Freedom of information legislation and research information: guidance for the higher education sector

Freedom of Information Act
Environmental Information Regulations

1. Introduction

The Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) provide rights of access to information held by public authorities in England, Wales and Northern Ireland (the term 'freedom of information legislation' will be used to refer to both sets of law throughout the guidance). Freedom of information legislation promotes openness and transparency by public authorities - by making information publicly available, public authorities are more accountable to the citizens they serve. Both sets of legislation provide an assumption or presumption in favour of disclosure of requested information - in other words, the 'default setting' when dealing with requests favours disclosure. Universities and publicly funded research bodies are public authorities for the purposes of the legislation and will be referred to as higher education institutions (HEIs) in the guidance. A request can be made for *any* information held by HEIs.

The Information Commissioner's Office (ICO) has produced this guidance to aid understanding and application of freedom of information legislation by HEIs, with a particular focus on research information. In January 2011, the House of Commons Science and Technology Committee[1] recommended that the ICO produce guidance following the high-profile cases about the disclosure of data and other information about climate change involving the University of East Anglia. The Committee specifically requested guidance on how freedom of information legislation should be applied to scientific research.

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1 http://www.publications.parliament.uk/pa/cm201011/cmselect/cmsctech/444/444.pdf

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There is no equivalent in FOIA to section 27(2) of the Freedom of Information (Scotland) Act, which provides an exemption to specifically protect ongoing research. The purpose of this guidance is to provide advice relating to the law as it currently stands - the exemptions and exceptions in FOIA and EIR can provide a reasonable level of protection for research information, when there is genuine need to protect it.

HEIs are unlike many other public authorities in certain aspects – most universities have charitable status; they are decreasingly funded by the public purse; parts of their income are derived from contracts to carry out privately financed research projects, often in partnership with commercial organisations. Subsequently, those working in the sector often share information with colleagues, partners and peers across a range of organisations in the course of their work, many of which are not subject to FOI legislation. Different types of information are held by HEIs – information may be of particular public interest; of commercial interest; provided in confidence or sometimes controversial.

The guidance aims to increase academics' and researchers' understanding and equip practitioners to deal with the distinctive challenges that freedom of information legislation can pose for HEIs. It should not be read in isolation; it should be read in conjunction with the existing general guidance published by the ICO that helps practitioners comply with their legal obligations when dealing with requests for information. The most relevant guidance is signposted in each section and is available at www.ico.gov.uk.

This guidance provides practical case examples derived from ICO decision notices and Information Rights Tribunal decisions[2] to help you deal with requests. It is worth noting that, beyond the controversial areas of climate change and animal testing, the number of ICO cases that have focused on research activity has been relatively small. It cannot cover all scenarios or provide a definite answer in respect of all requests you receive – the ICO expects HEIs to use these guidelines when considering requests for research information, focusing on the legislation and the facts of the case they are dealing with. The ICO encourages organisations who work across HEIs to develop more specific, complementary guidance for different audiences to provide further assistance in complying with the legislation.

The Environmental Information Regulations

[2] http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

The Environmental Information Regulations 2004 (EIR) give rights of public access to environmental information held by public authorities; their purpose is to contribute to a greater awareness of environmental matters by providing access to information about the environment. Accordingly, the type of information that is classed as 'environmental' is very broad – it constitutes any information 'on' – that is, about, concerning, or relating to – the various definitions contained in Regulation 2(1) of the EIR.

It is not necessary for the information itself to have a direct effect on the environment or to record or reflect such an effect, in order for it to be environmental. The ICO guidance 'What is Environmental information?' provides more detailed information on the EIR and determining whether they apply. When a request is received, you should consider whether the information might be classed as environmental and therefore dealt with under the EIR.

2. Recognising and answering freedom of information requests

This section will:

- help you recognise what form a request for information can take;
- help you determine whether information is held for the purposes of the legislation; and
- highlight the importance of good records management.

2.1 Recognising requests for information

Existing ICO guidance:

- Consideration of requests without reference to the identity of the applicant or the reasons for the request;
- Information held: information held on behalf of another;
- Time for compliance;
- Valid request: name and address for correspondence

A member of the public can request *any* recorded information they think a public authority may hold. This includes information held on computers, in emails and in printed or handwritten documents as well as images and video and audio recordings. A request may be written in the form of a question, rather than a request for specific documents; it may be addressed to any person in your organisation. For a request to be valid for the purposes of FOIA, the request must

be made in writing, state the name of the applicant and an address for correspondence and describe the information requested. Under the EIR, verbal requests are also valid.

The starting point in answering a request for information is to determine whether the information is held. In most cases, this will be obvious. You do not have to answer a question if this would mean creating new information or giving an opinion or judgement that is not already recorded. This section considers some of the more difficult scenarios in establishing whether information is held for the purposes of the legislation.

2.2 Is the information held for the purposes of the legislation?

In most cases it will be clear that a HEI holds information for the purposes of the legislation. However, there are circumstances specific to the higher education sector which means that establishing whether the information is held will not always be straightforward. For instance, academics often work in several capacities as examiners, clinicians, researchers; as well being employed by the university, they may conduct privately financed research or peer review others' work. There is a possibility that university networks and servers will be used to store such non-work related information. All of this can create complications in determining whether information is held.

What the Act says:

Section 3(2)(a) of the FOIA provides that for the purposes of the Act, information is held by a public authority, unless it is held on behalf of another person. If a public authority holds information to any extent for its own purposes, then even if it is also holding that information for someone else, it is nevertheless holding the information for the purpose of the Act. Section 3(2)(b) states that, for the purposes of the Act, information is held by a public authority if it is held by another person on behalf of that authority.

The ICO's existing guidance (Information held: information held on behalf of another) explains that for the purposes of FOIA:

- where the information is held **solely** on behalf of another person, the public authority does not hold the information itself;

- where a public authority holds information principally or partly on behalf of another person and exercises control of the information, it will also hold the information itself.

Applying the principles set out above, if an employee was conducting research that is funded by the university, or is used for university purposes, such as in learning materials, the related information will be held by the university for its own purposes. The following are examples of questions which should be asked when considering whether information is held for the purposes of the legislation:

- Is the related work contractual with the university?
- Is the related work funded by the university?
- Is the work part of an employee's contractual role?

2.3 Information held on personal email accounts

Information held on personal, non-work email accounts (eg Hotmail; Yahoo; Gmail) can still be subject to disclosure under the legislation. You will need to consider the principles above, (with reference to the more detailed guidance) to establish whether the information is held for the purposes of the legislation. Generally, if the information held on a personal email account is related to public authority business, it is likely to be held on behalf of the public authority in accordance with s3(2)(b) of FOIA. When searching for information in response to a request you should consider whether it is appropriate to ask a member of staff whether they hold information in a personal email account. If the information is not related to the public authority's work – considering the factors listed above, it will not be subject to the legislation. The ICO recommends that official work is stored on properly secure networks rather than personal email accounts.

Case examples – is the information held?

Open University - ICO decision notice FER0289351

This decision notice provides an example of when it is not immediately clear that information is held by the public authority. It also highlights the role of records management in making it easier for you to comply with your freedom of information obligations. A summary of the most relevant parts is provided here; you may find it helpful to read the decision notice in full[3].

In this case, a request was made for a copy of transcripts of seminars organised by a lecturer employed by the Open University. The

[3] http://www.ico.gov.uk/tools_and_resources/decision_notices.aspx

seminars were organised by the lecturer in his capacity as co-director of the Cambridge Media and Environment Programme, which was unconnected to his Open University role. Subsequently, the lecturer used the information gathered at the seminars for the purposes of a journal article which was written as part of his normal academic research activity for the University; the transcription of the audio recordings of the seminars was funded by the university's Geography Department for this purpose.

The Open University originally refused the request under section 40(2) (personal data) and section 41 as confidentiality had been promised to the seminar participants. However, during the Commissioner's investigation, the Open University realised that the transcripts had been destroyed at some point prior to the request and were no longer held - the Commissioner accepted this.

The Open University confirmed that the lecturer had the audio recordings of the seminars, from which the transcripts had been made, but it argued that he held these in private capacity. However, the decision notice found that the public authority did hold the requested information in the form of the audio recordings from which the transcripts were made. The decision notice emphasises that the Act provides a right of access to information, irrespective of the form in which it is held:

'A request may refer to information in a specific form, such as a particular written document, as a way of describing the information being sought. Where information is not in the possession of a public authority in the form that it is requested but it possesses the same information in a different form, then the requested information may still be held by the public authority for the purposes of the Act'.

The Commissioner accepted that the seminars were organised by the lecturer in a private capacity and were not part of his contractual duties, and that the university did not provide any funding for the running of the seminars. However, the lecturer had used the audio transcripts to inform a journal article he had written in the course of his normal academic research activity for the university. At this point, for the purposes of the legislation, the information contained in the audio recordings and transcripts was held by lecturer on behalf of the university by virtue of section 3(2)(b) FOIA.

Open University - ICO decision notice FS50254399

In this case, a request was made for information relating to work carried out by a lecturer for an external organisation. The Open

University had refused the request saying that they did not hold the information – it confirmed that the lecturer's involvement with the external organisation was carried out in his personal capacity and not as an employee - it provided no financial support; none of the work the requested information related to was undertaken by the lecturer as part of his contractual duties; and the work was done in the lecturer's own time outside working hours.

While the lecturer had used the University's email systems for correspondence related to the external organisation's work, the University had no interest in, or control over the requested information, which were private communications. The Commissioner was satisfied that that the information was not held for the purposes of section 1(1)(a) of the Act, as under section 3(2)(a) the information was only held by the public authority on behalf of another person.

2.4 Records management

Existing ICO guidance:

- Records Management FAQs
- Using the procedural codes of practice
- Environmental Information Regulations code of practice

Good records management will help public authorities to comply with freedom of information legislation and can improve business efficiency. It makes it easier for public authorities to determine whether information is held and to locate and retrieve it in response to requests. It also assists public authorities in establishing what information should be included in publication schemes as required by FOIA and proactively disseminated in line with the EIR.

The Code of Practice under section 46 of the Freedom of Information Act sets out recommended good practice in keeping, managing and disposing of records. The ICO has issued guidance on using the procedural codes of practice and the ICO records management FAQs document summarises the recommendations of the section 46 Code.

