

## The Implications of the Freedom of Information Act for Research

### Research and FOI

This report will summarise advice from a seminar on 24<sup>th</sup> January 2012 at Farrer & Co. on Freedom of Information and research data.

The Freedom of Information Act 2000 (FOIA) gives a general right of access to information by members of the public. Queen Mary could be asked (and is asked) for information, including research data, by anyone from anywhere and the default position is for full disclosure. All requests are applicant- and purpose-blind and Queen Mary must respond in 20 working days. The Environmental Information Regulations 2004 is a similar regime but applies to any information connected to the environment, from soil to emissions.

### Practicalities

Firstly, staff need to be able to recognise a request. Requests can come in to any part of the College and do not have to mention FOIA. (When a request is received, it should be notified to the Records & Information Compliance Manager). Examples of things to consider are:

- Is the information held? It won't be if the information is only held "on behalf of" a third party, which it might be if research is externally funded.
- When will the research be published? Is there a genuine intention to publish in the near future or is there some indeterminate plan to publish on a future date perhaps in years to come? This might make use of an exemption possible.
- Will it cost a lot to locate and produce? There is a limit to how much effort is required before a request could be refused, see below.
- Is the request vexatious? The *request* must be vexatious, not the requester, for it to be refused on these grounds and there are criteria to evaluate.

### Possible exemptions

In order to encourage transparency, accountability and the re-use of data, the assumption is that all information requested is potentially disclosable. Nonetheless, FOIA contains a number of exemptions that can be employed to withhold information, but there need to be clear arguments and evidence to support their use. The most relevant exemptions for research data are:

Section 22 (p) – information intended for future publication. There must be an intention to publish; you do not need a date but years is probably too long a timescale. In addition the published material must be the same as what has been requested, not just a summary or write-up.

Section 40 – personal data is exempt but if it can be truly anonymised then this won't apply (e.g. statistics). What is the risk of identification? Consent from research participants – their information only provided for the purpose of the research.

Section 36 – information is exempt if disclosure would inhibit the free and frank provision of advice or exchange of views in the opinion of the 'qualified person'. The qualified person for Queen Mary is the Principal. This could protect, for example, peer review comments where there is a need for honesty.

Section 41 – information provided in confidence. If there's no consent to disclose then it could lead to a breach of confidence but the information must be obtained from a third party (not generated by the HEI) and there must be a likelihood that legal action could ensue if data is released.

Section 43 (p) – prejudicial to commercial interests. HEIs are in a competitive environment for attracting students, staff, research funding, not just domestically. If this ability is hindered by releasing research data then it could damage commercial interests e.g. funder won't work with us again.

Also:

s.12 – exceeds the appropriate limit, where the cost of compliance would be over £450 or 18 hours work,

s.14 – vexatious or repeated,

s.38 (p) – health & safety, where e.g. disclosure might put staff at risk,

s.44 – statutory obligation not to disclose.

When any exemption is used it should be supported with explanations and those marked (p) above are also subject to a 'public interest test': does the public interest favour withholding or disclosing? The public interest is not defined and is essentially a matter of judgement to be assessed on a case-by-case basis.

Recently UUK lobbied to have s.22 amended so that pre-publication research data could be protected in the same way as an exemption in the Freedom of Information (Scotland) Act. [This does not appear to have been successful. No hard evidence was provided as to any 'chilling effect']<sup>1</sup>.

### **Re-use of Research Data**

Intellectual property rights are still enforceable; there is no automatic right to re-use (reproduce or exploit) information provided under FOIA. There is a need to notify an applicant when the information is released and show that there would be an adverse affect on IP rights (plus still have s.41 if provided in confidence and s.43 trade secret to call on).

At the moment there is no obligation to permit re-use of information when it is provided in response to an FOI request. The Protection of Freedoms Bill will amend FOIA which will mean that 'datasets' (i.e. raw data in electronic form) must be made available in re-usable form if and when a request is made, unless an FOIA exemption applies.

In addition, authorities will have to make relevant copyright works available for re-use in accordance with the terms of "the specified licence" where it is requested and forms part of a dataset and the authority is the only owner.

Therefore, it is important in research contracts with other parties make it clear who owns data and insert clauses relating to FOIA (and copyright).

The other of the U.K.'s 'Open Data' initiatives involves open access publishing of publicly-funded research. Dame Janet Finch is leading a working party to examine how UK-funded research findings can be made more accessible. In addition the Research Councils will be required to enforce the deposit of published articles in an open access repository and fund a 'gateway to research'.

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<sup>1</sup> Note that s.22A has since been inserted to the FOIA relating specifically to research data

## **Appealing Refusals and Penalties for Non-compliance**

All requesters have a right to an initial internal review when there is any aspect of the way in which a request has been handled with which they are not satisfied, including if exemptions have been used. After internal review a requester may still complain to the Information Commissioner's Office who will assess both sides of any arguments and arbitrate between the parties. At this stage late reliance on a new exemption is allowed. If the matter cannot be resolved with informal negotiation, the ICO may issue a Decision Notice, which could order that the information be disclosed. However, once the ICO has made a decision either party may appeal to the Information Tribunal.

The advice for managing Information Tribunal cases is that if particularly complex information needs to be explained then it is better to have a live hearing, where oral evidence is likely to be required, then on the papers. Then it is important to have individuals who can communicate about research to lay people.

### **Other points**

Under EU proposals university libraries and museums will lose their exemption from the Re-use of Public Sector Information Regulations 2005.

The UK IP Office's Consultation on Copyright, following the Hargreaves Review, proposes:

- Enabling the use of orphan works
- Introducing voluntary extended collective licensing
- Widening the current research exception so that sound and film can be copied for private study
- Allowing whole works to be copied for data mining for non-commercial research