

Freedom of Information and Contractors: A Briefing for Staff and Contractors

The [Freedom of Information Act (FOIA) 2000](http://www.legislation.gov.uk/ukpga/2000/36/contents) applies to all information held by public bodies. It also applies to specifically-designated private companies that perform public functions but not to other private companies.

Canterbury Christ Church University (‘the University’) is a designated body under the FOIA, and subject to the disclosure requirements. All of the information the University holds about a company is potentially covered by the FOIA, as is any information that a company holds on the University's behalf.

The FOIA applies to all information in the University’s possession, regardless of its source. The legislation covers both the information produced by the University and information which we hold which was originally provided by outside organisations, such as the companies with whom we do business. Information dealing with our relationships with these companies will also be covered.

Examples of the types of information which are within the scope of the legislation include:

1. Information which we might gather in the run up to a procurement exercise, such as product catalogues and details of potential suppliers.
2. Information provided by prospective suppliers as part of the tendering process.
3. Contracts and associated documents, such as the correspondence connected with negotiating a contract.
4. Information supplied by the contractor during the delivery of a contract, and information relating to our monitoring of the contract.

Requests for this sort of information have to be handled like any other FOIA request. The information must be provided unless a valid exemption applies. There are two exemptions in the FOIA that can be particularly relevant to requests that touch on our relationships with contractors, suppliers and tenderers

1. Information provided in confidence (FOIA section 41).

The exemption is designed to give those who provide confidential information to public authorities a degree of assurance that confidences will continue to be respected should the information fall within the scope of an FOIA request. This exemption can be used where the information was supplied to the University by an outside body or individual, and the disclosure of the information would be an actionable breach of confidence. This means there is a reasonable prospect that a court would rule against us if we released the information. The way the common law of confidence has evolved means that an actionable breach of confidence may occur if all of the following conditions hold:

* + The information has the necessary "quality of confidence": it is not widely available or completely trivial; and
  + When the information was conveyed to the University there was an explicit or implicit understanding the information would be kept in confidence; and
  + The release of the information is done without the permission of the party which supplied it.

In certain cases, the courts have set aside a duty of confidence on the grounds of an overriding public interest, but the grounds for breaching confidence must be strong ones (e.g. the information relates to misconduct or illegal activity).

1. Commercial interests (FOIA section 43).

This exemption applies in the following two circumstances:

1. The information is a trade secret: it is restricted information which is the source of a supplier's competitive edge in a particular market.
2. The release of the information would cause or be likely to cause actual harm to the commercial interests of a supplier, understood to mean its ability to successfully participate in a commercial activity; and the public interest in withholding the information and maintaining the exemption outweighs the public interest in releasing the information.

This exemption can be used to protect the commercial interests of the University as well as the interests of outside bodies with whom we do business. For example, we might invoke the exemption to refuse to release information which would undermine the University's ability to negotiate the lowest possible price for goods or services, or which would affect our ability to compete with other universities.

When applying this exemption, we have to keep in mind the commercial sensitivity of information can change with time. For example, information which is very sensitive during the tendering process may no longer be sensitive once a contract has been awarded; contracts and their associated information may cease to affect commercial interests once the contract has expired.

These exemptions together with other exemption may allow the University to withhold information about our dealings with contractors and suppliers. However, exemptions can only be used in certain situations and may be difficult to apply. The key point is there is no blanket exclusion under the FOIA for information relating to the private sector which is in the University’s possession.

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Freedom of Information and Contractors: Questions and Answers

This question and answer sheet is designed to address queries that have come up from contractors in relation to freedom of information.

*Q. If I give Canterbury Christ Church University information on my products or services, will this be subject to the Freedom of Information Act (FOIA) 2000?*

A. Yes, but that does not mean it will automatically be released if requested, as one of the exemptions under the FOIA may apply. We will seek your views before making a decision on disclosure of information that might affect your rights or interests.

*Q. My Company holds information on behalf of Canterbury Christ Church University. How am I affected?*

A. If the University gets a request for Information that includes information you hold on our behalf, we will ask you to provide it quickly so that we can comply with the FOIA. There has to be a response to a request within 20 working days after receipt.

*Q. What if a Request for Information comes direct to my company?*

A. Unless you are an organisation that is subject to the FOIA, you have no obligations to respond to such a request. If the request relates to information you hold on behalf of the University, you should not in any case disclose it without our explicit agreement.

To be helpful to the requester, if the information requested relates to the University, you should advise the request should be submitted directly to the University’s Freedom of Information Officer (foi@canterbury.ac.uk).

*Q. Are there any exemptions that allow Canterbury Christ Church University to refuse to supply information?*

A. The FOIA provides for a number of exemptions, two of which might be particularly relevant: information provided in confidence (section 41) and commercial interests (section 43).

Section 41 provides an Absolute Exemption. Where information is covered by an Absolute Exemption, the University may refuse to release the information and, in some circumstances, can refuse to confirm or deny whether we hold the information.

Section 43 provides a Qualified Exemption. Where Qualified Exemptions apply, the University has to undertake a public interest test to decide whether it is in the public interest to disclose the information or withhold it.

*Q. Could information I supply to Canterbury Christ Church University be protected by having a confidentiality clause in contracts or by providing the information in confidence?*

A. Confidentiality clauses are discouraged by the Information Commissioners Office (ICO) unless there are genuine commercial and/or legal reasons why the information should be treated as confidential (see the ICO advice in [*Information provided in confidence relating to contracts*](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/CONFIDENCEANDCONTRACTS.ashx)).

Information provided in confidence is only exempt if its disclosure would give rise to an actionable breach of confidence. This is a narrow legal exemption, which applies in limited circumstances and you should not assume this exemption will apply just because you think information is confidential.

If you consider information you provide to the University is confidential, you should notify the University and provide reasons why you consider the information to be confidential under the FOIA. Where possible, the contract should specifically identify information which the contractor regards as commercially sensitive, as this will simplify the process of dealing with FOIA requests, although decisions on whether or not to withhold will still have to be made by the University on a case by case basis.

*Q. What will Canterbury Christ Church University do if it receives a request for information that might affect my company?*

A. When considering requests, the University will consult you about information that may affect your rights or interests, unless we are already certain that we must or must not disclose it. This consultation will help us to decide if an exemption applies and what the considerations are in applying a public interest test about information disclosure. However, the law makes the University alone, responsible for making the final decision regarding disclosure.

*Q. What happens to tender information after contract is awarded?*

A. Information that was commercially sensitive during the tendering process may no longer be sensitive once contracts have been signed, therefore the University will consult with you to determine its disclosure.