

**Roundtable meeting between Information Commissioner's Office and Higher Education Sector to discuss the implications of Freedom of Information for the Sector
29 September 2010, Woburn House Conference Centre, London**

Note of Meeting

Attending

- Professor David Eastwood, Vice-Chancellor, University of Birmingham (Chair)
- Christopher Graham, Information Commissioner
- Professor Janet Beer, Vice-Chancellor, Oxford Brookes University
- Professor Peter Gregson, Vice-Chancellor, Queen's University, Belfast
- Mr Nigel Babb, Director of Strategic Developments, University of Wolverhampton
- Mr Steve Bailey, Senior Adviser, JISC InfoNet
- Ms Helen Bowles, Policy Adviser and Deputy CEO, GuildHE
- Mr Ian Creagh, Head of Administration and College Secretary, King's College London
- Mr Roger Gair, University Secretary, University of Leeds
- Mr Paul Gemmill, Director of Communications and Information Management, Biotechnology and Biological Science Research Council, representing Research Councils UK
- Mr David Evans, Strategic Liaison Unit, Information Commissioner's Office
- Dr Michael Jubb, Director, Research Information Network
- Professor Roger Kain, Dean and Chief Executive, School of Advanced Study, University of London
- Ms Olivia Kew-Fickus, Assistant Registrar, University of Birmingham (Rapporteur)
- Mr Rex Knight, Vice-Provost (Operations), University College London, representing the Association of Heads of University Administration
- Professor Kerstin Mey, Director, Department for Research and Enterprise, University for the Creative Arts
- Ms Julie Tam, Senior Policy Analyst, Russell Group
- Professor Tom Ward, Pro-Vice-Chancellor (Academic), University of East Anglia
- Mr Steve Wood, Head of Policy Delivery, Information Commissioner's Office

Background

The Independent Climate Change E-Mails Review ("Muir Russell Report"), released in July 2010, recommended that the Information Commissioner's Office (ICO) and the Higher Education (HE) Sector re-engaged with each other around the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR).

Following a preliminary meeting on 22 July 2010 between the ICO and representatives from the HE Sector, it was agreed to organise a sector/ICO roundtable to kick off work towards enhanced guidance for the sector on working within the FOIA and EIR.

The meeting on 29 September was that roundtable, brought together by Universities UK (UUK) under the chairmanship of Professor David Eastwood, who had volunteered for this role. The individuals invited were selected to ensure representation from a cross-section of universities and sector organisations with an interest in this area.

The agreed agenda for the meeting focused on issues of research data, teaching materials, intellectual property rights, commercial interest and proactive dissemination. Three cases were highlighted as of particular concern to the sector: the “climate e-mails” case from the University of East Anglia (UEA) which were the subject of the Muir Russell Report; a decision with regards to releasing teaching materials from a BSc Homeopathy course from the University of Central Lancashire (UCLAN); and a decision with regards to releasing a longitudinal set of tree ring data from the Queen’s University Belfast (QUB).

Discussion

All parties welcomed the opportunity to begin a dialogue about the HE sector and freedom of information.

SW from the ICO provided a summary of the three cases of most concern to the sector. In particular he focused his comments on areas of further action and key learning points from these cases.

Further to this summary, DE opened the floor. The resultant discussion covered all the topics listed for discussion in the agenda.

During this discussion, the ICO representatives made a number of germane points.

- Role of the ICO
 - The ICO is a regulator which implements and does not make the law. The ICO’s role is to ensure that institutions which the law defines as “public authorities”, which for the purposes of this law include all universities receiving public funding, adhere to the letter and the spirit of the law as written. The ICO can also work with the sector to assist it in understanding the implications of the law, including both its requirements and the protections it already affords.
 - The assumption of the FOIA and EIR is for release of information. Where a public authority believes information should be exempt from disclosure under the Act and that such disclosure would be against the public interest and the onus is on the public authority to make the case for rejecting a request. The ICO will rule based on the case put forward by the public authority; it will not make the case for the public authority.
- Case-by-case approach
 - Each case which comes before the ICO and the Information Tribunal (IT) is considered on its own merits, and it is difficult to draw blanket inferences from previous cases. The ICO urges public authorities to consider carefully the specifics of each case, rather than trying to construct a case to reject a request based on general principles or assertions.
 - Public authorities should respond to cases brought to the ICO or the IT in a timely and considered manner. Universities should deploy their strongest and best arguments at the earliest possible stage in the process.
- Competitive market and commercial interests
 - The ICO recognises that universities operate in a global competitive context which may be different from the context of other organisations affected by FOIA and EIR.

