



# DARTFORD BOROUGH COUNCIL

## Freedom of Information Act 2000 (FOI) Frequently Asked Questions – Procurement Process

The purpose of these FAQs, is to share information and promote understanding of the impact of FOI on the procurement process. These FAQs may be of interest to **Dartford Borough Council** staff involved in the procurement process and to contractors and/or potential contractors.

### **Q1. What is the Freedom of Information Act 2000 (FOI)?**

FOI makes provision for the disclosure of information held by public authorities or by persons providing services for them and provides that anyone can ask the Council for any information and, unless an exemption applies, the information must be supplied. FOI is fully retrospective.

The Code of Practice on discharge of Public Authority Functions under Part 1 FOI (available on the Department of Constitutional Affairs (DCA) website [www.dca.gov.uk](http://www.dca.gov.uk)) gives public authorities guidance on procedures for consultation with third parties when responding to requests, the impact of FOI on public sector contracts and accepting information in confidence from third parties.

### **Q2. How does this impact on companies?**

This means that all information that your company has provided and may provide in the future to the Council will be subject to FOI. Examples of such information include that submitted in relation to contracts, development proposals and information held for licensing and regulatory purposes.

Only public authorities themselves are required to respond to requests, so a requestor cannot apply to you direct. They will make their request to the Council and the Council is then obliged to respond according to FOI.

All information held by the Council is subject to FOI. The presumption is that information will be provided upon request, unless it falls within the scope of one of a limited number of specified exemptions.

Personal data is outside the scope of the FOI, because it is already within the terms of the Data Protection Act 1998.

### **Q3. Is there an exemption for information supplied by third parties?**

There is an absolute exemption (s41 Information Provided in Confidence) for information whose disclosure would constitute an 'actionable breach of confidence'. However, just because information is marked 'confidential', does not mean that it is. Third parties will need to demonstrate that information marked confidential is so, if requested by the Council.

### **Q4. What about commercially sensitive information?**

There is a public interest tested exemption (s43 Commercial Interests) for information whose disclosure would prejudice the commercial interests of any person, including those of Dartford Borough Council.

Whenever your company provides information to the Council which you believe would prejudice your interest if released under FOI, you should make the Council aware of this at the time it is provided. All future contracts should include a schedule specifying this information. However, simply marking information as 'confidential' or 'commercial: in confidence' only has the effect of identifying that an exemption could apply under FOI. The



issue will be not the marking but whether, at the time the request is received, a duty of confidence applies, or whether release would be likely to prejudice your commercial interests.

If you wish to propose use of confidential information or that a duty of confidence should apply to particular information, you should do so in compliance with the Code of Practice issued by DCA (s 45 of FOI). This will ensure that claims are based upon reasons that address the requirements of the Code. The Code can be accessed on the Internet at <http://www.dca.gov.uk/foi/codesprac.htm>.

***FOI is classification blind, so the fact that information may bear a security classification does not automatically exempt it from release. Requests for information must be judged on a case-by-case basis and assessed purely against the FOI exemptions rather than any security classification.***

#### **Q5. What will the Council do if it receives a request for information held on your contract/company?**

If the Council receives a request which involves information provided by your company and its unclear whether any claim to confidentiality applies, then the Council will consult with you. However, the Council has a very limited time in which to respond to the request, so it will be necessary for you to ensure that your contact details are as up to date as possible. Otherwise, the Council may have to make a decision without your organisation's input, as the Council is required to respond to requests within a 20 working day time limit.

#### **Q6. Will the Council be expected to release contract price information?**

There is no straight forward answer to this - each request will need to be considered on a case-by-case basis. Before any release of such information is sanctioned, the Council will have to consider (at least) the following points:

- Who provided the information? The Council may be obliged to consult with the supplier of the information to obtain their view and assessment of the impact of any release;
- How and why the pricing information was provided to the Council? In many cases this information will have been provided 'in confidence' (express or implied) for a particular purpose and Council staff would need to be clear whether any release might constitute an 'actionable breach of confidence';
- When the information was provided? If the information was provided as part of a competitive exercise that was run 2 years ago, it is likely that there will be no problem releasing the information. If, however, the information has been submitted as part of a current competitive exercise, then it is extremely unlikely that that information will be released. Refer to the Council's Freedom of Information Statement at Appendix A;
- Inevitably, the Council will receive requests for information where the answer is not so clear-cut, for instance, where a competitive exercise was concluded six months ago and where a further competition is anticipated. The decision is therefore much more complex. However, part of the assessment will include consideration of the impact of any release e.g. would the release result in significant harm to the commercial interests of anyone e.g. the contractor or the Council?

