

# FREEDOM OF INFORMATION MAY COMPROMISE COMPANIES

**The Freedom of Information Act 2000 will be fully implemented by January 2005. The act aims to promote freedom for the public to access information held by public bodies such as central and local government, police, health service and education authorities. But as it also applies to the FSA, businesses submitting commercially sensitive information to the FSA may find it becoming publicly available in the future.**

Richard Thomas, the government's information commissioner responsible for data protection and information legislation, told *Financial Director* that businesses should be aware of the implications of the Freedom of Information Act. "A lot of people think that freedom of information is just about the public sector, local authorities, police and that kind of thing to make them more transparent and accountable to the public. But the Freedom of Information Act will have many implications for business as well," he says.

"There may be occasion where companies provide really sensitive information to a public body. In this case, there is a risk of the information becoming publicly available. This may cause specific problems when companies provide information to regulatory bodies such as the FSA, for example. If you are providing information that might damage your company if were to be made public, then you should make the body aware of that. There are exemptions for trade secrets but it is the responsibility of the company to tell the regulator."

## Exemptions

Under the act, exemptions fall into two categories. Absolute exemptions, such as information relevant to court proceedings and Parliamentary Privilege, do not require the public body to consider the case for disclosure, and requests are automatically refused. Qualified exemptions only apply when the duty to deny access outweighs the public interest of disclosure.

When commercial information is provided in confidence, and any dissemination of that information would constitute an actionable breach of confidence, then absolute exemption may be applied. This includes obligations of confidence that arise in contracts or statutes concerning trade secrets or technological information. The act does not explain what constitutes these.

The more common exemption for business users envisaged is in Section 43 of the act, covering the qualified exemption of commercial interests. The act reads: "Information is exempt information if its disclosure under the act would, or would be likely to, prejudice the commercial interests of any person, which includes the public authority holding it."

Requests for such information will be considered on a case by case basis and the public body will decide whether to release information to the applicant. The act puts the onus on public bodies to "be aware of developments in the law of confidence in the context of trade secrets which may have a bearing upon decisions they make in applying this exemption."

Companies providing information in the first instance are not directly addressed by the act.

## Trade secrets

Although Thomas draws on exemptions inherent in the act, the Information Commission is still in the process of formulating its own internal policies for dealing with individual cases. The definition of 'trade secrets', for example, is still a moot point.

Rob Mechan, a policy manager responsible for finalising policy at the Information Commission, says that consultation is ongoing. "We are exploring the correct applications of commercially sensitive information and trade secrets as exemptions," he says. "I have been looking at a lot of case law surrounding trade secrets and it is obvious that trade secrets constitute more than just chemical and economic formulae."

Mechan is consulting with the public bodies but would also like to hear from FDs who wish to get involved in the consultation process.

## Advice

As the act is fully retrospective, all information companies have already given to public bodies will be subject to public scrutiny. Whether information constitutes trade secrets is open to interpretation and it is the responsibility of the public body to decide whether the information can be released.

No formal procedure has been established for companies to mark information as commercially sensitive, and there is no set method for companies, public bodies and the Information Commission to work together.

While Thomas advises companies to contact public bodies directly, Mechan also suggests that "the most sensible suggestion" is for the FSA and other public bodies to contact companies directly if a request has been made to view their data. But as the act requires all information to be made available within 20 working days of a request, this must be done very quickly.

FDs are urged to get involved as early as possible to avoid what Thomas describes as "tears in a couple of year's time".

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*A wide range of Briefings can be found at [www.financialdirector.co.uk/briefing](http://www.financialdirector.co.uk/briefing)*

## Useful links

- The Freedom of Information Act and consultation documentation is available at [www.dataprotection.gov.uk](http://www.dataprotection.gov.uk)
- Email Rob Mechan at [rob.mechan@ico.gsi.gov.uk](mailto:rob.mechan@ico.gsi.gov.uk)