SCOTTISH HIGHER EDUCATION INFORMATION PRACTITIONERS GROUP

Commercial Enterprises & Freedom of Information

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Adopted: August 2004

Disclaimer
This paper summarises the current thinking on this issue. Please note that it does not constitute legal advice. It has been prepared by Scottish HE freedom of 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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Contents

1. What is the purpose of this document? .......................... 1
2. Does freedom of information apply to commercial enterprises? .......................... 2
3. Who enforces freedom of information? .......................... 2
4. How will the FOIS Act affect commercial enterprises of HEIs? .......................... 2
5. Individual requests .................................................... 3
6. Exemptions ............................................................. 4
7. Publication Scheme .................................................... 4
8. Records Management ................................................... 5
9. Relationship between the Freedom of Information Act and the Data Protection Act ................................................... 5
10. Freedom of information and the environmental information regulations ................................................... 6
11. Further Assistance ...................................................... 6

Annex A: Implementation Action List
   I. Publicly-owned subsidiaries of an HEI .......................... 7
   II. Commercial enterprises within an HEI .......................... 8

1. What is the purpose of this document?

1.1 This guidance is an introduction to the Freedom of Information (Scotland) Act 2002 (the “FOIS Act”) for Higher Education Institutions’ (HEIs) commercial enterprises, such as accommodation services, and sports centres, and subsidiary companies wholly owned by HEIs, such as spin-off
companies. It highlights the main issues for commercial enterprises including some of the issues affecting consultancy services offered by institutions and their commercial enterprises.

2. Does freedom of information apply to commercial enterprises?

2.1 The FOIS Act applies to “Scottish public authorities” and defines HEIs as Scottish public authorities. The Act applies to all divisions and sections of HEIs, including their internal commercial enterprises such as accommodation services.

2.2 The FOIS Act also applies to any company that is wholly owned by one or more Scottish public authorities. These are known as publicly-owned companies and are defined as separate Scottish public authorities. Any company that is wholly owned by a Scottish HEI is a Scottish public authority in its own right. Any company that is wholly owned by a number of Scottish public authorities, e.g. a company that is wholly owned by a number of Scottish HEIs, or wholly owned by Scottish HEIs and other Scottish public authorities, is also a Scottish public authority in its own right. Even ‘dormant’ or ‘shell’ companies are subject to all the provisions of the FOIS Act. Companies that are owned in part by a Scottish HEI and in part by one or more non-public authorities are not subject to the FOIS Act. Companies that are owned jointly by a Scottish HEI and a non-Scottish HEI, e.g. a company that is owned by a Scottish HEI and an English HEI, are not subject to the FOIS Act. However, information that an HEI holds about these companies is subject to the FOIS Act.

3. Who enforces freedom of information?

3.1 The Scottish Information Commissioner (SIC) is responsible for policing the FOIS Act and has a duty to promote it. He has powers to issue public authorities with:
   a. “practice recommendations” giving guidance on compliance with the legislation,
   b. “information notices” requiring public authorities to provide his office with specific information to aid his investigations, and
   c. “enforcement notices” which require public authorities to comply with the Act.

   If a public authority fails to comply with an enforcement notice the case is passed to the Court of Session which has the power to make further enquiries and if necessary to deal with the public authority as if it had committed contempt of court. Contempt of court is punishable with an unlimited fine and up to a two-year prison sentence. The Office of the SIC is promoting the FOIS Act and plans a publicity campaign to coincide with the full enforcement of the Act in late 2004 and early 2005. See below for details of how to contact the Office of the SIC.

3.2 The UK Information Commissioner polices the Freedom of Information Act 2000 which applies to public authorities in England, Wales and Northern Ireland. The UK Freedom of Information Act also applies to public authorities with a UK wide remit operating in Scotland. The UK Freedom of Information Act does not apply to Scottish HEIs or their subsidiary companies.

4. How will the FOIS Act affect commercial enterprises of HEIs?

4.1 Commercial enterprises of HEIs, both internal enterprises and publicly-owned companies, must comply with the FOIS Act. Publicly-owned companies are responsible for their own compliance with the legislation but their HEI may choose to provide some support. An HEI's internal commercial enterprises, such as catering services, should receive support and guidance on compliance from the HEI.

4.2 The FOIS Act places three principal responsibilities on Scottish public authorities:
   a. As of 1 January 2005 to respond to any ‘written’ (fax, e-mail, letter, answer phone, audio tape) request for any information from anyone anywhere in the world (unless one of the limited exemptions applies). The FOIS Act has no concept of a formal freedom of information request, so any ‘written’ request for information will be a freedom of information request, even including surveys, student research questionnaires or requests for prospectuses.
b. To submit a publication scheme to the SIC. A publication scheme is a list of information which a Scottish public authority intends to make available on a proactive basis. Including information in a publication scheme constitutes a legally binding commitment to provide that information.

c. As of 1 January 2005 to comply with a code of practice on records management, which places 28 high-level requirements on Scottish public authorities, combining to form a requirement to establish and maintain complete records management systems and procedures.

