SCOTTISH HIGHER EDUCATION INFORMATION PRACTITIONERS GROUP

FOI and consortia or other collaborative working arrangements with other universities and non-public authorities (within the UK and worldwide)

Prepared by: Mark Robinson, Information Management Co-ordinator, University of St Andrews
Adopted: December 2004

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.

Copyright in original materials contained in this paper resides with the institution that produced it. The paper may be viewed, printed or downloaded for non-commercial use only. It is not to be modified, reproduced, transmitted, published or otherwise made available in whole or in part for commercial purposes without the prior written consent of the creating institution. If the paper is used elsewhere, the creating institution must be credited.

Contents

| 1. Background | 1 |
| 2. Items of Particular of Relevance from the Act | 2 |
| 3. Key Issues | 2 |
| 4. Frequently Asked Questions | 3 |

1. Background

1.1 The Freedom of Information (Scotland) Act 2002 (the Act) provides a general entitlement to all information held by a Scottish public authority. The entitlement includes information held about consortia (and other working arrangements) into which a Scottish Higher Education Institute (HEI) may have entered.

1.2 Under Section 23 of the Act, HEIs are required to make information available through a publication scheme. Information not made available through the scheme is available on request. Whether available through a publication scheme or on request, disclosure of information is subject to exemptions, of which the following, for example, may apply:

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
<td>Information otherwise accessible</td>
</tr>
<tr>
<td>26</td>
<td>Prohibitions on disclosure</td>
</tr>
<tr>
<td>27</td>
<td>Information intended for future publication</td>
</tr>
<tr>
<td>30</td>
<td>Prejudice to the effective conduct of public affairs</td>
</tr>
<tr>
<td>33</td>
<td>Commercial interests and the economy</td>
</tr>
</tbody>
</table>
1.3 Consortia with other HEIs and with other organisations are a common feature of most HEIs. Such partnerships can take many different forms. They can be strategic or operational; formally at the institutional level, or informally between groups and be on a regional, national or worldwide scale.

1.4 Examples of partnerships between HEIs, and with industry, include purchasing, degree programmes, collaborative courses, contract research, collaborative research, sponsored research, postgraduate studentships, student projects and placements, sponsored and honorary posts and secondments, HEI consultancy and associated commercial services and clubs and networks.

1.5 The three main activities that HEIs engage in that may result in consortia are:

- teaching and learning
- research
- innovation and knowledge transfer.

2. Items of Particular Relevance from the Act

<table>
<thead>
<tr>
<th>Section/Part</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>General entitlement</td>
</tr>
<tr>
<td>2</td>
<td>Effect of exemptions</td>
</tr>
<tr>
<td>3</td>
<td>Scottish public authorities</td>
</tr>
<tr>
<td>23</td>
<td>Publication schemes</td>
</tr>
<tr>
<td>Part 2</td>
<td>Exempt Information</td>
</tr>
<tr>
<td>60</td>
<td>Code of practice as to functions under this Act</td>
</tr>
</tbody>
</table>

3. Key Issues

3.1 Partnership in a consortium necessarily involves the transfer of information between the partners. Whether or not information is subject to disclosure will depend on whether or not an exemption legitimately applies. Other factors to consider include the terms and conditions of the consortium agreement and the legislative regime to which the partners are subject.

3.2 In those cases where all partners are subject to the Act, the rules concerning disclosure of information will be common to all and agreements can be drafted accordingly.

3.3 When entering into a consortium with partners not subject to the Act, HEIs are still bound by the Act even though the other partners are not. Any information HEIs hold concerning the consortium, regardless of the source of that information, is subject to disclosure under the Act unless an exemption legitimately applies.

3.4 Information provided by HEIs to a consortium will be subject to the Act as well as to any relevant legislation in force in the country to which the partners belong.

3.5 The more remote the consortium partners are from the reach of the Act and UK legislation in general, the more complex are the issues concerning the disclosure of information. Potential partners not subject to the Act include private Scottish organisations, public authorities including HEIs subject to the Freedom of Information Act 2000, private UK organisations, state or private organisations external to the UK.
3.6 All UK partners should be aware that processing any information the consortium may hold relating to an identifiable living individual constitutes ‘personal data processing’ and is subject to the Data Protection Act 1998.

4. Frequently Asked Questions

4.1 What is the first thing we should do concerning the Act when considering partnership in a consortium?

You should make all potential partners aware of the requirements of the Act concerning disclosure of information i.e. the timeframes that apply, any fees that may be charged, the exemptions that may apply, and the consequences of not complying with the Act. It may also be appropriate, at the same time, to advise your potential partners of the relationship of the Act with the Data Protection Act 1998.

