a response within a specified time period and to be told if the information that they have sought exists. If a request for information is denied, applicants are generally entitled to appeal the decision.

## **Exemptions from disclosure**

The right to information in the EU, UK, US or Canada (as well as in other jurisdictions providing FOI) is subject to exemptions which limit or restrict the right of access to data. Although not exhaustive, there are seven broad categories of exemptions:

- national security and international relations

- commercial interest
- personal privacy
- law enforcement and public order
- inspections, investigations and audits
- confidential information
- intra-agency and inter-agency communication

In some jurisdictions, such as the EU (EU Regulation 1049/2001, Article 4(4)), Canada (*Access to Information Act*, section 27), and the US (Executive Order 12600), public authorities are required to notify or consult a third party who has submitted business information that a request for information has been made and that disclosure of the information is being considered. If the third party believes that such information is exempt from disclosure, that third party may file a "reverse" FOI request to limit or restrict disclosure.

When a particular record contains both exempt information and disclosable information, a partial disclosure is required: the exempt information is to be deleted (i.e., redacted) from the remainder of the released document. In many jurisdictions, including the UK and the EU, certain exemptions do not give public authorities the absolute right to withhold the information; rather, the prejudice caused by possible disclosure must be balanced against the public interest in knowing the information which has been requested. In the UK, the commercial interest exemption will often overlap with the confidential information exemption (*Freedom of Information Act 2000*, s43 and 41). Both exemptions are subject to the public interest test.

In the UK, a third party's commercial interests might be prejudiced where disclosure would be likely to:

- damage its business reputation or the confidence that customers, suppliers or investors may have in it
- have a detrimental effect on its commercial revenue or threaten its ability to obtain supplies or secure finance
- weaken its position in a competitive environment by revealing market-sensitive information or information of potential usefulness to its competitors.

The commercial interest exemption is particularly relevant to commercial entities which file information with public authorities. There have been recent developments in that respect in the US, Scotland, Canada and the UK.

### **Commercial interest exemption — recent developments**

#### *US*

In the US, this exemption applies where disclosure would provide competitors with a valuable insight into the operational strengths and weaknesses of a company.

Confidential information may be submitted to a public authority on either a voluntary or mandatory basis. Voluntary information is "confidential", and therefore exempt, if it is of a kind that would customarily not be released to the public by the person from whom it was obtained. Mandatory information will be exempt if disclosure is likely to either: (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. (*Public Citizen Health Research Group v. Food and Drug Administration*, No. 98-5162 (DC cir, 6 August 1999))

A court recently upheld a public authority's partial disclosure of a third party company's application for a tax credit, because the public authority's decision "carefully evaluated which portions of the application qualified for protection as confidential 'trade secrets or commercial or financial information' under the exemption." (*GS New Markets Fund, LLC v United States Department of the Treasury*, No. 03-2222, 2005 WL 627877, DDC, 16 March 2005).

#### *Scotland and Canada*

The Scottish Information Commissioner has made two recent decisions (Scottish decisions 025/2005 and 014/2005) pursuant to s33 of the *Freedom of Information (Scotland) Act 2002*, which uphold disclosure of commercial information despite claims that the commercial interest exemption applied. In both cases, there was a failure to show what substantial prejudice to commercial interests would occur if third party information were disclosed. These decisions might provide some insight into how England and other European jurisdictions will apply the commercial interest exemption.

In Canada, however, there have been recent decisions in favour of third parties seeking to restrict disclosure in its entirety based upon the commercial interest exemption: *Merck Frosst Canada & Co v the Minister of Health Canada*; *The Blood Band v Minister of Indian Affairs*; and *Northern Development and Attorney General of Canada v HJ Heinz Co of Canada Ltd*.

#### UK

The Information Commissioner recently held that the commercial interest exemption applied to a public sector contract, e.g., information of prior financial arrangements between a public authority and a contracting artist. As such, disclosure would have prejudiced the authority's commercial interest (i.e., bargaining position in subsequent negotiations) rather than the commercial interest of the third party. The commissioner, however, warned: "[T]hose who engage in commercial activity with the public sector must expect that there may be a greater degree of openness about the details of those activities than had previously been the case prior to the [FOI] Act coming into force." (Decision notice 20 June 2005, case ref FS50063478).

#### **Advice for protecting information filed with public authorities**

These developments suggest that third party commercial entities that file information with public authorities ought to consider the following advice:

Advice	Comment
Confidential treatment of the information	In the US, request confidential treatment of commercial information filed with a public authority.
Request to be informed	The third party (submitter) should ask the public authority for an undertaking that the company will be

	informed if a request is made, though some jurisdictions require third parties to be kept informed.
Confidentiality and notification in contracts	Contracts between a company and a public authority should contain a confidentiality clause and a clause requiring the authority to notify the company when a request for information is made.
"Reverse" Fol request	If a third party (submitter of information) disagrees with a public authority on whether information is exempt from disclosure, consider filing a reverse Fol request to limit or restrict disclosure.

## Conclusion

Recent developments in the US, Scotland, Canada and the UK suggest that FOI laws will continue to allow access to sensitive commercial information. Commercial entities that file sensitive information with public authorities must not, therefore, assume that the commercial interest exemption will shield that data. Rather, commercial entities should seek to limit or restrict the public authority's disclosure of sensitive commercial information, either by contract, undertaking or a reverse FOI request. Only then will commercial entities be able to maximise the prospect of limiting or restricting the disclosure of sensitive information held by public authorities in the UK and other jurisdictions.

*This article originally appeared on **Complinet Insurance**. Go to <http://www.complinet.com/insurance-uk/register.html> to register for your free trial. **Complinet's Freedom of Information** e-learning course is a practical guide to the main principles of the Freedom of Information Act 2000. For a free trial, please contact client support on +44-87-0042-6400 or e-mail [clientsupport@complinet.com](mailto:clientsupport@complinet.com).*

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