1. Introduction

1.1 The Freedom of Information (Scotland) Act 2002, ("the Act"), introduces a general statutory right of access to all types of recorded information, of any age, held by Scottish public authorities. Higher Education Institutions (HEIs) are defined as public authorities under the Act and are therefore required to comply with it. From 1 January 2005 if anyone, anywhere in the world, requests information from our public authority we must provide it, or a valid reason for not doing so, promptly and, in any event, within 20 working days. People requesting information ("applicants") do not have to refer to the Act, or give reasons for their requests. We are not allowed to ask them why they are making a request or what they would do with the information. The request must be made in a recorded format e.g. a tape, email, or letter. We must provide advice and assistance to help applicants exercise their rights to information under the Act. If someone is dissatisfied with a public authority’s response to their request for information they can require that authority to review its decision. If this does not resolve the issue, the applicant can then complain to the Scottish Information Commissioner, who is responsible for enforcing the Act and promoting good practice.

1.2 This right to information is subject to certain exemptions. Many, but not all, exemptions are subject to a public interest test. If such an exemption applies to information that we hold, we must decide whether the public interest in withholding that information is greater than that in releasing it. If the public interest lies in releasing the information, or is evenly balanced, the expectation of the Act is that we should release that information. This means, for example, that we cannot withhold information on the grounds that we consider it to be commercially confidential without a clear legal justification for doing so, under a specific exemption to the Act.
In addition, many of the exemptions which are subject to the public interest test only apply if the disclosure of the information would ‘prejudice substantially’ a particular interest. This is, however, a difficult test to satisfy as there must be a real possibility of actual and significant prejudice.


This paper examines the effect of the exemptions that may be most relevant to commercially sensitive information held by HEIs. Requests for information previously withheld on the grounds of commercial confidentiality may arise in relation to many areas of activity. This paper provides general guidance on FOI and commercial confidentiality and key issues to consider when responding to requests for information that may arise in a HEI context. This compilation of key issues and frequently asked questions should be read alongside the SHEIP guidance papers on FOI and exemptions, research, teaching, consortia and collaborative working arrangements and issues of academic quality.


Some key issues to consider when drawing up contracts and agreements with other parties

These apply whether your HEI is the customer or the contractor e.g. where you are providing services, such as consultancy or training, to other bodies.

2.1 Review all contractual information, including pre-contract documentation such as invitations to tender and responses to invitations to tender and terms and conditions of business issued (i) by your HEI to potential contractors, suppliers and customers and (ii) to your HEI by potential contractors, suppliers and customers, to ensure that you are compliant with the Act.

2.2 Inform potential contractors and customers that the information you hold about your actual or potential contractual relationship with them may be subject to disclosure under the Act.

2.3 Before accepting, or agreeing to provide information in confidence consider carefully: is this information really confidential? A confidentiality clause in an agreement may at first sight appear to exempt the information that has been deemed “confidential” from disclosure if its release would constitute “an actionable breach of confidence” under Section 36(2) of the Act. This is an absolute exemption and, therefore, not subject to the public interest test. However, the position in law is not that simple. This exemption applies only to information you receive from another person or institution, not information created by your own HEI. The Code of Practice for Public Authorities issued by Scottish Ministers under Section 60 of the Act (“the Section 60 Code”) states that “it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest.” (para. 35) The Section 60 Code then sets out three requirements for an action for breach of confidence:

- that the information must have the necessary quality of confidence;
- that it must have been communicated in circumstances imposing a duty of confidence; and
- that there must be unauthorised use of the information to the detriment of the party communicating it. (para. 37)

It notes that “The courts recognise three broad circumstances where confidential information can be disclosed: disclosures with consent; disclosures required by law and disclosures where there is an overriding public interest.” (para. 39.) This exemption applies only to information less than 30 years old. Therefore, although Section 36(2) of the Act is an absolute exemption it is subject to a public interest test by the “back door”. This point is reinforced by the Scottish Information Commissioner:
“...given that the exemption has to be considered in line with the common law of confidence, which as mentioned above has a public interest defence, then the exemption should be treated as a class exemption and public authorities should take the public interest into account in deciding whether to disclose the information.” Scottish Information Commissioner Briefing Series: Section 36 Confidentiality (November 2004).

2.4 **Consider whether any confidentiality clauses requested meet the exemption criteria allowed under the Act.** When entering into contracts “or any other form of agreement or undertaking”, the Section 60 Code states that “public authorities should refuse to include terms which restrict the disclosure of information held by the authority and relating to the contract beyond the restriction permitted in the Act”, namely the Section 33 exemption:

- Information that constitutes a trade secret, (Section 33(1)(a) of the Act) or
- Information the disclosure of which under the Act would, or would be likely to, prejudice substantially the commercial interests of any person. (Section 33(1)(b) of the Act) (Section 60 Code para. 41)

Information must be less than 30 years old for this exemption to apply. Both parts of this exemption are subject to the public interest test.

