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This paper examines the issue of whether a valid Freedom of Information (FOI) request can be made for undergraduate and postgraduate dissertations. This version of the paper considers the issue under the Freedom of Information (Scotland) Act 2002 (FOISA).<sup>1</sup>

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## **1. Introduction**

As a starting point, s.1(1) of the FOISA 2002 states that:

A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

An issue arises in relation to the retention of undergraduate and postgraduate dissertations by universities (being Scottish public authorities by virtue of part 5 of Schedule 1 of the Act). Unless otherwise covered by one of the exemptions in the Act, information requested must be released to the requester.

For the purposes of this paper, a dissertation is taken to be a substantial piece of examinable work produced as a result of individual research by a final year or Masters student. Dissertations present particular issues due to their dual nature of being, on the one hand, instruments of assessment with particular personal significance to the writer, and on the other, items of research which are often made available in a University library.

A number of institutions have noted their reluctance for undergraduate and Masters dissertations to be made available to the general public, citing as reasons potential plagiarism, wide dissemination of otherwise examinable material, and administrative

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<sup>1</sup> Please note that this paper does not consider the position of PhD theses, as particular consideration in that case must be given to the tradition and/or obligation to publish which may be inherent in thesis submission.

burden. A further complication is that copyright in the dissertation may also remain with the student (though some institutions' regulations may provide for copyright being transferred through submission).

It is also noted that there is often a divergence in practice in higher education institutions as to the retention of dissertations (and frequently divergence of practice between academic units within even a single institution).

What exemptions may apply in the case of undergraduate and masters dissertations?

## **2. Information Not Held by Public Authority (s.17)**

Although it is obvious, it is worth first and foremost making the point that only information held by a public authority is subject to disclosure. Dissertations which have been returned to the student, discarded or destroyed (without a copy being taken) cannot be the subject of a valid FOI request. It is therefore a preliminary step to examine the institution's records management policy, and to assess the requirements (e.g. quality audit) and benefits (e.g. as research material) versus the burden (space and administration) involved in holding the dissertations.

Where an institution does not hold the information requested, by virtue of s.17:

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

## **3. Information Otherwise Accessible (s.25)**

Section 25 of the FOISA 2002 states:

Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

An institution may be able to claim the absolute exemption under s.25 if it can show that the dissertation is available either through its publication scheme, or in the library. The Model Publication Scheme for Scottish Higher Education Institutions does not include student sample work, so this item would be included in an institution's scheme only if specifically added.

Where dissertations are added (either for a limited time or indefinitely) to an institution's library stock, the s.25 exemption could be claimed as long as the institution allows external membership to members of the public, or public reference access. S.25(2)(a) the Act states that information:

may be reasonably obtainable even if payment is required for access to it

However, if the requester needed to pay a substantial charge for a year's membership in order to access a single document, this may be held to be outwith reasonably obtainable.

The UK Information Commissioner's guidance in relation to the similar provision in the UK Act states that although a public authority cannot enquire as to a requester's

circumstances, it should take into account (where these are known) travelling and mobility, whether the requester is a non-English speaker, disability, and the form of the information.

#### **4. Information Intended For Future Publication (s.27)**

Where there is some definite plan for the dissertation to be published, an institution may be able to rely on the s.27 exemption. A vague plan to publish is unlikely to be enough, and the public interest test will need to be applied. S.27 requires the planned publication date to be within twelve weeks, which is unlikely to be the case with most dissertations and considering academic publishing lead-in times.

#### **5. Prejudice To Effective Conduct Of Public Affairs (s.30)**

Section 30 provides that

Information is exempt information if its disclosure under this Act [...] (c) would [...] prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

This exemption is subject to the public interest test, and the institution would therefore have to show that the public interest in disclosure is outweighed by the public interest in maintaining the exemption. Although institutions have suggested that plagiarism and release of examinable material are factors in wishing non-disclosure of dissertations, it is suggested that meeting the substantial prejudice test would be difficult.

#### **6. Personal Information (s.38)**

Where the dissertation contains personal information, section 38 of the FOISA may apply. In particular, any markers' comments or indication of the grade should not appear on information released under the FOISA.

An argument can be put that under Sch.7 para 9(1) of the Data Protection Act 1998, by virtue of being an examination, a dissertation is in its entirety personal data. This comes from a particular interpretation of para 9(1), which states:

Personal data consisting of information recorded by candidates during an academic, professional or other examination are exempt from section 7.

This could be taken to mean that everything written by a candidate during an examination is exempt from section 7 (that is, exempt from data subject access). By implication, that information would only need exemption if it was personal data.

It is suggested that this is not the correct interpretation: instead, it merely exempts personal data recorded by a candidate during an examination, but there may be many other things written which are not personal data and which would not therefore fall under data protection.