Having an effective records management strategy and complying with information rights legislation contributes to good governance of work across institutes. Employees, including academics and researchers should be made fully aware of the legislation and its implications and the need to manage and organise their information

effectively. JISC have produced the useful Records Management infokit which provides a comprehensive starting point in understanding the benefits to managing information specific to the higher education sector. The ICO encourages HEIs to develop some similar, local level guidance aimed at specific audiences within the sector that can be used alongside the range of existing ICO guidance.

3. Refusing a request – applying exemptions / exceptions

There are a range of exemptions / exceptions in the legislation that are designed to protect certain types of information from disclosure. This section provides a summary of some exemptions / exceptions that may be particularly relevant to the higher education sector or where information constitutes research and provides links to the ICO's more detailed guidance in each area. When refusing a request, the onus is on the public authority to make the case for non-disclosure – as some of the case examples highlight, you will need to put forward convincing arguments, focused on the facts of the case to demonstrate how the exemption / exception is engaged. You will need to read the more detailed specialist guidance that is available for each exemption / exception.

3.1 The public interest test

Existing guidance

- The public interest test

Many of the FOIA exemptions referred to below, and all EIR exceptions are 'qualified', meaning that they are subject to a public interest test. The 'public interest' is that which serves the interests of the public. Even if a qualified exemption or exception is engaged (ie covers the requested information), the information must still be disclosed unless the public interest in maintaining the exemption or exception is greater than the public interest in disclosing it. The decision involves the balancing of factors on each side. Under the FOIA, an authority must apply the public interest separately to each exemption. However under the EIR, after applying the public interest test separately to each exception, the authority can then aggregate all the public interest factors when considering whether to disclose or not.

The public interest relevant to the exemption in question should be considered, rather than general public interest arguments relating to the subject.

There is a presumption running through the Act that openness is, in itself, to be regarded as something which is in the public interest. When considering the public interest in disclosure, the following factors will be relevant:

- furthering the understanding of and participation in the public debate of issues of the day;
- promoting accountability and transparency by public authorities for decisions taken by them;
- promoting accountability and transparency in the spending of public money; for HEIs, there will be a greater public interest in disclosing information relating to research that is publicly funded.
- allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions; for example, there will be a greater public interest in research that may have a particular impact on the public.
- bringing to light information affecting public health and public safety. The prompt disclosure of information by scientific and other experts may contribute not only to the prevention of accidents or outbreaks of disease but may also increase public confidence in official scientific advice.

The content of the information and contextual factors including the age of the information and the timing of the request will all have some bearing on the balancing of the public interest. The greater the amounts of money involved or number of people affected by decisions will weigh more heavily in favour of disclosure.

3.2 Requests that are costly, burdensome or disrupt public authorities

Existing ICO guidance

- ICO charter for responsible requests
- Using the Fees Regulations
- Vexatious or repeated requests

- Vexatious requests – a quick guide

There have been cases where campaign groups use freedom of information legislation to gather information about their particular interests from public authorities. This is permissible and requests should, in the main, be dealt with as normal. Some requests for information may embarrass or subject public authorities to levels of scrutiny they wish to avoid, but public authorities may not reject requests on these grounds.

The ICO charter for responsible requests aims to help individuals and organisations who use the legislation to make requests effectively and responsibly.

While the rights provided by freedom of information legislation are used responsibly in the main, there may be circumstances where requests become overly burdensome to deal with; disrupt a public authority's ability to perform their core functions, or appear to be part of an intention to disrupt or attack the public authority's performance. The legislation provides some exceptions to the duty to deal with such requests, and the ICO encourages public authorities to use these provisions when the legislation is abused in this way.

Under FOIA, vexatious or repeated requests can be dealt with under section 14: a refusal under section 14 removes the obligation to comply with section 1(1) of the Act – ie. you do not have to confirm or deny whether information is held or provide held information.

Requests which will exceed the cost limit for compliance (£450 for HEIs) can be refused under section 12. For more information on using section 12, see our guidance on Using the Fees Regulations.

Under the EIR, regulation 12(4)(b) provides an exception to responding to requests that are 'manifestly unreasonable'; it can be used to refuse requests that are vexatious or have excessive cost implications.

Vexatious requests

Deciding whether a request is vexatious is a balancing exercise, taking into account the context and history of the request. The key question is whether the request is likely to cause unjustified distress, disruption or irritation. There is existing detailed guidance (Vexatious or repeated requests) and a wealth of decision notices

and Tribunal decisions[4] to guide you in assessing whether requests are vexatious. The steps in the guidance that the ICO recommends you consider in deciding whether the threshold for vexatiousness has been met are well established and have largely been accepted by the Information Rights Tribunal as a good indication of whether section 14(1) can be applied to requests.

Under section 14(2), public authorities do not have to comply with repeated requests for the same information from the same person. There is no public interest test.

- If the cost of compliance is the only or main issue, you should consider section 12 instead.

- You can also avoid unwanted requests by voluntarily publishing any frequently requested information.

Case example – requests forming a campaign to attack / disrupt the public authority

University of Salford - ICO Decision notice FS50306518

This decision was one in a series of related complaints made to the ICO against the University of Salford. It is an interesting case because the investigation related to a number of FOI requests from a range of individuals that the university believed formed a campaign against it.

Between October 2009 and February 2010, the university received just over 100 requests for information, a marked increase in number and frequency. These requests were made by 13 individuals and 97 were submitted via the WhatDoTheyKnow website. The university argued the requests were vexatious as they were part of campaign to disrupt the work of the university that resulted from the dismissal of a former member of staff on disciplinary grounds.

Taking into consideration the context and history of the requests, the university were able to evidence a connection between the individuals and a pattern in the requests that demonstrated a repeated pursuit of specific information related to topics raised by the dismissed individual, presenting evidence from blogs and newsletters associated with the campaign. The Commissioner was satisfied that section 14 had been applied correctly in this case, finding that the requests were obsessive, harassing and designed to cause disruption and annoyance.

[4] Tribunal decisions can be accessed at http://www.informationtribunal.gov.uk/Public/search.aspx

3.3 Commercial and confidential information

Existing ICO guidance

- Section 41: information provided in confidence
- Section 41: information provided in confidence relating to contracts
- Section 41: the duty of confidence and the public interest test
- Section 43: commercial interests
- Section 43: commercial detriment of third parties
- Section 43: public sector contracts

Information obtained in confidence

It is clear that universities and research institutes often work in partnership with third parties which may involve exchanging information with them. Disclosures under FOIA should not undermine HEIs' ability to do this; under section 41 FOIA, the legislation can offer some protection for information that is obtained in confidence from third parties. There are two components to section 41:

- The information must have been obtained by the public authority from another person. A person may be an individual, a company, a local authority or any other "legal entity". It is not restricted to information provided verbally or in writing. The exemption does not cover information which the public authority has generated itself, although it may cover documents (or parts of documents) generated by the public authority if these contain confidential information provided by a third party. It is the information itself, and not the document or other form in which it is recorded, which needs to be considered.

- Disclosure of the information would give rise to an actionable breach of confidence. In other words, if the public authority disclosed the information, the provider or a third party could take the authority to court.

It is important to clearly identify information that is obtained in confidence when working with external commercial partners. Public authorities can use confidentiality clauses to identify information that may be exempt, but they should carefully consider the compatibility of such clauses with their obligations under freedom of

information legislation. Section 41 is an absolute exemption – meaning that it is not subject to the public interest but a public interest defence must considered it is established a breach of confidence would occur - this is covered in more detail in the guidance listed above.

Commercial interests

Under section 43(2), information can be exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it). The ICO's more detailed guidance states that a commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services. The underlying motive for these transactions is likely to be profit, but this is not necessarily the case, for instance where a charge for goods or the provision of a service is made simply to cover costs. There is a distinction to be drawn between commercial interests and financial interests. While there will be many cases where prejudice to the financial interests of a public authority may affect its commercial interests, this is not always the case.

The ICO expects public authorities to consult with affected third parties, in line with the Part IV of the section 45 Code of Practice; however, while the views of third parties are important, they will not be automatically accepted so as to mean that commercial companies involved with public authorities can veto the FOI process.

It is accepted that HEIs will often compete with other organisations when tendering for research; they carry out work in partnership with private organisations and there can be a commercial value to research they conduct.

Under the EIR, commercial information can be protected under regulation 12(5)(e); however, four elements have to be satisfied:

- Is the information commercial or industrial in nature;
- Is the information subject to confidentiality provided by law;
- Is the confidentiality provided to protect a legitimate economic interest;
- Would the confidentiality be adversely affected by disclosure?

Both s43(2) and regulation 12(5)(e) are subject to the public interest test.

Copyright and intellectual property rights

The freedom of information legislation only gives access to information. It does not give the recipient the right to reproduce or commercially exploit the information in breach of copyright or other intellectual property rights. It is also important to note that when giving access to information under the FOIA, an authority cannot place any conditions or restrictions on that access. For example, it cannot require the requester to sign any agreement before having access to the information.

HEIs could make the information available under the terms of an open licence such as Creative Commons or the Open Government Licence. Although this is not a requirement of the legislation the ICO would encourage HEIs to have a policy that enables research information to be made available under an open licence, in certain circumstances.

Freedom of information legislation does not prevent a copyright notice being issued with information disclosed, and a claim could be made if the individual subsequently uses the information in breach of copyright. The ICO encourages HEIs to only use copyright notices when necessary.

Under the EIR, regulation 12(5)(c) provides an exception to the duty to disclose environmental information if disclosure would adversely affect intellectual property rights. The Information Tribunal decision in Ofcom v ICO and T-Mobile (EA/2006/0078), set out how exception should be approached in paragraph 47:

> "The Information Commissioner's case was that he had been right in his Decision Notice to say that infringement of an intellectual property right was not sufficient to trigger the exception. He considered that the expression "adverse effect" required something more in terms of actual harm to commercial or other interests. Ofcom and T-Mobile, on the other hand, argue that the question of loss or harm should be taken into account when carrying out the public interest balance required by EIR regulation 2(1)(b), but not at the stage of determining whether the exception has been engaged…
>
> However we believe that, interpreting the exception restrictively requires us to conclude that it was intended that the exception would only apply if the infringement was more than just a purely technical infringement, (which in other circumstances might have led to a court awarding nominal damages, or even exercising its discretion to refuse to grant

the injunction that would normally follow a finding of infringement). It must be one that would result in some degree of loss or harm to the right holder. We do not therefore accept that such harm should only be taken into consideration when carrying out the public interest balance"

Case examples – is it commercial information?

