TRANSPARENCY REQUIREMENTS:

INTERACTION WITH FREEDOM OF INFORMATION, DATA PROTECTION, INTELLECTUAL PROPERTY RIGHTS AND RE-USE OF PUBLIC INFORMATION REGULATIONS

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THE FUNDAMENTAL RATIONALE

"Greater transparency across Government is at the heart of our shared commitment to enable the public to hold politicians and public bodies to account; to reduce the deficit and deliver better value for money in public spending; and to realise significant economic benefits by enabling businesses and non-profit organisations to build innovative applications and websites using public data."

(Prime Minister's letter to the Secretary of State, 29 May 2010)

SOME FUNDAMENTAL QUESTIONS

1. Exactly what to be made available when?
2. How will transparency provisions interact with existing laws: such as Freedom of Information, Data Protection, Intellectual Property Rights and Re-Use of Public Information Regulations?

WHAT GOVERNMENT DATA WILL BE MADE PUBLICLY AVAILABLE AND WHEN?

Published from when?	Salaries and crime data	Central Government data	Non-Central Government Data
June 2010	Names, grades, job titles and annual pay rates for most senior civil servants with salaries above £150,000.	Historic COINS spending data	
July 2010		**New ICT contracts worth more than £10,000 to be published "in full" (PM letter stated this was to apply to all ICT contracts but no minimum value was stated and did not state that to be published "in full")**	
September 2010	Names, grades, job titles and annual pay rates for most senior civil servants and NDPB officials with salaries higher than the lowest permissible in Pay Band 1 of the Senior Civil Service pay scale	**New tender documents for contracts worth more than £10,000 to be published "in full"**	
October 2010		Organograms for departments and agencies that include all staff positions	
November 2010		New items of central government spending more than £25,000	
January 2011	Crime data to be published at a level that allows the public to see what is happening on their streets	**All new contracts more than £10,000 to be published "in full" (PM letter stated this was to apply to all contracts but no minimum value was stated)**	**Tender documents and contracts for expenditure above £500**
January 2011		All UK international development spending more than £25,000	New items of local government spending more than £500

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INTERACTION WITH FREEDOM OF INFORMATION

“push” instead of “pull” of info into public domain

- **Plans to extend FOIA?**
- **Which ‘public authorities’ do transparency requirements apply to?**
- **Do FOIA and EIR exemptions apply and are there any specific ‘transparency ‘exemptions’?**

INTERACTION WITH FREEDOM OF INFORMATION

Different definitions of 'public body'/'public authority':

- **FOIA:** Bodies listed in Schedule 1 plus any entity which is wholly owned by the Crown or a single public authority or which is a wholly owned subsidiary of a publicly owned entity
- **EIR:** Public bodies under FOIA automatically public bodies under EIR (ICO guidance 17.12.09) plus entities carrying out a public administration function and entities with environmental responsibilities which are subject to the control of a public body
- **Transparency requirements:** No definition of 'public body' but see OGC guidance

WHICH PUBLIC SECTOR BODIES DO THE NEW PUBLICATION REQUIREMENTS APPLY TO?

- **OGC Guidance:**

- **Transparency – Publication of ICT Contracts Guidance Note September 2010**

- **Transparency – Publication of Tender Documents Guidance Note September 2010**

- **OGC Guidance divides public bodies into 'central' and 'non-central' government (Guidance applies to 'central' gov bodies)**

OGC GUIDANCE: CENTRAL GOVERNMENT

Central

- Central Government including departments, their agents and agencies
- All Non-Departmental Public Bodies
- National Health Service Bodies
- Trading Funds

Non-Central

- Local Government
- Intelligence Agencies
- Financial and non-financial public corporations
- Parliamentary Bodies
- Devolved Administrations

INTERACTION WITH FREEDOM OF INFORMATION

Exemptions:

- OGC Guidance says FOIA exemptions can still be applied
- Key FOIA exemptions will be:
  - Confidentiality (absolute exemption)
  - Commercial prejudice (qualified exemption subject to public interest test)
  - Personal Data (absolute exemption – Data Protection Act applies)
- Environmental Information Regulations exemptions?

INTERACTION WITH FREEDOM OF INFORMATION

- **Confidential information**
  - **OGC Guidance:**
    - **avoid including confidentiality clauses in contracts**
    - **use revised confidentiality wording (samples provided in guidance)**
    - **still subject to FOIA exemptions though**
- **Don't forget common law confidentiality rights**

INTERACTION WITH FREEDOM OF INFORMATION

- **Commercially sensitive information and trade secrets**
  - **overlap with confidential information**
  - **important to distinguish because public interest test will apply even if this exemption applies**
  - **there must be a real threat of prejudice plus the public interest in disclosing information must be outweighed (see useful guidance from David Evans of the Information Commissioner's Office on data.gov.uk)**

INTERACTION WITH FREEDOM OF INFORMATION

Keep in mind:

- **Information Tribunal Case involving disclosure of Government Gateway Contract (20 September 2010) – increasingly narrow view of application of FOIA exemptions**
- **No guidance from the Information Commissioner and Tribunal on rights to 'use' information once disclosed under EIR/FOIA**
- **Audit Commission Act: used recently as a way around FOIA/EIR as there are no equivalent exemptions. Considered recently in the Court of Appeal (in connection with a request to see a Veolia PFI waste contract) whether confidentiality laws apply**

INTERACTION WITH DATA PROTECTION

- Data Protection Act 1998 applies to 'personal data'
- Personal data is data relating to living individuals
- Data subject rights to receive their own personal data but not personal data of other individuals
- Unauthorised disclosure of personal data can be a breach of the Data Protection Act
- What about salaries and expenses information?

INTERACTION WITH RE-USE OF PUBLIC SECTOR INFORMATION REGULATIONS

- Transparency requirements: encouraging public bodies to make more information available for re-use
- New Open Government Licence:
  - is a wide licence covering copyright and database rights protected information
  - does not apply to personal data or intellectual property of third parties or open source
  - Mandated for central government only

INTERACTION WITH INTELLECTUAL PROPERTY RIGHTS

- If information is intellectual property of third parties then need to go back to FOIA/EIR exemptions
- FOIA: No specific 'intellectual property' exemption– confidential information and trade secrets & commercial prejudice information may be the most relevant instead
- EIR: Specific 'adverse effect on intellectual property rights' exemption

ANY QUESTIONS?

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