

## **Response to the Justice Select Committee Post-Legislative Assessment of the Freedom of Information Act 2000**

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The following is the 1994 Group's response to the Justice Select Committee's Post Legislative Assessment of the Freedom of Information Act 2000. For more detailed information please refer to the individual responses of our member institutions.

Members of the 1994 Group are: University of Bath, Birkbeck University of London, Durham University, University of East Anglia, University of Essex, University of Exeter, Goldsmiths University of London, Institute of Education University of London, Royal Holloway University of London, Lancaster University, University of Leicester, Loughborough University, Queen Mary University of London, University of Reading, University of St Andrews, School of Oriental and African Studies, University of Surrey, University of Sussex and University of York.

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### **Introduction**

We welcome this timely review of the Freedom of Information Act. Freedom of information and open access to the outputs of research is an important principle which the higher education (HE) sector embraces. The sector is proactive in this respect:

- Online publication repositories have been established by institutions to make the publications of academic staff publically available free of charge;
- Institutions pursue publication in open access journals wherever resourcing is possible. Open access journals make articles freely available globally in line with the 'gold' principle;
- Publications stemming from research projects funded by the research councils and many other key funders are required to be made freely available within electronic archives, for example the research council Research Outcomes System;
- Researchers commit to making the outputs of publically funded research projects available through publication schedules. Publication schedules are an important consideration in the award of Research Council funding;
- Institutions make data about their activities publically available in a variety of ways; publication of information on websites including annual accounts and providing detailed information on staff, students, income and expenditure to the Higher Education Statistics Agency. Detailed information is also made available for prospective students, including through the new Key Information Sets; and
- Institutions respond to growing numbers of requests for information under the Freedom of Information Act. The JISC InfoNet Annual Survey shows that the number of information requests received by institutions has grown by over 250% from 2005 to 2010.<sup>1</sup>

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<sup>1</sup> The Information Legislation and Management Survey conducted in association with UniversitiesUK and GuildHE, available

Institutions are committed to making information about their activities publically available. However, information provision must be balanced with the obligation universities have to the rigour and quality of their publically funded teaching and research and to maximising the benefit and outputs of such activities to the UK economy. The Freedom of Information Act in its present form does not adequately protect this balance.

## Research information

UK research, some of which is supported through public money, is acknowledged to be of world leading quality and the UK is recognised as one of most productive countries in the world in terms of research outputs.<sup>2</sup> It is a necessary first principle that research is conducted to the highest standards. It is this principle, embodied by the peer review system, which has contributed to the UK's international excellence in research. Requirements for research data and information to be made publically available must be in harmony with this principle, and cannot be allowed to jeopardise the viability of the research conducted in the UK.

The present Freedom of Information Act (FOIA) and the current Protection of Freedoms Bill progressing through Parliament presents some serious risks to this balance. The current FOIA does not do enough to protect research which has not reached its conclusion and the Protection of Freedoms Bill currently proposes that this lack of protection should be extended to cover research datasets. Whilst we endorse the public availability of research outputs there a number of serious risks presented by the current form of the FOIA and the proposals.

Research data should not be made publically accessible before rigorous analysis has been concluded by the researchers or until the analysis has reached the stage set out in the publication schedule. It is inappropriate to share data where analysis is partially completed or not verified. To do so would often be misleading, and would place at risk the ability of the UK-based researchers to publish their conclusions before competitors do. This is especially the case with longitudinal datasets which need a lengthy period of data collection before results will be meaningful.

Commercial interests are intrinsically linked to research which generates intellectual property and commercial possibilities. In a competitive environment commercial funders of research need to be assured that research data is confidential and secure until a project has reached fruition. The FOIA makes some exemptions for disclosure due to commercial interests, however this is conditional and must demonstrate that commercial prejudice would outweigh the public interest in disclosure. This complex clause may not in future provide funders with the necessary confidence in the UK as a desirable place to fund research. Funders from business and industry are easily able to take their research needs to international competitors should they have any concerns about the security of research data in the UK. This would be to the detriment of the UK's knowledge economy and to the higher education sector.

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

<sup>2</sup> BIS (2011) International Comparative Performance of the UK Research Base

<http://www.bis.gov.uk/assets/biscore/science/docs/i/11-p123-international-comparative-performance-uk-research-base-2011.pdf>

1994 Group (2011) Mapping Research Excellence: Exploring the links between research excellence and research funding policy

<http://www.1994group.ac.uk/documents/public/MappingResearchExcellence%20hi-res.pdf>

Data confidentiality is not simply important for commercial reasons. It is vital that participants in research studies can be assured of their anonymity. If such a guarantee is not possible participants will be dissuaded from sharing information and it will not be possible to conduct sensitive and important research across all disciplines including medicine and the social sciences. Redacting data to anonymise data is a complex, time consuming process with high associated costs which are not provided for under the FOIA.

The data generated from research can involve many terabytes of information of great complexity and variety in format. Making research data publically available in an accessible form is highly resource intensive. Supplementary data i.e. additional datasets and meta data which provide data descriptions, are needed to underpin the data increases the burden of demands made for research information. Data may be need to be interpreted using specialist software or stored in specialist datacentres and the costs of translating this to publically accessible sources is huge. The present FOIA makes provision for requests to be refused if the costs would be over £450. However, the burden of proof and the associated resources falls upon higher education institutions. The Protection of Freedoms Bill proposes that datasets under FOIA should 'as far as is reasonably practicable, provide the information to the applicant in an electronic form which is capable of re-use'. This clause is not sufficiently defined and may lead to exorbitant costs being needed to make the information available.

The FOIA conflicts with other important legislature. The Animals (Scientific Procedures) Act prohibits the disclosure of the identity of individuals holding Home Office project licences. It is a condition of the Home Office licence that this is adhered to and is a matter of personal safety. However, the University of Newcastle has been forced to disclose details of licences relating to projects where animals are used for experimentation by the Information Commissioner following a tribunal. The University is now in breach of its Home Office licence. This is a situation where the personal safety of researchers has potentially been placed in jeopardy and where the FOIA is in direct conflict with another piece of legislature. It is not acceptable for the safety of individuals performing approved and licensed research to be threatened. This also undermines the viability of important research work in the UK. As these conflicts indicate, the FOIA threatens the feasibility of the UK's research in a number of different ways. We therefore strongly support Universities UK in their call for an independent review of the effects of the FOIA on higher education institutions.

### **Higher education institutions as public bodies**

Higher education institutions have traditionally been included within the FOIA. However, the higher education sector is fundamentally different in some respects when compared with public services. Higher education institutions operate in direct competition with each other for research funding and for students. Other public bodies, such as local authorities, do not operate in a market to such an extent. Furthermore, the higher education sector is undergoing a significant period of change to become even more competitive. The Government's clear intention, as laid out in the Higher Education White Paper, is for private providers to enter the higher education sector and for competition to be increased. It is essential that there is a level playing field for all HE providers. We cannot have a situation where new private HE providers are exempt from FOIA requests whereas current HEIs are not. In future, students will be entitled to the publically supported student loan scheme regardless of whether they attend a private or current HEI. In a more competitive and market driven system it is entirely inappropriate, and against commercial interests, to subject one group of higher education providers to FOIA obligations for potentially commercially sensitive information.

Higher education institutions are funded through a diversity of sources, not simply through public funds. It has been commented in the Times Higher Education (THE) that as of 2012-

13 the state will be contributing only 40 per cent of the sector's costs as opposed to 60 per cent previously. The THE also highlights this will be below the 50 per cent European Union threshold for defining a public body.<sup>3</sup> Universities UK modelling also shows that in 2014/15 public funds will contribute only 22% to overall teaching income in comparison to 66% in 2010/11.<sup>4</sup> Given this, it may be more appropriate in future for some areas of higher education activity such as teaching to be exempted from FOIA legislation. We note this arrangement is currently in existence at the BBC and UCAS to protect some of the commercially sensitive activities of these organisations.

Universities are committed to making available appropriate information on teaching and learning resources. This will not change in the new funding environment. However, it will be important to protect the commercially sensitive information of higher education institutions in a sector which has been purposefully designed to be more competitive. Many of the anomalies and hazards outlined above arise from the blanket and increasingly arbitrary designation of universities as public bodies, rather than linking a public function, or an HE activity funded by the taxpayer delivered by any provider, under the act.

## **Conclusion**

Higher education institutions are committed to making information about their publically funded activities freely available. However this must be balanced with the needs of universities to respond to a competitive market place in both teaching and research. Compliance with the FOIA in its current form places at risk the excellence of the UK's research activity by forcing the release of data before project completion, deterring funders or placing researchers at risk. Since the implementation of the Freedom of Information Act the higher education sector has gone through a substantial period of change. A full and independent review is therefore needed to ensure that the FOIA and any forthcoming legislation from the Protection of Freedoms Bill is fit for purpose in the new funding environment. We strongly support Universities UK in calling for such a review. It is imperative that access to information enhances the quality, reputation and applicability of UK higher education rather than placing it at risk.

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<sup>3</sup> <http://www.timeshighereducation.co.uk/story.asp?sectioncode=26&storycode=418779&c=1>

<sup>4</sup> UUK (2012) *Futures for higher education: analysing trends*, p7. Available at: <http://www.universitiesuk.ac.uk/PolicyAndResearch/PolicyAreas/Scenarios/Documents/FuturesForHigherEducationReport.pdf>