



SCOTTISH EXECUTIVE

Health Department
Directorate of Performance Management & Finance

Dear Colleague

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002: PUBLICATION OF PPP CONTRACTS AND CAPITAL BUSINESS CASES

1. This guidance advises of the Scottish Executive Health Department's policy on openness in relation to the publication of contracts and other key documents in accordance with the above Act which has been fully implemented from 1 January 2005. It incorporates and replaces earlier guidance contained in [NHS HDL \(2002\) 49](#) issued on 13 June 2002.

Background

2. From 1 January 2005 every person is entitled to make a request for information to a public authority (such as a NHS Board) under the Freedom of Information Act.

3. The Freedom of Information Act aims to increase openness and accountability in government and across the Scottish public sector by ensuring that people have the right to access information held by Scottish public authorities. It also applies to companies wholly owned by a public authority and, if designated, it may even apply to private companies carrying out a function for a public authority, for example under a contract.

4. The Act applies to all recorded information, however old or recent, and whoever produced it. There is a strong presumption under the Act that information will be disclosed. However there are exemptions for key interests – eg commercially sensitive information, policy/internal deliberation.

5. Part 2 of the Act, which can be accessed at www.scotland-legislation.hmso.gov.uk/legislation/scotland/acts2002/20020013.htm provides full details of these exemptions.

22 April 2005

Addressees

For action

Freedom of Information officers NHS Boards,
Freedom of Information Officers Special Health Boards,
Chief Executive Common Services Agency,
Chief Executive State Hospitals Board for Scotland,
Chief Executive Scottish Ambulance Service Board.

For information

Chief Executive Health Education Board for Scotland,
Chief Executive NHS Education for Scotland,
Chief Executive Health Technology Board for Scotland,
Chief Executive Clinical Standards Board for Scotland,
Chief Executive NHS 24.

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Revised guidance on arrangements for publication of documentation relating to capital projects

6. Guidance for Scottish public bodies on the implications of the Freedom of Information Act in relation to the procurement process and the release of information has been prepared by the Scottish Procurement Directorate and is available on the Scottish Executive website at <http://www.scotland.gov.uk/Resource/Doc/1265/0006892.pdf>

7. NHS Boards must now consider the new powers available to the public for accessing information under the Freedom of Information Act. It is therefore advised that NHS Boards should ensure that all information relevant to the Business Case and contract is made accessible (the SPD guidance gives advice on timing of release). This includes the FBC Executive Summary and the “Plain English Summary” of the contract as well as all submitted annexes. This differs from current practice where supporting sections or annexes considered too technical or detailed may have been omitted.

8. Initial Agreements (IAs), Standard Business Cases (SBCs), Outline Business Cases (OBCs), Full Business Cases (FBCs) and contracts may still be edited to remove text of a commercially sensitive nature but it must be clearly stated in these documents what information has been excluded on the grounds of commercial confidentiality. Removal should be considered with reference to exemptions under the Freedom of Information Act. Any documents which contain references to suppliers must be cleared with the appropriate supplier(s) before publication.

9. Irrespective of the capital value of the project, IAs, SBCs, OBCs and FBCs should be made publicly available no later than one month from the announcement of its approval, PFI contracts within one month of financial close. A copy of the documents should be placed with the Local Authority, the Local Health Council, the Staff Partnership Representative and on view at the NHS Board for staff and patients to access.

10. The NHS Board should have accessible on its premises a hard copy of the business case(s) and PFI contract.

11. **For schemes in excess of £5m**, documents should also be displayed at the local main public library and SPICe, the Scottish Parliament library (see para 12 below). To let the general public know that these documents are available for perusal, an advert should be placed in the local press detailing their placement in the local library and the date from which the documents can be viewed. Separate adverts are required for OBCs and FBCs. The advert for the PPP/PFI FBC should state the expected date for financial close and the date when it is anticipated that the addendum will be added to the FBC in the local main library. No further advert need be placed for the FBC addendum.

12. **For schemes in excess of £5m**, a copy of the key documents should be sent to the Private Finance and Capital Unit, Scottish Executive Health Department, Basement Rear, St Andrew’s House, Edinburgh, EH1 3DG which will arrange for the documents to be placed in the library of the Scottish Parliament (SPICe). Although a paper copy of the documents is acceptable for SPICe, a CD –ROM is preferred. Each document should clearly show a contact name, address and telephone number within the NHS Board for enquiries specific to the project. Each PPP/PFI document should also state that general enquiries on PPP/PFI should be addressed to Mike Baxter on 0131 244 5041 or by email to michael.baxter@scotland.gsi.gov.uk

13. For Staff Partnership Representatives and the public library, the NHS Board should make contact and enquire whether they will be happy to accept a CD-ROM instead of paper. The NHS Board must however be assured that the public library, in particular, has the facilities to ensure that all documentation is accessible by the public in that format.

14. For schemes in excess of £5m, it is now mandatory for NHS Boards to set up a section of their website dedicated specifically to such projects. The approved Business Cases/PFI contract should be placed there together with as much relevant documentation and information as possible.

15. As a general principle, the acceptance of confidentiality agreements by public bodies, other than in exceptional circumstances, is discouraged, and this applies equally to terms included in tender documentation and conventional contracts. The inclusion of terms which restrict the disclosure of information relating to the contract beyond those restrictions permitted in the Act i.e. the information constitutes a trade secret or its disclosure under the Act would, or would be likely to, prejudice substantially the commercial interests of any person, should be strongly resisted.

16. At the outset of any procurement, the conditions of procurement should clearly explain that information provided to the NHS Board by the contractor/bidder/supplier may be subject to disclosure under the Act. When entering into PFI contracts, NHS Boards must comply with the terms of clause 52.3 of the Scottish Executive Health Department Project Agreement which can be viewed at www.show.scot.nhs.uk/pfcu.

17. However the legitimate commercial concerns of the contractor/bidder/supplier should be recognised and the conditions of procurement should encourage the identification of information which is truly sensitive. This information will be useful as it will highlight where consultation is needed in the event of a request. The contractor/bidder/supplier should be asked to justify the sensitivity of the information and how long it is likely to remain so. NHS Boards should, ideally, before accepting information regarded by the Company as commercially sensitive, take steps to ensure that the Company understands the possible implications of the Act

18. Where, exceptionally, it is necessary to include non-disclosure provisions in a contract, the NHS Board could agree with the contractor/bidder/supplier a schedule of the contract which clearly identifies both information which should not be disclosed and information which will be released. Any acceptance of such confidentiality provisions must be for a good reason, be capable of being justified to the Commissioner and include the proviso that information which is not, in fact, exempt under the terms of the Act or whose disclosure is required on public interest grounds, may have to be disclosed regardless of any agreement.

19. Most NHS Boards will have existing contracts that pre-date the Act, often by many years. These contracts may have confidentiality agreements that are unsupportable under the provisions of the Act. Information covered by a confidentiality agreement will only be exempt if the information is truly commercially sensitive. In these cases the Board should consult with the relevant contractor/bidder/supplier to:

- Advise them that information covered by the contract may need to be disclosed under the Act, irrespective of any confidentiality agreements;
- Agree procedures for consultation in the event that an information request is received.

It may be impractical to review every extant contract if large numbers are involved, in which case a more pragmatic approach is needed. It would then be sensible to restrict the review to contracts that are:

- Large value
- Critical to the NHS Board's function
- Controversial
- Otherwise likely to attract information requests.

20. If the NHS Board decides to disclose, and contractor/ bidder/supplier/ information is involved, the contractor/bidder/supplier should be informed of the decision prior to release where possible.

21. Where a contractor/bidder/supplier has been given the opportunity to identify sensitive material and has done so (and any declared period of sensitivity has not expired) consultation is needed if the request refers to that information. Where no sensitive material has been identified, consultation is not strictly necessary but as a courtesy it is recommended that the contractor/bidder/supplier be notified that a request has been made and given the opportunity to make representations if they so wish.

22. The Act specifically applies to information and carries no duty to disclose discrete documents. Indeed care should be exercised when considering whether to release a document provided by a supplier to ensure that any potential copyright issues have been considered. Normally it will be acceptable in copyright terms for a copy of a document to be provided under the Act if that is the best or most reasonable way of providing the information, but in many cases, where disclosure is appropriate, it will be preferable to extract information from documents or possibly provide a summary, provided it satisfies the request.

23. Colleagues are asked to bring this HDL to the attention of all persons who have a working interest in capital investment in NHSScotland.

Yours sincerely

Peter Collings
Director of Performance Management & Finance