- The ICO accepts the finding of the Information Tribunal (IT) in the UCLAN case that universities can have commercial interests, not just financial interests.
- The existence of a commercial interest or competitive environment alone is not enough to warrant exemption from release of information such as teaching materials. Decisions are made on a case-by-case basis, and universities must demonstrate the reality of potential commercial harm to them in each case by release of such information.
- Research data and IPR
 - There is no definition of “research data” currently in the law. The Muir Russell report encourages the ICO to look at the US example in this area, including the “Shelby amendment”¹. The ICO has investigated this, but the example itself is not straightforward due to the complex federal legislative environment in the US. Additionally, any change along these lines would require a change to the primary legislation. Currently, any information held by a university (including laboratory notebooks, simulations, etc.) is subject to the FOIA / EIR.
 - The ICO acknowledged that further work needed to be done around understanding IPR as it resides in research data, and SW confirmed that his team has already begun to explore this question.
- Existing protections within the law: their potential and limitations
 - Several exemptions weigh the public’s right to know against the public authority’s interest in not releasing information, and judgement calls must be made in cases using these exemptions. Universities should recognise that the outcome of certain cases may be strongly influenced by the public’s right to know about the subject matter in question.
 - There are acknowledged tensions between the Data Protection Act (DPA) and the FOIA / EIR. The onus is on the public authority to implement the requisite checks and controls to ensure that DPA is not breached by release of information under FOIA / EIR.
 - Conclusive proof does not exist around the alleged “chilling effect” of FOIA / EIR around management discussions. In some instances it is possible to use s. 36 of FOIA (“prejudice to the effective conduct of public affairs”) to avoid release of information pertinent to live and sensitive management discussions, although there must be judgement calls made about when a discussion moves from “live and sensitive” to “in the past” when disclosure of the information should be made.
 - The Muir Russell report suggests that there may be better strategies for universities to cope with sustained campaigns of the sort UEA experienced. The ICO would like to work with universities around this area.
 - Further discussions may also be useful to elaborate what is covered by s. 22 of FOIA (“intent to publish”) within the academic context.
 - The law assumes that information being released under FOIA and EIR is going into the public domain, so the identity of the individual requesting the information is not pertinent to any decision around release of information. Information released under the FOIA or EIR is subject to and protected by existing Copyright laws

¹ Independent Climate Change E-mails Review Report (2010), pp 94-95 in particular. The US “Shelby Amendment” in 1998 required all data produced under federally funded research to be made available under the US Freedom of Information Act. After discussion with the scientific community, the final guidelines gave a precise definition of “research data” as *“the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues”*.

- Sector initiatives
 - The sector has an existing initiative to openness and collaboration, as evidenced by the Open Access and Open Data agendas implemented through the research councils.
 - The ICO encouraged sector initiatives that might provide further guidance for universities around complying with FOIA and EIR in general and around specific relevant issues concerning research data and outputs and teaching materials. JISC and the Research Councils have done work in this area and greater collaboration with the ICO in this area could be productive.

DE noted the following items emerging from the discussion.

- The role and use of research data
 - The public has an interest in universities contributing to the UK's economic and reputational standing globally. Open data-sharing at too early a stage of research could dissuade international collaborators from working with UK colleagues, which would weaken UK research and "UK plc". It could also remove the internal incentives for researchers, resulting in less innovative research with less long-term impact.
- Lessons to draw from recent experience
 - Although there have been some recent cases which have caused concern for universities, there have been other cases where the ICO and/or the IT have upheld the universities' arguments.
 - Universities can draw on various exemptions if they believe it is necessary to reject information requests, and they must expect that these approaches to the exemptions will be tested.
- Management functions versus academic functions of universities
 - While the academic core of university functions (as defined largely by research and teaching) is quite different from the core work of other "public authorities" as defined by the law, the management aspect of universities arguably has more parallels with public sector bodies. This distinction may be useful in shaping the discussion around FOI / EIR guidance for the HE sector.
- Effective use of the existing legislation
 - Universities are increasingly expected to contribute to UK plc, as has been made explicit in recent policy speeches (e.g., Vince Cable speech of 8 September 2010). Ensuring a level of protection around research data and teaching materials may be an important aspect of ensuring that universities can meet this political imperative, but it must also be established that universities are deploying effectively the full protections already existing within the law.
 - Establishing a robust publication scheme will be an element in demonstrating that universities are seeking to operate within the spirit of the law. ICO encourage sector involvement in elaborating the publication scheme. However, issues around research data and IPR must be explored in more detail before productive attention can be paid to a revised publication scheme.

Actions

It was agreed to establish a working group representing the HE sector to work with the ICO in developing sector-led and sector-specific guidelines around the issues of research data, teaching materials and IPR.

After this work has been concluded, then the group might work with the ICO to inform any proposed amendments to the existing sector publication scheme in order to consider whether a framework for proactive dissemination of research data and /or teaching materials which still protected universities' necessary interests might be feasible. Research council initiatives around open access might provide a model in these discussions.

The ICO and Universities UK, working with JISC, RIN and other key stakeholders, have agreed to take this process forward.