

# Freedom of Information (Scotland) Act (FoISA) and Research Information

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**Adopted:**

## Disclaimer

This paper summarises the current thinking of the Scottish Higher Education Information Practitioners Group on this issue in line with the legislation and codes of practice current at the time of publication. Please note that it does not constitute legal advice. It has been prepared by Scottish Higher Education Information Practitioners to provide the sector with a practical approach to the implementation of freedom of information legislation. It should not be acted upon in isolation and, where necessary, you should seek professional legal advice.

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## 1.Consideration of key issues

The Freedom of Information (Scotland) Act 2002 (FoISA) is a blunt instrument to get access to research information because there is great variation across subject areas as to what are the appropriate stages and expected outputs that could be released. Information that may arise in the course of research and development is referred to in section 27 (S.27) of the FoISA. There is no equivalent provision in the Freedom of Information Act 2000 passed in Westminster.

This paper takes a theme-based approach to the issues rather than a repetition of the structure of the Act. Any decisions about the appropriate access to information under FoISA should necessarily include agreement on the following issues:

### 1.1 *Ownership*

The management and exploitation of intellectual property (IP), arising from research, is frequently linked to the promotion and commercial exploitation of inventions, inventive ideas and other intellectual property developed by members of staff and research students, to the mutual benefits of the inventor and University. The goals, in relation to intellectual property, are:

- To create a University environment that encourages the generation of new knowledge by faculty, staff, and research students.
- To facilitate wide transfer of useful inventions and scholarly works to society, particularly through UK companies and for the greatest benefit of the UK economy.

1.2 A University may have in place an “Intellectual Property Policy” and the terms and conditions of employment may explicitly recognise that, under the terms of the Copyright, Designs and Patents Act 1988, where intellectual property is created by an employee in the course of her/his employment, that IPR is owned by the employer. Furthermore, in order that postgraduate research students are able to benefit from the same levels of support and remuneration as staff, the university may require that all postgraduate research students assign the rights to intellectual property arising from their research to their university, so that they may be treated in the same way as members of the university’s staff in respect of their rights, in relation to IP.

1.3 Where research is sponsored by an external organisation the terms of the contract between the University and that organisation will define the ownership of the resulting IP. For example, if a postgraduate student is working at a sponsoring establishment there may be a separate agreement, which defines ownership of IP resulting from her/his research.

IP is not always ‘clean.’ It may have important components from Staff/post graduate students who have brought knowledge and expertise with them on appointment, or which has been generated by the activities of staff quite outside their normal duties and responsibilities.

#### *1.4 Dataset deposit requirements*

Most UK Funding Councils define their requirements for the cataloguing and archiving of research data beyond the life of the project funding. For example, the ESRC recommends the UK Data Archive (UKDA), which is part of Economic & Social Data Service (ESDS), is responsible for acquiring, storing and disseminating machine-readable data, both quantitative and qualitative, generated as a result of ESRC funding. ESDS Qualidata (which is part of the UKDA) also handles a limited number of qualitative materials that are not in digital format. This involves locating the materials elsewhere for long-term storage, at a relevant specialist repository in the UK.

## **2. Introduction**

2.1 Research is a complex activity. It comprises individual scholarly activity, collaborative activity, competitive bidding for research projects from internal or external sources, consultancy activities (for internal and external clients) and postgraduate student research<sup>1</sup>.

2.2 The management of primary research data and records includes material on: the research process, its outcomes or products, the management of the process and the primary and analysed research data. For some areas of study these records and the systems that generate, manipulate, manage and preserve are totally digital. It is, therefore, necessary to seek the views of researchers from across a wide range of subject areas in your institution. A group of research active academics could provide a useful review mechanism for practical procedures to manage FoISA requirements.

2.3 The key issue is whether, and in what circumstances, the application of exemptions should be used, to protect of an individual’s Intellectual Property Rights (IPR) in particular. Particular concern, expressed already in the University sector, is focused on the preservation of IPR and the potential abuse of these if all documents, or refined data sources, were to be made freely available. Whilst the general presumption of the Act, transparency of process, is not in dispute there is some difficulty in reconciling it with the outputs of research. Much of the problem with the FoISA is that it does not define the level of detail that should be released and academics are concerned that FoISA will challenge the academic conventions and culture of exchange<sup>2</sup>.

2.4 There is some variation of practice and culture according to subject, for example, raw data about space exploration is freely available from NASA but academics using sources for more narrowly focused work may instinctively keep the details more circumspect. In the Arts and Humanities the process of research is often on a longer timescale and the stages of research activities may be less well defined than in Engineering or Bio-medical research. In some cases this decision is based on a value judgement that changes according to the time of release.

2.5 Stimulating cultural change to match the presumptions that the FoISA makes about our activities will be a major challenge and it is clear that research ethics and academic conventions, identifying

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<sup>1</sup> For information on the application of records management to research records see the following url:  
[http://online.northumbria.ac.uk/faculties/art/information\\_studies/imri/rarea/rm/rm\\_primary\\_res\\_data.htm](http://online.northumbria.ac.uk/faculties/art/information_studies/imri/rarea/rm/rm_primary_res_data.htm)

<sup>2</sup> Calman, Susan & Gourlay, David, “The Impact of FOI Laws on Academic Research” The Freedom of Information Journal Volume 1, Issue 4 (March/April 2005)

appropriate attribution of sources and suchlike, regarding exchange of information about research activity will play an important part of compliance.