#### **Q7. What are the exemptions which might apply to information supplied by contractors?**

There is no blanket exemption for commercial confidentiality. Each request will have to be examined on its own merits and FOI applied. The following exemptions are likely to be relevant when the Council has to decide whether to disclose information under FOI about contractors and partners relationships with the Council, details of contractors, tendering information etc.



1. Section 40 protects personal information, though a public interest test can apply to third party information in some circumstances.
2. Section 41 provides an absolute exemption where disclosure of the information will constitute an actionable breach of confidence.
3. Section 44 provides an absolute exemption where disclosure (otherwise than under FOI) by the public authority holding the information is prohibited by, or under any other enactment or it is incompatible with any Community obligation;

This may apply to some information received during the procurement process conducted under the EU Procurement Rules. It may also apply to confidential information identified in various contract related regulations (the Public Works Contract Regulations 1991, the Public Services Contract Regulations 1993 and the Public Supply Contract Regulations 1995).

4. Section 43 allows information to be withheld where it constitutes a trade secret or where disclosure is likely to prejudice the commercial interests of any person (including the public authority). This is a qualified exemption subject to the public interest test.

### **Q8. What about information held by contractors, partners and PFI companies?**

Any information held by another body on behalf of **Dartford Borough Council** is considered to be subject to FOI. In addition to this, any contractors fulfilling the 'functions of a public authority' may be added to Schedule 1 of FOI by an Order. This will effectively designate them as public authorities for the purposes of FOI.

If you create and hold records on the Council's behalf, you should be aware that FOI requires good standards of records management that are detailed in the Code of Practice issued by DCA under Section 46 of the FOI. This Code can be accessed on the Internet at <http://www.edca.gov.uk/foi/codesprac.htm>.

As any recorded information can be requested, the Council would advise against recording unnecessary information that could be embarrassing or incriminating if released. In addition, you should be aware that it is a criminal offence under section 77 of FOI to alter or destroy a record in order to prevent disclosure once a request for information has been received.

**If you have any queries regarding the Freedom of Information, please contact:**

**The Freedom of Information Officer  
Freedom of Information Unit  
Dartford Borough Council  
Civic Centre  
Home Gardens  
Dartford  
Kent DA1 1DR  
Tel: 01322 343634  
Email: [foi@dartford.gov.uk](mailto:foi@dartford.gov.uk)  
Website: <http://www.dartford.gov.uk/>**



## APPENDIX A

### Freedom of Information Act 2000 Statement *(incorporated in Instructions to Tenderers)*

The Freedom of Information Act 2000 (FOI) makes provision for the disclosure of information held by public authorities or by persons providing services for them. FOI provides that anyone can ask Dartford Borough Council for any information and, unless an exemption applies, the information must be supplied. FOI is fully retrospective.

Therefore, subject to the foregoing, information relating to your tender and/or contract may be disclosed upon request to members of the public or interested parties.

1. Information contained in your tender and/or contract documents will be treated as commercially sensitive up to 6 months following the tender submission date.
2. After the 6 months have expired, the Council will consider the disclosure of any information contained in the tender documents (successful and unsuccessful tenderers) and/or contract, including price quotes.

If any information contained in your tender documents and/or contract is commercially sensitive or is a trade secret, the **onus is on you the tenderer** to ensure that this information is clearly identified to Dartford Borough Council. Any tender document and/or contract **MUST** have any commercially sensitive information and/or trade secret clearly marked and identified as such with reasons.

I consider the following information contained in the tender documents to be \*commercially sensitive/trade secret *[delete as appropriate]* and my reason(s) are: