

Universities UK submission to inform the post-legislative scrutiny of the Freedom of Information Act

3rd February 2012

Executive summary

1. Higher education institutions recognise and strongly support the need for openness and transparency and are working proactively in many ways to support this across all of their activities. UK universities are, for example, at the forefront of developments to support open access to research findings and better, more accessible, information for students.
2. The Freedom of Information Act (FOIA) places additional requirements on universities, which are defined as 'public authorities' for the purposes of this legislation. Higher education institutions have worked to effectively comply with the FOIA but there are increasing concerns about the application of this legislation in a higher education environment. This is for a number of reasons:
 - Higher education institutions are mostly charities and autonomous bodies that operate in a highly competitive international environment. The nature of funding to the sector is changing significantly, with the largest proportion now coming from private sources on a competitive basis. The emergence of a market-based sector raises the question of whether FOI legislation, as currently applied, is the most effective and efficient mechanism to support openness and transparency in this new environment.
 - Current government policy for higher education is also encouraging greater competition and diversity of provision from new providers that are not currently subject to the FOIA. Competition can only be fair and effective if all institutions are operating on a level playing field, subject to the same regulations.
 - Evidence from individual institutions points to an increasing complexity of requests and substantial costs being borne in complying, especially where all costs cannot

The essential voice for our universities

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be claimed.

- Universities undertake a significant amount of the UK's research. Across a number of measures this is second only to the United States in its quality. This research is currently subject to the FOIA, and early release of research findings and data can have potentially serious implications for the quality and reputation of UK research, universities' competitive position nationally and internationally, and relationships with commercial partners.
 - In a higher education environment the FOIA can come into direct conflict with other legislation, such as the Animals (Scientific Procedures) Act and the Data Protection Act. In the increasingly marketised higher education environment, we also have concerns regarding the application of the FOIA in relation to competition law.
3. While further advances in openness and transparency in higher education are to be encouraged, the changing nature of the sector means that the FOIA as it is applied in a university context is now in urgent need of review.

Recommendations

We seek the Committee's support for the establishment of an independent review that would consider the application of the FOIA to a changing higher education sector. This will ensure that studies currently examining a number of the issues raised in this submission can inform decisions made in this area.

Notwithstanding the establishment of an independent review, we believe the following issues need to be addressed:

- The question of how the FOIA should be applied to a more diverse set of higher education providers needs resolving as a matter of urgency. We seek the advice of the Committee on how this should be dealt with as part of the new regulatory framework for higher education, currently being developed by the Department for Business, Innovation and Skills.
- Universities UK proposes that the Committee should reconsider the definition of activities that could be charged for and count towards the exemption where cost of compliance exceeds the appropriate limit.
- Further advice and guidance on how the FOIA interacts with other legislation in a higher education context is required.

- Universities UK seeks greater clarity on whether higher education institutions could be treated in the same way as other organisations under the FOIA that have strong commercial interests.
- We seek the Committee's support for the introduction to the FOIA of a limited exemption for pre-publication research.
- Universities UK calls on the Information Commissioner's Office to clarify existing guidance about the application of current exemptions to research.

The importance of transparency in higher education

Key messages:

- **Higher education institutions support the need for openness and transparency of information.**
- **The higher education sector is already actively working to achieve greater transparency across all of its activities.**

Transparency and openness in higher education

1. Higher education institutions recognise and support the need for openness and transparency – to inform students' education choices; for accountability in the spending of public funds; and within the research community, to encourage greater use and application of research for the economic and social advantage of the UK.
2. The higher education sector is already leading and actively working towards greater openness and transparency. Higher education institutions are engaged in providing information through: individual institutions' websites, including data repositories¹; the Higher Education Statistics Authority; the Transparent Approach to Costing²; reporting on Office for Fair Access agreements; and new work that is being conducted to produce Key Information Sets. Further work on encouraging openness of data is being conducted by a working group led by Dame Janet Finch, and the Royal Society is also conducting research looking at improving the openness of data in science³.
3. Many of the key funders of UK research, including the research councils and medical research funders such as the Wellcome Trust, have policies in place to require any peer-reviewed research paper resulting from their funded projects to be deposited in an electronic archive. The Higher Education Funding Council for England (HEFCE) has a shared commitment with Research Councils UK to ensure that significant outputs from research activity are made available as widely as possible both within and beyond the research community. The vast majority of research conducted in UK universities is undertaken with a view to eventual publication and it is a requirement of the Charities Commission that research undertaken by educational establishments is only 'charitable' if its results are made available for the public benefit.