4.2 In what circumstances will information concerning our consortium and its work be exempt from disclosure?

The Scottish Higher Education Information Practitioner’s Group has prepared guidance on the application of the exemptions in the Act and this is accessible at http://www.st-andrews.ac.uk/foi/FOIExemptions

The guidance does not constitute legal advice and you should contact your institution’s staff members with responsibility for compliance with the Act for further assistance.

The Scottish Executive or the Scottish Information Commissioner (the Commissioner) may provide further guidance on exemptions in the future. Case law will eventually determine the circumstances in which exemptions can be applied.

4.3 In what circumstances is it appropriate to include a confidentiality clause in a consortium agreement?

The Code of Practice under Section 60 of the Act makes it clear that HEIs should always consider carefully any request to have information covered by a confidentiality clause, and should make clear to potential partners that the HEI cannot guarantee information will not be disclosed unless the requirements of section 36(2) of the Act, or other exemptions, are met. Furthermore, HEIs should not agree to hold information in confidence if it is clearly not confidential in nature. If HEIs accept a confidentiality clause, they must have a good reason for doing so and must be able to justify their decision to the Commissioner.

The Code of Practice under Section 60 of the Act is accessible at: http://www.scotland.gov.uk/library5/government/sedfpa-00.asp

4.4 The consortium partners require a confidentiality clause in the agreement. Can you suggest suitable wording that would meet their requirements yet enable us to comply with the Act?

The consortium agreement may include a clause concerning the circumstances under which disclosure of confidential information is permitted. A typical clause would cover the disclosure of information when required by law and provision for giving the other partners advance written notice of the intention to disclose. This clause could be amended by making specific reference to the Act.

Alternatively you may wish to include an additional clause specifically enabling your HEI to disclose information to meet the requirements of the Act. The example below could serve either as an amendment to an existing clause or as an additional clause.
“Any partner subject to the Freedom of Information (Scotland) Act 2002 may additionally disclose confidential information in compliance with that Act and shall take all reasonable steps to give the other partners prior written notice before any such disclosure.”

It is advisable to seek legal advice before committing your HEI to any legally binding agreement.

4.5 What are our options when a partner insists on a confidentiality clause even though we feel it is unlikely that the inclusion of such a clause would prevent the disclosure of the information concerned?

HEIs should refuse to include clauses which restrict the disclosure of information it holds relating to the agreement beyond the restriction permitted in the Act. The Code of Practice under Section 60 of the Act makes it clear that HEIs should always consider carefully any request to have information covered by a confidentiality clause, and should resist the request unless there is a clear justification for confidentiality. If HEIs accept a confidentiality clause, they must have a good reason for doing so and must be able to justify their decision to the Commissioner.

Where it is necessary to include a confidentiality clause in an agreement, an option could be to agree with the partner a schedule to the agreement which clearly identifies information which should remain confidential. Any acceptance of such confidentiality provisions must be for a good reason and must again be capable of being justified to the Commissioner.

Any insistence by a partner on maintaining the confidentiality of information that is non-exempt may be a reason for partners to reconsider their positions and query whether or not the consortium should proceed.

The Code of Practice under Section 60 of the Act is accessible at: http://www.scotland.gov.uk/library5/government/sedfpa-00.asp

4.6 We are entering into a consortium where the agreement is to be interpreted in the light of foreign legislation. How will that legislation impact on the disclosure of information the consortium partners hold?

There is no easy answer to this question as it depends on the circumstances of each case. In general terms information you hold concerning the consortium will be subject to the Act regardless of the terms of the agreement. The information held by other consortium partners will be subject to the legislation prevailing in their countries.

4.7 Following on from the above, we are entering into a consortium with a partner from another country. They require a clause in the agreement stating that the copyright law to apply is that of their country. How will that clause affect our obligation to disclose information that we hold which was provided by our partner?

HEIs need to be aware that there is currently much discussion on the perceived conflict between copyright law, and in particular copyright in third party materials held by an HEI, and the Act. It should be remembered that it is always possible to make third party material available by means which strictly speaking would not breach copyright e.g. available to read on the premises.