2.5 **Accept information in confidence only if it is necessary for your HEI “to obtain that information in order to carry out its function and it would not otherwise be provided or could not otherwise be obtained”**. When providing information, your HEI should avoid unnecessary secrecy and restrictions should be drawn as narrowly as possible and according to individual circumstances. “Apart from such exceptional cases, authorities should not impose terms of secrecy on contractors” or customers. The Section 60 Code warns that public authorities should resist wherever possible confidentiality clauses relating to the terms of a contract such as “its value and performance, arrangements for monitoring progress and performance under the contract, incentives for early completion or penalty clauses for failing to meet targets”. This information is, not unnaturally, likely to be of public interest. (Section 60 Code paras. 43, 45 and 52) However, if your HEI holds information solely on behalf of its customers, such information will not be subject to the Act.

2.6 **If your HEI accepts confidentiality clauses, be prepared to justify their inclusion to the Scottish Information Commissioner** if an applicant who has been denied access to the information lodges a complaint. If the Scottish Information Commissioner is satisfied that your HEI has failed to comply with the Act, he may issue an Enforcement Notice requiring your institution to take specified steps in order to comply. (Section 51 of the Act).

2.7 **If, exceptionally, you agree that some information is genuinely confidential and would be likely to meet the criteria for exemption under the Act, record this information on a separate schedule of the contract**, in question, identifying why the information is confidential, -that its disclosure would “prejudice substantially” the party’s commercial interests- and for how long. Information in the main body of the contract can then be released promptly in response to a request for information under the Act. Include within the contract “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.” (Section 60 Code para. 44).

2.8 The Office of Government Commerce (the "OGC") has produced model FOI/Confidentiality clauses to deal with both the implications of the Freedom of Information Act 2000 itself for procurement contracts, and the obligations of the Act for both contracting authorities and suppliers/contractors. These will be incorporated into OGC’s generic suite of model terms and conditions. It should be noted that the model clauses deal with the Freedom of Information Act 2000 and not the Act itself and so, if used by Scottish HEI’s, would need to be amended first to refer to the Act and the Section 60 Code.

3. **When responding to requests for information that may be considered commercially sensitive**

Consider carefully:

3.1 **Who needs to be consulted in order to answer this enquiry?** Allow sufficient time if you need to consult a third party which gave you the information, e.g. an external contractor. Remember that your HEI must provide this information, or a valid reason for not doing so, promptly and, in any event, within 20 working days. Moreover, it is your HEI that must decide whether the information is exempt from disclosure - not the external contractor or customer.
3.2 Has the information been provided by a contractor tendering for business under existing EU procurement rules? If your HEI has accepted a “reasonable request” from the contractor that the information should remain confidential, that information will be exempt under Section 26(b) of the Act, as its disclosure would be incompatible with an EC obligation. This is an absolute exemption and not subject to the public interest test. Please note that the planned new EU public sector procurement Directive (2004/18/EC) may impact on confidentiality of tender information. More information is in Section 4, below.

3.3 Would a refusal to release the information be justified under the commercial exemptions set out in the Act?

- Is the information a trade secret? (Section 33(1)(a) of the Act)

- Would the release of information prejudice substantially, or be likely to prejudice substantially, the commercial interests of any person, including your HE institution? (Section 33(1)(b) of the Act)

In both cases if the information is less than 30 years old it is exempt but you must apply the public interest test before deciding whether you should release or withhold all or any of it.

3.4 Would disclosure of information that you have received in confidence from another person or organisation constitute an actionable breach of confidence? (Section 36(2) of the Act) If the information is less than 30 years old, seek their permission to release it. If permission is refused, are the three requirements set out in the Section 60 Code for an action for breach of confidence met? (These are listed in Section 2, above). If so, this information is likely to be exempt from disclosure. However, the exemption may still be challenged, on appeal to the Scottish Information Commissioner, or in court, if there is “an overriding public interest” in releasing the information.

3.5 Do other considerations apply that may exempt the information from disclosure under the Act?

The most relevant exemptions in this context are likely to be in relation to:

- Information intended for future publication within 12 weeks, including announcements of major developments or policy initiatives, or research information intended for future publication (Section 27(1)(2) of the Act).

- The effective conduct of public affairs. (Section 30(c) of the Act). This is most likely to be relevant in cases where information relates to “significant HE institution decisions” before they become public knowledge and are finalised, or information which, if disclosed, may significantly disrupt HEI business, compromise security or safety. This exemption applies only to information less than 30 years old.

- National security and defence (Section 31 of the Act) which may apply to some research contracts undertaken on behalf of the UK Government, Scottish Administration or an overseas government co-operating militarily with the UK.

- International relations (Section 32 of the Act), for instance in relation to some research undertaken on behalf of overseas governments.

- Personal information, where the release of personal data to a third party would breach the data protection principles (Section 38(1)(b) of the Act).

- Health and safety (Section 39(1) of the Act), where the release of information would be likely to endanger the physical or mental health or safety of an individual.

- Environmental information, in cases where information is accessible under the Environmental Information (Scotland) Regulations 2004: treat as an Environmental Information request (Section 39(2) of the Act).

All of the above except the personal information exemption are subject to the public interest test.