2.6 It is likely that there will be considerable interest in getting information from HEIs about their research activities. Individuals or campaigning organisations may want this to support public debate e.g. information about the impact of particular chemicals on health. Campaigning organisations may also want information for campaigns which HEIs would regard as against their interests e.g. future plans for building on green-field sites or information about use of animals in research. Commerce and industry may seek information to help them further their commercial interests e.g. there is evidence from overseas of companies asking for research information from several universities to see whether this can be fitted together to generate new exploitable knowledge - the "jigsaw principle". The Office of the Scottish Information Commissioner (OSIC) has indicated that they will examine the application of the exemptions on a case-by-case basis.

### 3. Exemptions

#### 3.1 It is up to each institution to establish and communicate the most appropriate means to assess and apply the exemptions and on whom responsibilities fall.

3.2 In terms of research the most relevant exemptions may be content-based exemptions, and hence subject to the substantial prejudice and public interest tests. The content-based exemptions most likely to be relevant to research information are:

- S.27(1) Where the information is intended for publication within twelve weeks.
- S.27(2) Where the information is "obtained in the course of, or derived from, a programme of research".
- S.33(1)(a) Trade secrets
- S.33(1)(b) Where release of the information would substantially prejudice the commercial interests of any person.
- S.39(1) Health and safety.. This is potentially applicable to requests about work involving animal research or other controversial topics.

There is a separate guidance document covering the use of exemptions more fully and the relevance of commercial interests exemption has also been addressed elsewhere.

3.3 The Scottish Information Commissioner has indicated in cases subject to the public interest test he intends the balance to be in favour of the disclosure of information. "Public interest" has been defined to be "of serious concern or benefit to the public not merely of individual interest". "Public interest" is not defined in the Act, and the concept may change over time and according to the circumstances of each situation. Scottish Public Authorities are told in the relevant Code of Practice issued under the Act that when they consider whether the use of exemptions is appropriate they "will need to make a subjective judgement based on the circumstances of each case and in the light of any emerging guidance or best practice".

3.4 Overseas experience is that the issue of whether information will make a contribution to public debate is relevant. It is not beyond the realms of possibility that HEIs could find themselves required to release information on research in progress, which would otherwise be exempt. Examples might include information about GM trials or vaccine trials. HEIs often use disclosure of research activity in stories proactively released to media so FOISA may not actually extend this much further.

3.5 What about the substantial prejudice test? On the face of it this seems to be broadly applicable since it applies to the programme, the interest of any individual participating in the programme (a broader concept than the individual member of staff), the SPA which holds the information, and any other SPA (but not, interestingly, public authorities not subject to the Scottish Act e.g. an English HEI). Situations where the substantial prejudice test could be argued to apply might include:

- where premature disclosure might make it difficult or impossible to complete the research programme;
- where premature disclosure might damage an individual academic's career prospects (although it's important to note that the SPA, and the individual academic, will continue to retain their intellectual property rights in any information supplied in response to FOI requests)
- damage to an HEI's future RAE submission?

3.6 An 'absolute exemption', which is **not** subject to the public interest test, may be relevant. These include:

- S.38 – Personal data. This applies where the information considered for release would entail a breach of the data protection principles.
- S.25 – Information otherwise accessible. Where the information is reasonably available elsewhere or from the public authority's own publication scheme.
- S.36 Confidentiality. Where release of information would constitute an actionable breach of confidence.

#### **4. What research information is covered by the S27(2) research exemption?**

4.1 To qualify as a programme of research it must meet the following criteria identified by OSIC:

- Genuine "academic research", not just data collection
- Is speculative and whose commercial value may not yet have emerged
- Includes humanities research
- Is finite
- Is intended for publication
- When research continues for years or decades, the requirements are that the research scope is to be well-defined and a clear completion date can be identified

4.2 What if the research is not intended for publication?

- The exemption in S.27 cannot be relied on
- The expectation is to disclose
- Another exemption may apply

4.3 The exemption under S.27 (2) of the FoISA (Information intended for future publication: research programmes) it acknowledges that as with other types of investigation the premature release of information may be misleading and possibly harmful if the information is not at a completed stage.