¹ For example see the University of Southampton <http://data.southampton.ac.uk/>, the Open University <http://data.open.ac.uk/>, and University College London <http://eprints.ucl.ac.uk/>

² More information on TRAC is available at <http://www.hefce.ac.uk/finance/fundinghe/trac/>

³ Further information on the project 'Science as a public enterprise: opening up scientific information' can be found at <http://royalsociety.org/policy/projects/science-public-enterprise/>

4. It is well recognised across the academic community that improving access to publicly-funded research undertaken in UK higher education institutions not only benefits the general public as a whole but enhances the international reputation of UK research by making the results more accessible worldwide.
5. Publication schemes are in place for nearly all higher education institutions. However, most of this information, and much more, is already freely available on institution websites. We would question whether the publication scheme in its current form is the most efficient route to providing access to this information.

Implementation of the FOIA in higher education

Key messages:

- **The costs of complying with the FOIA are not reflected in what can be charged.**
 - **It is unclear how institutions will be able to comply with proposed requirements in the Protection of Freedoms Bill to make data reusable while maintaining confidentiality.**
 - **In a higher education setting the FOIA can conflict with other legislation, making it impossible to comply with both.**
 - **Several research projects are currently underway looking at the FOIA and universities which will report after the post-legislative scrutiny period.**
6. The higher education sector has complied effectively with the FOIA and, according to Joint Information Systems Committee (JISC) InfoNet survey data, in 2011 94% of requests were dealt with within the required 20-day period. There are, however, examples of cases that have proved particularly problematic and we have increasing concerns about how the FOIA will be applied in a changing higher education environment. Whilst the Information Commissioner's Office (ICO) has produced useful sector-specific guidance to help higher education institutions, Universities UK believes that these problems have arisen due to the fact that the original legislation was not written with higher education in mind. Indeed, a number of issues relating to the FOIA and higher education are not reflected in the Memorandum to the Justice Select Committee on Post-legislative Assessment of the FOIA.

The costs of compliance

7. While it is recognised that organisations can charge for some limited aspects of responding to requests under the FOIA, as the Justice Committee memorandum itself recognises, there are costs, such as time spent considering exemptions and redacting confidential information, which are not covered. The process of redacting data (due to sensitive personal or commercial content) can be very time consuming, and requires someone with suitable knowledge to ensure that all the necessary sensitive data is removed, and no more.

Universities UK proposes that the Committee should reconsider the definition of activities that could be charged for and count towards the exemption where cost of compliance exceeds the appropriate limit.

8. There remains an unanswered question about how institutions can ensure that data is suitably redacted so that when combined with other sources advanced data-matching technologies do not lead to the possibility of individuals being identified. This is particularly pertinent under the proposed amendment of the FOIA through the Protection of Freedoms Bill, which will require datasets to be made available in a reusable format.
9. Even where the request is ultimately withdrawn there can be significant repercussions in terms of the time and resource an institution may spend dealing with it rather than conducting business as usual. For example, the University of Oxford received a request for research data from a large nationwide health study, submitted by a company with a significant commercial interest in it. Although the request was not ultimately pursued the research group had a year of research time disrupted in attempting to rebut the request, and the institution incurred significant legal costs in the process.
10. Full research is underway to ascertain the costs of FOIA compliance in the higher education sector. JISC InfoNet is conducting research with seven higher education institutions to track requests, including determining all staff involved – including their grade and the amount of time spent actively working on the request – and any additional costs (for example photocopying, postage, and so on). The outcomes of this research will not, however, be available until March 2012.
11. In addition, research is being conducted by the University College London Constitution Unit on the impact of the FOIA on universities (particularly how well universities cope with the extra administrative and other burdens of the FOIA), and the use academic researchers have made of the FOIA. This project is due to finish in July 2012 so is also unavailable to inform the current post-legislative scrutiny process.

Data on FOIA compliance

12. JISC InfoNet has run an annual survey on FOIA compliance in higher education since 2005⁴. This survey (relating to requests received by the higher education sector under the FOIA, Environmental Information Regulations and the Data Protection Act) has sought to understand some of the factors driving current patterns of requests and to help predict and prepare for future ones.
13. The number of requests being made under the FOIA has continued on an upward trend, with an average monthly number of FOI requests per institution of 10.1 in 2011 compared to 8.6 in 2010, and just 2.8 in 2005. Although this number is not high compared to the volume of requests received by other public bodies, such as local authorities, the cost and complexity of requests appears to be increasing.
14. In terms of the exemptions being used by institutions to withhold information under FOI, for the first time section 12 ('Exemption where cost of compliance exceeds appropriate limit') has been the most applied, followed by section 40 ('Personal Information') and section 21 ('Information accessible to the applicant by other means'). In 2010 22% of non disclosure relied on the section 12 exemption, increasing to 28% in 2011.
15. This increase in the use of the section 12 exemption is perhaps an indication of more complex requests being submitted. This is further supported by the increase in the length of time institutions took to fully process a request. Further information from the survey is available online.⁵

Conflict with other legislation in higher education

16. Some requests have exposed conflicts between the FOIA and other legislation in a higher education setting, including related legislation such as the Environmental Information Regulations (2004), the Data Protection Act (1998) and the Animals (Scientific Procedures) Act (ASPA). This causes problems for institutions trying to comply with conflicting legislation.

Further advice and guidance on how the FOIA interacts with other legislation in a higher education context is required.

⁴ The Information Legislation and Management Survey conducted in association with Universities UK and GuildHE, available at <http://www.jiscinfonet.ac.uk/foi-survey/index.html>

⁵ Available at <http://www.jiscinfonet.ac.uk/foi-survey/index.html>

Case study: conflict between legislation

Newcastle University received an FoI request for project licences relating to specific projects where animals were being used for experimentation. The request was initially refused using three exemptions: health and safety (endangering the safety of individuals), commercial interests and prohibitions on disclosure. The prohibition on disclosure related to the licenses having been issued by the Home Office under ASPA. This was accepted by the information commissioner when Newcastle's original decision was challenged, but overruled by the Information Tribunal on appeal. Newcastle University has now released the data under the FOIA but this is a breach of the terms of ASPA. In addition to the risk the university believed this exposed individual members of staff to, this decision also placed staff at the risk of prosecution for disclosing the data because in this instance the FOIA is in conflict with ASPA.

This case also demonstrates the cost implications to institutions of trying to refuse such requests; the university spent over £250,000 on legal fees alone in disputing this case (see <http://www.independent.co.uk/news/science/universities-forced-to-come-clean-about-controversial-primate-experiments-6262805.html>).

The university believes that should it receive a similar request it will be open to the same legal risk and might be required to take the case to the Information Tribunal again, as they understand that one of the reasons that prosecution was not pursued by the Home Office was that the university had been ordered to release the data. This would obviously have considerable cost and time implications.

Vexatious requests

17. Universities report that they do receive requests which they consider to be vexatious but that the definition of vexatious is so unclear that they are deterred from seeking to use this exemption. Further guidance, particularly around what constitutes a vexatious request and how frivolous, time-wasting requests should be handled, would be welcomed, as would a review of what should be included within a university's publication scheme and the level to which project data plans demonstrate an intention to publish.

The FOIA and a changing higher education sector

Key messages:

- **The higher education sector has changed significantly since the introduction of the FOIA. Universities UK recommends that an independent review is held which considers the position of universities within the FOIA.**
- **Unlike most other public authorities, higher education institutions face competition both nationally and internationally.**
- **There is a need for a level regulatory playing field between all types of providers.**

18. Higher education institutions are different from all other organisations included under the FOIA in that they are the only organisations (excluding the BBC⁶) that face competition between themselves within the sector as well as internationally, and are largely privately funded. Since the FOIA was introduced the higher education sector has also changed significantly. The balance of funding within public institutions in the UK has changed from 61% public funding in 2005–06 to 55.9% in 2009–10⁷, and this trend is expected to continue. David Willetts, Minister of State for Universities and Science, has recently confirmed that student fees will be treated as private income, potentially lowering this ratio significantly. Further evidence of the shift in funding can be seen in the reduction of the HEFCE teaching grant received by institutions⁸, which will be replaced by income from tuition fees. The grant is predicted to drop from 66% in 2010–11 to approximately 22% in 2014–15 as a proportion of overall teaching income.⁹

19. The FOIA recognises that some organisations, such as the BBC and the Universities and Colleges Admissions Service, have public activities that are subject to the FOIA and commercial interests that are not covered. Recognition by the Ministry of Justice and the ICO that universities teaching and research activities have commercial value would be very welcome.

