

## FOI and Student Work

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*This paper is written to address the freedom of information and confidentiality issues surrounding work undertaken by university and college students on placement in third-party organisations. In this paper, "host organisation" is used to refer to the company or other body in which the student does his or her placement.*

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### 1. Concerns of the Private Sector

The Freedom of Information Act 2000 (and, in relation to Scotland, the Freedom of Information (Scotland) Act 2002) places a duty upon public authorities, including colleges and universities, to make information available through a Publication Scheme, and to disclose information requested unless exempt under the Act's provisions.

The fundamental provision of the Act provides that information held by a university or college must be disclosed to a person requesting it, unless the information falls under one of the closely-defined exemptions listed in the Act. Even information which belongs to a third party must be disclosed as long as it is held by the university or college.

This guide is to address concerns that private bodies may have that important, confidential or sensitive company information may be released as a result of a freedom of information request being made for the student project which incorporates it.

### 2. Relevant Exemptions

First, it should be noted that only information held by the college or university is subject to freedom of information requests. Where a student submits a project or other work to the college or university, this will then be held by that institution until such times as it returns or destroys all copies held of it. Students should be reminded only to include such host organisation material as is necessary for completion of the

work, and should ask permission of the host organisation before including any material which may be sensitive in any way.

Under the Freedom of Information Act 2000, the following exemptions may be relevant in relation to a request for student work containing host organisation information:

*Extract from the Freedom of Information Act 2000:*

**Information provided in confidence.**

41. (1) 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.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

### **3. Section 41. Information provided in confidence**

S.41 provides that information protected by the law of confidentiality is not subject to disclosure under the Freedom of Information Act. In order for information to be 'confidential' according to law, it must meet two criteria:

- It must be given in a manner which demonstrates that it is to be considered confidential, *and*
- It must have the necessary quality of confidentiality

The first of those two tests is met either by a declaration of confidentiality (for example, where a document is stamped 'confidential'), or by the information being imparted in a situation where the duty of confidentiality is clearly made. However, this alone is not sufficient for the information to come under a legal duty of confidentiality. In addition, there must be a clear reason why the information should be treated as confidential, or legal terms, it must have the necessary quality of confidentiality. The ICO, in his guidance available at <http://www.informationcommissioner.gov.uk/cms/DocumentUploads/AG%202%20Info%20in%20conf.pdf> (on page 3), describes this quality as the following:

"The information need not be highly sensitive, nor can it be trivial. The preservation of confidences is recognised by the courts to be an important matter and one in which there is a strong public interest. This notion is undermined if it is argued that even trivial matters are covered."

Unfortunately, this is quite a vague concept. However, if the tests are met, then s.41 operates as an absolute exemption, and there is no need to consider the "public interest test", which weighs up any benefit to society disclosure would have.

One approach that host institutions may attempt is to agree confidentiality clauses with the college or university. Pertinent advice on this has been given by the Scottish Information Commissioner, pronouncing under the equivalent Scottish section. He has said that he wants public authorities to avoid agreeing to confidentiality clauses, except where necessary, and this is likely to be a view shared by the UK Information Commissioner. Useful reference may be made to the Scottish guidance given in the document on s.36 of the Scottish Act (equivalent to s.41 of the Freedom of Information Act 2000), paragraphs 8 & 9, (to be found at <http://www.itspublicknowledge.info/legislation/briefings/section36.htm#New>).

**In summary** : where information is of a confidential nature, and has been provided in circumstances which make clear it is confidential, s.41 is likely to provide an exemption to the provision of that information where a freedom of information request is made for student work containing it. However, the concept of confidentiality is vague in law, and it may be difficult to argue the exemption in less clear circumstances. It is unlikely that the Information Commissioners accept confidentiality clauses in contracts without question, and these should not be seen as a panacea.

#### 4. Section 43. Commercial interests

A student's work may contain information that is commercially sensitive in some way, particularly if it reveals inside information which would be valuable to competitors. Such information may be exempt from disclosure under s.43 of the Act.

