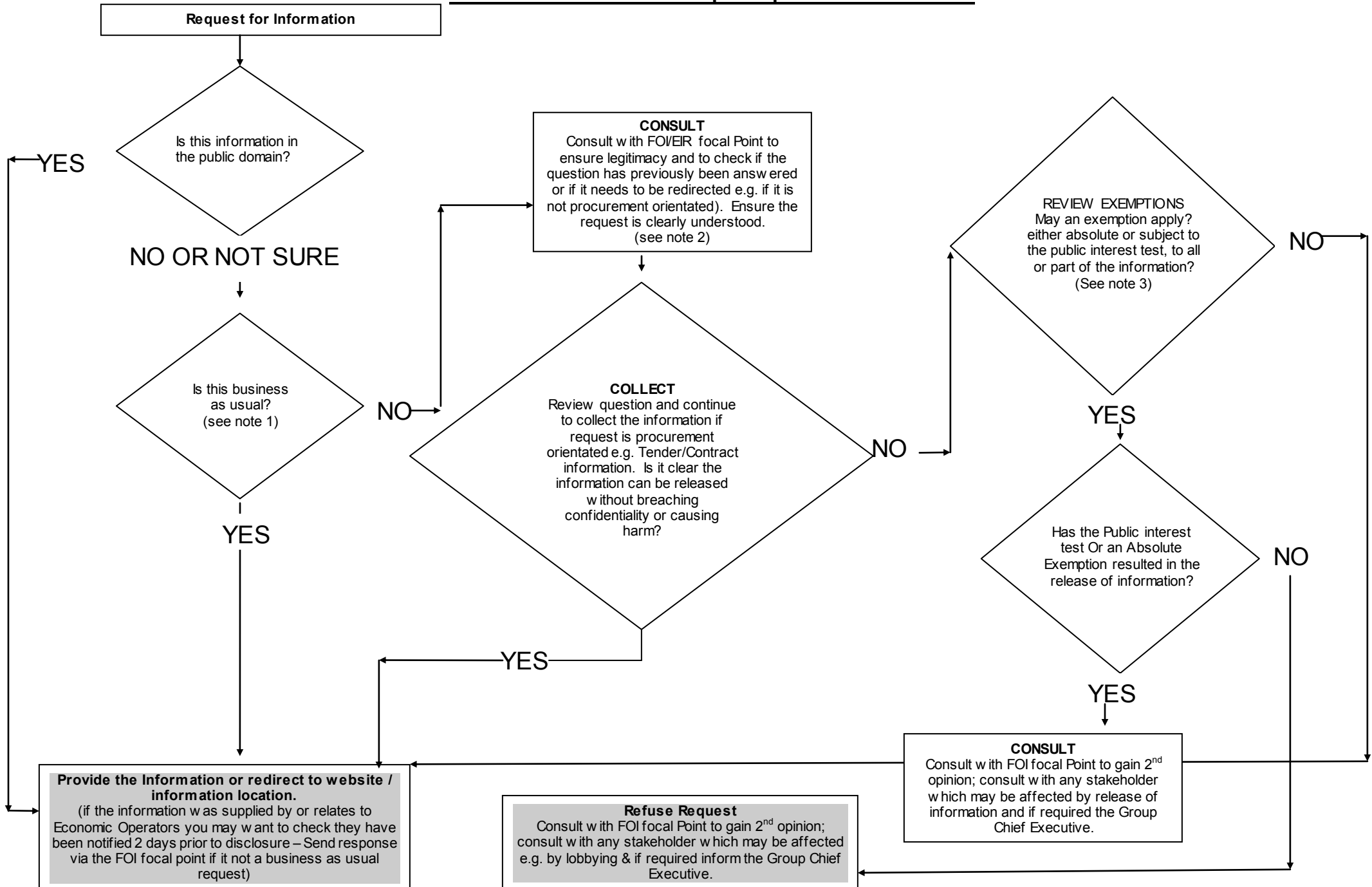



**Freedom of Information request quick reference chart**



The guidance in this document TPP 128 is directed specifically at the Purchasing Department in relation to commercial information only.

Full details of the Purchasing aspects of FOI are contained in the CPD Information Disclosure Guide. General guidance on Translink FOI issues can be obtained from the Translink Records and Information Manager.