Universities UK seeks greater clarity on whether higher education institutions could be treated in the same way as other organisations under the FOIA that have strong commercial interests.

⁶ Note that some of the BBC's activities are not subject to the FOIA, including its commercial subsidiaries.

⁷ HESA (2011) *Finance Plus* Cheltenham: HESA

⁸ Note that this relates to higher education institutions in England only.

⁹ Universities UK (2012) *Futures for higher education: analysing trends* London: UUK p. 7. Available at: <http://www.universitiesuk.ac.uk/PolicyAndResearch/PolicyAreas/Scenarios/Documents/FuturesForHigherEducationReport.pdf>

20. The recent Department for Business, Innovation and Skills (BIS) Higher Education White Paper contained a stated intention to make the market more competitive, which included opening up higher education to a more diverse set of providers. As the higher education market opens up, however, an anomaly is created in terms of how different providers are treated for the purposes of the FOIA. Competition can only be fair and effective if all institutions are operating on a level playing field, subject to the same regulations. The question of how the FOIA should be applied to a more diverse set of higher education providers needs resolving as a matter of urgency.

We seek the advice of the Committee on how this should be dealt with as part of the new regulatory framework for higher education currently being developed by BIS.

21. This move to a more equitable market is supported by research conducted for the Higher Education Better Regulation Group (HEBRG)¹⁰ at the request of BIS¹¹. The HEBRG report includes specific recommendations in relation to FOI legislation which Universities UK urges the committee to consider.

22. Universities UK would welcome the Committee's views on the issues raised in this submission; however, given the significant changes taking place in higher education and the issues this raises, **Universities UK recommends that an independent review is held which considers the position of universities within the FOIA.** This would also allow current research to be used to inform decisions.

The FOIA and research

Key messages:

- **Universities UK calls for a qualified exemption for pre-publication research.**
- **ICO guidance on how existing exemptions apply to research should be clarified.**
- **Unless the UK acts, our competitive interests will be damaged.**

¹⁰ HEBRG (2011) *Review of the non-HE regulatory landscape and its impact on HEIs* London: HEBRG available at: <http://www.hebetterregulation.ac.uk/OurWork/Documents/HEBRG%20Review-Final%20Report.pdf>

¹¹ In BIS (2011) White Paper *Students at the Heart of the System*, Chapter 6, available at: <http://c561635.r35.cf2.rackcdn.com/11-944-WP-students-at-heart.pdf>

Pre-publication research

23. Universities have become increasingly concerned about the position of pre-publication research data and information under the FOIA. Researchers can be asked to disclose research information before it is complete, before it has been subject to peer review, and before the originators have had an opportunity to benefit from their work by securing publication or protection of any intellectual property arising from the work, such as patents.

24. Universities UK strongly supports moves to increase access to data. Paragraph 2 of this submission describes important current developments in this area. However, we also believe there is a need to protect the manner and timing of the publication of research information and results, so as to:

- a. **Uphold the quality and reputation of UK research.** There is a risk that misleading information may enter the public domain before it has been cleaned, checked, and subjected to analysis and peer review. Researchers may be challenged on their approach or findings before they have had a chance to address any flaws in their work. In relation to health-related research, individuals might misdiagnose or medicate themselves on the basis of misleading information gaining currency supported by incomplete research. This could damage the UK's reputation for quality research.
- b. **Support universities' competitive position.** University research is fundamental to the UK's global competitiveness, and is considered second only to the United States. It is also a highly competitive field. Premature disclosure of research information will enable international competitors to profit from work undertaken in UK universities before the originators have had a fair opportunity to protect their ideas or secure grants for future research. This will act as a disincentive to original research.

This risk is increased by provisions in the Protection of Freedoms Bill which require universities to permit reuse of datasets which are made available under new provisions.¹²

It may be difficult or impossible to secure publication opportunities in reputable journals if findings are already in the public domain. Publication record influences university income via the Research Excellence Framework, as well as universities' ability to secure future grants and commercial contracts, and attract academic staff and students. This harms universities' competitive interests, if not necessarily their

¹² Currently clause 102 of the Protection of Freedoms Bill.

commercial ones. We do not believe that the current ‘commercial interest’ exemption covers such circumstances.

c. Encourage research partnerships with commercial and charitable bodies.

