

Annex B - Guidelines For Disclosure Of Commercial Information Under The FOI Act.

Commercial Information

1. Information is made available to MOD throughout the contracting process, from initial expressions of interest through to the discharge of the contract, and occasionally beyond.
2. The safeguarding of information which if disclosed would prejudice the commercial interests of any person, including the Public Authority holding the information, has long been a requirement in MOD procurement.
3. Commercially sensitive information can be reasonably expected to benefit from the protection of either the exemption set out in the FOI Act at Section 41 - Information Provided in Confidence or Section 43 - Commercial Interests, which is subject to the PI Test.
4. Acquisition teams should, however, reject any attempt by Industry to mark information in a way that purports to judge whether an exemption is applicable or grant a veto on disclosure to the originator. According to the FOI Act, MOD must always make the decision on whether or not to disclose the information.
5. Acquisition teams will have to be cautious about making assumptions about the reduction of harm that might arise from disclosure of commercial information as a result of the passage of time.
6. In general the commercial sensitivity of information will decline over time to the extent that the harm arising from disclosure will be minimal and outweighed by the public interest in openness. However, in a competitive environment Industry will always be looking for historical information about competitors from which to draw inferences about future performance to detriment of the owner of the information.
7. Technical information very rarely loses its commercial potential in some part of the world - old technology in the UK may be regarded as still useful in other countries and still capable of being licensed and controlled by the owner, provided it has been kept private.
8. Acquisition teams should be aware of their legal obligations to Industry, as there are likely to be confidentiality provisions such as DEFCON 531 in contracts. In some cases separate confidentiality agreements will have been entered into before Industry submitted sensitive information to MOD.
9. There may also be circumstances, such as a PFI contract, where information requested is both commercial and personal, (e.g. TUPE information). Acquisition teams will therefore have to bear in mind their obligations under the Data Protection Act and the Environmental Information Regulations.
10. The aim of this Annex is to set out the common issues that may need to be addressed when dealing with requests for different types of commercial information.

Each case must be treated individually and on its own merits. These guidelines set out what the 'normal' response should be.

The Approvals Process

11. Requests may be received for information behind an MOD investment decision that would involve drawing upon or providing a specific Business Case or Investment Approval Board (IAB) papers or submissions, which include commercially sensitive information. Each request would have to be treated on its merits. The notion of being subject to public scrutiny may seem uncomfortable, but it will increasingly be the norm and it must be the expectation.

Section 35 (Formulation of Government Policy, etc) Exemption

12. If Ministers were involved in the approval process then their views should be sought at the outset. If Ministers from a previous administration were involved then advice should be sought from DG Info Access. Ministerial correspondence and related submissions may be protected, subject to the PI Test, by the exemption at Section 35 (Formulation of Government Policy, etc).

Section 36 (Prejudice to the Effective Conduct of Public Affairs) Exemption

13. The IAB Secretariat and other participants should also be consulted to determine whether the exemption at Section 36 (Prejudice to the Effective Conduct of Public Affairs) should be considered on the grounds that disclosure would hinder the frank exchange of views between officials, or would otherwise prejudice the effective conduct of public affairs. This exemption requires a 'qualified person', in MOD this falls to a Minister, to decide that the s.36 exemption is engaged. Officials should carry out a PI Test and include this information in the submission seeking the Minister's decision. The submission must also include all the information within scope of the request to allow the Minister to make a fully informed decision.

Section 41 - Information Provided in Confidence & Section 43 - Commercial Interests Exemptions

14. Confidential information from Industry set out in the approvals papers or submissions will be protected by the absolute exemption at Section 41 - Information Provided in Confidence where its disclosure would result in an actionable breach of confidence, i.e. someone could bring a legal action against MOD with a reasonable prospect of success.

15. If the request is received before a decision has been made on the investment, acquisition teams should recommend refusal of a request for commercially sensitive information citing the exemption at Section 43 - Commercial Interests on the grounds that:

a) Safeguarding commercially sensitive information is crucial to MOD's ability to fairly and effectively conduct its approval process.

b) MOD must protect its business reputation for even-handed treatment of tenderers and protect its staff from accusations of impropriety.

c) If Industry do not have confidence that information they provide to MOD will be adequately protected, the volume and quality of information provided will suffer.

