

Alumni for FREE SPEECH

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Dear June,

Freedom of Information (Scotland) Act 2002 ("the 2002 Act"): Ref 79-23 – Request for Review

Thank you for your email of 17 March 2023 attaching the University's Response to the Freedom of Information Request at the end of my letter to Alistair Merrill dated 21 February 2023. This is AFFS' request that University reviews its response to Request 10.2 pursuant to **Section 20** of the 2002 Act.

Request

In its FOI Request AFFS asked the University to:

- “10.2 Please identify each of *“the mandatory training packages for students and staff”* referred to by the Principal in her address to Advance HE, stating the title or name of the training and the identity of its provider and supplying copies of the materials produced in relation to such mandatory training.
- 10.3 Please state whether (and, if so, which of) *“the mandatory training packages for students and staff”* identified in answer to Request 10.2. still exist.”

In response, the University stated:

“The following mandatory online training modules were purchased from an external provider (Marshalls eLearning) and were made available to the University under licence:

- Diversity in the Workplace (staff); and
- Student Diversity.

The University is unable to disclose the content of these training modules under the licence terms and conditions. Release of materials which the owner protects by licence would substantially prejudice the University's operations, as release may lead to the University being denied further use and/or facing a claim for damages for breach of licence conditions.

Application of the section 30(c) FOISA exemption is subject to the public interest test i.e. for the exemption to be engaged the public interest in the information being withheld must be shown to outweigh that in disclosure. The public interest in transparency is recognised; however, in this instance, the University is of the view that the public interest is best served in the information being withheld for the following reasons:

- The University benefits in many instances by securing training materials for student and staff development from third parties. Release of protected materials would place the University at immediate risk with the licence holder of the Equality, Diversity and Inclusion training and would also threaten relationships with other third-party providers who trust that the University will honour their licence conditions.
- Typically, external providers make available training materials at a fraction of the cost compared with the expenditure required for in-house production.
- Being denied access to training materials, from current and potentially future providers, will threaten the University's ability to operate, not least in areas of safety and wellbeing, which heavily make use of external training materials. This would also have a detrimental effect on the University's ability to secure best value products and services, minimising spend from the public purse.

For your information, you will find an overview of the training modules on Marshall eLearning Consultancy website at: [https://marshallelearning.com/types/diversitycourses/...](https://marshallelearning.com/types/diversitycourses/)

Both of the above training modules are currently in place."

It is understood from this response that there were two Marshall eLearning courses which the University required staff and students to take and pass as a condition of their entitlement respectively to study or work at the University at the date of the Principal's address to Advance HE in July 2021 and that they were those titled:

- "*Diversity in the Workplace*" (i.e. that referred to at <https://marshallelearning.com/e-learning-courses/diversity-workplace/>); and
- "*Diversity Training for Students*" (i.e. that referred to at <https://marshallelearning.com/e-learning-courses/diversity-training-for-students/>).¹

It is also understood from the University's response that these same modules remain in place now.

¹ Although this has a different title than stated in the University's Response, we note that it is stated to have been "*developed with St Andrews University & Manchester University and is a module in our online student induction*".

The respective “*Course Overview*”, “*Course Parts*” and “*Course Features*” sections of the relevant webpages consist of no more than headings and tell one next to nothing about the actual contents of either course. Both are stated to be available in “*Off the Shelf*” or “*Bespoke*” versions. It is not clear which version the University purchased.

It also appears from the University’s website that, in addition to the “*Diversity in the Workplace*” training identified in the University’s Response, “*Mandatory training*” for “*All employees*” also includes “*Unconscious Bias*” training which requires an 80% pass mark in a “*short quiz*” at the end.² Was this additional course also provided by Marshall eLearning (i.e. is it that referred to at <https://marshallelearning.com/e-learning-courses/unconscious-bias-training/>)? If so, AFFS assumes that reference to it was omitted from the Response in error but that the University seeks to withhold disclosure of training materials on the same grounds as those relied on in relation to the other Marshall eLearning EDI courses. If not, please could the University please provide copies or the training materials for this course ?

Whatever the full scope of mandatory staff and student EDI training, the position is that, despite being publicly funded institution which (correctly) recognises the public interest in transparency about the contents of EDI training modules staff and students are required to take (and “pass”) as a condition of their employment or ability to study³, the University continues to refuse to disclose what those contents are. In doing so the University purports to be entitled to rely on the exemption from disclosure contained in **Section 30(c)** of the 2002 Act and claims that, “*in all the circumstances of the case, the public interest in disclosing the information is ...outweighed by that in maintaining the exemption*”.⁴ The University has the burden of establishing both the availability of the exemption and that the public interest in maintaining it outweighs that in disclosing the information requested. The contents of this letter is without prejudice to the University’s burden of proof.

