FOI and teaching materials

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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 may include access to teaching materials.

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 the conditions and exemptions in the Act.
1.3 Teaching materials come in many forms and may include:

- Lecture notes
- Printed matter such as source books and module books
- Computer-based teaching material combining text, graphics, animation, still images, video and audio, all of which can be delivered by a variety of mechanisms
- Audio and video tapes

2. Items of Particular Relevance from the Act

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3. Key Issues

3.1 Ownership of IPR in teaching materials if not already determined should be so before 1 January 2005 in order to allow compliance with the Act.

3.2 It is not necessary that an HEI assert ownership to all teaching materials and it may not be possible for it to do so. It would however aid the HEI and the public if ownership of IPR in teaching materials were consistently applied.

3.3 Teaching materials are a commercially valuable resource. It might be beneficial to the HEI if ownership of teaching materials were vested in the HEI.

4. Frequently Asked Questions

4.1 **What is the first thing I need to know concerning the Act and teaching materials?**

   The Act, subject to exemptions, provides a general entitlement to all information an HEI holds. This entitlement may include access to teaching materials which are deemed to be held by the HEI even if IPR ownership rests elsewhere. The Act does not provide a specific exemption for either the IPR of the HEI or that of a third party, but the institution might be able to rely on another exemption under the Act. For guidance on exemptions please see FAQ no. 12 below.

   For further discussion of the issues surrounding the Act and IPR 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/foidundaswilsonipr.htm](http://www.jisclegal.ac.uk/publications/foidundaswilsonipr.htm)

4.2 **Should I include teaching materials in the publication scheme?**

   This is a matter for your HEI to decide. While protected by copyright, teaching materials may be commercially exploitable. If they are published freely on the web, they are vulnerable to unauthorised use. On the other hand, some HEIs, both in the UK and overseas, freely publish some or all of their teaching materials over the Internet.
If your HEI adopted the Model Publication Scheme, or the Commissioner approved a bespoke scheme which did not include a class for teaching materials, then your HEI is not required to include teaching materials in its publication scheme.

4.3 I am not sure whether or not I am able to comply with a request for teaching materials. What should I do?

You should consult your HEI’s policy concerning the ownership of IPR in teaching materials. If a policy does not exist one should be developed immediately. Lack of a policy on which to make an informed decision whether or not to release teaching materials in response to a request is not an exemption under the Act and will result in extra pressure being placed on staff attempting to deal with requests within the 20 working day time limit.

Such a policy would not of itself preclude the release of information under FOISA, however, but may support reliance on one of the exemptions in the Act. The FOISA does not provide a specific exemption for either the IPR of the HEI or that of a third party.

4.4 If I have the option, in what circumstances will it be appropriate to retain or transfer ownership to my HEI of the IPR in my teaching materials?

As the situation will vary between HEIs, this is a matter for you to discuss with your Head of School or other responsible staff member as appropriate.

4.5 Another HEI has requested copies of teaching materials and I suspect their intention is to use them in their own courses and lectures. Do I have to provide these materials to the other HEI?

Teaching materials are held by the HEI and are covered by the general entitlement in the Act. Under section 1(1) of the Act, a person who requests information is entitled to be given it. The identity of the person making the request and the reason for their request are not relevant to whether or not information is to be disclosed.

Information can only be withheld if one of the exemptions in the Act can be legitimately applied. In this case, an exemption that may apply is that under section 33 of the Act concerning commercial interests. For guidance on exemptions please see FAQ no. 12 below.

4.6 What do I do if someone asks for copies of teaching materials for classes that I no longer teach?

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

If the HEI no longer holds the information it would be helpful to be able to prove that it no longer holds the material. Suspecting that the information is not there or not being able to find the information is not enough. It would be useful in this situation to be able to refer the applicant to a retention and disposal schedule and also to documentary evidence that the information concerned was disposed of in accordance with that schedule.

For guidance on exemptions please see FAQ 4.12 below.

4.7 What is the relationship between the Act and copyright?

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 Can teaching materials be deemed to have been released into the public domain during lectures etc. and therefore exempt from disclosure as they are ‘otherwise accessible’ under section 25 of the Act?

It may be difficult to argue this as the release of information in a lecture is to matriculated students who have paid for the right to attend that lecture as part of their education. The information has not been generally released to the public.

For guidance on exemptions please see FAQ 4.12 below.

4.9 How does the Act apply to teaching collections such as the art history slide collection, the anatomy collection and the geology collection?

It is not likely that material of this nature, apart perhaps from photographic images, would be considered to be information and thus fall under the Act. Your HEI would most likely not wish to make this material available other than by sending images to the applicant or by making the material available for inspection on HEI premises.

4.10 How does the Act apply to syndicated or multi-partner teaching materials?

Even where the HEIs have asserted their IPR rights and the terms of the agreement restrict access to within the HEIs involved, the teaching materials are still information held by the HEIs and are thus covered by the general entitlement in the Act unless subject to one of the exemptions. For guidance on exemptions please see FAQ no. 12 below.

4.11 How does the Act apply to e-learning materials?

FOISA applies to e-learning materials just as it does to traditional materials, as the information is held by the HEI. FOISA does not provide a specific exemption for either the IPR of the HEI or that of a third party. The institution would have to rely on some other exemption in order to refuse to disclose the material.

4.12 Which exemptions could we legitimately apply to prevent disclosure of our teaching materials?

The advice below is intended to give a brief indication only of which exemptions may apply. Further information on the application of exemptions is available from:

- Your HEI staff member with responsibility for compliance with the Act
- Guidance prepared by the Scottish Higher Education Information Practitioner’s Group which accessible from the Universities’ Scotland website. (The guidance does not constitute legal advice and you should contact HEI 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.
One factor that might be relevant when considering whether or not any of the exemptions below applies is how original the material is i.e. is it a reworking of already published information or is it something new? If the material is a reworking of already published information it is unlikely that an exemption will apply as the information is already in the public domain.

Teaching materials MAY be legitimately exempt from disclosure under the following exemptions:

**Section 25 Information otherwise accessible**

The information is readily available at another source e.g. from your publication scheme, School web pages, the copyright holder, publicly accessible library or a retail outlet.

**Section 26 Prohibitions on disclosure**

In rare circumstances it may be that some teaching materials, while able to be disclosed in a teaching environment, are otherwise prohibited from disclosure by or under an enactment.

**Section 27 Information intended for future publication**

The information may be intended for publication within 12 weeks of receipt of the request in which case the exemption under section 27(1) of the Act may apply.

The exemption under section 27(2) is also relevant where lecturers include information in their lectures about their current research findings before the results of that research are published.

**Section 33 Commercial interests and the economy**

This might be the strongest argument to protect teaching materials. Release by your HEI could substantially prejudice its commercial interests in as much as it would allow competing HEIs to adopt material from your courses with a high QAA rating etc. and impact on the competitive advantage of a particular course offered by your HEI.

**Section 36 Confidentiality**

In rare circumstances it may be that some teaching materials, while able to be disclosed in a teaching environment, are otherwise prohibited from disclosure by a confidentiality agreement.

**Note:** Where requests for information are repeated, vexatious or would exceed the upper cost threshold of £600 the HEI also has grounds for refusing to comply with the request.