16. If the request is received after a decision has been made on the investment, acquisition teams must provide an explanation of why the investment was approved. Where an applicant seeks details beyond this explanation, each case will have to be treated on its merits. In order to protect commercially sensitive information acquisition teams should consider the exemptions at Section 41 - Information Provided in Confidence and Section 43 - Commercial Interests.

17. For major projects, acquisition teams may wish to consider putting an explanation regarding investment decision made on to the MOD Publication Scheme to avoid having to answer individual requests for information.

Section 26 – Defence Exemption

18. Any part of the approval documents that set out measures for the maintenance of essential supplies/services that are, or would be, needed in times of conflict may be protected if disclosure is likely to prejudice the effectiveness of the Armed Forces by the exemption at Section 26 - Defence subject to the PI Test.

Published Commercial Information

Section 21 - Information Accessible by Other Means Exemption

19. The Official Journal of the European Union, the European Defence Agency's Electronic Bulletin Board and the MOD Contracts Bulletin regularly publish contract information. A great deal more information is provided in the reports by the National Audit Office to Parliament about major defence projects. Reports are also produced by the Review Board for Government Contracts, a Public Authority in its own right.

20. The MOD Publication Scheme was launched in November 2002. It is a catalogue of information telling the public where to find information and whether there is a charge. The scheme includes links to the Commercial Toolkit (CMT) and to information on subscription to the MOD Defence Contracts Bulletin.

21. Commercial information that is reasonably accessible to the public by other means does not have to be disclosed in response to individual requests under the FOI Act, regardless of whether or not there is a charge for the information. Geographical separation of source and requester will be a factor for consideration in deciding whether access is reasonably convenient.

22. In responding to requests for published commercial information, acquisition teams should tell applicants where to find the information, but not provide the information itself citing the absolute exemption at Section 21 - Information Accessible by Other Means.

Section 22 - Information Intended for Future Publication Exemption

23. Commercial information intended for publication may also be protected by the exemption at Section 22 - Information Intended for Future Publication, which is subject to the PI Test.

24. Acquisition teams must consider whether premature release of the information would harm the procurement process (e.g. where published commercial information needs to be made available to all interested parties at the same time to ensure equal treatment). Moreover, acquisition teams should be wary of setting a precedent that may harm the publisher of the information, particularly if publication of the information is imminent.

Competitive Tendering Process

25. Sufficient information should be made available to the public to preserve the accountability of the tendering process. However, disclosures must not unduly impede MOD in its effective pursuit of value for money or compromise the confidentiality of the tenders.

26. Protecting the confidentiality of information received by MOD from Industry is important to encourage the provision of full information by tenderers and to promote the equal treatment of tenderers by ensuring that details of individual tenders are not disclosed.

27. Each request for information received on the tendering process must be treated on its merits. Where such requests relate to information generated or provided by tenderers, the tenderer must be asked to provide, in writing, reasons for any claim to confidentiality and the potential for disclosure to cause harm.

28. DEFFORM 47 requests that tenderers provide a named individual within the company to handle FOI enquiries. Acquisition teams should compile such contact details into a list to be made available to those dealing with FOI requests.

Tender Information Before Contract Award

29. **Before contract award, the exemption at Section 43 - Commercial Interests should be cited to refuse to provide any tender related information where disclosure would cause prejudice to MOD's commercial interests, i.e. by harming its ability to conduct an effective competition, which requires encouraging the provision of full information by tenderers and maintaining strict equity amongst the tenderers.**

30. There is a strong public interest in MOD being able to maintain the confidentiality of the tendering process so that its competitions are not undermined. Moreover, the exemption at Section 41 - Information Provided in Confidence should also be cited to protect Industry's tender submissions at this stage.