If the first interpretation is followed (and everything written by an examination candidate is personal data) then the FOISA s.38 exemption applies, and unless there

is an overriding public interest in disclosure (which would be unlikely), no disclosure would need to be made. It is argued that this interpretation is unlikely to be followed, and this is supported by guidance from The Information Commissioner's office: [Please note that this is the UK Information Commissioner, as he has responsibility for the Data Protection Act 1998 throughout the UK]

[T]he advice is that such dissertations are not personal data, the principal reason being that they are not biographical information about the individual student. Essentially, a dissertation comprises information about the subject matter of the dissertation, not information about the author. [...] [T]he notes of the marker, any comments about the student and grade etc. would be considered to be personal data.

Information Commissioner  
(by email, December 2004)

In this case, only actual personal information within the dissertation should be redacted, and the rest of the information supplied. Along with this should be an explanation, stating that personal information has been redacted under the exemption contained in s.38 of the FOISA, and to comply the institution's obligations under the Data Protection Act 1998.

Institutions should note the corresponding duties to protect personal data that go along with claiming the s.38 exemption. For example, it would be inconsistent for an institution to claim a s.38 exemption for information that was available to the public or student body at large in the library.

## **7. Information Provided in Confidence (s.36)**

Section 36(2) states:

Information is exempt information if- [...] its disclosure [...] would constitute a breach of confidence actionable by that person or any other person.

In order for there to be an actionable breach of confidence under Scots law, the information must have the necessary quality of confidence, the information must be received in circumstances which reveal an obligation of confidence is being created, and there must be unauthorised disclosure of that information to the detriment of the pursuer. However, breach of confidence is a relatively undeveloped area of Scots law, and it is difficult to define .

It is arguable that a student submitting work to a university does so on the understanding that it will be held in confidence. This would require that the information contained in it is confidential in some way (for example, if sensitive research data was contained in it), that the circumstances made it clear that there was to be an obligation of confidentiality, and that disclosure would be detrimental. It is suggested that these tests would be unlikely to be met in the case of a standard undergraduate or Masters dissertation.

## **8. Copyright and Disclosure**

Where an institution's regulations either by specification or default provide for the copyright in a dissertation to remain with the student, an issue arises as to whether the institution can make disclosure. There is no issue if copyright belongs to the institution, or where compliance with the FOISA is by a means other than copying the original work (i.e. by inviting the requester in to see the dissertation, or by supply of a summary/digest).

An issue arises where an institution feels that making a copy is the best or most practical way of responding to a request, and the student owns the copyright in the work, or if the dissertation contains third party copyright material (which has been used by the student). The institution will then need to rely on s.50(1) of the Copyright, Designs and Patents Act 1988, which states:

Where the doing of a particular act is specifically authorised by an Act of Parliament, whenever passed, then, unless the Act provides otherwise, the doing of that act does not infringe copyright.

However, there is (at the least) uncertainty as to whether 'an Act of Parliament' includes the Freedom of Information (Scotland) Act 2002 (an act of the Scottish Parliament). This was remedied in November 2004 by the passing of the Freedom of Information (Scotland) Act 2002 (Consequential Modifications) Order 2004. To quote the Scottish Information Commissioner:

...the order extends the application of section 50 of the Copyright, Designs and Patents Act 1988 to FOISA. Currently, that section only applies to the UK Freedom of Information Act 2000. This means that authorities will not be breaching copyright if they disclose information in which they do not own the copyright. Recipients of the information, however, will only be able to reproduce that information if it accords with the copyright requirements of the author.  
Scottish Information Commissioner  
(at <http://www.itspublicknowledge.info/news.htm>, October 2004)

Institutions may therefore release the information to the requester, but should ensure the recipient is aware that copyright subsists in the document, and that it may not be copied further without the consent of the copyright holder.

## 9. Conclusions

- Dissertations are subject to FOI requests.
- Where the dissertation requested is reasonably obtainable by other means, an institution can rely on s.25 of the FOISA, an absolute exemption. Institutions may wish to consider adding dissertation to their publication scheme.
- Where there is a definite plan to publish the dissertation within twelve weeks of the request, the institution can rely on s.27 of the FOISA, subject to the consideration of public interest in immediate disclosure. The requester should be notified of the details of the future publication.
- Where an institution does not hold copyright in a dissertation, it may still copy and disclose the dissertation, relying on s.50 of the Copyright, Designs and Patents Act 1988.

- Where an institution can show substantial prejudice to its affairs, and can show that the prejudice is greater than the public interest in disclosure, it can rely on s.30 of the FOISA, but this is likely to be difficult.
- Where a dissertation contains personal information relating to an identifiable individual, this must be redacted before disclosure of the information. The requester should be notified that this redaction has taken place under s.38 of the FOISA.
- In future, the definition of 'information' under the FOISA may be clarified through decisions so that student work such as dissertations is not covered (given that the FOISA is primarily concerned with transparent administration). However, until such clarity emerges, it is suggested that institutions need to take a cautious view, and accept a wide definition of 'information'.

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