5. Individual requests

5.1 The FOIS Act entitles anyone from anywhere in the world to ask for information held by an HEI and their publicly-owned companies. They are entitled to receive the information requested unless there is a reason for not supplying the information which can be justified in terms of the Act’s exemptions. The FOIS Act does provide exemptions for some information but the exemption categories are narrow and many are subject to a public interest test. See below for further information about exemptions.

5.2 This means that most of the information held by HEIs and their publicly-owned companies will be available on request from 1 January 2005 when the FOIS Act comes fully into force. It should be noted that any recorded information held by an HEI is subject to the FOIS Act regardless of who “created” or “owns” the information. For example if an HEI holds information received from a privately owned company (a company that is not defined as a public authority by the FOIS Act) that information may be requested and, if no exemptions apply, made available.

5.3 Scottish public authorities have a maximum of 20 working days to answer a freedom of information request. In that time, they must confirm or deny that they hold the information, supply the information or explain why they will not. Public authorities have a duty to be as helpful as possible; this includes helping enquirers to make a valid request. The duties are laid out in the section 60 Code of Practice issued by the Scottish Executive and can be found at: http://www.itspublicknowledge.info/legislation.htm.

5.4 The request must come in a recorded format, e.g. letter, e-mail, fax, audio/video cassette. The request does not have to mention the Freedom of Information (Scotland) Act, so any recorded request for information you receive is a freedom of information request. For example if you receive a marketing questionnaire asking about the number and types of computers your company uses and how old they are you must answer it if you have recorded that information.

5.5 Any member of staff could receive a freedom of information request so all staff must be made aware of the FOIS Act and its requirement to answer requests for information within 20 working days. Staff must answer the request or, if the request is sensitive in some way or has been received by the wrong department, staff must pass the request on to an appropriate person for it to be answered. The 20 working days is counted from the day that the request is received by the public authority, not from the day that it is received by the appropriate person within the public authority, so it is important that requests reach the appropriate person quickly.

5.6 Scottish public authorities will be able to pass some of the costs of answering individual requests onto the enquirer in some circumstances. The Fees Regime, drafted by the Scottish Executive and approved by the Scottish Parliament, regulates what costs can be recovered from the enquirer. The Regime is not intended to permit full cost recovery. Authorities may recover a proportion of prescribed costs. The first £100 of the prescribed costs must be provided free of charge to the enquirer. Authorities may recover 10% of the costs incurred between £100 and the upper cost limit of £600. No enquirer will ever have to pay more than £50 for information provided in response to an individual request for information. The full details of the Fees Regime are available on the Scottish Executive’s freedom of information web pages at: http://www.scotland.gov.uk/about/FCSD/MCG-NW/00018017/Introduction.aspx.
6. Exemptions

6.1 The FOIS Act contains 17 exemptions to the information access rights. The ones most likely to apply to information held by HEI commercial enterprises and publicly-owned companies are:

a. Information otherwise accessible (s.25)
Information that can be reasonably obtained without making an individual freedom of information request is exempt. To be reasonably obtainable it must be available elsewhere than from the public authority or available from the public authority through its publication scheme (see below for further details about publication schemes). For example, books that are currently in print are reasonably obtainable from a number of sources, including bookshops and libraries. In contrast, the accounts information companies send to Companies House is only obtainable from Companies House or from the company itself, and must therefore be put in the publication scheme to qualify for this exemption. This is an absolute exemption. Absolute exemptions are not subject to the public interest test (see below).

b. Commercial interests and the economy (s.33)
Information is exempt if it constitutes a trade secret or if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person, including the public authority or the publicly-owned company. This exemption is subject to the public interest test (see below).

c. Confidentiality – legal proceedings (s.36(1))
Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt. This exemption is subject to the public interest test (see below).

d. Confidentiality (s.36(2))
Information obtained from another person is exempt if the disclosure of the information would constitute an actionable breach of confidence. This is an absolute exemption. Absolute exemptions are not subject to the public interest test (see below).

e. Personal information (s.38)
Information is exempt if it constitutes personal information, as defined by the Data Protection Act 1998 (the “DP Act”) and its disclosure would breach the data protection principles of the DP Act. This is an absolute exemption. Absolute exemptions are not subject to the public interest test (see below).

Exemptions that are not absolute are subject to the public interest test. The public interest test requires public authorities or publicly-owned companies to provide the information unless, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosure of the information.