31. The implications of disclosure are more serious as the competition and approvals process moves towards a decision. This is also the time where efforts to

extract information relating to the conduct of a competition and the relative strengths of competing tenders will be most concentrated.

32. Incorrect disclosure of tender information could require the competitive process to be restarted, at significant cost to MOD in terms of both nugatory effort and programme delay, and to Industry in terms of additional tender preparation time, thus incurring additional costs. In addition the MOD's ability to generate genuine competition may be compromised where information is disclosed when a further competition is planned and/or a contract has not been finalised.

Tender Information After Contract Award

Contact Award Decision

33. MOD has decided to publish information on contract award that it cannot reasonably expect to protect under the FOI Act. This will mean that the information will not have to be provided in response to individual requests for information. The contractor is given advance notice in DEFFORM 47 so it can identify specific harm in disclosing the information, which may only be withheld on an exceptionally basis.

34. MOD will routinely publish in the Official Journal of the European Union, the European Defence Agency's Electronic Bulletin Board and the MOD Contracts Bulletin the following information:

- a) contractor's name;
- b) nature of the goods or services to be supplied;
- c) award criteria;
- d) rationale for contract award;
- e) price of the winning tender; and
- f) identities of unsuccessful tenderers.

35. **After contract award, acquisition teams must be prepared to provide, upon request, a full explanation of how and why the contract was awarded.** For the award of major public contracts, acquisition teams may wish to consider putting this explanation on to the MOD Publication Scheme to avoid having to answer individual requests for information.

Tender Evaluation

36. If a request is received asking for more details on why a contract was awarded, acquisition teams should consider in consultation with the winning tenderer the commercial sensitivity of the data used in the process to award the contract.

37. If release information on tender evaluation could disadvantage the tenderer in the market or otherwise damage its commercial interests then it is unlikely that the

data would be released. Acquisition teams should consider citing the exemption at Section 43 - Commercial Interest in order to redact the commercially sensitive information.

Winning Tender Submissions

38. The general approach to a request for a copy of the winning tender will be to exempt certain elements of successful tender submissions while disclosing others. After contract award, the following information is unlikely to be exempt:

- a) identity of the successful tenderer;
- b) nature of the service or goods to be supplied;
- c) criteria, sub-criteria and weightings used to award the contract;
- d) total price (e.g. £325M) of the winning tender, unless the tenderer can establish that it could materially disadvantage the tenderer in the market place; and
- e) marketing and promotional information from the tenderer.

39. If the applicant requests a copy of the winning tender submission then the acquisition teams must review the document after consulting the winning tenderer. The commercially sensitive content of the winning tender should be protected citing Section 41 - Information Provided in Confidence or Section 43 - Commercial Interests.

40. The Section 26 - Defence exemption should be considered to protect sensitive information relating to the technical specification and performance of defence equipment/material.

Unsuccessful Tender Submissions

41. A distinction has to be drawn between successful and unsuccessful tenderers. The unsuccessful tenderers have not had the benefit of the award of a public contract that might outweigh any detriment arising from disclosure of information about the successful tender. Accordingly, the commercially sensitive content of unsuccessful tenders should be protected citing the exemptions at Section 41 - Information Provided in Confidence and Section 43 - Commercial Interests. However, the identities of the unsuccessful tenderers are not generally commercially sensitive and should be disclosed.

Age of Tender Submissions

42. The age of the tender submission must be taken into account in determining the commercial sensitivity of the tender. Harm arising from release of the sensitive parts of the tender could decrease given the passage of time. For example, if release of the winning tender price is withheld on the grounds that it would allow rival companies to underbid for a similar requirement abroad. After a number of years have elapsed, the sensitivity of the information could have reduced to the point where the information can be released.

Contract Information

General

43. Acquisition teams should allow greater access to information about the contract once it has been finalised. Such openness will reinforce the effects of wider public sector reforms in encouraging better internal management, making departments more accountable, and raising the profile of competitive tendering within government.