3.6 If information is in a document marked “confidential” or ”commercial in confidence” this is by no means definitive as it must still meet the exemptions set out in the Act in order to be withheld legally. It should be borne in mind that a document may have been marked "confidential” on the basis
that it was sensitive at the time it was created. However, with the passage of time, it may no longer be so.

3.7 **Would it cost more than £600 to provide this information?** If yes, you would be entitled to refuse to provide the information requested on cost grounds. You cannot charge for requests costing less than £100 to answer. Your HEI can charge 10% of the cost of answering requests between £100 and £600, up to a maximum fee of £50 and can seek full recovery of any amount by which the costs would exceed £600. VAT should not be added. Bear in mind that you can only count the cost of locating and retrieving the information and providing copies and giving effect to any preference for receiving the information that the applicant may have specified: not the time spent determining whether your HEI holds the information and applying exemptions. You must provide advice and assistance to the applicant, to help them narrow their request for information that could be retrieved within the cost limit.

3.8 **If you consider the information to be exempt, in most cases you must apply the public interest test before deciding whether you should withhold or release the information.** The term "public interest" has not been defined in the Act but in the Section 60 Code is described as "something that is of serious concern or benefit to the public" i.e. "in the interest of the public", not merely "of interest to the public". The Code provides examples of factors to consider when applying the public interest test, for instance, whether releasing the information would promote accountability or contribute to the effective oversight of public expenditure. The Code also states unambiguously that "in deciding whether a disclosure is in the public interest, authorities should not take into account:

- Possible embarrassment of government or other public authority officials;
- The seniority of persons involved in the subject matter;
- The risk of the applicant misinterpreting the information;
- Possible loss of confidence in government or other public authority" (para.75).

3.9 If you refuse to release information, explain in your refusal notice how and why you reached your decision, which exemption applies and why stating "the specific reasons for doing so in terms of the exemptions applied to each exclusion", including (subject to Section 18 of the Act) why, where applicable, the public interest in applying the exemption outweighs the public interest in disclosing the information. See also Decision of the Scottish Information Commissioner in Response to an Appeal under the Code of Practice on Access to Scottish Executive Information, 24 November 2004. However, you do not have to explain why an exemption applies "if to do so would itself disclose exempt information" (Scottish Executive Freedom of Information (Scotland) Act 2002: Open Learning Workbook Module 12.2.5 and Section 16(3) of the Act).

4 **Freedom of Information and commercial confidentiality: some sample questions**

4.1 **Question** Don’t the new EU Procurement Regulations allow contractors greater rights to insist that their customers sign up to confidentiality clauses? How does that square with Freedom of Information?

4.1.1 **Issues to consider:**

- Current EU Directives require public authorities to comply with a contractor’s “reasonable confidentiality requirements”. “The proposed new consolidated public sector procurement Directive (2004/18/EC) which is likely to come into effect in 2006, has a tighter confidentiality provision; it will prohibit the disclosure by contracting authorities of information which has been designated as confidential by contractors. The exemption under 26(2) of the Act, disclosure incompatible with an EU obligation, is unlikely to apply to the new EU procurement Directive, because “this particular provision of the proposed Directive is stated to apply in accordance with national law. This means that any public authority contemplating non-disclosure in line with the proposed Directive will still need to apply the confidentiality exemption as contained in Section 36 of the Act.” Scottish Information Commissioner Briefing Series: **Section 36 Confidentiality**.

4.1.2 **Conclusion:** Although the proposed directive appears to strengthen the rights of contractors to insist that information they have provided remains confidential, in practice this will be subject to the rules for applying the confidentiality exemption under Section 36 of the Act.
4.2. **Question:** I am worried about the impact of FOI on our relationships with suppliers, contractors and customers and our income generating activities. For information to be exempt under Section 33 of the Act we would have to demonstrate that its release would “prejudice substantially the commercial interests of any person”. This seems more onerous than the UK FOI Act, which only requires public authorities to prove that releasing similar information would “prejudice” commercial interests. Surely this places HEIs in Scotland at a disadvantage to those in England, Wales and Northern Ireland? What’s to stop companies preferring to do business with HEIs south of the border or even overseas to avoid disclosure against their interest?

4.2.1 **Issues to consider:**

- At the time of writing (December 2004) it is too early to predict how the Act will impact on relationships between public authorities and the private sector. It is the expectation of the Scottish Ministers that the Act will lead to a culture of greater openness and accountability, for instance in how public money is spent, that would be beneficial to all parties.

- The Scottish Information Commissioner has estimated that there are at least 10,000 public authorities in Scotland alone. This represents far too large a sector for private companies to ignore as potential commercial partners.

- It is the case that the Scottish Act sets a higher standard of “substantial prejudice” for public authorities to meet if they seek an exemption from the disclosure of commercially sensitive information. The Section 60 Code states that “authorities should consider disclosing the information unless the prejudice caused would be real, actual and of significant substance”. (para. 72) By contrast, the UK Freedom of Information Act states that Authorities must show that disclosure would “prejudice” a specified interest. The Home Secretary has said that harm should be “real, actual or of substance”. (Scottish Information Commissioner: **Comparative Table: Freedom of Information Act 2000 and Freedom of Information (Scotland) Act 2002.**). In practice, we will have to wait until a sufficient body of case law has developed to find out whether the distinction between “substance” and “significant substance” is more apparent than real. In the meantime, the Section 60 Code recommendations on drawing up contracts summarised in 2, above, should satisfy the concern that “Companies will need to be confident that an authority will apply its general commitment to openness in a way which does not damage their legitimate interests”. (Section 60 Code para.42).

- The Act provides a conditional or qualified exemption for information “obtained in the course of, or derived from, a programme of research” which is still ongoing (Section 27(2) of the Act). This exemption is not included in the UK Freedom of Information Act 2000. However, this does not necessarily give Scottish HEIs an advantage over their counterparts in the rest of the UK. To qualify for the exemption for 'information intended for future publication' under Section 22 of the Freedom of Information Act 2000 it is not necessary to set a publication date, so this exemption would apply to research programmes undertaken elsewhere in the UK by HEIs. By contrast under the Act, information must be due for publication within 12 weeks if it is to be exempt under (Section 27(1) of the Act). It is for this reason that the Act contains a specific exemption for information that forms part of a research project as it was felt that Scottish HEIs should not be placed at a competitive disadvantage when compared to HEIs in other jurisdictions. Information Commissioner: **Freedom of Information Act Awareness Guidance No 7: Information intended for future publication**, Awareness Guidance issued in respect of the Freedom of Information Act 2000 V2, May 2004.

4.2.2 **Conclusion:** Whether the differences between the UK and Scottish Freedom of Information Acts will have any measurable impact on the commercial activities of Scottish public authorities remains to be seen in the light of emerging case law. In practice, both FOI regimes impose a duty on public authorities not to agree to hold contractual information in confidence unless it can be justified under the limited exemptions under the respective Acts. No matter where they are in the UK, “Public authorities cannot contract out of their obligations under the Act”- Information Commissioner: **Freedom of Information Act Awareness Guidance Number 2: Information provided in confidence** (Awareness Guidance issued in respect of the Freedom of Information Act 2000, V1).

4.3 **Question:** There is concern that individual HEIs will be unable to negotiate particularly advantageous terms of business with contractors if contract information is generally available to others who have not benefited from favoured client status.
4.3.1 Issues to consider:

- Would releasing this information prejudice substantially your HEI's commercial interests or anyone else's? (Section 33(1)(b) of the Act). If you consider that this may be the case apply the public interest test. If information about the terms of contracts between companies and public authorities is not generally available, how will you know whether your HEI is benefiting from particularly advantageous terms of business or getting the same deal as everyone else? The perceived advantages for individual HEIs must be set against the interests of the public and other public authorities in gaining greater value for money as a result of more openness about contractors' terms of business.

4.3.2 Conclusion: On balance the presumption would be that HEIs should release this information unless it would meet the criteria for any of the following exemptions

- Prejudice substantially the commercial interests of the HEI or any other person or institution AND satisfy the public interest test
- Constitute an actionable breach of confidence
- Be prohibited under an EU obligation in the case of "reasonable confidentiality requirements" in contracts that have been subject to EU tendering procedures
- Would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs AND satisfy the public interest test.

4.4 Question: Some of our contractors/business clients insist that the terms -or in some cases, the very fact - of our commercial relationship remains confidential.

4.4.1 Issues to consider:

- Would release of this information be an actionable breach of confidence? (Section 36(2) of the Act) If you are asked for information which is currently covered by a confidentiality agreement with your contractor/customer, tell them about your HEI's obligations under the Act and seek their consent to release it. This should serve to reduce the risk of a claim for breach of contract (as opposed to a claim for breach of confidentiality) as a result of any disclosure made by your HEI under the Act. If a decision is made to refuse to release the information on the grounds that it is covered by a confidentiality agreement, be prepared to justify this to the Information Commissioner. If the information is genuinely confidential it may be subject to one of the exemptions listed under the next bullet point.

- Consider why your contracts/clients want this degree of confidentiality and whether this is admissible under the Act. Certain limited exemptions to the Act allow public authorities to refuse to confirm or deny that they hold information requested. This applies ONLY in cases where revealing whether or not the information exists would be contrary to the public interest. Those most likely to be of potential relevance in this context are listed below. For further information and examples read SHEIP: Freedom of Information (Scotland) Act 2002: A Guide to Exemptions.

  - Prejudice to the effective conduct of public affairs (free and frank advice) or (free and frank exchange of views) Section 30(b)(i),(ii) of the Act
    Example: consultancy to inform an options appraisal on a major potential policy development.
  - Commercial interests (trade secret) or (substantial prejudice) Section 33(1)(a), (b) of the Act
    Example: some external research contracts, external consultancies e.g. on financial/industrial issues, such as potential acquisitions/mergers, or estate management.
  - Health and safety Section 39(1) of the Act: Example: security, risk management consultancies.
  - Formulation of Scottish Administration policy (formulation or development of government policy) Section 29(1)(a) of the Act
    Example: some ongoing research on behalf of the Scottish Administration.
  - National security and defence Sections 31(1)-(3), 31(4)(a), (b) of the Act
Example: defence-related research undertaken on behalf of UK Government, Scottish Administration or overseas government co-operating militarily with UK.

