



## Information provided in confidence relating to contracts

The Freedom of Information Act 2000 (FOIA) gives a right of public access to information held by public authorities. This is part of a series of guidance notes to help public authorities understand their obligations and promote good practice.

This guidance highlights that you must have obtained the information from another party in order for the section 41 exemption for information provided in confidence to apply, and explains how this relates to contracts.

### Overview

- A concluded contract agreed between a public authority and another party is not generally information being provided by one party to the other. So section 41 in these circumstances cannot apply.
- However, there may be circumstances where information contained in the contract is obtained by the public authority from the other party as part of the contractual process. In these circumstances section 41 may apply.

### What does section 41 say?

Section 41 explains that:

- information will be exempt from disclosure if it was **obtained** by the public authority from another party (including another public authority), and
- the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would result in a breach of confidence actionable by that or any other party.

The exemption cannot apply to information the public authority has generated itself. The information must have been provided by someone else.

### Does section 41 cover contracts?

A concluded contract agreed between a public authority and another person is not usually information being provided by one party and obtained by the other. Therefore, in most cases, information in a concluded contract cannot benefit from the section 41 exemption because it has not been obtained by the public authority from another party.

However, depending on the circumstances of the case, some information relevant to a contract may count as confidential information obtained from another party, for example, information regarding a pre-contractual negotiating position or technical information either contained within the body of a contract or provided as a separate schedule.

**Example:** In [Derry City Council v Information Commissioner \(EA/2006/0014; 11 December 2006\)](#), the Tribunal stated that “the correct position is that a concluded contract between a public authority and a third party does not fall within section 41(1)(a) of the Act” and “We are also conscious of the fact that contracts will sometimes record more than just the mutual obligations of the contracting parties. They will also include technical information, either in the body of the contract or, more probably, in separate schedules. Depending, again, on the particular circumstances in which the point arises, it may be that material of that nature could still be characterised as confidential information “obtained” by the public authority from the other party to the contract, (or perhaps a “trade secret” under section 43 (1) of the Act) in which event it may be redacted in any disclosed version”.

### **Recommended good practice**

Part V of the [Section 45 Code of Practice](#) outlines good practice regarding a public authority’s confidentiality obligations relating to contracts under the FOIA. However, the two points we would like to highlight in particular are:

- When a public authority enters into a contract, it should let that other party know before the contract is drawn up that part or all of the contract may be disclosed in response to a freedom of information request.
- Public authorities can use confidentiality clauses to identify information that may be exempt, but they should carefully consider the compatibility of such clauses with their obligations under the FOIA. They may also help identify occasions where the other party to a contract should be consulted before disclosure. Such clauses cannot however prevent disclosure under the FOIA if the information is not confidential.

### **More information**

For more information on the section 41 exemption see our guidance entitled [Information provided in confidence: Awareness guidance 2](#)

This guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunal and courts on freedom of information cases. It is a guide to our general recommended approach to this area, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information, please contact us.

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