44. Information should therefore be made available unless there is a sound basis that such a disclosure would prejudice the commercial interests of MOD and/or Industry. In such cases acquisition teams should apply the exemptions at Section 41 - Information Provided in Confidence and Section 43 - Commercial Interests. In general at the mid point of contract performance acquisition teams should be ready after consultation with the contractor to release more detail about the contract.

Cost of Compliance

45. At the outset the acquisition team should estimate the cost of determining whether MOD holds the information and of locating, retrieving, extracting the information.

46. The cost of compliance with the request should not exceed £600 (made up of the staff costs based on a fixed hourly rate of £25 and other costs of collecting the information) above which MOD is not obliged to supply the information although we still have to consider providing information up to the appropriate limit. You should consult with the requestor before providing any information to ask what information that can be provided best meets their needs.

47. The cost of physically redacting exempt information this information counts towards this estimate. Most of the requests for contract information received so far have resulted in a redacted version of the contract being disclosed and experience suggests the effort of just redacting around 350 pages of a contract may exceed the financial limit. However, an estimate of cost needs to be made for each case.

Contract Information

48. Non-standard terms and conditions may be commercially sensitive. Whilst there may separate security concerns that would prohibit disclosure, commercial sensitivity should not normally extend to:

- a) the name of the contractor;
- b) the description of the requirement that might have already been set out in the Official Journal of the European Union and/or the MOD Contracts Bulletin;
- c) the total value of the contract;
- d) the contract start date;

- e) the contract end date;
- f) whether each contract contains provisions requiring the parties to maintain confidentiality of any of its provisions;
- g) a statement of the reasons for confidentiality;
- h) standard contractual clauses used in the contract;
- i) performance measurement;
- j) performance and financial guarantees after any financial sensitivity to the contractor has expired;
- k) payment or invoicing arrangements after any financial sensitivity to the contractor has expired;
- l) standard indemnities (e.g. refit and repair of naval vessels, shipbuilding contracts, nuclear submarine builders, nuclear risks, research & development contracts - guided weapons and diversion of orders to MOD from other customers);
- m) whether rebate, liquidated damages and service credits clauses are included in the contract - the details of which may only be releasable after the financial sensitivity to the contractor has expired; and
- n) information about service standards where a contractor is delivering services directly to the public.

Contract Drawings and Maps

49. Acquisition teams will need to treat on its merits each request for drawings and maps included in contracts. Acquisition teams should be careful not to withhold information on the grounds of security when it is already in the public domain. The Ordnance Survey publishes maps which show MOD establishments down to a level of detail that identifies buildings and roads. Moreover, aerial photographs of the whole country are in the public domain, which will inevitably include images of MOD establishments.

50. Acquisition teams should be careful of disclosing a further level of detail that would indicate for example what is taking place or being stored in particular buildings. The exemption at s24 - National Security should be considered to withhold detailed maps/drawings if the establishment is regarded as being vital to the security of the United Kingdom, e.g. if the release of the maps/drawings would aid a terrorist in successfully targeting the establishment. However, it would be hard to justify using s24 for a training base, administration site, etc. Acquisition teams should consider using s26 - Defence in those instances. Info-Access Pol 1 must be informed when using s.24.

51. If acquisition teams need to consult on the security aspects of releasing maps/drawings, they should contact the Principal Security Adviser in the TLB or Trading Fund and the Establishment and Security Officers of the site concerned who

should understand the implications for the release of maps/drawings and will, if necessary, seek policy advice from Department of Defence Security (DDefSy).

Contract Negotiations

52. The Information Tribunal has recognised the commercial interests of a public authority might be prejudiced if "certain information in relation to one transaction were to become available to a counter party in negotiations on a subsequent transaction".

53. To establish prejudice to MOD's bargaining position, MOD would have to be planning or active in negotiations for goods or services, which are similar enough to be treated as true comparables for negotiation purposes. Moreover, the terms and conditions of the existing and future contracts need to be similar enough to allow a true comparison between them.

54. In such cases MOD's use of the exemption at Section 43 - Commercial Interests depends on constructing a reasonable case that disclosure is likely to adversely affect achieving value for money in the negotiations.