AFFS does not believe that the exemption is available to the University. In any event, the reasons relied on by the University in concluding that public interest lies in refusing disclosure of the contents of its compulsory EDI modules are plainly insufficient to outweigh the public interest in transparency which it acknowledges. AFFS therefore requests the University to review its decision and to disclose the EDI training materials without further delay. If, despite the contents of this letter, the University continues to refuse disclosure, AFFS will refer the matter to the Scottish Information Commissioner (“**SIC**”).

Background

As I expect you are already aware, the existence and contents of the EDI module in mandatory training for students matriculating at the University has been a matter of public interest and controversy since (at least) the publication of critical articles and an editorial in the Times

² <https://www.st-andrews.ac.uk/osds/essentials/mandatory-training-for-employees/>

³ [Failure to matriculate \(st-andrews.ac.uk\)](https://www.st-andrews.ac.uk/news/2019/09/19/failure-to-matriculate/)

⁴ Within the meaning of **Section 2** of the 2002 Act.

newspaper in October 2021.⁵ AFFS has also seen a copy of a letter to the University from the Free Speech Union dated 21 October 2021 raising concerns about the content and legality (including under both the **Human Rights Act 1998** and the **Equality Act 2010**) of the mandatory EDI training referred to in the Times following a complaint to it by a student.⁶ Similar mandatory training at other UK universities has also been the subject of public interest and press comment.⁷

AFFS's sister project, Best Free Speech Practice ("BFSP"), has produced a briefing paper about the sort of mandatory EDI training which, it seems, continues at St Andrews and elsewhere.⁸ What is said in BFSP's briefing about the **Human Rights Act 1998** and the **Equality Act 2010** applies as much to staff training as to student and as much to Scottish universities as to English. In Scotland, the mandatory imposition of such training on staff who do not agree with all or some of its contents could also infringe **Section 26** of the **Further and Higher Education (Scotland) Act 2005**.⁹

As will be clear both from the contents of the FSU's letter and BFSP's briefing paper, there are real issues about the lawfulness of the mandatory EDI training imposed by the University. The fact that the training is mandatory but might be unlawful gives rise to a very obvious and very strong public interest in knowing its precise contents.

The University's Response

Despite the fact that the possible illegality of EDI training has been expressly raised with it University both by the FSU and in my letters to the Proctor and Mr Merrill, the University does not appear to have taken this into account when purporting to apply the public interest test. It seems that the only factor the University weighed in favour of making disclosure of the contents of EDI training was its perfunctory acknowledgment of "*the public interest in transparency*".

Rather than apply any reasoned approach to the public interest test, the University has, it seems, resorted to a stock response to requests for disclosure of the contents of EDI training. AFFS is aware of the University's response to a similar request sent Professor Alan Sokal of UCL on 29 October 2021. We note that the University's response, if not quite verbatim, was materially identical to that sent to AFFS. This does not suggest that any proper or additional

⁵ See, e.g.: <https://www.thetimes.co.uk/article/pass-bias-test-to-enter-st-andrews-rgcvcglx3>; [The Times view on the bias test at St Andrews University: Beyond all Reason](#)

⁶ See: <https://freespeechunion.org/letter-to-st-andrews-about-the-diversity-training-students-have-to-undergo-before-they-matriculate/>

⁷ See, e.g.: <https://www.telegraph.co.uk/news/2021/09/27/wearing-second-hand-clothes-example-white-privilege/>

⁸ <https://bfsp.uk/wp-content/uploads/2023/01/BFSP-re-compulsory-EDI-training.pdf>

⁹ <https://www.legislation.gov.uk/asp/2005/6/section/26>

consideration was given to AFFS' request despite the different context in which it was made and the additional issue as to the lawfulness of compulsory EDI training raised.