- International relations Section 32(1)(a), (b) of the Act
  Example: Some research undertaken on behalf of overseas governments.

ALL of these exemptions are subject to the public interest test. They cannot be used to withhold information about commercial relationships and research activities that are already a matter of public knowledge.

4.4.3 Conclusion: on balance the presumption would be to release this information unless it would

- Constitute an actionable breach of confidence OR

- Be in the public interest to refuse to confirm or deny that your HEI holds the information requested.

4.4 Question: I have been asked for a list of all the internal and external customers who have used our commercial service in the last 12 months? Must I oblige?

4.4.1 Issues to consider:

- Can this information be provided at a cost below the £600 ceiling? E.g. from your customer database or accounting records. If YES, consider whether any exemptions may apply to the release of this information. If NO, consider whether you wish to release this information anyway. If you do not, you must provide advice and assistance to the applicant, to help them narrow their request for information that could be retrieved within the cost limit e.g. by limiting the request to a list of external customers only or users of a specific service such as corporate hospitality or the design of display boards.

- Would releasing this information prejudice substantially our commercial interests or anyone else’s? (Section 33(1)(b) of the Act). An example might be if the request came from a company offering a competing service. If this were the case, bearing in mind that you cannot ask applicants why they want the information, you would need to consider whether the loss of such business had the potential to cause serious harm to the HEI’s commercial interests. If YES then apply the public interest test. The potential harm to the HEI’s commercial interests by loss of income may be outweighed by the public interest if more open competition among suppliers benefited public services.

- Would release of customer names be an actionable breach of confidence? (Section 36(2) of the Act) All contractual information, including terms and conditions of business issued by your HEI to potential contractors and suppliers, should contain a statement that information you hold about your contractual relationship with them may be subject to disclosure under the Act. Avoid signing an undertaking to keep the existence of a commercial contract or the name of the customer confidential unless it is genuinely confidential and there is a legally justifiable reason for doing so. In the case of contracts predating January 2005, disclosure of the names of corporate or institutional customers should not be exempt UNLESS this information meets the exemptions set out in the Act (the most relevant of these are outlined in Section 2 above) and, where applicable, the public interest test. If you have agreed to keep contract information confidential you should consult the customer before releasing the information. If the other party to the contract does not consent, you may still be required by law to release the information, if it is in the public interest to do so. However, you should consider whether, if by doing so, you will breach the terms of your contract with the contractor.

- Would the release of customer information breach the Data Protection Act 1998? (Section 38(1)(b) of the Act) The release of company and institutional names would not breach the data protection principles. Release of personal names contrary to the Data Protection Principles (for example, disclosure without the data subject’s consent) would breach the DPA if the person were a customer in a personal capacity, e.g. a student, rather than an official of a public authority purchasing goods and services in the course of their work.

4.4.2 Conclusion: on balance the presumption would be to release a customer list unless it would meet the criteria for any of the following exemptions:
• Prejudice substantially the commercial interests of the HEI or any other person or institution AND satisfy the public interest test

• Constitute an actionable breach of confidence

• Involve the release of personal data to a third party contrary to the Data Protection Principles (for example, without the individual's consent)

• The information is otherwise accessible, for example because it is already available through your HEI's publication scheme

• It is intended that the information will be published within 12 weeks of the request and it is reasonable in the circumstances to withhold disclosure until publication.

4.5 Question: Our unit sells goods/services to external customers and to other Sections within our HEI. Sometimes we act as a sub-contractor to other Sections that then sell on our service to external customers. One of these external customers has asked us for a breakdown of our internal charges. Must we provide this information? If we do this we are concerned that we may lose vital business to private companies who are not bound by our obligations under FOI.

4.5.1 Issues to consider:

• Is some or all information about your pricing structures for internal and external customers already in the public domain—e.g. do you publish a price list? If so, you could provide this information, or if it is already available under your HEI's publication scheme it is exempt as it is already “otherwise obtainable” (Section 25 of the Act).

• Would releasing this information prejudice substantially your HEI's commercial interests or anyone else’s? (Section 33(1)(b) of the Act). If YES then apply the public interest test. The potential harm to the HEI’s commercial interests by loss of income may be outweighed by the public interest if greater transparency and more open competition among suppliers benefited public services.

• Would release of this information be an actionable breach of confidence? (Section 36(2) of the Act) If this information is currently covered by a confidentiality agreement with your contractor/customer, tell them about your HEI’s obligations under the Act and seek their consent to release it. This should serve to reduce the risk of a claim for breach of contract (as opposed to a claim for breach of confidentiality) as a result of any disclosure made by your HEI under the Act. If a decision is made to refuse to release the information on the grounds that it is covered by a confidentiality agreement, be prepared to justify this to the Scottish Information Commissioner. A claim that the pricing information is genuinely confidential is likely to be based on actual or potential substantial prejudice to commercial interests, so be prepared for this claim to be subjected to the public interest test if you withhold the information and the applicant complains to the Scottish Information Commissioner. Review all contractual information, including pre-contract documentation such as invitations to tender and responses to invitations to tender and terms and conditions of business issued by your HEI to potential contractors and suppliers, to ensure that you are compliant with the Act.