55. Acquisition teams, therefore, need to consider how value for money is to be achieved in the procurement and what information is already available in the public domain before making this judgement. In any case, prejudice is likely to diminish with time and, in due course, the potential damage to the MOD's bargaining position will no longer outweigh the public interest in disclosure.

Price Information

56. Incorrect disclosure could hinder the future supply of pricing information from Industry that would adversely affect MOD's ability to achieve value for money in non-competitive procurement. Care therefore needs to be taken not to unduly impede MOD in the effective pursuit of its business.

57. Each request for pricing information should be treated on its merits with the contractor being asked to provide, in writing, reasons for any claim to confidentiality (e.g. arising from DEFCONs 127 or 643) and whether the contractor believes the company would suffer harm from disclosure.

58. The total price of the contract will be generally disclosed, as it is unlikely to be confidential. Price is one of many factors considered in awarding a contract. The contract value should be made available to the public to preserve accountability for the spending of public money. For major projects, the headline figures may include the price for readily identifiable sub-systems (e.g. the engine of an aircraft). Acquisition teams should agree any further breakdown of the price with the contractor concerned before releasing it.

59. Line item and unit pricing (including option year prices) will be generally withheld by using the exemptions at Section 41 - Information Provided in Confidence if the contractor is likely to suffer competitive harm because its competitors are likely to use its line item pricing to underbid the company in future competitions.

60. A contractor's pricing structures, internal costing information or information about its profit margins will be generally withheld for information received from industry or Section 43 - Commercial Interests for MOD's analysis of industry's information. However, if there is evidence of fraud, profiteering or some other sharp practice, the PI Test under Section 43 would favour disclosure.

Technical Information

61. Technical information will have commercial value, a long shelf life and significant development costs. Where technical information is Industry's intellectual property, MOD would normally receive the information pursuant to a contract containing DEFCON 531 that obliges MOD to treat all information supplied under the contract in confidence. Where this information is clearly confidential in nature and there would be clear harm from disclosure of the information (e.g. rival companies could exploit this knowledge), Section 41 - Information Provided in Confidence would normally be cited to withhold the material.

62. If there is any doubt whether there is a legal obligation of confidentiality with regard to Industry's intellectual property (e.g. the obligation is implied rather than explicit) then the exemption at Section 43 - Commercial Interests should also be cited. There is likely to be little public interest in the release of Industry's technical information unless it underpins a major acquisition decision or there is a public safety issue.

63. Where technical information is MOD's intellectual property, there would be clear harm to MOD's commercial interests to release its intellectual property at less than its market price. The public has paid for this intellectual property and it is in their interest that the value of their investment is protected. Neither is it in the public interest that the MOD budget should be denied future income from exploiting its intellectual property.

Commercial Information From Foreign Governments

64. Acquisition teams may receive requests for information that will require consideration of both commercial and international sensitivities. This will probably require an extended period of consultation with foreign Governments, international bodies and overseas contractors in order to assist MOD assess where the public interest lies. Where such extended consultation is required the applicant should be immediately informed that the request may take, for example, 60 days to handle.

65. MOD has several hundred Memoranda of Understanding (MOU) and Information Exchange Programmes ranging from bilateral defence materiel relationships to specific arrangements for research or equipment collaboration. Although these MOUs are not legally binding, they nonetheless represent formal governmental commitments and most contain references to general security arrangements and provisions about the handling of information. International information is also received through overseas contractors under the auspices of an export licence where MOD is obliged to restrict disclosure.

66. The breach of a non-disclosure provision in an MOU, or the terms of an export licence, or release of any international information without consent

of the originator has the potential to seriously undermine international relationships and to curtail the future flow of information.