University of Nottingham - ICO decision notice FS50125011

In this case, the Commissioner upheld the university's application of s43(2). The requested information related to grants received by the university from private companies in the military sector. It is interesting to note that, during the Commissioner's investigation, following consultation between the university and affected third parties, where the private company had no objection to the disclosure, the information was provided to the complainant. The decision notice focused on information relating to contracts with two companies, Boeing and Rolls Royce, who did not agree to disclosure.

The university argued that their own commercial interests would be prejudiced as their ability to secure contracts with the parties concerned and more widely would be negatively affected. The university competed with other universities and private companies to secure contracts in the field, and the disclosure of the information, which included specific amounts granted from Boeing and Rolls Royce, would give competitors an unfair advantage, allowing them to undercut the university's prices. The Commissioner gave weight to representations from the affected third parties, who were clear that they would reconsider their position of placing contracts with the university if confidentiality of the contracts could not be guaranteed.

In considering the public interest, while the Commissioner recognised that disclosure would provide transparency relating to the university's finances and in contracting with private organisations related to the military sector, particular weight was given to the public interest in the ability of the public authority to generate commercial revenue. He found that the university had correctly applied section 43(2) and that the public interest in maintaining the exemption outweighed the public interest in disclosure.

Queen's University Belfast - ICO decision notice FS50163282

This case demonstrates the failure of the university to put forward strong arguments to make a case for the application of the exceptions to the requested information and ultimately, the Commissioner ordered disclosure of the requested information. A request had been made for the raw data relating to tree ring research; the university had refused the request claiming a number of EIR exceptions – regulations 12(4)(b), 12(4)(d); 12(5)(c) and 12(5)(e).

In relation to 12(4)(b) (manifestly unreasonable) and 12(5)(d) (adverse affect on unfinished / incomplete documents), the university failed to adequately demonstrate why the exceptions applied. In relation to regulation 12(5)(c), (adverse affect on intellectual property rights), the university did not convincingly explain how it held intellectual property rights over the raw data. In considering whether regulation 12(5)(e) (confidentiality of commercial / industrial information) applied, a public authority must prove that the withheld information satisfies four elements:

Is the information commercial or industrial in nature;
Is the information subject to confidentiality provided by law;
Is the confidentiality provided to protect a legitimate economic interest;
Would the confidentiality be adversely affected by disclosure?

The Commissioner accepted that the raw data had commercial value to the university. However, the decision notice found that the exception was not engaged as the information was not subjected to confidentiality provided by law; the information was primary data generated by the university and not shared with any third parties; the university did not demonstrate that the information possessed the necessary quality of confidence.

3.4 Impact of disclosure on open discussion, academic freedom and peer review

Existing guidance

- Section 36: effective conduct of public affairs
- Section 36: what should be recorded when considering the exemption?

The exchange of views between academics and researchers, internally and with other organisations, for a range of purposes is an important part of the research process. It is well established that researchers need to examine and discuss their results as they proceed, and validate their findings and conclusions before publication. Freedom of information legislation recognises the general importance of processes that enable free and frank discussion and the exchange of views.

Section 36 FOIA (prejudice to the effective conduct of public affairs) or regulation 12(4)(e) (internal communications) and regulation 12(5)(f) (interests of the person who supplied the information) of the EIR can provide protection for this type of information. While there is a lack of case law on the application of these exemptions to research information in the higher education sector, it possible to look to FOI case law related to the government policy exemption (section 35) for assistance, as the key principles of 'safe space' and 'chilling effect' are equally relevant to the public interest test under section 36 and the arguments can be extended to circumstances in the higher education sector.

Safe space arguments

Safe space arguments are about the need for a 'safe space' to formulate policy, debate 'live' issues, and reach decisions without being hindered by external comment and/or media involvement. FOI case law relating to section 35 (government policy) indicates that strong weight must be given to allow a 'safe space' to develop policy; this can be extended to scenarios such as report development in the higher education sector under section 36. Accordingly, academics should be able to formulate and debate opinions relating to research away from external scrutiny. Several Tribunals have accepted public interest arguments about the loss of a safe space as valid, particularly when they are put forward in relation to the specific policy debate to which the information relates.

Chilling effect arguments

Chilling effect arguments are directly concerned with the argued loss of frankness and candour in debate, that it is said, would lead to poorer quality advice and less well formulated policy and decisions. The Tribunal has given little weight to general arguments about wide ranging 'chilling effects' that are not specifically related to the information in question.

The public interest test under section 36 must be considered in the context of each request: safe space and chilling effect arguments will be weighted appropriately according to the content of the information (eg what the information will add to public understanding and debate); the timing of the request; whether the research is complete and if there are links to future research. If a research project or research related initiative is 'live', the public interest will carry extra weight in favour of non disclosure; a strong public interest in disclosure will generally be required to overcome it. Even if a project is complete, the ICO considers that arguments about general impacts on academic freedom and a chilling effect can still be relevant, particularly if the impacts of disclosure on other future research projects can be clearly explained.

