

Freedom of Information and the Public Interest Test

This document was jointly produced by Dundas & Wilson - <http://www.dundas-wilson.com/> and the JISC Legal Information Service.

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Note

This document is one of a series which attempt to illustrate how certain matters relevant to Further and Higher Education are likely to be treated under the Freedom of Information (Scotland) Act 2002 ("FOISA").

The document summarises the current thinking surrounding the application of the FOISA in relation to the exemptions that are available to public authorities (referred to as institutions in the note). Specifically the note sets out some of the factors which should be considered when applying the public interest test.

Although the information is principally aimed at Scottish institutions some of the information will be of interest to institutions UK wide.

The document is provided as information only. It should not be relied upon solely. It is advised that where necessary you should seek professional legal advice from a law firm.

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1. Introduction

Freedom of Information legislation is of great importance to the Further and Higher Education Sector as both providers and purchasers of services. This note will focus on the interaction between Freedom of Information and the use of the public interest test in claiming exemptions when a request for information is received.

1.1 Freedom of Information - General

There are two pieces of legislation which implement the Freedom of Information regime in the United Kingdom: the Freedom of Information Act 2000 ("FOI") and the Freedom of Information (Scotland) Act 2002 ("FOISA"). For the purposes of this note, we will concentrate of the provisions of the Scottish statute.

From the 1st of January 2005 any person who makes a request for such information from a public authority must be provided with that information, subject to certain conditions summarised below. The legal right of access includes all types of “recorded” information of any date held by Scottish public authorities no matter when it was created or received.

The Scottish Information Commissioner is an independent public official appointed to enforce and promote the FOISA.

The FOISA applies to all Scottish public authorities including the Scottish Executive and its agencies, the Scottish Parliament, Local Authorities, Universities and Scottish Further Education colleges (in this note, collectively “Institutions”).

1.2 Rights of Access

Section 1 of the FOISA establishes the right of access for individuals and corporate entities to;

- All information;
- Held by or on behalf of an Institution;
- No matter when it is generated or received by that Institution; but
- Subject to certain exemptions.

To exercise the right of access, the access request must be made to the Institution in writing or some other permanent form (e-mail is acceptable in most instances). There is no need for the request to explicitly mention Freedom of Information legislation. However, the information requested must be described.

The Institution must respond to such a request within 20 working days. Whilst FOISA does not apply to “private” companies it does apply to information about private companies held by an Institution, including information provided by a private company to the Institution. So for example, and subject to any relevant exemptions, information in a Tender received by an Institution may well be subject to disclosure under the FOISA requirements. Such disclosure would be made only after any relevant exemptions had been applied.

1.3 Exemptions

The FOISA creates a general and broad right of access to information held by an Institution. However, there are exemptions available to the Institution under FOISA. Note that the exemptions available under FOISA are slightly different from FOI exemptions.

These exemptions are classified into: (i) absolute exemptions; and (ii) qualified exemptions.

The absolute exemptions are set out in Section 25 (Information otherwise accessible), Section 26 (Prohibitions on disclosure), Section 36(2) (Confidentiality), Section 37 (Court Records) and parts of Section 38(1) (Personal Information).

The public interest test does not apply to such absolute exemptions and as such they are not further discussed in this note. All other exemptions set out in the FOISA are categorised as qualified exemptions.

Crucially, an Institution can only take advantage of such a qualified exemption (in order to refuse/restrict a requested disclosure) after it applies the public interest test.

Note also that the exemption for confidentiality is subject to an inherent public interest test.

2. The Public Interest Test - General

The public interest test is set out in section 2(b) of the FOISA:-

“To information which is exempt information by virtue of any provision of Part 2, section 1 (the right to information) applies only to the extent that-

- (a) The provision does not confer an absolute exemption; and***
- (b) In all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.”***

Applying the public interest test requires a balancing of competing interests, i.e. the general public interest in disclosure and the public interest in maintaining the exemption. There is a presumption that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

It is necessary for the Institution to consider whether any harm or unfairness arising from disclosure is outweighed by the public interest in making the information available.

There is limited guidance available on the use of the test (see below).

The current Scottish Information Commissioner has made it clear that he is likely to scrutinise carefully any claimed exemption under a qualified exemption, i.e. where the Institution has applied the public interest test and subsequently refused to release the requested information. At a practical level any Institution seeking to rely on a qualified exemption must genuinely and reasonably perform the required public interest analysis, and equally importantly maintain a record (an audit trail) of that analysis.

