

# **Freedom of Information Act 2000**

## **Overview Summary**

*This overview is intended for the general reader who wishes to understand the broad principles of the Freedom of Information Act 2000 without the need to go into specific detail. It is based on our own understanding of the Act and on guidance issued by JISC (Joint Information Systems Committee - an advisory body funded by the joint Further and Higher Education Funding Councils) and other sources. Each of the main points given is followed by the relevant Section number of the Act so that if further details are required, that section may be consulted in the fuller companion document entitled **Sectional Summary**. In that document, all those sections of the Act relevant to the University have been reproduced with a parallel commentary alongside in plain English.*

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### **Introduction**

The Freedom of Information Act 2000 (FOIA) is intended to act as a catalyst for change in the way public authorities approach openness and manage their records. Its provisions apply in England, Wales and Northern Ireland, but not in Scotland which has its own similar, though different, Act passed by the Scottish Executive on 28 May 2002.

A White Paper on Freedom of Information, "Your Right to Know", was published in December 1997 for comment and consultation, followed by a draft Freedom of Information Bill published in May 1999. Following debate by both Houses of Parliament, the Act was finally passed and received Royal Assent on 30 November 2000. It was originally intended that implementation of the Act would be under the auspices of the Secretary of State for the Home Office, but responsibility was transferred (along with that for Data Protection) to the Lord Chancellor on 8 June 2001. Any references in the Act to "the Secretary of State", therefore, should now be read as "the Lord Chancellor".

In addition to the Act, two Codes of Practice have been issued by the Lord Chancellor: one concerning the discharge of public authorities' functions under Part I of the Act, issued under S45 of the Act; the other concerning the management of records, issued under S46.

The former Data Protection Commissioner was re-named the Information Commissioner from January 2001 and responsibility for the day-to-day implementation and enforcement of the Act (along with that for Data Protection) now lies with his Office.

The Act only applies to public authorities (listed in Schedule 1 of the Act), including universities, and not private organisations. However, private organisations defined as a "publicly-owned company" such as spin-off companies that are wholly or largely owned by a public authority will also be subject to the Act [S6].

Broadly speaking, there are two mechanisms for placing information in the public domain. Firstly, the Act establishes the right for any person making a request to a public authority to be informed in writing whether or not the authority holds the information sought, and, if so, to be supplied with that information subject to certain exemptions. Secondly, it requires public authorities to make available information they hold and to publish a publication scheme which sets out the categories of information they intend to make readily available.

## **Right of Access**

Under Part I of the Act, anyone may make a request for information to any public authority providing it is in writing, states the name and address of the enquirer and describes the information requested [S8(1)]. Requests can be made electronically (*eg* by email or fax) so long as they are legible and are capable of being used for subsequent reference [S8(2)]. The identity of the enquirer is of no concern to the authority except in the case of vexatious or repeated requests [S14] or personal information [S40(1)]. There are no restrictions as to nationality or residence. The authority has the "duty to confirm or deny" whether or not it holds the information [S1(6)], and if it does, to supply it [S1(1)] within 20 working days from receipt of the request [S10(1)] (with certain exceptions).

Authorities are not obliged to provide information where they cannot find it without assistance and can make reasonable enquiries of the applicant in order to identify and locate the information requested [S1(2)]. If such information is not received, the authority is not obliged to answer the request [S1(3)]. However, the authority also has a duty to advise and assist enquirers in making their applications [S16(1)], and compliance with the Lord Chancellor's guidance issued under S45 will be regarded as fulfilling this duty [S16(2)].

Where an applicant expresses a preference for the information to be supplied in a particular way, for example by asking for a hard copy of the information or a summary of it, the authority is obliged to do so wherever practicable [S11(1)] or explain why it cannot [S11(3)]. If no preferences are expressed by the applicant, the authority may supply the information by any reasonable means [S11(4)].

## **Exemptions**

Part II of the Act sets out 23 exemptions where the right of access to information is either not allowed or is qualified. In the main, these relate to issues such as national security, law enforcement, commercial interests and data protection. Information is also exempt under the Act if it is accessible to the applicant by other means [S21] such as a publication by another body (eg HESA or a government department). Information readily available under the authority's publication scheme need not be provided in response to an individual request, though under the "duty to advise and assist" the authority would be expected to inform the applicant where the information could be found. Nor is there any obligation to respond to vexatious or repeated requests [S14].