There will be particular public interest considerations in favour of disclosure related to publicly funded research or research that may have a particular impact on the public - these will vary depending on the content of the information and other contextual factors. Once a research project is complete, there will be particular public interest in disclosing factual background data – proactive disclosure of this kind of information is considered in Section 4 of the guidance.

In some cases, section 41 FOIA will also be relevant to requests for information relating to exchanges in quality assurance processes or peer review if the information has been received in confidence.

Case example – is peer review information exempt from disclosure?

Medical Research Council - ICO decision notice FS50074593

In this case, the ICO ruled that peer review information was legitimately withheld under sections 36 and section 41 FOIA. The ICO's decision was upheld by the Information Tribunal (McLachlan v ICO and MRC, EA/2008/0059). The decision was reached on the facts of this case; it does not mean that all information relating to peer review processes will be exempt in every circumstance.

A request was made to the MRC for information about research it had funded into ME and also details of any applications for funding which had been refused. The MRC provided details of applications it had funded and a summary of the general areas covered by the eleven applications which had been refused since 2002. The complainant made a further request for the written evidence that supported the refusal to fund the eleven applications, including the reports provided by independent experts who had reviewed the

applications on behalf of the MRC.

The eleven applications were assessed by the external reviewers with copies of the reports being provided to the applicants in an anonymised form. They were then considered by the Health Services and Public Health Research Board or the Neurosciences and Mental Health Board. Of the applications covered by the request, three had been forwarded to the full Boards for discussion and for a decision to be made as to whether a grant should be awarded.

Section 41 – information obtained in confidence

The Commissioner was satisfied that the applicants, reviewers and members of the Research Board were 'another person' and the applications, assessments and reports were found to be obtained by the MRC from these third parties for the purposes of section 41(1)(a). In considering whether disclosure of the information would constitute an actionable breach of confidence under s41(1)(b), the Commissioner considered the following:

(i) if the information had the necessary quality of confidence;
(ii) if the information was imparted in circumstances importing an obligation of confidence; and
(iii) whether disclosure would mean an unauthorised use of the information to the detriment of the confider (although the element of detriment is not always necessary).

In considering (i), the Commissioner accepted that the information was not readily available, in the public domain or of a trivial nature; it was commercially sensitive and subject to intellectual property rights and therefore had the necessary quality of confidence to justify the imposition of an obligation of confidence. In relation to (ii), the Commissioner accepted that there was an express obligation of confidence owned to the applicants in respect of their applications and that the content of the reviewers' reports and Boards' assessments would also be treated in a confidential manner. In relation to (iii) the Commissioner accepted, following consultation by MRC, that none of the applicants would have consented to disclosure of the information at the time the request was made. It was accepted that disclosure of the information, bearing in mind its sensitive nature, would harm applicants' commercial interests.

While section 41 is an absolute exemption with no public interest test, under the common law of confidence, a duty of confidentiality can be overridden if there is an exceptional public interest in the disclosure of the information concerned. The Commissioner found

that the public interest in disclosure did not outweigh the public interest in maintaining the duty of confidence owed to the applicants and reviewers and that section 41 was engaged.

Section 36 – prejudice to the effective conduct of public affairs

While the Commissioner found section 41 was engaged in respect of all the information, for completeness, he considered MRC's claim that section 36(2)(b)(i) and (ii) applied in respect of the Research Boards' assessments of the applications. These parts of section 36 exempt information from disclosure if, in the reasonable person of a qualified person, the disclosure would, or would be likely to inhibit the free and frank provision of advice or exchange of views for the purpose of the deliberation. The Commissioner considered (i) the opinion of the qualified opinion and (ii) whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

The opinion was given by the Executive Director of MRC, who the Commissioner accepted that he was a 'qualified person' for the purposes of section 36 and that his opinion was given prior to the issuing of the refusal notice. Based on the circumstances in this case, the Commissioner accepted that it was objectively reasonable for the qualified person to conclude that the disclosure of the withheld information would have been likely to inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation. The disclosure of this information could clearly have an impact on the willingness of the Board members to provide detailed comment and advice in the future because of the concern that if potential applicants knew that critical comments might be disclosed, they might be deterred from making an application.

In considering the public interest test, the Commissioner accepted that there was a general public interest in disclosing information to aid understanding of the decisions reached and to promote accountability and transparency. However, there was strong public interest in preserving a free flow of information between those assessing funding applications to ensure that appropriate research is given funding, which benefits the research community and ensures the effective spending of public money. It would not be in the public interest for the free and frank provision of advice and views to be inhibited, producing limited reviews of application and making it more difficult to determine the true merits of particular applications. The Commissioner concluded that the public interest in maintaining the exemption outweighed the public interest in disclosing the information in this case.

3.5 Impact of disclosure on international relations

Existing guidance

- Section 27: international relations

HEIs work at a local, national and international level with a range of partners; some carry out functions which relate directly to, or have the potential to affect, the international relations of the UK. Section 27 of FOIA provides an exemption to disclosure of information that would or would be likely to prejudice UK interests. As the ICO guidance on Section 27 explains in more detail, the exemption does not necessarily focus on the scale or importance of the issue or on the subject or type of the information, but on whether UK interests abroad, or the international relations of the UK would be prejudiced through the disclosure of the information relating to the issue. It is important to note that the prejudice must be to the interests of the UK itself rather than simply to the public authority which holds the information, or limited to a part of the UK, or a sector or group in the UK.