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Purchasing Department document in relation to commercial information only FOI, EIR and DP

**Notes for the Freedom of Information request quick reference chart**

**Note 1 What is business as usual?**

Business as usual is things such as official correspondence, telephone enquiries from contractors etc. All Translink FOI requests are co-ordinated centrally (standard response templates should be used). Janice Davidson co-ordinates all FOI responses and co-ordinates with the Records & Information Manager on the application of exemptions. If you are not sure or suspect that you have an FOI request you must forward the request to Janice Davidson for advice and guidance immediately.

**Note 2 Consulting**

Before starting to collect the requested information the Purchasing Department must ensure that the request is clearly understood. It may be necessary to contact the requester to confirm the expectations around the request and to discuss how the Requestor's requirements can be met with minimum effort. If Translink needs further information from the Requestor Translink do not have to comply with the request until extra information is received and the response time halts if you need to contact the person who raised it for further details.

It is also considerate and Translink recommended procedure to inform the relevant 3<sup>rd</sup> party before the information is disclosed although there is no obligation to do so. It is not recommended that the personal details of the applicant who has made the request are revealed to the 3<sup>rd</sup> party.

If a 3<sup>rd</sup> party wishes to make a case for non-disclosure they should be asked to set out their reasons objectively; a simple objection is not sufficient to help Translink make a decision.

If after consultation Translink decide to disclose information against a Contractors wishes Translink should notify the Contractor at least 2 working days prior to the disclosure to enable the Contractor to consider legal action to prevent disclosure.


**Note 3 Exemptions that apply**

The FOI Act recognises that for Government to be effective there must also be limits on openness in areas like commerce. The Act seeks to find the balance between correct disclosure and correct retention. Industry is most likely to be interested in the balance struck on commercial information, as virtually all the commercial information Translink holds falls within the scope of the FOI Act.

The Act lays out 23 situations in which information is considered exempt and any of these could apply to information concerning the relationship between Translink and a contractor.

The CPD Information disclosure guidance has a comprehensive list of the exemptions and this can be found at

[http://www.cpdni.gov.uk/guidance\\_note\\_02\\_08\\_information\\_disclosure\\_for\\_public\\_sector\\_procurement\\_practitioners\\_v2-3.pdf](http://www.cpdni.gov.uk/guidance_note_02_08_information_disclosure_for_public_sector_procurement_practitioners_v2-3.pdf) pages 5-9.

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There are **two commercial related exemptions in the FOI Act that are most likely to apply**, these are:

1. **Section 41 Information which has been provided in confidence** – This exemption is absolute and does not require a Public Interest Test. Please note that this exemption is not as wide as it may first appear. The Information Tribunal has confirmed that information in a contract is not confidential however depending on the circumstances there can be elements of a contract may qualify as confidential it is developing case law that helps to determine if the information is or is not confidential.


Things to consider that may help clarify the situation:

- Would it be likely that the Authority would be sued by another party if it released the information i.e. could it be an actionable breach of confidence?
- Is the information requested trivial or widely publicly available?
- Is the information subject to an obligation of confidence e.g. expressly via a confidentiality agreement or implied because it is routinely treated as confidential in the past.
- Labels of confidentiality, clauses or agreements may not ensure the exemption applies particularly if there is a strong public interest in its disclosure.
- The status of information changes over time; what once was confidential may no longer be confidential.

2. **Section 43 where release of the information is likely to prejudice someone's commercial interests** (will be subject to a Public Interest Test).

Things to consider that may help you to decide if Section 43 applies:

- Is the information a trade secret? In this context a trade secret is not restricted to secret formulas for manufacture but can include information of a non scientific nature like estimating and pricing methodologies or customer names.
- Would it be likely that the disclosure would prejudice the commercial interests of any person including Translink? e.g. if disclosed to a competitor could cause real or significant harm like damage business reputation, competitiveness, future sales or cause damage to Translink when in a tendering process or if by disclosing it Translink would put off future suppliers from providing the information on the same or similar matter. Or there may be a situation where Translink is asked to confirm or deny if they hold information the consideration to disclose may also prejudice commercial interests and be contrary to public interest e.g. advanced knowledge of a takeover.

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Information which would need to be carefully considered and may require consultation prior to release includes sensitive commercial information e.g.:

- Confidential information e.g. tenders, prices, cost structures, performance or financial reports and intellectual property.
- Tender evaluation reports and contracts.
- Submissions to Ministers about procurement matters

The Public Interest Test (PI Test):

The PI Test is referenced in Section 2 of the FOI Act and it is worth noting that ‘interest’ means the ‘greater good’ rather than curiosity.


If a Section 43 exemption is going to be applied then a PI Test must be conducted. The test is to ensure that the public interest in maintaining the exemption outweighs the public interest in disclosing information. Where the disclosure interests outweigh or are evenly balanced with the withholding interests, the requested information must be disclosed as there is a presumption in favour of disclosure in the FOI Act.

Additional time may, in exceptional circumstances, be taken over the 20 working day response providing it is a “reasonable” time and that is for consideration of an exemption with the application of a PI Test. If this additional time is needed the applicant should be informed at the beginning of the process. In addition the extension of time must be claimed in the original 20 working days and the applicant must be told which exemptions may be applied and what the new target date is for a decision. If Translink reach this date and are still not ready to respond Translink must write again to the applicant giving another revised date.


It is important to note that information and its accessibility is not static and may change over time.

**General points to note on FOI:**

- The FOI Act and the EIRs both came into force on the 1<sup>st</sup> January 2005.
- Translink use a Publication Scheme to proactively release information which can be viewed on our website at: <http://www.translink.co.uk/freedomofinformationact.asp>
- Members of the public have a statutory right of access to information held by public sector bodies such as Translink. This means information recorded in any form e.g. hard copy files, e-mails, notes of telephone calls and photographs.
- Any person from anywhere making a request for information, subject to certain exemptions, must normally be supplied the information within 20 working days if Translink hold it. Bank holidays, statutory closures etc. can be excluded from the response time.

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- The Purchasing Department hold significant amounts of relevant commercial information and must take care in this area and not allow time to pass without action.
- All information held by Translink regardless of origin or age falls within the FOI Act. Including information supplied by another person to Translink e.g. by another Public Body like CPD and information held by another person on behalf of Translink e.g. information held for us by a Contractor. If a Contractor holds information for Translink we must ensure that that information can be accessed to enable us to meet any FOI request and this should be part of the contract. This is why one of the measures we take is to reference FOI in our terms and conditions of business.
- It must also be considered that retrieval of information may involve an additional charge if retrieving the information cannot reasonably fall within the scope of the contract but requests from Contractors for payments should be resisted. Translink contracts should include the area of fair and reasonable access to information and Translink does not expect to be charged in such circumstances. In addition if a 3<sup>rd</sup> party wishes to assess if the information would cause them harm if it was disclosed then this activity should also be at their own expense; Translink is not obliged to consult on disclosure and given that it seems very unlikely that Contractors would prefer not to be consulted charging by Contractors is unacceptable. Translink do recognise that in exceptional circumstances recovery of expenses may be required and in which case Translink will consider a payment which it considers fair and reasonable.
- Certain types of information are exempt from disclosure but applicants will be able to appeal if Translink refuses to release information requested or if we fail to comply with any other provision of the FOI Act.
- Good Records Management provides the foundation for cost-effective implementation of the FOI Act and the Purchasing Department must know where their information is held and have control over it. The Purchasing Department's Purchasing Administration Controller is accountable for Records Management within the Department.
- To ease the collection of information Tenderers are asked at ITT stage to return a Freedom of Information Statement and a clause exists in the standard terms and conditions of contract in relation to FOI.
- Much of FOI decisions if applied are subject to the Information Commissioners interpretation on a case by case basis therefore it is difficult to list what would or would not be exempt. An example of this is illustrated at Annex 1.
- Release of commercial information at the wrong time can cause serious harm e.g. programme delays if competitive processes need to be restarted or contract negotiations are hindered, it is important to be mindful of this.

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- All responses on FOI should be handled in accordance with the Code under Section 45 of the FOI Act and therefore the Translink Records and Information Manager must be consulted on the current procedure to be used. The information if disclosed should be considered in the Translink Publication Scheme.
- The names of individuals should be removed from released documents unless it is obvious or permission has been obtained from those individuals. Section 40 of the Act (Personal Information) does not always need to be referenced when removing names.
- The level of signature on the reply to the applicant should be considered, Translink has a duty of care to staff particularly if information is contentious and if in doubt this should be a senior member of staff.
- If after the reply has been sent and if the applicant requests further information it is important not to get drawn into releasing new information at this point. Instead invite the applicant to enter a new FOI request in writing or if they are unhappy with the previous answer remind them of the appeals procedure.
- NITHC / Translink FOI procedures are due to be published in March 2009 and should be referenced for further information.