In any event, the University's justification for its refusal to disclose the contents of compulsory EDI training is untenable. As already noted, the University relies on the exemption contained in **Section 30(c)** of the 2002 Act i.e. that the disclosure of the contents of the EDI training "*would ...prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs*"¹⁰ and has concluded that the public interest in disclosure is outweighed by that in maintaining this exemption. The University's arguments appear to operate on the following, for-want-of-a nail, basis:

- (1) the release of the EDI training would be a breach of the University's licence with Marshall eLearning and may, therefore, lead to the University being denied further use or access to of the training modules and/or facing a claim for damages;
- (2) the University's breach of its licence to use the EDI materials would not only expose it to a claim from Marshall eLearning but would "*also threaten relationships with other third-party providers who trust the University will honour their licence conditions*";
- (3) the possible loss of access to all present and future third-party training materials used by the University would "*threaten the University's ability to operate, not least in areas of safety, which heavily make use of external training materials*"; and
- (4) because such training materials are made available by third parties "*at a fraction of the cost compared with the expenditure required for in-house production*" loss of access "*would have a detrimental effect on the University's ability to secure the best values products and service, minimising spend from the public purse*"; and because of the above
- (5) disclosure of the compulsory EDI training materials would, or would be likely to "*prejudice substantially*" the University's "*effective conduct of public affairs*"; and
- (6) the likelihood of such substantial prejudice outweighs the public interest in the disclosure of EDI training materials mandatorily imposed on all students and staff at a public funded institution.

(emphasis added)

With respect, this justification is obviously factually and legally flawed for the following reasons:

- (1) As both the terms of Section 30 itself (e.g. the references to "*the collective responsibility of the Scottish Ministers*" and to the risk of inhibition of the internal exchange of advice and

¹⁰ <https://www.legislation.gov.uk/asp/2002/13/section/30>

views for the purpose of deliberation) and the SIC's Guidance about it¹¹ make clear, the Section 30(c) exemption relates to the conduct of "*public affairs*" by Scottish governmental authorities.¹² The University is not such an authority and does not conduct such "*public affairs*". It is not therefore surprising that no such conduct of any such affairs is referred to in the University's Response. All other points made below are without prejudice to this fundamental reason why the University is not entitled to rely on the exemption in Section 30(c). Even AFFS were wrong about this, though, for the additional reasons given below, the University would still not be able to rely on the Section 30(c) exemption on the basis it advances.

- (2) In circumstances where the mandatory EDI training materials would be disclosed pursuant to the public interest in response to a FOI Request, there is no significant prospect of Marshall eLearning either bringing or succeeding in an action for breach of licence conditions. Even if an action were brought and a breach of licence proved, there would be no significant prospect of the University being exposed to any significant liability for damages (and certainly none which would threaten its "*ability to operate*" whether in areas of safety and wellbeing or otherwise). More particularly:
 - (a) As the University fails to provide any particulars of any licence condition it asserts would be breached by its disclosure of the mandatory EDI training materials, AFFS must reserve its position as to that. For present purposes, however, it is assumed that any licence with Marshall eLearning (an English company headquartered in London) is governed by English law and that it contains terms which protect the commercial confidentiality in Marshall eLearning's intellectual property and prevent disclosure of the content of its EDI training courses without consent.
 - (b) Leaving aside whether the University has ever sought consent to release the relevant materials pursuant to AFFS's FOI Request, whether or not subject of an express contractual obligation, confidentiality obligations are subject to a public interest defence permitting disclosure of relevant information, even in breach of contract, where the public interest justifies it¹³.

¹¹ <https://www.itspublicknowledge.info/sites/default/files/2022-04/BriefingSection30PrejudicetotheEffectiveConductofPublicAffairs.pdf>

¹² In this regard, the exemption referred to in **Section 30** form part of a sub-set of exemptions relating to the conduct of government-related public affairs sequentially contained in **Sections 28 to 33** of the 2002 Act.

¹³ This is different from, and additional to, the public interest balance required under **Section 30(c)** of the 2002 Act in any event. It was applied by the English ICO in rejecting Oxford University's attempted reliance on the confidentiality exemption in **Section 41** of the **Freedom of Information Act 2000** in respect of certain allegedly confidential information provide to it by Stonewall in its, now well known, decision of 30 June 2022 ("**the Oxford Case**"): <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022502/ic-129040-y4t2.pdf>. Even though no statutory public interest test applies to the **Section 41** exemption, the ICO ordered Oxford to provide the information sought because