67. International project offices may prepare and issue statements of work, invitations to tender and contracts for co-operative acquisition projects on behalf of the partner nations. MOD is subject to the FOI Act. Any organisation which is part of MOD must respond to requests for information. Therefore:

a) If an international project office is an integral part of MOD or an acquisition team within MoD has assumed the role of an international project office then the international project office/acquisition team is subject to the FOI Act; and

b) If the international project office is not part of MOD (e.g. located in an international armaments agency or part of a foreign Government) then it is not subject to the Act. However, information held by MOD originating from the international project office is subject to the FOI Act. If an applicant submits a request for that information then it must be handled by MOD in accordance with the FOI Act.

68. Under the FOI Act, every request must be considered on its merits and a case recorded for or against disclosure. However it is likely that **in all but the most unusual circumstances MOD will refuse to release confidential information received from foreign Governments unless they consent to the disclosure.**

69. Acquisition teams should check that the requested information is not available to the requester directly from the foreign Government before refusing the request by citing the Section 27 - International Relations exemption.

70. **If it is deemed that maintaining international relationships must always be the paramount concern, it is likely that it will be necessary to refuse requests for information originating abroad if the Government concerned objects.** This resistance would need to continue in the event of any appeal and ultimately could require use of the Ministerial veto to bar even the release of unclassified information that has no intrinsic sensitivity.

Industrial Restructuring

71. Acquisition teams may become aware of a proposed merger or acquisition of defence companies either through an informal approach or during the formal consideration under the UK Enterprise Act and/or European Community Merger Regulation.

72. Before the formal announcement puts the information into the public domain, acquisition teams should refuse to confirm or deny that MOD holds any information about the restructuring citing the Section 43 - Commercial Interests exemption. Disclosure would cause harm to companies as it would affect the share prices. Even if MOD has no prior knowledge of the restructuring MOD would still have to issue a standard 'neither confirm nor deny' as any other response may arouse the suspicions of the markets.

73. The period of market sensitivity is relatively short given that a formal announcement by the parties involved immediately places the knowledge of a

proposed transaction into the public domain and hence no exploitation or harm is then possible.

74. After the formal announcement acquisition teams should consult the Directorate of Supplier Relations and the companies involved about disclosing any restructuring information. MOD would generally at this stage acknowledge that consideration was being given to the national security implications of the restructuring and after a decision was reached release its views on the impact of the restructuring on the defence sector.

Financial Status Of Companies

75. Where financial weakness of a company may be suspected any leakage of information to third parties at this stage could be damaging to business confidence in the company at a possibly critical time in its affairs. This could have serious consequences, both for MOD and the company. Acquisition teams should refuse any requests for information citing Section 43 - Commercial Interests in all but the most unusual cases.

Shared Data Environments

76. A Shared Data Environment (SDE) allows authorised users controlled access to information and applications agreed to be made available in support of their shared business processes. SDEs may contain not only information which is contractually required to be supplied under project contracts placed by MOD, but also further information provided informally by MOD contractors, subcontractors and suppliers and other third parties relevant to, and to facilitate the delivery of the project.

77. Access control is a critical issue in a SDE. Users will only make information available if they are satisfied that their rights are properly protected and that only designated users will be able to access information for legitimate project purposes. One of the principal tenets of providing access to information is the need for trust. It is imperative, therefore, that all users of the SDE protect the privacy and commercial sensitivity of the information accessed through the SDE.

78. To facilitate this in all cases there needs to be a formal confidentiality agreement and clear understanding of what information MOD holds in the context of the FOI Act. It is also important to clearly establish what information in the SDE is held on behalf of MOD (i.e. whether it falls within the scope of the FOI Act. Work in progress (i.e. information that MOD have access to before its contracted delivery date) should not fall into this category, neither should information to which MOD is permitted reading access only for a narrowly defined management purpose.

Protective Markings

79. Protective Markings and descriptors (e.g. Restricted – Commercial, Restricted – Contracts, Protect – Commercial & Protect - Contracts) dictate how information is stored, copied and communicated. They do not, in themselves, mean that information is properly exempt from disclosure under the FOI Act. Consideration

must be given to the sensitivity of the information at the time of a request for disclosure and what prejudice is likely to arise from its disclosure.