### **The Environmental Information Regulations (EIR)**

- Unlike the FIO Act EIRs cater for oral requests.
- All exceptions to EIR disclosure are subject to the PI Test.
- Some Exceptions to the EIR include:
  - Protection of Intellectual Property Rights
  - Economic Interests where information was supplied under a duty of confidence
  - Information provided voluntarily by a 3<sup>rd</sup> Party that disclosure of which would adversely affect that 3<sup>rd</sup> Party.
- If an EIR request is received by the Purchasing Department it should be forwarded without delay to the Translink Records and Information Manager for action.

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### **The Data Protection Act (DP)**

- In contrast to FOI and EIR requests the DP Act applies to information held about an individual and requested by that individual. DP requests should be redirected to the Translink Records and Information Manager and great care in this area should be taken; the consequences for incorrect disclosure can be serious.
- However requests for commercial information may involve personal data and this is subject to the FOI Act. The exemption at Section 40 of the FOI Act will need to be used. Section 40 references the 8 principles in the DPA Act and states that disclosure must not contravene them. The most relevant of these to Procurement is that personal data be processed fairly, lawfully and without deception.
- The most likely risk to Purchasing is that we unlawfully disclose personal data that is held in confidence such as information provided under TUPE. The information released can be a summary of data but must not readily identify the individuals.
- The next situation that may arise is from the element of fairness (although this is a vague concept) for example we might inadvertently disclose when releasing information some personal information (e.g. a person's name) and it could be argued that this would cause disclosure unnecessary distress or damage to the individual. Care must be taken when releasing documents which may include such information.
- Reference should be made to the NITHC / Translink DPA Policy and associated guidelines for further information.


Further Reading CPD web site: Information Disclosure Guide.

[http://www.cpdni.gov.uk/guidance\\_note\\_02\\_08\\_information\\_disclosure\\_for\\_public\\_sector\\_procurement\\_practitioners\\_v2-3.pdf](http://www.cpdni.gov.uk/guidance_note_02_08_information_disclosure_for_public_sector_procurement_practitioners_v2-3.pdf)

Information Commissioner's Office:

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_5\\_annexe\\_v3\\_07\\_03\\_08.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_5_annexe_v3_07_03_08.pdf)

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_12\\_info\\_caught\\_by\\_foi\\_act.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_12_info_caught_by_foi_act.pdf)

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## ANNEX 1

**Press Release**  
**For immediate release**  
Date: 27 June 2008

### **ICO orders council to release contract with financial details**

The Information Commissioner's Office (ICO) has ordered Mid Suffolk District Council to release a contract with a commercial partner, including the financial details, concerning the work to carry out repairs and maintenance at Mid Suffolk Leisure Centre. The ICO has dismissed the possibility that releasing the contract would be likely to prejudice the commercial interests of the council or the contractor.

The council initially provided a redacted version of the contract but told the requester that it was unwilling to release the financial details. The council provided a number of reasons including that disclosure would breach confidentiality, set a precedent and may prevent it from obtaining the best possible price for future work or projects.

In her ruling, Assistant Commissioner, Anne Jones, refused to accept that disclosure would be likely to lead to any change in the tendering process or undermine the council's ability to achieve best value for money. The contract in question dates back to 2004. She also refused to accept the council's suggestion that disclosure would deter organisations from entering into business with public authorities on the basis that council contracts are a lucrative source of business for commercial organisations.

The Assistant Commissioner has criticised Mid Suffolk District Council for taking several months to deal with the complainant's request for an internal review. The ICO also criticised the council for unacceptable delays in providing additional information and explanations throughout the investigation. The council repeatedly refused to provide material in a timely manner and the ICO has now formally reminded the council of its obligations under the Freedom of Information Act.

Mid Suffolk District Council has 35 days from the date of the decision notice to release the information outlined in the notice.

You can find a copy of the decision notice at the ICO website.

### **ENDS**

If you need more information, please contact the Information Commissioner's press office on 020 7025 7580.