- (c) As already noted above, AFFS cannot tell from the generalised descriptions of the relevant courses on the Marshall eLearning website what the contents of the EDI training is. However, judging from indications of the contents of related Marshalls eLearning courses there is every reason for AFFS to believe that only one side of contested issues such as transgender ideology¹⁴ and Critical Race Theory¹⁵ is presented to students and staff and that they are required to agree with it when completing the tests required to pass. The same belief is justified by the reports of questions (and required answers to) certain of EDI module matriculation tests in the press (including the Times articles previously mentioned).
- (d) Given the lucrative and growing market for this type of one-sided training (including at UK universities), Marshall eLearning's own motives for producing courses which both assume the validity of and invite agreement with such contested and controversial ideas and theories are, no doubt, more commercial than those of other purveyors of the same ideology such as Stonewall, Advance HE (both of whom have representatives on the University's Court) and Black Lives Matter. The agenda, however, is the same and so is the likely impact of the free speech rights of students and staff at the University.
- (e) As already noted in footnote 13 above, these considerations were the basis of the finding in the Oxford Case that Oxford University would have a public interest defence to any action for breach of confidence brought by Stonewall.¹⁶ The same considerations would mean both that Marshall eLearning would be unlikely to bring any action against the University for breach of its licence resulting from its compliance with an FOI Request and would be unlikely to succeed even if it did so. In this case, there is the added public interest which arises from the real possibility that (because of its mandatory nature and/or because only particular

it found that Oxford would have a public interest defence to any action for breach of confidence by Stonewall.

¹⁴ For example, even in the very limited information publicly available about the contents of one of Marshall eLearning's LGBTQ+ courses <https://marshallelearning.com/e-learning-courses/diversity-video-range-lgbtq/> there are references to so-called "gender identity" and to "how we can be an ally for the LGBTQ+ community". Both gender identity and allyship are socially and philosophically controversial and contested concepts advocated by Stonewall and others as part of their "no debate" political agendas. As explained in my letters to the Proctor and Mr Merrill, they are both also formally endorsed in the EDI pages of (and elsewhere on) the University's website and those of some of its academic departments.

¹⁵ For example, the references to assumed "Systemic Racial Biases" and to so-called "White Privilege", "Unconscious racial bias" and "Racial microaggressions" (all of which are highly controversial and contested aspect of certain kinds of race ideologies such as Critical Race Theory) in the "Course Parts" section of another of Marshall eLearning workplace diversity courses: <https://marshallelearning.com/e-learning-courses/lets-talk-about-race-in-the-workplace/>

¹⁶ See: paragraphs 26 to 42.

responses to questions on controversial issues count as correct in “*passing*” the training), the contents of the EDI training is unlawful for reasons explained both in the FSU’s letter to the Principal and by own letters to the Proctor and Mr Merrill.

- (f) Furthermore, a contractual confidentiality obligation would, in any event, likely be subject to an express or implied term permitting disclosure under compulsion of law. If, when considering its entitlement to rely on the **Section 30(c)** exemption, the University reasonably concluded (as, for the reasons given above and below it plainly ought to) that the public interest in transparency outweighed any supposed actual or likely substantial prejudice to its effective conduct of public affairs, it would be compelled to make disclosure of the EDI training materials under **Section 1** of the 2002 Act. That is another reason why disclosure in such circumstances seems unlikely to be found to be a breach of the licence.
 - (g) Marshall eLearning also has an on-going commercial relationship with the University and a lucrative business in selling its EDI training in the university sector. That also makes inherently unlikely that it would want to be seen to bring a claim against a client on the basis of an FOI disclosure based on the public interest.
 - (h) Even if Marshall eLearning brought an action, however, and even if it established a breach of the licence, it is difficult to see what significant monetary losses could be caused by the University’s disclosure of the EDI training materials pursuant to AFFS’s FOI Request. Although the University’s Response refers to the theoretical possibility of “*facing a claim for damages for breach of licence conditions*”, just as it does not identify any relevant breach, it does not particularise (even in terms of heads of possible loss, let alone quantum) any potential losses for which it might be liable to pay damages.
- (3) Further and in any event, the University does not even identify (let alone explain) any basis upon which the supposed breach of its licence with Marshall eLearning because of its disclosure, under statutory compulsion, of the EDI training materials sought, either:
- (a) “*may lead to the University being denied further use*” of such materials (let alone all or any other training materials provided by Marshall eLearning whose disclosure is not sought); or
 - (b) “*would also threaten relationships with other third-providers who trust that the University will honour their licence conditions*”.
- (4) There is also no plausible legal basis (and none is suggested) on which other present third-party suppliers (let alone future suppliers) might (or could) deny the University access to any (still less, many or all) training materials on the basis that the University had made limited disclosure of certain of Marshall eLearning’s EDI materials under compulsion of an FOI Request. There is simply no measurable risk in this regard.

Certainly, there is none which could outweigh the strong public interest in disclosure of the EDI materials.