4.4 Discussion has focused on the exemptions that could be granted on the grounds that release of requested information would substantially prejudice our commercial interests (S.33 1(a) and (b)) or the personal interests of an individual (such as S.38 - Personal data or S.39(1) - Health and safety). Information contained in award submission reports and "lay summaries" submitted to funding councils are the type of information likely to be requested. Other sector guidelines have been produced to cover in more depth the related issues of Intellectual Property Rights and Copyright, Contracts and Commercial Confidentiality. They are available at:

<http://www.universities-scotland.ac.uk/FoI/foI%20site/FoINewsGuidance.htm>

#### **5. The researcher and the student**

5.1 Information recorded as part of personal research programmes will generally be regarded as being "held" by the HEI so access may be given through FoISA though the copyright remains with the individual author(s). This is explored further:

<http://www.jisclegal.ac.uk/publications/foiundawilsonipr.htm>

<http://www.jisclegal.ac.uk/ipr/IntellectualProperty.htm>

<http://www.jisclegal.ac.uk/publications/ethesesandrew.htm>

It may also be that some information generated by students undertaking research will also legally be held by the HEI. The Commissioner has indicated that this is likely to depend on whether the intellectual property rights belong to the HEI (when treatment will be the same as for staff) or the individual student (where the fact that the information may reside on the HEI's computer network will not be regarded as relevant). A related issue is whether information supplied to an HEI by a third party is held by the HEI. This will generally be the case, and raises issues, for example, in relation to information supplied to HEIs as part of tender processes e.g. for new building contracts.

5.2 Your institution *may* require a standard research contract to be produced between a University, a Funding Source or Commercial Sponsor, and a Postdoctoral Research Assistant. OSIC has identified that there is public interest in the contractual agreement and the actual research, the sources of funding and any relevant financial information.

## 6. Operational information about research activities

6.1 An unresolved question is establishing at what level it is appropriate to publish information about University and School/Departmental research strategy. There is widely held concern by academics that if information is to be published at School/ Department level an edited summary may have to be compiled in order to avoid breaching commercial interests. This may have to be resolved on a subject specific basis or following specific advice from the Commissioner's office.

## 7. Commerciality of research

7.1 The issues of commercialisation and contracts are explored in other SHEIP guidelines as commercial sponsors of research may insist on confidentiality in relation to either: data supplied to the researcher or even prevent the researcher from confirming that they have a contract to undertake research for the commercial body.

<http://www.universities-scotland.ac.uk/Fol/foI%20site/FoINewsGuidance.htm>

The fact that disclosure would prevent us from obtaining a patent would presumably give us a strong argument under the 'commercial interests' exemption. In relation to research involving clinical trials and epidemiological studies the "lay summaries" (abstracts) from grant applications are already produced and in future research funders **may** be obliged to pro-actively make them available.

## 8. Frequently Asked Questions

### 8.1 How will freedom of information affect the way I keep my research information?

It will mean that information that has been recorded as part of research programmes will generally be regarded as being "held" by the HEI for freedom of information purposes. There are exemptions to disclosure that may be applicable to some information created as part of the programme when you receive a request. If your research is *not* part of a programme of research the expectation should be that it would be disclosed. HEIs have 20 working days to respond to a freedom of information request, so you should make arrangements to ensure that information can be retrieved in this time even if you are away.

### 8.2 How will freedom of information affect my intellectual property rights?

Providing a copy of information for freedom of information purposes does not mean that an individual or organisation has waived their intellectual property or moral rights. The recipients of the information still have to respect those rights, and this should be made clear in your response to requests

The rights of access under the Act are retrospective and apply to documents created before 01 January 2005 but are in the University's possession. Although the Act includes exemptions to the rights of access in certain circumstances, it does not provide an exemption specifically for intellectual property rights, whether those of the University or those of a third party who has provided the University with information. However, the management and appropriate exploitation of intellectual property (IP), arising from research, should not be compromised by the existence of the Freedom of Information (Scotland) Act.

### 8.3 My unit is funded entirely from external sources. Is it exempt from freedom of information?

No, it is not exempt. It will be covered because the Act applies to all our activities and relationships (even with commercial or external sources). Following the introduction of the FoISA, we should avoid entering into contractual agreements that include blanket confidentiality clauses. However confidentiality clauses that relate to specific information that is genuinely confidential can be accepted where there are good commercial reasons for doing so.

### 8.4 I have been granted access to data for my research on special terms. How does freedom of information affect this?

There is some variation of practice and culture according to subject, this decision should be based on a value judgement that takes into account to the type of data, who owns the data and possibly the time of release. You may wish to consult with the person or institution that gave access to the data, although the decision on whether or not to release is the responsibility of the HEI. In some cases the exemption for information held in confidence may be relevant. When setting up new arrangements for access to data, disclosure issues should be discussed at that time.

### 8.5 My research career is based on the exploitation of a particular database of information. Would I be expected to give this database away to any enquirer?

Not necessarily. This decision should be based on a value judgement that takes into account to the type of data, the focus of the work, who owns the data and possibly the time of release.

8.6 I brought research information with me from my previous institution. How does freedom of information affect this information?

It is still covered by the Act if it is still "held" by the institution. This decision should be based on a value judgement that takes into account to the type of data, the focus of the work, who owns the data and possibly the time of release.

8.7 I carry out research funded by commercial companies. Does freedom of information mean that I have to give away their confidential information?

There is a provision within the Act to maintain the confidentiality of such information, and it is explored in the following document:

<http://www.universities-scotland.ac.uk/Fol/foI%20site/FoINewsGuidance.htm>

8.8 The research exemption talks about substantial prejudice to the interests of any individual involved in the research. Does "individual" include organisations and companies?

Yes, it reflects the legal definition of individual, which includes organisations or companies.