• Is the Section that sub-contracts your work part of your HEI or another public authority in its own right? If so, information it holds about its contractual relationship with your unit is also subject to disclosure under the Act unless a relevant exemption applies. In this regard, you should bear in mind that the confidentiality exemption only applies to information obtained by your HEI from another person. It does not apply to information which your HEI has generated itself although other exemptions may be applicable.

4.5.2 Conclusion: on balance the presumption would be to release pricing information unless it would meet the criteria for any of the following exemptions

• Prejudice substantially the commercial interests of the HEI or any other person or institution AND satisfy the public interest test

• Constitute an actionable breach of confidence
4.6 Question: Some of the technical specifications we produce for our own systems and services are effectively trade secrets. Can we withhold this information?

4.6.1 Issues to consider:

- **Is this information a trade secret?** (Section 33(1)(a) of the Act)
  
  Does it meet the definition of a trade secret set out in *Freedom of Information (Scotland) Act 2002: A Guide to Exemptions*, SHEIP September 2004?
  
  (a) It must be used in the course of trade or business.
  
  (b) The owner must make efforts to discourage widespread dissemination of it.
  
  (c) There must be some economic advantage or value from the fact that it is NOT generally known.
  
  If it satisfies all three criteria you have grounds for claiming that the information is exempt from disclosure. You must still apply the public interest test. The Section 60 Code notes “While the public interest will rarely justify disclosure of a trade secret, there will be circumstances where adverse commercial impacts are not a sufficient justification for non-disclosure. Where disclosure is necessary for the protection of public health, public safety or the environment, for example, such considerations may outweigh financial loss or prejudice to the competitive position of a third party.” (Section 60 Code para. 46)
  

4.6.2 Conclusion: if the information satisfies the criteria for designation as a trade secret, it is exempt from disclosure under the Act, subject to the application of the public interest test.

4.7 Question: We are working on a research project that may have strong commercial spinout potential. We are going to publish a final report when the project funding ends in two years. Meanwhile we have been asked for detailed information about our interim findings. Do we have to release this information? We are concerned that someone else will exploit our research before we can.

4.7.1 Issues to consider:

- **Does the information meet the criteria for exemption as research information intended for future publication?** (Section 27(2) of the Act) Such information would be exempt “where it is intended that a report will be published and early disclosure would, or would be likely to, prejudice substantially either the programme itself or the interests of an individual participant or an authority” (Scottish Executive Freedom Of Information (Scotland) Act 2002: Open Learning Workbook Module 13.2.3).
  
  The Office of the Scottish Information Commissioner (OSIC) has provided further guidance on what constitutes a “programme of research” that would qualify for the exemption:
  
  - Genuine academic research, well defined, not just data collection or the analysis of such data
  
  - Is speculative and whose commercial value has not been established
  
  - Includes research relating to social issues, the arts and humanities as well as science and technology
  
  - Is finite –not open-ended
  
  There must also be a continuing intention to publish a report of the research at a future date (i.e. the exemption will cease to be available if a decision is taken not to publish the research). In addition, it is not relevant whether the information actually requested will be included in the final report of the research.
In assessing whether disclosure would result in substantial prejudice, consideration could be
given by your HEI to (i) the potential commercial value of the research and (ii) whether early
disclosure would give competitors an unfair advantage.

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- If the information is exempt, does the public interest lie in releasing it anyway or
withholding it? In some cases it could be argued that the balance of public interest would lie in
releasing the information before it was due for publication. An example might be information about
a scientific discovery with significant public health implications. Whereas in the case of a project
with potential commercial value “…there is a public interest in a research institution being able to
conduct research and to exploit it without it being appropriated by other companies, and in
researchers being able to pursue their academic careers, which could be damaged if their

- Would releasing the information prejudice substantially the commercial interests of your
HEI or any other person or institution? If there is justifiable concern that releasing this
information into the public domain would potentially allow other companies to exploit the
commercial benefits of your HEI’s research, it could be argued that this would not be in the public
interest, for the same reasons as described above in the previous bullet point. Again, it may also
be appropriate to consider the potential commercial value of the research in assessing whether
the test for substantial prejudice would be met.

- Has the project established its commercial potential to the extent that your HEI plans to
obtain a patent? In that case the Act does not override the Patents Act 1977 which
  - states that any disclosure of information prior to patent application makes the application invalid
  - protects ongoing research and generally publishes details of patent applications after 18
    months
  - prohibits disclosure of information which is prejudicial to the defence of the realm or public
    safety

If disclosure would prevent your HEI from obtaining a patent, this factor should be considered when
determining whether releasing the information would prejudice substantially its commercial interests.
- SHEIP: Freedom of Information (Scotland) Act (FOISA) and Research Issues, prepared by Clare
Johnson, Senior Records Manager, Glasgow University, December 2004.