There are two general categories of exemption: (i) *Absolute Exemptions* - those where there is no duty to consider the public interest; and (ii) *Qualified Exemptions* - those where, even though an exemption exists, an authority has a duty to consider whether disclosure is required in the public interest. Briefly, the public interest test requires an authority to determine whether the public interest in withholding the information outweighs the public interest in disclosing it by considering the circumstances of each particular case in the light of the potential exemption which might be claimed. The balance lies in favour of disclosure since withholding must *outweigh* disclosure. In some cases, the "duty to confirm or deny" the holding of the information may still apply even if disclosure of the information itself would be against the public interest. The following lists summarise the position and give the relevant section of the Act to which the exemption relates.

*(i) Absolute Exemptions*

These are the exemptions to which the "public interest test" does not apply.

N/A = not applicable to the University

- S21 Information accessible to applicant by other means
- S23 Information supplied by, or relating to, bodies dealing with security matters
- S32 Court records, *etc*, including post mortems
- S34 Parliamentary privilege (N/A)
- S36 Prejudice to effective conduct of public affairs (N/A)
- S40 Personal information (very largely covered by the Data Protection Act 1998)
- S41 Information provided in confidence
- S44 Prohibitions on disclosure by another enactment or where disclosure would constitute contempt of court

*(ii) Qualified Exemptions*

The "public interest test" *must* be applied in these cases. Where the decision to withhold is taken, the authority must inform the applicant of its reasons, unless providing the reasoning would effectively mean releasing the information.

N/A = not applicable to the University

\* = unlikely to affect the University

- S22 Information intended for future publication
- S24 National security (in cases not covered by S23, which are absolute)
- S26 Defence
- S27 International relations
- S28 Relations within the United Kingdom\*
- S29 The economy\*

- S30 Investigations and proceedings conducted by public authorities (N/A)
- S31 Law enforcement
- S33 Audit functions (N/A)
- S35 Formulation of government policy, *etc* (N/A)
- S36 Prejudice to effective conduct of public affairs (except information held by Houses of Parliament, which is absolute)
- S37 Communications with Her Majesty, *etc*, and honours
- S38 Health and safety
- S39 Environmental information
- S40 Personal information (very largely covered by the Data Protection Act 1998)
- S42 Legal professional privilege
- S43 Commercial interests

It should be noted that these are broad categories and absolute/qualified exemptions do not necessarily apply in all and every circumstance; whether a particular exemption under S40 Personal Information was absolute or qualified, for example, would depend on very precise circumstances. In practical terms, it should also be noted that several of the sections would not normally apply to University activities but may do so in part in particular circumstances. In cases where a requested document contains some exempt information, only those specified pieces of exempt information can be withheld and the rest of the document has to be released.

### **Refusal of a Request**

If an authority intends to rely on an exemption where the duty to confirm or deny does not apply, or to claim the information requested is itself exempt information, it must, within 20 working days, give the applicant notice of the fact, specifying the exemption in question and stating why the exemption applies [S17(1)]. If at that time the authority has not yet reached a decision concerning the public interest test, it must also indicate this and give an estimate of the date by which the authority expects such a decision to be made [S17(2)]. If it does decide the public interest in withholding the information outweighs the public interest in supplying it, the applicant must be informed of the reasons for its decision [S17(3)].

The authority must also inform the applicant within 20 working days if it is claiming that the cost of supplying the information would exceed the appropriate limit [S12] or the request is vexatious or repeated [S14] [S17(5)].

Where the authority has claimed exemption, it must give details of its complaints procedure and give particulars of the right under S50 to apply to the Commissioner for a ruling on whether the request has been dealt with in accordance of part I of the Act [S17(7)].