Universities work with commercial and charitable bodies on research projects. We know that the potential for the results of such research to be released to competitors under the FOIA is a barrier to such contract arrangements, and believe that as the risk becomes increasingly clear to companies, they will take research contracts elsewhere – to international competitors, or non-university research partners. This is not in the best interests of the UK economy, or consistent with other government policy initiatives to encourage collaboration between universities and industry.

Research at an early stage may have *potential* but not actual commercial value – for example by identifying areas for further research which could yield commercially valuable results. Again, current guidance does not explain how the commercial interest exemption might be engaged by such cases.

Case study: commercial relationships

The University of Oxford was in negotiation with a big multinational company in relation to a studentship and £24,000 funding. The FOIA raised many concerns and significant resources were used in the negotiation involving research administrators, the Legal Office and the researchers. Ultimately the contract was not signed and a one-off compromise was agreed since the project was already underway, but future relationships were soured.

25. In Universities UK’s view it remains unclear how current exemptions apply to research in all circumstances, despite the efforts of the ICO through sector-specific guidance. The commissioner’s comments about the misapplication of exemptions in several recent cases involving university research demonstrate the problem in understanding how they might apply to circumstances for which they were not originally designed, since parliament did not envisage the research case during the passage of the FOIA. Further clarification of existing guidance would help, but we remain persuaded that there is a gap in current exemptions.

Universities UK has proposed a limited amendment to the FOIA which would provide specific protection from disclosure for pre-publication research.

26. This amendment would:

- be subject to the public interest test

- be used when some harm would result from disclosure
- be used when none of the existing exemptions are adequate

Universities UK calls on the ICO to clarify existing guidance about the applicability of current exemptions to research.

Wider tensions between the FOIA and research interests

27. Although specific protection for pre-publication research is a particular priority, there are wider concerns about the application of the FOIA to research. In particular, there is a concern that the potential for some information to be released under the FOIA could lead to participants becoming unwilling to participate in some types of research. Changes in data manipulation techniques, which allow the triangulation of data, potentially revealing individual identities, can make it impossible to guarantee anonymity.
28. New provisions in the Protection of Freedoms Bill will compel universities to permit the reuse of data. The FOIA is motive blind, so reuse will be possible even where the intentions are directly contrary to the purposes of the original study. Data protection legislation requires consent to be sought for reuse of information. It is not clear how universities could comply with that duty in these circumstances.

Case study: research data

The University of Stirling (under the Freedom of Information Act Scotland) received a request from Philip Morris International for data collected from underage smokers on their behaviours (including reasons for starting smoking), as part of a study funded by Cancer Research UK. Stirling considered the participants in this study to be a vulnerable group and was concerned that if it allowed information gathered for research purposes to be used by a commercial company with an interest in marketing tobacco to young people the consequence would have been to deter future participants in research. It might also have put research funders off funding future projects with the university, with huge financial implications for the research unit.

The university unsuccessfully attempted to apply the exemption relating to 'vexatious requests', but later successfully used cost limits to refuse the request. However, they note that the requester is at liberty to return with a more limited request which they will not have grounds to refuse. Although Scotland has an exemption for pre-publication research, it was not relevant in this case since Stirling does not intend to release the dataset in question.

Universities UK believes that this submission provides evidence of the unanticipated effects that the FOIA has had on higher education institutions. The higher education sector is proactively working to increase access to information. However, information should not be released in a manner that causes a detrimental effect on institutions' ability to: compete in national and international markets for teaching and research, gain funding, or protect intellectual property rights. Given this, Universities UK welcomes the post-legislative scrutiny of the FOIA and urges the Committee to support the call for an independent review of the application of the FOIA in a changing higher education sector.

About Universities UK

Universities UK is the representative organisation for the UK's universities. Founded in 1918, its mission is to be the definitive voice for all universities in the UK, providing high quality leadership and support to its members to promote a successful and diverse higher education sector. With 133 members and offices in London, Cardiff and Edinburgh, it promotes the strength and success of UK universities nationally and internationally.

Universities UK welcomes the opportunity to respond to the call for evidence for the post-legislative scrutiny of the Freedom of Information Act (2000) (FOIA).