*Extract from the Freedom of Information Act 2000:*

**Commercial interests.**

43. (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

In order for this exemption to apply, the information must either be a trade secret, or the release of the information must be likely to prejudice commercial interests. In addition to this, a "public interest test" must also be applied. This means that a college or university must consider what public interest would be served by release of the documents, and must release the information if it considers that public interest to be more important than the commercial interest being protected.

#### *Trade Secrets*

The first is where information amounts to a trade secret. This is not defined under the Act, but the Information Commissioner gives guidance as to the term's meaning in his "Freedom of Information Act Awareness Guidance No 5"

(<http://www.informationcommissioner.gov.uk/cms/DocumentUploads/AG%205%20Commercial%20interest%20Jan%2005.pdf>). On page 3 of the Guidance, he states:

“Many people often think of a trade secret to be secret formulae or recipes. While such information is certainly likely to be included in the term, it may also extend to names of customers and the goods they buy or a company's pricing structure if these are neither generally known and the source of a company's “competitive edge”.

The Awareness Guidance goes on to give four factors to be taken into account in deciding whether information is a trade secret.

- The information must be used for the purpose of trade, or in other words, in relation to the generation of profit.
- It should be obvious from the nature of the information or by notice that the owner considers that release of the information would be useful to a rival, or detrimental to the owner.
- Whether the information is already readily available should be taken into account. If it is known beyond a select few, it is unlikely to be a trade secret.
- Information which would be easy for competitors to discover or reproduce themselves is unlikely to constitute a trade secret.

In addition to the protection given to trade secrets, the Act also protects against the disclosure of information which would be likely to prejudice the commercial interests of any person, which therefore includes the host organisation. The Information Commissioner defines the commercial interest as relating to “a person's ability to successfully participate in a commercial activity, i.e. the purchase and sale of goods or services.” This is clearly wider than trade secrets properly defined. The Awareness Guidance gives the example of a company planning to make 100 employees redundant. Although this does not directly affect the company's ability to trade, it may affect profitability in terms of consumer confidence, and the willingness of banks and suppliers to extend credit.

#### *Public Interest Test*

Where student work contains either a trade secret or information which would affect a company's commercial interests, this does not necessarily mean that the information is exempt under the Freedom of Information Act. In addition, the college or university will have to apply the public interest test. If the public interest in the release of information outweighs the commercial interest, then disclosure is still required. Unfortunately, judging the balance is not a precise decision, and until decisions are made on the matter by the Information Commissioner, there will be uncertainty regarding it. The judgment to be made will be to compare the harm that will be caused versus the benefit of releasing the information, and clearly this is a qualitative judgment. General guidance on the application of the public interest test is on the Information Commissioner's website at:

<http://www.informationcommissioner.gov.uk/cms/DocumentUploads/AG%203%20-%20Pub%20Int%20reform.pdf>.

## **5. Other More Specific Exemptions**

In particular contexts, the following exemptions may also be relevant. The Freedom of Information Act 2000 sections are given, but relevant equivalents are to be found in the Freedom of Information ( Scotland ) Act 2002.

### **23. Information supplied by, or relating to, bodies dealing with security matters**

If a student's work contains information gained whilst on placement at a government security agency (such as the Security Service, the Secret Intelligence Service, GCHQ, the special forces, security tribunals or the National Criminal Intelligence Service), such information will be exempt for disclosure under s.23 of the Act.

### **24. National security**

If a student's work contains information gained whilst on placement, and release of that information would be detrimental to national security, then the information will be exempt under s.24 of the Act. Unlike s.23, there is no limitation as to which type of host organisation is involved. For example, this section may exempt sensitive information gained by a student about the work of the Home Office in vetting applicants for asylum in the UK, insofar as it relates to national security.

### **26. Defence**

Where a student's work contains sensitive information relating to the defence of the UK, or the work of the armed forces, s.26 provides a relevant exemption.

