The Freedom of Information (Scotland) Act 2002 and Animal Testing

Prepared by: Gordon Brown, Records Manager, The Robert Gordon University based on Universities UK circular I/03/125 and I/03/125(a)
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Disclaimer
This paper summarises the current thinking of experts in the field of animal testing and biotechnological research 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 on behalf of Universities Scotland to provide the sector with a practical approach to the implementation of freedom of information legislation. It should not be acted upon in isolation and, where necessary, you should seek professional legal advice.

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1. Introduction

1.1 Freedom of information is likely to have significant consequences for the scientific community and for research involving animals.

1.2 Especially after protests undertaken in summer 2004 against Oxford University there are obvious concerns about the security threat to research institutions from animal rights extremists, and about increased anti-vivisection campaigning and whether Universities are increasingly seen as easy targets by campaign groups.

1.3 It is important that relevant public bodies understand and apply the Freedom of Information (Scotland) Act 2002 (FOISA) in a consistent and informed manner.
1.4 Although the aim of FOISA is to encourage openness of information, there needs to be careful consideration given to the release of sensitive information and the correct application of exemptions is very important.

1.5 This guidance document is divided into two parts. The first part is general guidance on how to deal with many of the issues arising from such research.

1.6 The second part is a communication strategy for institutions to adopt and change to their own particular situation.

2. Exemptions

2.1 Certain information may be exempt under the Act. What complicates the situation is that duplicate information will be held by Higher Education and Further Education institutions and the Home Office. The information will qualify for both FOISA and the Freedom of Information Act 2000 (FOIA) where it is more difficult under FOISA to exempt the same information. The key exemptions which are relevant to these fields of research are:

- Section 26: Prohibitions on disclosure (under an enactment)
- Section 27: Information intended for future publication
- Section 33: Commercial interests and the economy
- Section 35: Law enforcement
- Section 36: Confidentiality
- Section 38: Personal Information
- Section 39: Health, safety and the environment

2.2 Sections 27, 33, 35, 36 (1) and 39 are subject to the 'public interest test'. This means that even if an exemption does apply, the public authority must still disclose it if disclosure of the information is more in the public interest than it remaining confidential. It is the public authority which should first carry out the public interest test.

2.3 Animal rights groups may see this as an opportunity to generate a public outcry about a particular issue and thus create a 'public interest' in it being disclosed. What constitutes the public interest will change over time and so monitoring of decisions is important.

Section 26: Prohibitions on Disclosure

2.4 The most likely prohibition to disclosure is section 24 of the Animals (Scientific Procedures) Act 1986 (ASPA).

2.5 Section 24 provides that under the 1986 Act "A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information…which he knows or has reasonable grounds for believing to have been given in confidence”.

2.6 Section 24 only applies to those with statutory ‘functions’ under the 1986 Act. This includes:

1. The Home Secretary and Ministers in his department
2. Civil servants in the Animal Procedures Section
3. The Inspectorate and the Animal Procedures Committee

2.7 The effect of section 24 is to make it a criminal offence for any of the above to disclose information given in confidence.
2.8 Researchers and research institutes do not discharge legal functions under ASPA so section 24 does not apply to them. Researchers should not themselves release exempt information or personal data about a third party.

2.9 It needs to be remembered that ASPA and FOISA are independent Acts of Parliament and therefore operate separately. For section 26 exemptions to apply the information must be able to be exempted firstly under ASPA. Essentially the strength of a section 26 exemption rests upon the strength of other Acts.

2.10 The exact way ASPA relates to FOISA will only become gradually clearer as test cases are dealt with once FOISA comes into full effect.

Section 27: Information Intended for Future Publication

2.11 A public authority could openly disclose information on this type of research in its publication scheme. One possibility is to include details as part of the ‘Management of Research & Development’ category contained within the model publication scheme (MPS) which has been adopted by most institutions. The other option is to introduce a new class of information into the MPS at its first review. If the policy of an academic institution is to publish work once it has been peer reviewed, this might be clearly stated. If publication is likely to be out with the stated 12 week period then this exemption should not be relied upon.

2.12 Timescales are often long, because of reasons beyond the control of the public authority e.g. referees may take a long time. It is not likely to be acceptable to estimate a long total time that encompasses all such delays. It is better to refer to timescales over which the public authority has control e.g. stating that work would normally be sent for publication within a specified time of its completion. The test of whether publication should be accelerated is one of public interest not necessarily one of reasonableness.

Section 33: Commercial Interests and the Economy

2.13 Another important exemption for researchers under the Act is that which exempts information for disclosure where it would, or would be likely to, “prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority)".

2.14 With academic information it is sometimes unclear which information is commercial in nature. Some information is clearly noted as of potential value because of its intellectual property potential. University researchers liaise with their respective knowledge transfer units to discuss protecting such information as intellectual property.

2.15 However, information might not be recognised for its commercial value until some time down the line. In such a case the information might be withheld until it was published under exemption section 27.

Section 36: Confidentiality

2.16 Much of the information in project licences is currently held in confidence by the Home Office under the ‘common law’ of confidentiality. The exemption in the Act reaffirms this by exempting information from release if “information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings”. This is subject to the public interest test. Or if information “was obtained by a Scottish public authority from another person (including another such authority) or “its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of
Confidentiality arises when information is passed from one party to another. According to legal experts, information must be imparted or communicated to the recipient in circumstances “importing an obligation of confidence”. When a researcher sends an application to the Home Office, this is implicit. It is not necessary to mark project licence applications as ‘confidential’. Current Home Office policy is to consult first if they are considering releasing any information relating to a researcher’s work. The Home Office practice to consult should continue after FOISA comes into force.

Higher or Further Education Institutions sending information will make sure that data is received in confidence. Although the duty of confidentiality has to be qualified, it should not be a major issue and any such data would be held in confidence. Failing that, institutions would almost certainly use the health and safety exemption to protect individuals.

Marking a document as confidential does not necessarily make it so. The Home Office therefore cannot maintain blanket confidentiality on all the information it receives in project licence applications.

In the legal case of ‘Imutran vs Uncaged Campaigns’ (2001), the judge clearly held that project licence applications and related correspondence with the Government amounted to information given in confidence.

When requests for information are made to universities, this exemption is unlikely to apply to their own project licences and other such information, since they will not have been provided with the information by another party. Other exemptions from disclosure will need to be applied.

Academic institutions will generally undertake research for commercial organisations under a confidential contract. The terms of such contracts are referred to in the section 60 Code of Practice. It states that “any acceptance of such confidentiality provisions must be for a good reason, be capable of being justified to the Commissioner” and that “public authorities should therefore resist such clauses, wherever possible”.

The protection of suppliers is a concern for all Institutions involved so it will be hoped that confidential agreements will be upheld.

Section 38: Personal information

Individual’s names attached to a body of research are the most sensitive information due to the potentially serious consequences if disclosed. Section 38 of the Act states that “information is exempt information if it constitutes (b) personal data and either the condition mentioned in subsection (2) (the “first condition”) or that mentioned in subsection (3) (the “second condition”) is satisfied”. The first condition is “that the disclosure of the information to a member of the public otherwise than under this Act would contravene – (i) any of the data protection principles; or (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress).

Section 10 of the Data Protection Act 1998 entitles an individual “to require the data controller...to cease, or not to begin, processing, or processing for a specified purpose or in a specified manner, any personal data in respect of which he is the data subject, on the ground that, for specified reasons – (a) the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or another, and (b) that damage or distress is or would be unwarranted”.

Confidence actionable by that person or any other person”. These are covered by an absolute exemption from disclosure. They are not subject to the public interest test.
2.26 If any member of staff, involved in research, is concerned about their personal data being disclosed or processed in a way that may jeopardise their health and safety, it would be wise for them to exercise their right under section 10 of the Data Protection Act 1998.

2.27 Public authorities will already have experience in applying the Data Protection Act 1998. The Durant vs. Financial Services Authority ruling in December 2003 however, has changed this exemption. A person's name on a licence application will no longer automatically be exempted under this section. With an appeal against the original decision in progress, a more stable exemption may be Section 39 as described below.

Section 39: Health, Safety and the Environment

2.28 The protection of staff and suppliers of goods and services from animal rights attacks is a priority for all institutions. This should be covered by the exemption for information "if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual".