Under the EIR, regulation 12(5)(a) provides an exception to disclosure of information to the extent its disclosure would adversely affect international relations, defence, national security or public safety.

Case example – would disclosure of the information have an adverse affect on international relations?

University of East Anglia - ICO decision notice FER0280033

This decision notice illustrates the importance of putting forward arguments for non-disclosure that are relevant to the purpose of exception cited. In this case the University of East Anglia had refused a request for a digital version of a weather dataset under regulation 6 (form and format); regulation 12(5)(a) (adverse affect on international relations); 12(5)(c) (adverse affect on intellectual property rights and 12(5)(f) adverse affect on interests of the information provider). Ultimately the Commissioner ruled that none of the exceptions were engaged.

In relation to regulation 12(5)(a), the Commissioner accepted that UEA is one of the UK's leading research establishments in relation to

the area of climate change and works closely with other UK research establishments on this area, including the Met Office which is part of the Ministry of Defence. He accepted that it would be possible to mount a case that any actions taken by UEA in relation to its research on climate change could reflect on other UK establishments involved in climate change research. This could have an affect on the UK's national interests and international agreements and negotiations. The Commissioner accepted the potential link between the disclosure of the withheld information and the impact on international relations.

In considering whether disclosure of the withheld information would adversely affect international relations, the Commissioner considered if the relationship between UEA and foreign national meteorological services to such an extent that the UK climate research community would be seen as no longer being able to assure that research data would be kept confidential where this was appropriate. While a significant amount of the requested data was already in the public domain, the university failed to sufficiently explain the sensitivity of the information that was not in the public domain. The university presented detailed evidence about the context in which datasets are supplied and exchanged and how disclosure would impact on the university relationship with foreign research partners, but many of the arguments put forward about the impact on international relations were speculative and there was not enough evidence to support the likelihood of an adverse affect occurring. An impact on the relationship between the university and its international research partners was not enough to engage the exception – ultimately, the university did not demonstrate how disclosure would result in an adverse affect in the context of international relations.

3.6 Requests for personal data – data protection

Existing ICO guidance

- Section 40: personal information
- Section 40: applying the exemption for third party personal data
- Section 40: circumstances where the names of individuals may be disclosed
- Section 40: when should salaries be disclosed?
- Section 40: access to information about public authorities' employees

- Determining what is personal data
- What is personal data? - A quick reference guide

Section 40 of the FOIA sets out an exemption from the right to know if the information requested is personal information protected by the Data Protection Act (DPA). Equivalent provisions and exceptions are set out in regulations 5(3), 12(3) and 13 of the EIR. When dealing with requests, you should refer to the more detailed ICO guidance on personal data listed above that is available at www.ico.gov.uk.

The exemption is designed to address the tension between public access to official information and the need to protect personal information. Freedom of information requires public authorities to release information unless it is exempt. But the legislation does not require information to be disclosed if that would be a breach of the DPA. It is essential to understand and apply this exemption correctly to ensure compliance with both regimes.

Anonymising personal data

Considering whether personal information can be anonymised for the purposes of disclosure under the legislation might be relevant when requests are made for research datasets that include personal data.

Truly anonymised data is not personal data and there is no need to consider the application of any DPA principles when considering whether or not to disclose truly anonymised data. The test of whether the information is truly anonymised is whether any member of the public can identify individuals by combining the 'anonymised' data with information or knowledge already available. Whether this 'cross-referencing' is possible is a question of fact based on the circumstances of the specific case.

A case example which considers anonymisation of personal data is the ICO decision notice served on the Department of Health (FS50122432) which looks at this in relation to anonymised abortion statistics and the resulting High Court decision (CO/13544/2009) from April 2011 which ultimately upheld the ICO's decision.

3.7 Interpretation and misinterpretation

The legislation provides a right to recorded information; general concerns about accuracy or risks of misinterpretation are not valid grounds to refuse disclosure under the freedom of information legislation. While there is no legal obligation to provide additional contextual information to disclosures of information where there are concerns about misinterpretation, as a matter of good practice, the ICO encourages public authorities to provide such information as guidance on how to use or interpret the information.

Where there is real risk of misinterpretation of information that may cause some kind of harm, the exemption / exceptions in the legislation should provide adequate opportunities for protection. As well as the types of harm the exemptions and exceptions considered above aim to prevent, there are a range of other provisions in the legislation that might be relevant. For example, if the misinterpretation of a medical dataset could be misused to the extent would pose a risk to the health and safety of individuals, section 38(1) provides an exemption to disclosure where it would endanger the health or safety of any individual. The ICO has issued guidance on section 38.

4. Proactive disclosure and publishing information

This section covers some of the things you can do that may help you to proactively meet the public interest in research information, reduce the number of requests you have to deal with, and make the requests that you do receive easier to handle.

4.1 Proactive disclosure of information

Existing ICO guidance:

- How to operate a publication scheme
- Definition document for universities
- EIR proactive dissemination

Increased proactive disclosure can often be best way to build trust between public bodies, stakeholders and the wider public. Under section 19 of FOIA, public authorities have an obligation to adopt a publication scheme approved by the ICO. Under the EIR, regulation 4 requires a public authority to:

- progressively make environmental information available to the public;
- publish this information on the internet, in most cases; and,

- take reasonable steps to organise its environmental information to make it easier to access and publish.

