

The Relationship between Data Protection, Freedom of Information and Intellectual Property Rights

For whom is this guidance intended?

This guidance is intended for all University staff with an interest in intellectual property issues.

What is the purpose of this guidance?

It provides an overview of our current understanding of how data protection, freedom of information and intellectual property legislation will interact.

Why is this an issue?

The Data Protection Act 1998 and the Freedom of Information (Scotland) Act 2002 both give people rights of access to information held by the University.

The Data Protection Act permits people to see information that the University holds about them (including information in e-mails, on personal drives of computers, or on home computers if you work from home) if they make a subject access request.

The Freedom of Information (Scotland) Act gives people – including other universities and organisations such as the Scottish Executive or Microsoft - the right to access any other recorded information that the University holds (again, including e-mails, information on personal or home computer drives or research information). The rights of access under the Freedom of Information (Scotland) Act came into force on the 1 January 2005, but those rights are retrospective and apply to documents created before this date but are in the University's possession.

Although the Acts include exemptions to the rights of access in certain circumstances, neither piece of legislation gives an exemption specifically for intellectual property rights, whether those of the University or those of a third party who has provided the University with information.

The Freedom of Information (Scotland) Act has also required the University to develop a publication scheme. This is a list of the types of information that the University will make available to the public as a matter of routine without waiting to receive an individual request.

The University's publication scheme can be viewed at <http://www.pubs.recordsmanagement.ed.ac.uk/>. Inclusion of an item in a publication scheme is a legally binding commitment to publish that information in its entirety to the timetable set out in the scheme. However, if your information is included in a publication scheme you do not have to respond to individual requests for information, so if you expect that an area of your work will attract a large number of individual requests, it will save you time if you include that work in the University's publication scheme.

Who owns the IPR in my work?

The University's code of good practice in research states that, 'Unless otherwise agreed, the University owns Intellectual Property arising from research undertaken by employees in the course of the employment.' Further information can be found at <http://www.research-innovation.ed.ac.uk/information/goodresearchpractice.pdf>

What is involved in responding to a freedom of information or subject access request?

The procedures for responding to a freedom of information request can be found at: <http://www.recordsmanagement.ed.ac.uk/InfoStaff/FOIstaff/FOIguidance.htm#RequestHandling>

The procedures for responding to a subject access request can be found at: <http://www.recordsmanagement.ed.ac.uk/InfoStaff/DPstaff/SubjectAccessRequests/DealingWithSARS.htm>

Will I lose my IPR or moral rights if I provide information in response to a freedom of information or a data protection request?

Providing a copy of information under the Data Protection Act or the Freedom of Information (Scotland) Act does not mean that an individual or organisation has waived their intellectual property or moral rights. The recipients of the information still have to respect those rights, and our standard letters for responding to requests make this clear.

Can I withhold information from a subject access request to protect IPR?

There is no exemption in the Data Protection Act to protect IPR. If you hold information about an identifiable, living individual, and that person or their representative asks to see it, then you must provide a copy of the information regardless of whose IPR is involved. The University Records Management Section will provide separate guidance on what exemptions are available under the Data Protection Act.

What exemptions does the Freedom of Information (Scotland) Act offer that might help to protect my IPR?

Although the Freedom of Information (Scotland) Act does not include a specific exemption for IPR, there are a number of exemptions that might be relevant, depending on the circumstances. Please note that the tests for freedom of information exemptions are high, and many are also subject to a public interest test, so careful consideration is required before deciding that information is exempt information.

The following exemptions might apply:

1. If the information is due for publication within 12 weeks of receipt of the request for the information **and** it is reasonable to continue to withhold the information until the publication date, you can refuse to provide the information

in response to an individual request. This exemption is subject to the public interest test.

2. There is an exemption specifically for research information. However, there are a number of tests you must meet before you can claim this exemption:
 - The programme of research must be ongoing.
 - There must be an intention to produce a report of the research.
 - Disclosure of the information before date of publication of report would **substantially** prejudice the programme of research, the interests of anyone participating in the research, the interests of the publisher, or the interests of the University. Please note that ‘prejudice’ is not sufficient to qualify for this exemption – the release must be capable of causing substantial prejudice or the exemption is not triggered.

You must meet all these requirements before you can claim the research exemption.

The exemption is also subject to a public interest test.

3. There is an exemption for a trade secret. This is subject to the public interest test.
4. If responding to a freedom of information request will damage patent applications, the Freedom of Information (Scotland) Act does provide an exemption that would address the situation in most cases, for example where the disclosure of the information would substantially prejudice the commercial interests of any person or organisation. Please note that the test is ‘**substantially** prejudice’, not inconvenience. This exemption is subject to a public interest test. Please refer pages 3-4 of the “Guide to Exemptions” on the Records Management Section website for an explanation of ‘substantially prejudice’:
<http://www.recordsmanagement.ed.ac.uk/InfoStaff/FOIstaff/SHEIPExemptions/Exemptions.htm>
5. The Act contains a number of other exemptions, for example, for court records and personal data. Where research concerns these types of information, some research data may be exempt.
6. If you commit to publish the information to a specified timetable as part of the University’s publication scheme, then you will not have to supply information in response to individual requests. For example, if you are working on a two-year research project in an area which is likely to attract a high level of public attention, you could commit to publish your research data on completion of the project.

A full guide to the Freedom of Information (Scotland) Act exemptions can be found at <http://www.recordsmanagement.ed.ac.uk/InfoStaff/FOIstaff/SHEIPExemptions/Exemptions.htm>

What exemptions does the Freedom of Information (Scotland) Act offer to protect the IPR of a third party who has provided me with information?

Although the Freedom of Information (Scotland) Act does not include a specific exemption for IPR, there are a number of exemptions that might be relevant, depending on the circumstances. Please note that the tests for freedom of information exemptions are high, and many are also subject to a public interest test, so careful consideration is required before deciding that information is exempt information.

The following exemptions might apply:

Items 1-4 of the previous question also apply to third party intellectual property rights.

In addition, information for actionable breach of confidence exemption. See exemptions guidance for more information:

<http://www.recordsmanagement.ed.ac.uk/InfoStaff/FOIstaff/SHEIPExemptions/Exemptions.htm>

What is the public interest test?

Many exemptions are subject to a public interest test. The test requires you to assess whether the public interest in maintaining the exemption is greater than the public interest in disclosing the information. If it is not, the information must be disclosed. Please refer pages 4-6 of the “Guide to Exemptions” on the Records Management Section website for guidance on how to apply the public interest test:

<http://www.recordsmanagement.ed.ac.uk/InfoStaff/FOIstaff/SHEIPExemptions/Exemptions.htm>

Do I need to worry about freedom of information if I think that my information qualifies for an exemption and would meet the public interest test?

Even if you are confident that the information you hold will pass all the tests to qualify for an exemption (including the public interest test), there is a process for appealing against decisions not to release information. This could culminate in the Scottish Information Commissioner instructing the University to release your information. It is important to follow the processes outlined in the request handling procedures on the Records Management Section website so that we have a strong case in the event of a challenge. These can be found at:

<http://www.recordsmanagement.ed.ac.uk/InfoStaff/FOIstaff/ReviewProcedures/ReviewProcedures.htm>

What help is available?

The University Records Management Section provides advice, guidance and training on data protection, records management and freedom of information issues. We can be contacted at recordsmanagement@ed.ac.uk

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