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THE FREEDOM OF INFORMATION ACT AND COMPANIES

The Freedom of Information Act, which received royal assent on 30th November 2000, aims to promote a culture of openness in the public sector. Private sector organisations will also feel the effect of the new regime and therefore those advising them must have a good understanding of the Act.

The Freedom of Information Act will apply to every “public authority” which is listed in Schedule 1. This includes government departments and their agencies, Parliament, local authorities, and health organisations. The Secretary of State has the power to add to this list privatised industries and other private bodies that carry out public functions either of their own accord or pursuant to a contract with a public authority.

The Government and local authorities keep vast amount of statistics and information which could be very useful to companies to identify future areas of business, etc Every public authority will have to adopt a publication scheme which sets out the classes of information which the authority publishes or intends to publish, the manner of its publication and the cost to the public (if any).

The Freedom of Information Act gives an applicant the right to request a public authority for any information which it holds in its records. The authority must state whether the information requested is held by it and, if it is held, to supply it to the applicant. It is important to understand that any individual or organisation can make a request for information using the Act. Companies can therefore obtain valuable information from public authorities which could benefit their business. For example a company which is in the business of recycling waste may wish to know to whom the local authorities recyclable waste currently goes. This will allow it to know who its competitors are and what it can do to win future work. A public authority must supply requested information within 20 working days.

Part II of the Act contains many categories of exempt information which a public authority need not disclose. With regard to some of these the exemption is so wide that an authority need not even tell the applicant whether it holds the information e.g where an exemption is required to safeguard national security. The two most important exemptions as far as companies are concerned are contained in section 39 and section 41 of the Act.

Section 39 allows an authority to withhold information where to disclose would constitute an actionable breach of confidence by that other person. Section 41 allows information to be withheld where to disclose would prejudice the commercial interests of any person (including the public authority holding it) These two exemptions provide some protection to companies whose information may be the subject of a request to a public authority under the Act. Whilst there is no duty on the authority to consult the company whose information is being requested, the company can, if it

knows of the request persuade the authority to claim these exemptions. It is also important for companies when handing over information to public authorities to emphasise its commercial confidence and perhaps even insert clauses in contracts requiring consultation before disclosure.

Dissatisfied applicants who have had their requests for information refused will be able to complain to the Information Commissioner, Elisabeth France (formerly the Data Protection Commissioner). She has the power to issue enforcement notices against authorities who do not comply with the Act forcing them to take certain measures or even to disclose the information requested. The Commissioner can also seek entry and inspection of a public authority's premises. An appeal from the decision of the information Commissioner is to the newly formed Information Tribunal.

The main provisions of the Freedom of Information Act must be brought into force within five years. This will allow the Secretary of State the flexibility to have different commencement dates for different kinds of public authority. At the moment we are still waiting for a draft commencement order.

It is not yet clear what the full impact of the Act will be on the private sector. Certainly at the moment it seems as though for most commercial organisations, not a likely to be designated bodies, the Act is more of an asset than a liability. These organisations should study the provisions of the Act carefully as well as any draft publication schemes produced by public authorities. This will enable them to identify what information they would like and where it is likely to be. They will then be in a good position, once the Act comes into force, to make requests for this information and exploit it, once they have it, in advance of their competitors.

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