2.1 The public interest analysis

There is some existing limited guidance to establish how the analysis should be carried out from the House of Lords when they initially considered the FOI. For example, at the Committee Stage in the House of Lords, Lord Falconer stated;

“As far as public interest between disclosure on the other hand and the maintenance of the exemption on the other is concerned, it has to be looked at objectively. One looks at the impact of disclosure, that is, making it public. What is the impact of the exemption being maintained? That should be looked at objectively rather than in terms of whatever the motive may be of the person applying.”

An Institution should have a procedure in place to objectively evaluate the request, but each decision should be made on its own merits taking into account the different factors which may influence the decision, for example the age of the information.

2.2 The concept of public interest

The concept of the public interest is deliberately flexible. It may include:

- promoting public debate of issues of the day;
- promoting accountability in decision-making on public expenditure;
- allowing individuals to understand decisions and, in some cases, assisting individuals in challenging these decisions; and
- bringing to light information affecting public safety.

2.3 Relevant factors

Based on guidance information and other publications, relevant factors that should be considered by an Institution include: -

- the general public interest in accessible information;
- would disclosure contribute to the administration of justice or enforcement of law?;
- would disclosure inform the public of any danger to public health or safety?;
- would disclosure contribute to a debate of importance?; and
- would disclosure prejudice a person's privacy rights?

Factors which should NOT be taken into account by an Institution include: -

- the possible embarrassment of Institutions or other officials;
- the possible loss of confidence in Institutions or public authority;
- the seniority of persons involved; and
- the risk of an applicant misinterpreting the information.

2.4 Challenges

It is always possible that an Institution's application of the public interest test may be investigated. If an Institution refuses a request for information, then the person requesting the information has the right to appeal to the Scottish Information Commissioner. The Scottish Information Commissioner may then investigate the Institution's actions. The Commissioner has the power to order an Institution to disclose the information if the Commissioner believes that the authority has acted wrongly in refusing a request.

Institutions should be prepared for any such challenge and must ensure that their publication schemes are adhered to and that any public interest decision is accompanied by a clear audit trail of the decision making process. Bearing in mind the statutory timescales involved in responding to a request (twenty working days), Institutions should ensure that procedures and guidelines are in place to enable requests to be responded to quickly and with the relevant audit trail in place.

3. *Summary*

There are some basic steps that an Institution needs to undertake when it receives a request for information. These include asking:-

1. Does the Institution hold any information to which the request relates?;
2. Can any exemptions be claimed by the authority?;
3. Does the public interest test apply to that exemption? If so, the Institution should apply the public interest test as outlined in 2.1 above and carefully document how its decision was reached
4. Remember that what is of interest to the public is not necessarily in the public interest
5. If after applying the public interest test the Institution decides that the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption, then it should inform the party that requested the information of its decision in writing within the 20 day limit giving reasons for the decision. Otherwise it should release the requested information.

The concept of the public interest is crucial to the concept of Freedom of Information. Whilst the lack of a statutory definition of the concept is unfortunate, it is clear that it does oblige an institution to weigh competing interests in each case. At its simplest, something which is in the public interest serves the interests of the public whatever interest that may be. In deciding whether or not to disclose information the Institution must decide whether or not it is in the public interest to disclose or withhold information.

In applying the test therefore, an Institution must;

- Keep audit trails of the decision-making to ensure that a robust defence can be mounted if a complaint is made; and
- Try to develop a clear policy approach in relation to the implementation of the public interest test as requests are received. This may include the development of a written policy for use when the public interest test arises. Some guidance can be found in “Freedom of Information Act Awareness Guidance No 3” noted in the further reading and guidance section.

Equally, Institutions should not;

- Use the excuse that something is complicated or difficult to understand as a way of withholding information; or
- Forget to consider other legislation that may apply (for example the Data Protection Act 1998 and the Human Rights Act).

4. Further reading and guidance

The UK Information Commissioner has produced an Awareness Guidance document called "Freedom of Information Act 2000 - Awareness Guidance No 3" available on the UK Information Commissioner website at - <http://www.informationcommissioner.gov.uk>

Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000 by Meredith Cook, August 2003, published by the UK Constitution Unit and available at - <http://www.ucl.ac.uk/constitution-unit/publications/index.php>

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