7. Publication Scheme

7.1 The FOIS Act requires all public authorities including publicly-owned companies, to adopt, maintain, publish and review from time-to-time a publication scheme. HEI’s internal commercial enterprises do not need their own publication scheme but must contribute to their institution’s publication scheme.

7.2 Publicly-owned companies must develop a publication scheme and submit the appropriate forms to the SIC no later than 31 August 2004. The schemes must be in operation from 30 November 2004. Please note that these are different deadlines from the deadlines for HEI’s own publication schemes which are 31 May 2004 for submission to the SIC and 1 September 2004 to be fully operational.

7.3 To help publicly-owned companies with their publication scheme commitment, the SIC has developed two model publication schemes for publicly-owned companies, one for active companies and one for dormant companies. Both are available on the SIC website with guidance on how to use them at: http://www.itspublicknowledge.info/poc.htm. It is likely that publicly-owned companies will want to adopt the appropriate model publication scheme unless there is additional information that should be covered in their scheme, such as information that the company currently sells, consultancy information or specialist information such as out of print books. For example if a company currently sells information that is not reasonable
accessible elsewhere and which is not covered by the model publication scheme, the company will lose out financially unless they include the information in their publication scheme; because the company will not be able to charge the full cost of providing the information in response to an individual request (see above). Where it is not possible to adopt one of the model publication schemes publicly-owned companies must submit a bespoke publication scheme to the SIC for approval.

7.4 If developing a bespoke publication scheme publicly-owned companies are recommended to use the model scheme as the basis for their own bespoke scheme. Companies should decide what additional classes of information they need to include in their publication scheme and then draft appropriate class descriptions.

7.5 Publicly-owned companies should study the SIC’s guidance on producing and submitting a publication scheme for approval, this is of particular importance if companies are submitting a bespoke publication scheme. The Publication Scheme Guidance is available on the SIC’s website at: http://www.itstpublicknowledge.info/pscheme.htm, and provides guidance on the publication scheme requirements.

8. Records Management

8.1 From 1 January 2005 HEIs and their publicly-owned companies will have to comply with the section 61 code of practice on records management. The code of practice comprises 28 high-level requirements which form a requirement to establish and maintain complete records management systems and procedures. The provisions of the code of practice are not mandatory but failure to comply with the code of practice will be seen as indicative of a probable failure to comply with the rest of the FOIS Act.

8.2 Records management allows an organisation to know what information it has, where it is kept and how long to keep it. Proper records management has obvious benefits for organisations subject to freedom of information and also has many operational and business benefits:
   a. Saves time spent looking for information
   b. Supports information sharing
   c. Aids storage planning and management
   d. Better use of physical and server space
   e. Increases control over information assets
   f. Reduces costs and risks associated with keeping unnecessary information
   g. Underpins legislative compliance


9. Relationship between the Freedom of Information Act and the Data Protection Act

9.1 The relationship between the Freedom of Information Act and the Data Protection Act is complicated.

9.2 Freedom of information requests for information about another person can only be refused if the disclosure would breach the data protection principles, or if it would cause substantial damage or distress to the data subject and the public interest in not disclosing the information outweighs the public interest in disclosing the information.

9.3 The UK Assistant Commissioner for Scotland (the officer responsible for policing the Data Protection Act in Scotland) has indicated that information about someone acting in an official capacity should normally be provided in response to a freedom of information request unless there is some risk to that individual. Information about home, family life, personal finances,
personal references and information of a personal rather than professional nature should not normally be provided in response to a freedom of information request.

9.4 If an individual requests information about himself or herself it is a subject access request under the Data Protection Act rather than a freedom of information request.

10. Freedom of information and the environmental information regulations

10.1 The Environmental Information (Scotland) Regulations 2004 (“EISR”) implement the EU Directive 2003/4/EC 28 January 2003 on public access to environmental information. The EISR place a duty on all Scottish public authorities (including publicly-owned companies), holding environmental information, to make that information available to those who ask for it.

10.2 The definition of “environmental information” is very broad and includes information about all aspects of the environment including the state of the environment, the natural environment and the built environment, emissions and discharges, and activities affecting elements of the environment. It includes all recorded information regardless of the format, e.g. written, audio tape, video tape, database form.

10.3 EISR provide similar rights to individuals as FOISA but the responsibilities of Scottish public authorities and publicly-owned companies are different under EISR from FOISA. HEIs and publicly-owned companies must therefore differentiate between requests for environmental information, which must be handled in accordance with the EISR, and other requests for information, which must be handled in accordance with FOISA.

10.4 There is not yet any guidance on EISR. However, the Scottish Executive is drafting a code of practice for Scottish public authorities on discharging their responsibilities under the regulations. Further information is available on the Scottish Executive website at: http://www.scotland.gov.uk/consultations/environment/ateic-00.asp.

11. Further Assistance

11.1 Annex A gives the commercial enterprises and subsidiary companies an Implementation Action List which gives guidance on where to start.

11.2 The Scottish Information Commissioner polices the Freedom of Information (Scotland) Act. Further information about the FOIS Act is available on his website and from his office.

The Office of the Scottish Information Commissioner

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Doubledykes Road
St Andrews
Fife
KY16 9DS

Telephone: 01334 464610
Fax: 01334 464611
E-mail: enquiries@itspublicknow ledge.info
Website: http://www.itspublicknowledge.info/
Annex A: Implementation Action List
The following lists suggest where publicly-owned companies and internal commercial enterprises should start when thinking about compliance with the Freedom of Information (Scotland) Act 2002. There are two lists, one for publicly-owned subsidiaries (list I) and one for internal commercial enterprises (list II). Please turn directly to the appropriate list.

I. Publicly-owned subsidiaries of an HEI

Freedom of Information (Scotland) Act: Individual Requests
1. Find out about the requirements of the Act.
2. Think about:
   a. Scenarios of difficult requests and consider how you would deal with them.
   b. Information you would have concerns about releasing.
   c. What information might be particularly costly to provide.
   d. The procedures you will adopt to answer requests.
3. Develop procedures for answering requests for information.
4. Raise staff awareness of the requirements placed on public authorities when answering requests for information after 1 Jan 2005.
5. Implement procedures for answering requests for information from 1 Jan 2005.

Freedom of Information (Scotland) Act: Publication Scheme
1. Find out about the publication scheme requirements.
   b. See the SIC’s model publication schemes for companies, http://www.itspublicknowledge.info/poc.htm.
2. Decide whether or not one of the model publication schemes is suitable for your publicly-owned company.
   a. Think about whether you have additional information that should be included in your publication scheme?
3. If you have decided to adopt the model publication scheme –
   a. Complete form OSIC 3 and send it to the SIC by 31 August 2004.
   b. Complete the introduction to the publication scheme by including information about your company, and your company’s archive and records management policy.
4. If you have decided to submit a bespoke publication scheme –
   a. Use the model publication scheme as the basis of your bespoke scheme.
   b. Decide which classes of information you want to add.
   c. Draft class descriptions for each of your new classes of information.
   d. Complete the introduction to the publication scheme by including information about your company, and your company’s archive and records management policy.
   e. Submit your company’s publication scheme and form OSIC 1 to the SIC by 31 August 2004.
5. Implement your publication scheme from 30 November 2004 and put in place procedures for maintaining and reviewing the scheme.
6. Raise staff awareness of the publication scheme so that they can direct enquirers to it.

Freedom of Information (Scotland) Act: Records Management
1. Find out about records management, the records management requirements of the Act and your company’s current records management practices.
2. Think about how you can improve your company’s records management to ensure that all information can always be found regardless of staff holidays and illness.
3. Develop records management procedures.
4. Ensure your staff have appropriate training to use and implement the records management procedures.
5. Implement records management procedures.
II. HEI’s internal commercial enterprises

Freedom of Information (Scotland) Act: Publication Scheme
1. Find out about your HEI’s publication scheme.
2. Think about the contributions you will make to your HEI’s publication scheme.
3. Compile your contributions to the publication scheme.
4. Develop maintenance procedures for ensuring that:
   a. The information you are committed to publishing under the publication scheme is published on time to the timetable laid out in the publication scheme.
   b. The information you are committed to publishing under the publication scheme is published in the manner laid out in the publication scheme.
   c. If the information you are committed to publishing is published on the Internet, the URL pointing to it from the publication scheme is up to date.
5. Implement maintenance procedures by 1 September 2004 when your HEI’s publication scheme goes ‘live’.
7. Raise staff awareness of the publication scheme so that they can direct enquirers to it.

Freedom of Information (Scotland) Act: Individual Requests
1. Find out about the requirements of the Act.
2. Think about:
   a. Scenarios of difficult requests and consider how you would deal with them.
   b. Information you would have concerns about releasing.
   c. What information might be particularly costly to provide.
3. Raise staff awareness of the requirements placed on your HEI when answering requests for information after 1 Jan 2005.
4. Implement procedures for answering requests for information using.

Freedom of Information (Scotland) Act: Records Management
1. Find out about records management and the records management requirements of the Act.
2. Think about how you can improve records management for your commercial enterprise to ensure that all information can always be found regardless of staff holidays and illness.
3. Develop records management procedures.
4. Ensure your staff have appropriate training to use and implement the records management procedures.
5. Implement records management procedures.