4.7.2 Conclusion
Information about research projects in progress is potentially exempt from disclosure if

- it meets the criteria for exemption as research information intended for future publication (Section
  27(2) of the Act) AND satisfies the public interest test OR
- its release would prejudice substantially the commercial interests of the HEI or any other person
  or institution AND satisfy the public interest test
- disclosure would be an actionable breach of confidence, for example because the HEI has
  entered into a confidentiality agreement in keeping with its obligations under the Act and the
  guidance issued by the Scottish Information Commissioner. See Section 2 above.

Otherwise, on balance the presumption would be to release this information.

4.8 Question: We are working on a research consultancy project funded by a commercial partner. We
don’t intend to publish anything. We have been asked for copies of the research contract, detailed
information about the project and minutes and reports of project management meetings. Surely this
information is commercially confidential?

4.8.1 Issues to consider:
• The Act only applies to information held by a public authority on its own behalf. If your HEI has material in its possession which it holds on behalf of the commercial partner then this information need not be disclosed under the Act.

• Is all or just some of the information requested potentially exempt? The Act applies to recorded information, not the whole of a document containing the information sought by the applicant. If you consider that some or most of the information requested is exempt from disclosure be prepared to provide the non-exempt information. This may involve providing a summary of the objectives of the project and redacted copies of the contract or edited minutes and reports of project management meetings.

• Does the information meet the criteria for exemption as research information intended for future publication? (Section 27(2) of the Act) In this case, maybe not, as there is no intention on the part of the HEI to publish the research outputs. However, if the commercial partner intends to publish the research then the exemption may be applicable.

• Does your HEI or its commercial partner plan to obtain a patent on the project product or outputs? If so, disclosing the information prematurely may prevent your HEI from obtaining a patent and thereby potentially prejudice substantially its commercial interests (Section 33(1)(b) of the Act). For information about the scope of the Patents Act 1977 in this context, see the previous question on research towards publication.

• Would releasing the information prejudice substantially the commercial interests of your HEI or any other person or institution? (Section 33(1)(b) of the Act). If YES then apply the public interest test. You will need to weigh up considerations such as the potential harm to your HEI’s commercial interests by loss of research income, or damage to your commercial partnership’s potential to exploit the intellectual property in the research. Depending on the subject of research, there could be public interest in withholding the information, for instance because of the benefits of HEI industry collaboration, the income that this generates to enable research which may have significant public benefits and the economic impact. Arguments of this kind would need to be weighed against those of releasing the information because of the general principle of transparency about the HEI’s major external funding/income sources and potentially the public interest in the subject of a specific research project e.g. food industry sponsored research into the impact of sugar consumption on public health.

• Would release of this information be an actionable breach of confidence? (Section 36(2) of the Act) This would apply to information that you are given by your commercial partner or a third party, not information that your own HEI has generated in the course of the research. If the terms of your research contract, or other information provided by your commercial partner, are subject to a confidentiality agreement, tell them about your HEI’s obligations under the Act and seek their consent to release the information. This should serve to reduce the risk of a claim for breach of contract (as opposed to a claim for breach of confidentiality) as a result of any disclosure made by your HEI under the Act. If they object, or you agree that the information is genuinely confidential and should therefore be withheld, be prepared to justify this to the Scottish Information Commissioner. Although this is an absolute exemption, to succeed in law a claim of actionable breach of confidence would need to be soundly based e.g. on actual or potential substantial prejudice to commercial interests, and this claim would be subject to the public interest test.

4.8.2 Conclusion: On balance the presumption would be that HEIs should release this information unless this would meet one or more of the following exemptions

- Prejudice substantially the commercial interests of the HEI or any other person or institution AND satisfy the public interest test
- Constitute an actionable breach of confidence

4.9 Question: Currently we can turn down requests for information from students doing projects. How must we respond to such requests in future? Can we direct applicants to a policy statement?

4.9.1 Issues to consider:
Requests of this kind should be considered on a case-by-case basis. Bear in mind that you cannot ask applicants why they want the information. The key question is: what information does the student want?

- **Is it already available under your HEI’s publication scheme, or available in a publication, readily available to buy, or to borrow from a library?** If so, it is exempt as it is already “otherwise obtainable” (Section 25 of the Act). For example, if the information is held in previous editions of your HEI’s annual accounts, these could be “otherwise obtainable” by consultation in your archive or library.

- **Is the information held by your HEI or on its behalf but not available in your publication scheme?** If so you must apply the checklist of questions set out in Section 3 of this paper to determine the appropriate course of action. In particular, would a refusal to release the information be justified under the exemptions set out in the Act? Would it cost more than £600 to provide this information? If you were asked, for example for a copy of your HEI’s current marketing strategy, you would need to consider whether releasing this information would seriously prejudice the HEI’s commercial interests.