### **42. Legal professional privilege**

Communications between a lawyer and his or her client have a confidentiality under the rules of "legal professional privilege"

In a small number of particular cases, the following exemptions may also be relevant, particularly where a student works within departments of government.

- 27. International relations
- 28. Relations within the United Kingdom
- 29. The economy
- 30. Investigations and proceedings conducted by public authorities
- 31. Law enforcement
- 32. Court records, etc
- 33. Audit functions
- 34. Parliamentary privilege
- 35. Formulation of government policy, etc
- 36. Prejudice to effective conduct of public affairs
- 37. Communications with Her Majesty, etc. and honours

It may also be possible to rely on an exemption which relates to a quality of the information unrelated to its confidential nature. These include:

- 38. Health and safety
- 40. Personal information
- 44. Prohibitions on disclosure

## **6. Environmental Information Regulations**

Information regarding the environment is subject to disclosure upon request under the provisions of the Environmental Information Regulations 2004 (or the broadly equivalent Environmental Information (Scotland) Regulations 2004).

Under the regulations, "environmental information" is widely defined, including any written information on the state of air, water or land, and includes waste, emissions,

management policies relating these. The exceptions contained in the Environment Information Regulations are generally similar to the exemptions listed above in relation to the Freedom of Information Act 2000. However, it should be noted that only commercial interests relating to third parties (not the public authority itself) are likely to be protected under the Environmental Information Regulations, and the Regulations allows environmental information volunteered to a public authority to be withheld if its release would prejudice the likelihood of such information being provided in the future.

More information on these provisions, can be found on page 10 of the Information Commissioner's Awareness Guidance 5 documents, to be found at <http://www.informationcommissioner.gov.uk/cms/DocumentUploads/AG%205%20Commercial%20interest%20Jan%2005.pdf>. General information is available from DEFRA at <http://www.defra.gov.uk/corporate/opengov/eir/guidance/index.htm>.

## **7. Suggested Steps to be Taken Prior to Project Work - Templates**

Universities and colleges offering students placements should consider including the following text in their guidance:

### **Guidance on Freedom of Information for Work Placement Students**

The Freedom of Information Act 2000 (or, in Scotland , the Freedom of Information ( Scotland ) Act 2002) places an obligation on public authorities to disclose information they hold upon a request, unless it is exempt information. Universities and colleges are included in the definition of 'public authorities', and in certain circumstances, student work can be the subject of a valid freedom of information (FOI) request, as it will be held by your institution.

Whilst preparing student work on placement, you may have access to information about your placement organisation, its customers, its goods and services. You may have been asked to include some of this information in your essay or project report, or you may wish to include it to back up your argument.

You should follow these guidelines when writing your essay or report:

#### **1. What information are you going to include in your work?**

In preparation for writing your essay or report, consider whether you are going to include any information about your placement organisation. This may include actual documents, information from computer systems or databases, and information obtained from talking to people at the company.

#### **2. Are you going to include sensitive information in your work?**

Consider whether any of the information you are likely to include would be sensitive in any way. For example, would a rival company benefit from knowing the information? Would others knowing the information put the host organisation in a weaker negotiating position in any way.

#### **3. Consider alternatives to including this information**

You should consider whether the inclusion of sensitive information is necessary to your work. You should consider referencing documents instead

of including the information in your work, or using similar but non-sensitive information, such as historic figures, if these could prove the point equally as well.

**4. Discuss with your supervisors.**

If there is a possibility of including such sensitive material, you must discuss this with your institutional supervisor, and with your mentor at the placement organisation. You may be asked to explain why the inclusion of the information is important to your work.

**5. Check again once you are ready to hand your work in.**

Review your work before handing it in, and decide whether you have included any information which could be considered as sensitive by your placement organisation. If you have included such information, ensure that your college or university supervisor, and your placement organisation supervisor know that this is the case.

**Remember that your institution relies on good relations with outside organisations to enable it to offer placements such as that from which you are benefiting.**

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For more information about Freedom of Information, ask if your institution has a Freedom of Information Officer, see your institution's website, or visit - [www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk)