

Decision Notice



Decision 210/2010 Professor David Colquhoun and Edinburgh Napier University

Handouts and PowerPoint presentations for specified lectures

Reference No: 201001741
Decision Date: 9 December 2010

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Professor David Colquhoun asked Edinburgh Napier University (the University) for certain lecture timetables and lecture handouts or PowerPoint slides. The University responded by providing the lecture timetables but withholding the other information under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, Professor Colquhoun remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the University had partially failed to deal with Professor Colquhoun's request for information in accordance with Part 1 of FOISA, by wrongly withholding information under section 33(1)(b) of FOISA: he was not satisfied that disclosure would (or would be likely to) substantially prejudice the University's commercial interests. He also found that the University had failed to comply with sections 15(1) (in failing to explain the relevant information resources available to students) and 17(1) (in failing to give notice that certain of the requested information was not held) of FOISA. He required the University to provide Professor Colquhoun with the information previously withheld from him, and to provide him with advice about any other information resources available to students attending the lectures specified in his request.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held) and 33(1)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 27 July 2010, Professor Colquhoun wrote to the University requesting the following information:
 - a) lecture timetables for 5 specified modules;
 - b) "powerpoints and handouts" for a number of specified lectures from the BA Complementary Healthcare (Aromatherapy) and the BA Complementary Healthcare (Reflexology) programmes.



2. The University responded on 20 August 2010. It provided the lecture timetables as requested. It withheld the information covered by the second part of Professor Colquhoun's request under section 33(1)(b) of FOISA, arguing that disclosure of the information would prejudice substantially its commercial interests. The University provided reasons for its decision.
3. On the same day, 20 August 2010, Professor Colquhoun wrote to the University requesting a review of its decision. In particular, Professor Colquhoun drew the University's attention to a decision of the (UK) Information Commissioner, later upheld by the Information Tribunal, in which the University of Central Lancashire had been ordered to disclose teaching material from its BSc (Hons) Homeopathic Medicine degree course¹.
4. The University notified Professor Colquhoun of the outcome of its review on 2 September 2010. It upheld the decision to withhold the requested information under section 33(1)(b) of FOISA.
5. On 2 September 2010 Professor Colquhoun wrote to the Commissioner, stating that he was dissatisfied with the outcome of the University's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Referring to the Information Tribunal decision cited above, he argued that the commercial value of the information he had asked for was negligible.
6. The application was validated by establishing that Professor Colquhoun had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 21 September 2010, the University was notified in writing that an application had been received from Professor Colquhoun and was asked to provide the Commissioner with any information withheld from him. The University responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the University, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the University was asked to provide any further comments or background information it wished the Commissioner to take into account in reaching his decision on whether the information was exempt from disclosure under section 33(1)(b) of FOISA.

¹ [http://www.informationtribunal.gov.uk/DBFiles/Decision/i357/UCLAN_v_IC_&Colquhoun_\(EA-2009-0034\)_Decision_08-12-09_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i357/UCLAN_v_IC_&Colquhoun_(EA-2009-0034)_Decision_08-12-09_(w).pdf)



9. The University was also asked to confirm that it had provided the Commissioner with all information covered by the terms of Professor Colquhoun's request, and was invited to comment on the similarity between the current case and the case considered by the Information Tribunal in appeal decision EA/2009/0034.
10. The University responded on 29 October 2010. It advised that it had no further comments to make in relation to the application of the exemption in section 33(1)(b) of FOISA. It confirmed, with an explanation, that all withheld information had been provided to the Commissioner. The University's submissions will be considered further in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Professor Colquhoun and the University and is satisfied that no matter of relevance has been overlooked.

Information not held

12. As mentioned above, the Commissioner sought, and received, confirmation from the University that no handouts or PowerPoint presentations were available for a number of the lectures listed in Professor Colquhoun's request. The University explained:

"We have moved on in terms of teaching delivery and use student centred learning, so many of the classes involve pre-reading, discussion and debate. Students are strongly encouraged to identify evidence and bring it to the class where it is discussed and critiqued. We do not encourage students to rely on PowerPoint presentations or handouts. Some modules are fully online and delivered using a virtual classroom. Students engage with online materials and have a live, synchronous, online class."
13. In the circumstances, the Commissioner accepts that the University has identified all handouts or PowerPoint presentations relating to the lectures listed by Professor Colquhoun, and that no handouts or PowerPoint presentations are held in relation to some of the lectures. However, the University failed to give notice to Professor Colquhoun that it did not hold certain of the information he had asked for. Accordingly the Commissioner finds that the University failed to comply with section 17(1) of FOISA.

Duty to provide advice and assistance

14. Section 15(1) of FOISA requires a Scottish public authority to provide (so far as it is reasonable to expect it to do so) advice and assistance to a person who proposes to make, or has made, a request for information to it.



15. The Commissioner finds that the University failed to comply with section 15(1) of FOISA in dealing with Professor Colquhoun's request. It did not explain to Professor Colquhoun that the terms of his request ("handouts and powerpoints") would not fully describe the information resources available to students attending some of the lectures listed in his request. This denied him the opportunity to submit a request phrased in terms more relevant to the range of information actually held by the University.
16. The Commissioner now requires the University to provide Professor Colquhoun with advice about any other information resources available to students attending the lectures specified in his request, to allow him to make a further request for such additional materials should he wish to do so.

Information withheld under section 33(1)(b) of FOISA

17. Section 33(1)(b) provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person, including any Scottish public authority. A public authority applying this exemption must be able to indicate the nature of the commercial interests involved and explain how these interests would, or would be likely to, be substantially prejudiced by disclosure of the information. Section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA.

The University's submission: commercial interests

18. The University has relied on the arguments presented to Professor Colquhoun in its initial response to his request (20 August 2010), and has not provided any further arguments or information in support of its decision.
19. In its letter of 20 August 2010, the University first dealt with the question of whether it has commercial interests. The University argued that it is engaged in commercial activity in the provision of courses to fee-paying students, and that income is generated from student fees.
20. The University submitted that it engaged in commercial activity by generating fee income from its courses. It argued that the environment in which it operated was a competitive one, in respect of the area of study, with some 15 UK universities offering undergraduate programmes in Complementary Therapies and some 21 further education colleges in Scotland alone offering courses in the same subject. A number of private sector bodies also offered training in this field. The University advised that student numbers in this area had increased over the last few years, with Higher Education Statistics Agency figures indicating that the number of higher education students in Undergraduate Complementary Medicine had increased from 4,280 in 2004/05 to 5,115 in 2007/08.



21. The University advised that in order to operate successfully in the competitive commercial environment it had described, it had invested significant resources in terms of staff time in developing course materials. It considered that the course materials represented the intellectual property of the University. It argued that if it were to release this material into the public domain, it would significantly reduce the value of its intellectual property and place its competitors in an advantageous position of having access to its course materials at no charge. Disclosure would also inhibit the University's ability to attract fee-paying students in a competitive environment if the specially developed teaching materials which provided the value and content of such courses were readily available to the public without enrolling on a course of study and paying a fee. It considered this would be substantially prejudicial to its commercial interests.
22. The University provided its reasons for considering that the public interest in disclosure of the information was outweighed by the public interest in maintaining the exemption in section 33(1)(b) of FOISA. It recognised that there was a public interest in public authorities being as open and transparent as possible, and that disclosure of certain information could increase the accountability of public authorities for decisions which might have an impact on the wider public.
23. However, balanced against these considerations, the University found that there was a strong public interest in ensuring that universities were able to protect their intellectual property and to benefit from their investment in the provision of course materials, to ensure their continued success and income generation in the competitive environment in which certain courses operated. The University concluded that this outweighed any public interest in disclosure of the information requested by Professor Colquhoun.