2.29 The Government has confirmed that it is "committed to the maintenance of necessary protections for individual scientists and their research institutions." (Angela Eagle. Commons Written Answers. 19 October 2001)

2.30 It seems extremely unlikely that the Office of the Scottish Information Commissioner (OSIC) or the courts would force any organisation to disclose information which could reveal the identity of a member of staff involved in animal research.

2.31 It has been suggested that animal rights activists will use ‘triangulation’ to identify researchers, by asking for several separate items of information which when put together, reveal their identity. It is the responsibility of the organisations whose staff might be vulnerable to warn other holders of information of the potential damage which could be done by release of information that was apparently innocuous, but when taken with other information could reveal the identity of a researcher through triangulation.

2.32 It is unclear how great the risk is. The activists have been doing literature searches for over 20 years to find out which scientist has published what research on animals. Many researchers have information about them on their own research institute's website as well. So far, the availability of information from public institutions is not what has limited the activity of extremists. In recent years most extremism has been directed to commercial companies. However, the example of protests, in summer 2004, at the building of a new facility at Oxford University, including the targeting of suppliers highlights that Universities are as likely a target as commercial private companies.

2.33 One particular concern is where research is specialised enough that a simple search by keyword(s) on an online search engine may identify individuals involved in controversial research. If information is refused to the applicant and the case goes to review either within the institution or the OSIC, the number of people qualified to understand the information can be so limited that have all been used in the original review decision or work for a rival institution and should therefore not see the information.

3. How information may be used

3.1 Animal welfare organisations would like to see more information available to encourage the spread of good practice in the care of laboratory animals.
3.2 It seems likely that the most extensive use of freedom of information about animal research will be by the antivivisection organisations like the National Anti-Vivisection Society (NAVS) and the British Union for the Abolition of Vivisection (BUAV), for example to:

(a) Obtain more evidence of animal suffering;
(b) Build up a picture of what research is being carried out where, so as to target their campaigns more precisely
(c) Challenge project licence applications, and suggest non-animal alternatives

3.3 They are also looking for details on the decision-making and rationale for permitting experiments.

3.4 The NAVS has made it clear that it wants to gain access to project licence applications before they are granted. Its plan is to ‘challenge’ the science and suggest non-animal alternatives. This would cause difficulties because:

(a) It would increase the bureaucracy as interjections by campaigning groups hamper the normal interactive process between the applicant and Inspector. Some project licence applications would require significant legal input to determine which parts were exempt. In this circumstance meeting the 20 day limit may be problematic.
(b) Animal rights groups might use the information in applications to mount campaigns based on deliberate misrepresentations of the proposal

3.5 No doubt anti-vivisection groups will obtain some information about some animal research projects through freedom of information and this will be used in some of their campaigns. However, they have used exactly the same type of information from published papers in their campaigns for many years.

3.6 It is hoped that FOISA will also favour research. The Home Office has announced their intention to put some anonymised and non-confidential information (probably as an ‘overview’) about every new project licence in the public domain, probably via the Home Office web site. In time this level of openness will hopefully have a positive effect on public attitudes to animal research.

4. Handling Requests

4.1 Every institution will have its own way of handling freedom of information requests. However requests for information relating to sensitive subjects may have to be handled differently. A centralised unit for co-ordinating and replying to these requests would be advisable. It will also help manage the monitoring of requests within an individual institution as well as the Higher Education/Further Education sector as a whole.

5. Monitoring Requests

5.1 With the fear of triangulation of information to identify an individual(s) who is active in the field of animal/bio-technological research, there is a more pressing need to monitor requests.

5.2 A network across all institutions would bring real benefits to all and would provide a practical platform to allow the sharing of information across the sector.
5.3 A network of license holders and other relevant staff has, in the autumn 2004, been established through Universities UK. This will hopefully be a useful forum for Institutions to discuss ongoing relevant issues. However, there are obvious differences between FOISA and FOIA and any difference in judgement by the respective Information Commissioners is likely to increase over years. To reflect this, a separate Scottish only network would also be beneficial.

5.4 The information to be shared would likely be:

1. Enquiries received on subject
2. Outcomes of reviews
3. OSIC’s decisions
4. General advice/guidance amongst experts

5.5 Members of such a network would be nominated by the Secretaries of respective Institutions.

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Adapted by Gordon Brown, The Robert Gordon University, December 2004
Appendix I:

Developing a University Communication Plan for Research Using Animals