For further discussion of the issues surrounding the Act and copyright please see “Freedom of information and Intellectual Property Rights” jointly produced by Dundas & Wilson and the JISC Legal Information Service and accessible at http://www.jisclegal.ac.uk/publications/foiundaswilsonipr.htm

4.8 What can be done to ensure that a partner not subject to the Act refrains from disclosing information that is exempt?
Unless the information is required to be disclosed under the legislation applying in that partner’s country, this situation is most appropriately covered by the inclusion of a suitable clause in the agreement. In order to avoid unnecessary secrecy, any such constraints should be drawn as narrowly as possible and according to the individual circumstances of the case. Apart from such exceptional cases, you should not impose terms of secrecy on consortium partners.

4.9 When requested, must we release information provided by a partner where the partner does not want that information released?

The Code of Practice under Section 60 of the Act covers this situation. There may be cases where information has been received from a partner and to disclose that information without their prior consent would constitute an actionable breach of confidence such that the "confidentiality" exemption in section 36(2) the Act would apply. In that event, HEIs should discuss with the partner whether the information still needs to be regarded as confidential.

Consultation should take place where:
- the views of the partner may help HEIs to determine whether an exemption under the Act applies to the information requested; or
- the views of the partner may help HEIs to determine where the public interest lies.

Consultation will be unnecessary where:
- HEIs do not intend to disclose the information in any case because of some other legitimate ground under the Act;
- the views of the partner bear no influence on the decision of HEIs, for example, where there is other legislation either preventing or requiring disclosure.

HEIs are not relieved of their obligation to disclose information under the Act, or their duty to reply within the statutory time, should a third party fail to respond to consultation or fail to respond within the given time frame. In all cases, it is for HEIs, not the third party (or any representative of that party) to determine whether or not information should be disclosed under the Act. A refusal to consent to disclosure does not, in itself, mean that information should be withheld.

However, in circumstances where disclosure of that information without the prior consent of a partner could constitute an actionable breach of confidence, HEIs may wish to seek legal advice.

The Code of Practice under Section 60 of the Act is accessible at: http://www.scotland.gov.uk/library5/government/sedfpa-00.asp

4.10 If we are not the lead partner for a particular aspect of the consortium’s business, can we refer the enquirer or transfer their request to the lead partner, rather than answer the request ourselves?

The obligation to respond to a request lies with the organisation that received the request. Even though you are not the lead partner, you would be expected to disclose the relevant information that you hold.

There are however circumstances when it may be appropriate to transfer a request and guidance is available in Paragraphs 30 to 34 of Code of Practice under Section 60 of the Act. The Code is accessible at: http://www.scotland.gov.uk/library5/government/sedfpa-00.asp

4.11 Are there any particular steps to follow should our consortium engage in research involving the personal data of individuals?
The consortium must ensure that where research involves the personal data of individuals that the data is dealt with in compliance with the Act and in particular the Data Protection Act 1998. As research projects vary partners should consult HEI staff with responsibility for Freedom of Information and Data Protection for assistance.

4.12 Can we transfer research data concerning individuals to our foreign consortium partners?

Principle eight of the Data Protection Act 1998 says that “Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.”

You can therefore transfer personal data to consortium partners who are members of European Economic Area (EEA) countries and territories. The EEA consists of all member states of the European Union (EU) together with Iceland, Liechtenstein and Norway.

Personal data can be transferred to a consortium partner who is not a member of an EEA country or territory in the following circumstances:

- When the consortium partner is a US company that has agreed to comply with the 'safe harbor' agreement. The agreement was developed by the US Department of Commerce and approved by the EU
- When the partner is a member of a country where the EU has recognised the adequacy of the protection of personal data. The following countries have been recognised:
  - Argentina
  - Canada
  - Guernsey
  - Hungary
  - Switzerland
  - USA (companies as above)
- When the consortium partner uses the standard contractual clauses adopted by the European Commission (EC) for ensuring adequate safeguards for personnel data transferred to countries outside the EEA
- When one of the circumstances set out in Schedule Four of the Data Protection Act 1998 is met. These circumstances include:
  - The data subject has given consent to the transfer
  - The transfer is necessary for the performance of a contract to which the data subject is a party
  - The transfer is necessary for reasons of substantial public interest
  - It is necessary for the purpose of legal proceedings
  - It is necessary in order to protect the vital interests of the data subject
  - The transfer is of part of the personal data on a public register
  - The transfer is made on terms which are of a kind approved by the UK Information Commissioner as ensuring adequate safeguards for the rights and freedoms of data subjects

4.13 What do we do if someone asks for copies of information concerning a consortium that was in operation before the Act came into force?

The Act provides a general entitlement to all information held by HEIs. If your HEI still holds the information, and it is not available through the publication scheme, then, subject to exemptions, the information is to be made available on request.