Public sector clients in the Republic of Ireland carrying out procurement processes are seeing an increase in requests for the disclosure of tender information pursuant to the Freedom of Information Act 2014. Requests for such information generally tend to emanate from entities who have participated in the procurement process and ultimately been unsuccessful; however, it should be noted that such requests are not confined to disappointed tenderers and anyone can make a request for the disclosure of tender information.

Given the rise in FOI requests for access to tender information, it seems timely to set out some of the key principles established in Decisions of the Irish Information Commissioner relating to disclosure of tender information. Such requests will generally be considered by the Information Commissioner in the context of the exemptions at section 35 (Information obtained in confidence) and section 36 (Commercially sensitive information) of the FOI Act 2014.

**Sections 35 and 36**

In summary, section 35 provides that an FOI request shall be refused where:

- it concerns information given to the FOI body in confidence and on the understanding that it would be treated as confidential and its disclosure would be likely to prejudice the giving to the body of similar information and it is of importance to the body that such information continue to be given (section 35(1)(a)), or

- disclosure would constitute a breach of a duty of confidence provided for by an agreement or enactment or otherwise by law (section 35(1)(b)).

Section 35(1)(a) is subject to a public interest test so that such information will generally be released if the public interest would, on balance, be better served by granting than by refusing to grant the FOI request.

In summary, section 36 provides that an FOI request shall be refused if it concerns:

- trade secrets (section 36(1)(a)),

- financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession (section 36(1)(b)), or

- information which could prejudice the conduct or outcome of contractual negotiations (section 36(1)(c)).

Section 36(1) is also subject to a public interest test.
**Key decisions and principles**

Key decisions of the Information Commissioner on disclosure of tender information include:

- Henry Ford & Sons Ltd, Nissan Ireland and Motor Distributors Ltd and the Office of Public Works (Case Number 98049);
- Mr Mark Henry and the Office of Public Works (Case Number 98188); and
- McKeever Rowan Solicitors and the Department of Finance (Case Number 99183).

The principles established in these cases can be summarised as follows (although it is important to note that the decisions are very fact-specific):

- Public bodies are obliged to treat all tenders as confidential at least until the time that the contract is awarded (Case Number 98188).

- There is generally a distinction between the treatment of information provided by successful and unsuccessful tenderers, with the successful tenderer’s information more likely to be released. This is usually on the basis that as the successful tenderer will be in receipt of public funding, there is a public interest in ensuring the maximum openness in relation to the use of public funds. There is generally considered to be no public interest in the release of commercially sensitive information about unsuccessful tenderers who have received no public funding.

- The commercial sensitivity of information usually decreases over time. Only in "exceptional circumstances" will historic prices remain trade secrets (Case Number 98188).

- When a contract is awarded, successful tender information loses confidentiality with respect to price and the type and quantity of the goods supplied. The public interest also favours the release of such information but exceptions may arise (Case Number 98188).

- The argument that a tender price is a trade secret cannot apply to a tender price after the conclusion of the tender process. Whilst the Information Commissioner accepted that during the currency of the tendering process, the price offered by each tenderer was confidential and a trade secret, he held that the secrecy of some information might be short-lived and concluded that tender prices could no longer be considered to be trade secrets after the tender process has concluded (Case Number 98049).

- Commercial aspects of tenders can be protected. In contrast to tender prices, the Information Commissioner accepted as a general proposition that a company’s current pricing strategy or otherwise unavailable product information could be a trade secret even following the conclusion of a tender competition (Case Number 98188). Consequently, information relating to the compilation of prices (for example, financial models or pricing mechanisms) may be exempt for disclosure.

- With regard to the tender of the successful tenderer, details of the internal organisation of the successful tenderer’s business, analyses of the requirements of the public body, or detailed explanations as to how the tenderer proposes to meet the requirements may remain confidential after a contract is awarded (Case Number 99183).

- In relation to evaluation reports, the assessment of low-ranked tenderers may be withheld as negative comments about such tenderers could prejudice the position of the firms concerned. Comments about the highest-ranked tenderers are more likely to be released as the comments are likely to be positive (Case 99183).

- No tender-related records are subject to either release or exemption as a class. Each record relating to a tender competition must be examined on its own merits in light of the relevant circumstances (Case Number 98188).

**Guidance**

Helpful guidance for authorities on FOI and tender documentation can be found in the following documents:


**For more information, please contact:**

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Áine Smith</td>
<td>Consultant</td>
<td>+353 1 6441 474 <a href="mailto:ainesmith@eversheds-sutherland.ie">ainesmith@eversheds-sutherland.ie</a></td>
</tr>
<tr>
<td>Peter Curran</td>
<td>Partner</td>
<td>+353 1 6644 990 <a href="mailto:petercurran@eversheds-sutherland.ie">petercurran@eversheds-sutherland.ie</a></td>
</tr>
</tbody>
</table>