### **Fees**

An authority may charge a fee for providing the requested information if it gives the applicant notice in writing to this effect (known as a "fees notice") before supplying the information [S9(1)]. There is no obligation to supply the information until the fee is paid, and if the fee is not paid within three months, the request lapses [S9(2)]. The fee charged has to take into

account regulations made by the Lord Chancellor [S9(3) and (4)] and published in his S45 guidance, including an upper limit. These are on a sliding scale and the authority is not obliged to provide more information than can be found for that cost [S12(1)]. However, the duty to confirm or deny that the information is held still applies [S12(2)]. If the cost of compliance exceeds the appropriate limit, or the provision of information is not otherwise required by law, the authority may charge for providing information in accordance with the regulations [S13].

## **Records Management**

The Act integrates existing rights of access to public records covered under the Public Records Acts of 1958 and 1967 with the new wider rights of access to information. Under the Act, all records become generally available unless specific exemptions can be applied. After 30 years, records become "historical records" and many of the Freedom of Information exemptions cease to apply [S63(1)], as does the "duty to confirm or deny" [S63(2)]. Others cease to apply after 60 years (*eg* correspondence concerning the conferring of honours [S63(3)]) or 100 years (*eg* records concerning law enforcement [S63(4)]). A few will remain exempt even after 100 years (mainly to do with security and defence). Under S46, the Lord Chancellor has issued a Code of Practice for authorities to follow regarding the keeping, management and destruction of records. Further guidance on this will be made available on request.

## **Publication Scheme**

Each public authority is required to adopt, maintain and regularly review a "publication scheme" approved by the Information Commissioner [S19(1)]. This must specify the classes of information the authority publishes (or intends to publish), the manner in which it is to be published and whether the material is to be available free of charge or on payment [S19(2)]. This scheme must be published taking into account the public interest in allowing access to information [S19(3)], but the authority is free to publish in whatever manner it thinks fit [S19(4)].

The Commissioner is also permitted to approve model publication schemes relating to groups of authorities (such as Higher Education institutions), whether prepared by himself or others [S20(1)]. Where an approved model scheme is adopted by an authority without modification, no further approval by the Commissioner is required. If modifications are made, approval has to be sought only for the modifications [S20(2)]. Guidance to the University of Sheffield's publication scheme can be found in document *University of Sheffield: Freedom of Information Publication Scheme*.

## **Enforcement**

Enforcement of the provisions of the Act is largely carried out by the Information Commissioner. It is also part of his rôle to promote good practice and compliance with the Act, to approve publication schemes and disseminate advice about the Act. He also has powers of entry and inspection similar to those under the Data Protection Act 1998 [S55 and Sch.3].

If an applicant is not satisfied with the response received from an authority, he has the right to appeal through the authority's own complaints procedure set up under the S45 Code of Practice. Once these proceedings have been exhausted, he can appeal to the Commissioner [S50]. In most circumstances the Commissioner is required to serve a "decision notice" on both the complainant and the authority [S50(3)]. If the Commissioner decides to uphold the complaint, the notice will state the steps the authority must take within a specified period to comply [S50(4)].

If the Commissioner needs further information himself before deciding the case, he can serve an "information notice" requiring the authority to provide specified information to him within a specified period [S51].

The Commissioner can serve an "enforcement notice" on an authority where it has failed to fulfil its obligations under Part I of the Act, requiring it to take specified steps within a specified time [S52].

In any case where a decision notice, information notice or enforcement notice is served, the authority can appeal to the Information Tribunal which will either allow or dismiss the appeal, or substitute its own notice [S57 and S58]. A complainant can also appeal against a decision notice to the Tribunal [S57(1)]. If an authority continues to fail to comply with any of these notices, the Commissioner can certify the failure to the High Court which can then deal with the authority as if it had committed a contempt of court [S54].

Where a public authority has failed to comply with the S45 and S46 Codes of Practice issued under the Act, the Commissioner may serve a "practice recommendation" stating his opinion that the authority has failed to comply with the code and specifying the steps that should be taken to do so [S48].

The Act makes it an offence for any officer or employee of an authority to alter, deface, block, erase, destroy or conceal records (or any part thereof) held by an authority with the intention of preventing their disclosure to an applicant who has requested the information. The penalty (served on the individual, not the authority) is a fine [S77].

*Note: Whilst every care has been taken in the preparation of this material, neither the author(s) nor the University of Sheffield can accept liability for any loss or damage caused arising in connection with reliance on its contents.*

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