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1. Introduction

This paper will examine the issue of whether a valid Freedom of Information (FOI) request can be made for undergraduate and Masters dissertations. This version of the paper considers the issue under the Freedom of Information Act 2000, applying to UK public authorities.¹

As a starting point, s.1(1) of the Freedom of Information Act 2000 (hereafter referred to as FOIA) states that:

Any person making a request for information to a public authority is entitled [...] to have that information communicated to him

as long as the public authority holds that information. An issue arises in relation to the retention of undergraduate and postgraduate dissertations by universities (being public authorities by virtue of para.53 of Schedule 1 of the Act). Unless otherwise covered by one of the stated 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.

¹ 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.

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 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

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 information is not held by the institution, the institution should confirm that in accordance with s.1(1)(a) it does not hold the information, and give details of any complaint procedure, and of the right to apply to the Information Commissioner. Under the duty of advice and assistance, the institution may inform requester of relevant information actually held, or consider transferring the request to another public authority that does hold the information (see "Part III: Transferring request for information" in the Section 45 Code of Practice at <http://www.dca.gov.uk/foi/codepafunc.htm>, January 2005).

3. Information Otherwise Accessible (s.21)

Section 21(1) of the FOIA states:

Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

An institution may be able to claim the absolute exemption under s.21 if it can show that the dissertation is available either through its publication scheme, or in the library. The Model Publication Scheme for Higher Education Institutions does not include student sample work, so this item would only be included in an institution's scheme if specifically added.

Where dissertations are added (either for a limited time or indefinitely) to an institution's library stock, the s.21 exemption could be claimed as long as the institution allows external membership, or public reference access. S.21(2)(a) of the Act states that information

may be reasonably accessible to the applicant even though it is accessible only on payment,

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 this provision 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.22)

Where there is a plan for the dissertation to be published, an institution may be able to rely on the s.22 exemption. S.22 requires there was a plan to publish at the time the request was made, and that it is reasonable to delay disclosure until publication. There does not need to be a definite date for publication set, however. The difficulty with dissertations is likely to be in demonstrating that current disclosure would be unreasonable. It may be possible to argue that disclosure would prejudice negotiations with publishers or would prejudice a patent application. However, s.43 Commercial Interests may cover these situations more clearly.

5. Prejudice To Effective Conduct Of Public Affairs (s.36)

Section 36(2) provides that

Information [...] is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act- [...]
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

In terms of the higher education sector, the Vice Chancellor or equivalent has been designated as the 'qualified person' for certifying prejudice under s.36. The 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 the fact some dissertations are made available in the higher education sector would lead to the conclusion that disclosure is unlikely to prejudice the effective conduct of an institution's affairs.

6. Personal Information (s.40)

Where the dissertation contains personal information, section 40 of the FOIA may apply. In particular, any markers' comments or indication of the grade should not appear on information released under the FOIA.

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

As the definition of examination clearly includes a dissertation,² this could be taken to mean that an entire dissertation is exempt from section 7 (that is, exempt from data subject access). Only personal information is subject to section 7 subject access requests: therefore, by implication, dissertations must be personal information to need exemption from the provision.

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 a dissertation candidate is personal data) then the FOIA s.40 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:

[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.40 of the FOIA, 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.40 exemption. For example, it would be inconsistent for an institution to claim a s.40 exemption for information that was available to the public or student body at large in the library.

7. Information Provided in Confidence (s.41)

Section 41(1) states

² By virtue of Sch.7 para 8 of the Data Protection Act 1998.

Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

In order for there to be an actionable breach of confidence under English/Welsh law or under Northern Irish law, three tests have to be met (defined in the case of *Coco v A.N. Clark Ltd* [1969] RPC 41): first, the information must have the necessary quality of confidence (that there is reasonable belief that the information is confidential). Second, the information must be imparted in circumstances which make show there is an obligation of confidence. Third, there must be use or potential use of the information without the owner's authority.

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. In particular, where an institution's practice has been to make dissertations available in the library, it will be difficult to then argue the confidentiality exemption.

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 FOIA 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).

Where the copyright belongs to the student, and an institution feels that making a copy is the best or most practical way of responding to a request, 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.

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.21 of the FOIA, an absolute exemption. Institutions may wish to consider adding 'dissertations' to their publication scheme.
- Where there is a definite plan to publish the dissertation, the institution can rely on s.22 of the FOIA, subject to the consideration of public interest in immediate disclosure. The requester should be notified of the details of 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.36 of the FOIA, 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.40 of the FOIA.
- In future, the definition of 'information' under the FOIA may be clarified through decisions so that student work such as dissertations is not covered (given that the FOIA 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'.

Author Jason Campbell
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