Re-Use of Information: Click-Use System

80. The Click-Use Licence was launched to encourage the re-use of public sector information in order to stimulate the information and publishing industry. It allows public sector information to be re-used in information products and services with the minimum of bureaucracy via a simple, online transaction.

81. Under the Re-Use of Public Sector Information Regulations, public sector organisations have a responsibility to publish standard licence terms, preferably online. Public authorities authorise Office of Public Sector Information (OPSI) to license the re-use of certain categories of their information under the Click-Use Licence. For further information, the series of guidance notes OPSI have published to provide practical help to public sector organisations on how they can meet their responsibilities under the regulations can be found at <http://www.opsi.gov.uk/advice/psi-regulations/advice-and-guidance/psi-guidance-notes/index.htm>.

82. Acquisition teams should note that licensing of Public Sector Information requires the authority of either DIPR or one of the Trading Funds.

Copyright

83. If MOD is complying with its statutory duty under the FOI Act to release information to an applicant then MOD will not be in breach of The Copyright, Designs and Patent Act 1988 (CDPA).

84. The FOI Act specifically authorises release of the information to an applicant, even if it is in such a form as would otherwise breach the copyright interest of a third party. When copyright material is provided to the requester, this should be marked with a copyright legend warning that a licence or permission will be required from the copyright owner for further copying. The CDPA will continue to protect the rights of the copyright holder once the information is received by the applicant.

85. Where the disclosed information may be subject to copyright, the covering letter to the applicant should contain the following warning:

The information supplied to you continues to be protected by the Copyright, Designs and Patents Act 1988 (the CDPA). Unless specifically permitted by the CDPA, any reproduction of the information, in whole or in part, requires the permission of the copyright holder. Most documents supplied by the Ministry of Defence will have been produced by government officials and will be Crown Copyright. You can find details on the arrangements for re-using Crown Copyright from the Office of Public Sector Information at:

<http://www.opsi.gov.uk/click-use/index.htm>.

Information you receive may also include third party owned information. Such information must not be reproduced, in whole or in part, without first obtaining the permission of any such third party rights holder.”

86. Acquisition teams should be clear what is normally prohibited by the CDPA (i.e. the copying of a document or a substantial part of a document). If a request was made for a copy of a particular document and MOD did not own the copyright to that document or have a licence to use it, as a matter of policy, acquisition teams should take all reasonable steps to protect the copyright.

87. In order to protect the copyright it may be possible to give the person access to read that document which would not constitute infringement of the owner's copyright. In the case of a more general request, if a small insubstantial part of that document needed to be quoted in order to respond, that would not be prohibited by the CDPA although care would need to be taken not to infringe copyright when drafting a synopsis of the document. Advice should be sought from the Intellectual Property Rights Group.

88. Infringement of copyright may result in the commercial interests of the owner being prejudiced and the exemption at Section 43 - Commercial Interests may need to be considered. Where the copyright owner is known, acquisition teams should consult to ascertain the extent of the harm that would result from disclosure.

Confidentiality Clauses

89. In drafting bespoke confidentiality clauses in contracts acquisition teams must secure the protection of commercially sensitive information provided to MOD without creating an unduly wide exclusion from the FOI Act. Use of such confidentiality clauses must be capable of being justified by the nature of the information being disclosed.

90. MoD and Industry have agreed the wording of an amendment to DEFCON 531 to take account of the FOI Act resulting in Edition 05/05 of DEFCON 531. This edition protects MoD from a breach of contract where it is required to disclose information under the FOIA or the EIRs. It also sets out that before any such disclosure MoD will consult Industry and in any event notify them of the disclosure. Edition 05/05 of DEFCON 531 is to be used in all new contracts. Acquisition teams may at their own discretion decide to amend existing contracts to include Edition 05/05 of DEFCON 531.

91. Edition 05/05 of DEFCON 531 took many months of careful negotiations in order to strike a balance between the requirement to protect commercially sensitive information and our obligations under the FOIA and the EIR. Consequently no additions or amendments to this DEFCON on the FOIA and/or the EIR are to be offered or accepted.