Commercial interests: the Commissioner's analysis

24. The Commissioner first considered the question of the University's commercial interests. He accepts that the University raises income from fees paid by students (or paid on their behalf by the Scottish Government), and that universities are, to some extent, competing to attract students to enrol on their courses. Information available on the University's website shows that tuition fees and education contracts account for 26% of its total income (2009), while the rest of its income is derived from a number of other sources. The Commissioner accepts that the University has a commercial interest in attracting fee-paying students to enrol on the programmes it offers.
25. The question for the Commissioner to consider, therefore, is whether disclosure of the course materials requested by Professor Colquhoun would, or would be likely to, prejudice substantially the commercial interests of the University, and if so, whether the public interest in maintaining the duty to provide the information would outweigh the public interest in disclosing it.
26. The University has put forward three reasons why disclosure would substantially prejudice its commercial interests:
 - the potential reduction in value of the University's intellectual property;



- the advantage the University's competitors would gain from free access to the course materials; and
 - the likelihood that students would be discouraged from enrolling on courses for which a fee is charged if they have free access to the teaching materials which provide the value and content of such courses.
27. The Commissioner finds that all three of the above arguments are undermined by the University's explanation that students on the courses in question are now encouraged to rely less on handouts and PowerPoint presentations, and more on other learning methods and resources. The Commissioner notes that only 3 handouts were available for 5 lectures on the Complementary Therapy Honours Project, while only 5 handouts were available for 9 lectures on CPT Contemporary Approaches to Aromatherapy Practice. With no handouts or PowerPoint presentations provided for a significant number of lectures, the Commissioner believes that the information withheld from Professor Colquhoun does not offer a complete overview of those elements of the courses listed in his request.
28. The Commissioner therefore finds it unlikely that disclosure of the handouts or PowerPoint presentations would, or would be likely to, give the University's competitors a significant advantage. He notes that no other Further or Higher Education institute in Scotland is currently offering degree courses in Aromatherapy or Reflexology. Should another college or university seek to develop such a course, the Commissioner believes that the commercial advantage it would gain from access to the withheld information would be minimal, given that there are no handouts for a number of the lectures and other teaching methods and resources are used by the University.
29. Nor does the Commissioner accept that it is likely that prospective students would be discouraged from enrolling on the courses if the handouts and PowerPoint slides were made publicly available. It would be clear to any prospective student with access to the handouts and PowerPoint slides that these would not provide the same level of knowledge as enrolling on the degree course and benefitting from the teaching, discussion, debate, and access to online learning facilities.
30. For the reasons given in the preceding paragraphs, the Commissioner does not accept that disclosure of the information in question would significantly reduce the value of the University's intellectual property. The Commissioner has also taken into account the protection afforded by copyright law.
31. The test required by section 33(1)(b) of FOISA is "substantial prejudice" to commercial interests. On the basis of the arguments and evidence presented to him, the Commissioner does not accept that disclosure of the information withheld from Professor Colquhoun would (or, for that matter, would be likely to) prejudice substantially the University's commercial interests. He therefore finds that the exemption was wrongly applied by the University when responding to Professor Colquhoun's request.

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32. As the Commissioner has found that the exemption does not apply, he is not required to go on to consider whether the public interest in disclosure is outweighed by the public interest in maintaining the exemption (section 2(1) of FOISA).
33. The Commissioner therefore requires the University to provide Professor Colquhoun with the information previously withheld from him.

DECISION

The Commissioner finds that Edinburgh Napier University (the University) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Professor Colquhoun. The University wrongly withheld information under section 33(1)(b) of FOISA, and thereby failed to comply with section 1(1) of FOISA. It also failed to provide Professor Colquhoun with notice that certain of the information he had requested was not held, as required by section 17(1) of FOISA. The University also failed to provide Professor Colquhoun with reasonable advice and assistance in relation to his information request, as required by section 15(1) of FOISA.

The Commissioner therefore requires the University to provide the withheld information, and the advice detailed in paragraph 16 of this decision notice, by 27 January 2011.

Appeal

Should either Professor Colquhoun or Edinburgh Napier University wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Enforcement
9 December 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

17 Notice that information is not held

- (1) Where –

- (a) a Scottish public authority receives a request which would require it either –
(i) to comply with section 1(1); or



- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

33 Commercial interests and the economy

- (1) Information is exempt information if –

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority)

...