- **Does your HEI actually hold the information or does someone hold it on its behalf?** The Act applies only to recorded information, “If the institution does not already hold the information, it does not have to create the information to answer a request.” SHEIP: Freedom of Information (Scotland) Act 2002: A Guide to Exemptions. So for instance, if the applicant wants an aggregated summary of data that your HEI holds only in raw form, you do not hold the summary and therefore do not have to provide it.

- **Does the applicant really want information – or expertise?** If your applicant is writing a dissertation about say- technology transfer, or key recent developments in printed textiles, they may be looking for your expertise as an academic or practitioner, rather than relevant sources. You may be able to satisfy their request by pointing them to an article or journal paper you have written on the subject. If not, you do not hold the information and you are not obliged to provide what is in essence unpaid consultancy.

4.9.2 Conclusion
The key question is does the applicant want information or to pick your brains on the subject? If you hold the information, decide whether you should provide it, or whether it is exempt, taking account of the public interest where appropriate. If the request is for your expertise on a particular subject, rather than information, then you do not have to provide unpaid consultancy unless it is your HEI’s policy to do so.

4.10 Question: Donations from alumni and other individual and corporate givers are a vital source of income for new developments. Many donors insist on anonymity. Some companies will not be happy for recipients to reveal details of current or past sponsorship agreements. We are concerned that we will thus lose income to other good causes that are not subject to FOI.

4.1.1 Issues to consider:
- **Would the release of donor information breach the Data Protection Act 1998 (DPA)?** (Section 38(1)(b) of the Act). Individual living donors would have their anonymity protected by the DPA unless they have given consent to be identified as the source of a gift or there is another basis under the Data Protection Act on which to justify disclosure. This should be covered by an HEI’s existing donation procedures. The release of company and institutional names would not breach the data protection principles and in any case corporate donors and sponsors are usually keen to gain recognition for their gifts. The DPA exemption does not apply when donors have died. So in a case where a donor’s family want the bequest to be anonymous, your HEI would need to rely on another exemption to the Act. For instance, a case might be made that disclosing the identity of the donor against the wishes of his/her family would constitute an actionable breach of confidence or prejudice substantially, or be likely to prejudice substantially, the commercial interests of the donor’s family or of your own HEI (Section 33(1)(b) of the Act). This might arise if it risked losing a significant income stream by being unable to comply with donor requests for anonymity.

- **Do other exemptions come into play?** If your HEI was in negotiation with a potential major donor or sponsor, information about the negotiations could be withheld until the donation was
announced if its release would substantially prejudice the effective conduct of public affairs. (Section 30(c) of the Act) Again this is subject to the public interest test. In the unlikely event of a company not wishing its gift to your HEI to be publicised explore the reasons with them to establish whether there is a legitimate exemption that might justify this information being withheld. In some circumstances the release of sponsorship information might be argued to prejudice substantially, or be likely to prejudice substantially, the commercial interests of the sponsor. (Section 33(1)(b) of the Act) However, the public interest would appear to dictate that information about corporate donations should be available in the interests of accountability.

- Your HEI should consider, to the extent that it has not already done so, putting into place a FOI compliant policy on donations. Donors could be made aware of your HEI's proposed approach to disclosing details and its obligations under the FOI. In this way, in respect of donations caught by such a policy (i.e. not donations made prior to the policy being introduced)) the HEI will be clearer at the outset as to what information it can disclose.

4.1.2 Conclusion
Information about individual personal donors would be exempt from disclosure if its release breached the Data Protection Principles. Otherwise, on balance the presumption would be to release this information unless this would

- Prejudice substantially the commercial interests of the HEI or any other person or institution or substantially prejudice the effective conduct of public affairs AND satisfy the public interest test OR

- Constitute an actionable breach of confidence

5. Essential reading

Scottish Ministers: Code Of Practice On The Discharge Of Functions By Public Authorities Under The Freedom Of Information (Scotland) Act 2002
Laid before the Scottish Parliament on 6 September 2004
Pursuant to Section 60(5) of the Freedom of Information (Scotland) Act 2002
Prepared in consultation with the Scottish Information Commissioner

Scottish Executive: Freedom of Information (Scotland) Act 2002 - Open Learning Workbook

Scottish Information Commissioner
Briefing Series: Section 27 Information intended for future publication, October 2004
url: http://www.itspublicknowledge.info/Section27.htm
Briefing Series: Section 36 Confidentiality, November 2004
url: http://www.itspublicknowledge.info/Section36.htm

The Office of Government Commerce - Model Contract Clauses

Scottish Procurement Directorate, Scottish Executive: Scottish Public Sector Procurement and Freedom of Information, Draft version 2.4, 13 October 2004
url: http://www.scotland.gov.uk/Topics/Government/SPD/19468/21681

urls: http://www.dundas-wilson.com http://www.jisclegal.ac.uk

Scottish HE Information Practitioners Group (SHEIP) guidance papers, including:
- Commercial Enterprises & Freedom of Information
- Freedom of Information (Scotland) Act (FOISA) and Research Issues
- FOI and consortia or other collaborative working arrangements with other universities and non-public authorities
- FOI and teaching materials
- FOI and Quality