The ICO's model publication scheme:

- sets out the types of information you must routinely publish; which should include at least the minimum environmental information required by the EIRs.
- explains the way you must provide the information;
- states what charges you can make for providing information; and
- commits your authority to providing and maintaining a guide to the information you provide, how you provide it and any charges.

There have been cases involving HEIs where problems of mistrust, were to some extent, exacerbated by a lack of availability of background data. As well building trust, making more information publicly available through the publication scheme will help your organisation to avoid the administrative costs of dealing with certain types of freedom of information requests. The information should be easy for the authority and any individual to find and use.

To enable universities to comply with their obligations to operate a publication scheme, the ICO has published a sector specific 'definition document', which provides examples of the kinds of information that universities are expected to provide in order to meet their commitments under the model publication scheme (the ICO plans to work with the sector to review the definition document for universities, which will provide further guidance about publishing research information).

The ICO encourages HEIs to go further in the publication of background and factual data supporting research wherever possible, particularly once research projects are complete, so that certain categories of research information are consistently available. The ICO accepts that understanding the context of research areas is important and information sharing across disciplines and subject areas will sometimes vary for legitimate reasons – some areas can easily make data freely available as soon as it is produced, others may need to be more restrictive in what information is made available and to whom.

This aim of openness is in line with the Research Council UK's guidelines in their RCUK Common Principles on Data Policy and ESRC'S guidance on data management plans.

The ICO recommends research policies and strategies should also be published – this will include quality assurance procedures, policy and procedures relating to intellectual property, ethics committee terms of reference, applications and their approval, and any other relevant codes of practice; and any policy, strategy and procedures relating to knowledge transfer and enterprise.

4.2 Information intended for future publication

Existing ICO guidance:

- Section 22 – information intended for future publication

Section 22 of the FOIA provides an exemption from the right to know if the information requested by an applicant is intended for future publication. To be covered by the exemption, the information must be held with the intention of publication at the time the request was made. It will not be permissible to argue an intention to publish the information when that decision was only made after the request was made. It is not, however, necessary to have set a publication date. Publication will often be publication in accordance with the publication scheme of the public authority.

The exemption also covers information held by the authority which another person (whether an individual, a company or another public authority) intends to publish. This is a situation which may arise reasonably frequently. For instance one public authority may have been given a draft of a document to review which another organisation intends to publish.

Data management plans are useful tools that will assist you in planning disclosure of information and pre-empting information requests. You may be able to reduce the number of requests for information and the number of times upon which you may need to rely on section 22 by providing the public with a clear description of planned publications, including a publication timetable. This could be included as a class of information within a publication scheme. It may also be helpful within publication schemes to indicate the likely date of publication within the description of the class of information. For instance, many public authorities include minutes of management board meetings as a class of information within their publication schemes. It may be helpful to indicate that the minutes will be published within a week, a month etc of the meetings. It may also assist if drafts of documents include intended publication dates and an indication of whether any or all of the information could be released prior to publication.

Section 22 is subject to the public interest test. As the guidance explains, as the application of this exemption presupposes that the request information will be disclosed, in balancing the public interest, the focus is not on the harm that may arise from disclosure of the information; the balance of the public interest must focus on whether, in the circumstance of the case, it would be in the public interest for the public authority to keep to its original timetable for disclosure, or whether the public interest would warrant an earlier disclosure.

Case example – information intended for future publication

University of Liverpool - ICO decision notice FS503493523

A request for a copy of a PhD thesis was submitted to the university. The PhD had been privately funded and the thesis was embargoed from publication, as it formed the basis of a book that was subject to a commercial publishing contract. The university had refused the request under section 22(1) and section 43(2).

In assessing whether section 22(1) had been correctly applied, the Commissioner considered the following questions:

Was the information requested held by the University?
Was there an intention to publish the information at some date in the future when the request was submitted?
In all the circumstances of the case, was it 'reasonable' that information should be withheld from disclosure until some future date (whether determined or not)?

The university demonstrated that the information was held and that there was a genuine intention to publish the thesis. It provided confirmation that once the book was commercially published (a date of intended publication was provided) it would place the thesis into the library, from where it would be available on request. If it became clear that the book would not be published, the thesis would be placed in the library.

The Commissioner accepted that section 22(1) had been applied correctly – he agreed that it was reasonable for the information to be withheld from disclosure until the book was published as the thesis had been properly subject to the university's embargoing process; it had evidenced commercial and financial value of publication of thesis it would not be desirable to put the individual in breach of publishing contract; and early disclosure might

undermine students obtaining private funding.

In considering the public interest test under section 22, the balance must focus on whether it would be in the public interest to keep to original publication timetable, or whether the public interest warrants an earlier disclosure. In this case, factors of transparency and accountably, taking into account the thesis concerned a developing field of research, was weighed against the impact of the impact of disclosure on the integrity of the university's embargoing policy and the potential damage to the commercial interests of the author and publishers. The Commissioner found that the public interest weighted in favour of maintaining the exemption in this case.

More information

This guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information or data protection, please Contact us: see our website www.ico.gov.uk.