- (5) Even if, contrary to all of the above, there were a basis to believe that disclosure of the EDI materials requested might lead to a significant risk to the University's future ability to buy-in EDI (or other) training materials, its assertions (which are a critical element of its purported reliance on the **Section 30(c)** exemption) that the risk of losing access to third party training materials:
 - (a) *"will threaten the University's ability to operate, not least in areas of safety and wellbeing, which make heavy use of external training materials"* (emphasis added); and
 - (b) *"will have a detrimental effect on the University's ability to secure best value products and services, minimising spend from the public purse"* (emphasis added).

are obvious hyperbole unsupported even as a matter of inherent probability (let alone any evidence).

- (6) The University baldly asserts that external training providers make training materials available at *"a fraction of the cost compared with the expenditure required for in-house production"*. However, the University has failed to provide any information (whether in relation to EDI training or any other) about:
 - (a) what proportion of the training referred to is prepared in-house¹⁷ and what is bought-in from external providers; and
 - (b) what it currently spends on the creation of internal training materials and what on that provided by external providers.
- (7) Given that the University managed to operate very successfully as a provider of higher education for upwards of 600 years without finding it necessary (let alone essential) to impose training of the sort referred to on its students and staff (including whatever part is provided by third parties), its current suggestion that the loss of access to third-party training materials would *"threaten the University's ability to operate"* is, frankly, absurd.

¹⁷ AFFS is aware from the, 1 December 2021, letter the University sent to Professor Sokal of UCL following its Internal Review of its original Response to his FOI that, as a matter of fact, the University produces extensive training materials in-house. AFFS has seen the Consent Training and Training in Environmental Sustainability (TESA) disclosed to Professor Sokal. We note that the University redacted in its entirety the *"Mandatory Quiz"* at the end of that training and that: (a) to pass mandatory Consent Training, 100% of the *"correct"* answers must be given (facilitated by feedback as to why any wrong answer given was not *"correct"*) and (b) to pass mandatory TESA Training 90% of the answers must be correct. As the University withheld their content, we assume that these quizzes were provided by a third-party provider and that the similar so-called quizzes at the end of the EDI training are similar in nature.

- (8) According to its latest financial statements¹⁸, in addition to an endowment of over £113m, in the latest financial year the University had income of over £313m of which £134m came from tuition fees and only £44m in government funding grants (i.e. *“the public purse”*). The University had over £380m in net assets. Even assuming, therefore, that the University wishes to continue to spend its money on the sorts of training it has considered appropriate and worthwhile in recent years, the idea that the difference in the cost of preparing it in-house as opposed to buying it in will pose any material risk to its *“ability to operate”* (including *“in areas of safety and wellbeing, which heavily rely on external training materials”*) is plain nonsense.
- (9) Since, according to its Response, the University is already spending over £235,000 per annum on employing the five members of its *“core EDI staff team”*, it is also difficult to see why it should be difficult for any necessary EDI training to be prepared by such experts within the scope (and cost) of their employment even if Marshall eLearning was not prepared to continue to supply training materials. Some might think it would be better and cheaper for the University to take such an approach in any event. Be that as it may, however, the idea that the disclosure of the relevant EDI training materials would have any material detrimental impact on the University’s ability to provide training (let alone ability to operate) is, again, absurd.
- (10) That brings one back to the terms of **Section 30(c)** itself. In relation to this, AFFS position is that:
- (a) Even if (which is denied for the reasons given in sub-paragraph (1) above) it were entitled in principle to rely on the Section 30(c) exemption, the University has given no reasons (let alone provided any evidence) for its conclusion that disclosing the limited third party EDI training materials sought *“would ... prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”*.
- (b) As the SOI Guidance already referred to makes clear (at paragraph 33), the onus is on the University clearly to demonstrate *“how and why disclosure would harm the effective conduct of public affairs”* and the existence of *“substantial prejudice”* by establishing both *“a genuine link between disclosure and harm”* (i.e. one which not simply *“a remote or hypothetical possibility”*) and that the supposed prejudice is *“of real and demonstrable significance, rather than simply marginal”*. The University has clearly failed to demonstrate any of these things.
- (c) Without prejudice to the University’s burden of proof, the reasons it has given both for concluding that there is any actual or likely relevant *“substantial prejudice”* and for concluding that, in all the circumstances of the case, the public interest in disclosing the EDI materials is outweighed by that in maintaining the **Section 30(c)** exemption also do not withstand any serious scrutiny.

¹⁸ <https://www.st-andrews.ac.uk/media/finance/documents/financial-statements/financial-statement-31-july-2022.pdf>

The University has, therefore, come nowhere close to fulfilling the requirements of Section 30(c), but even if it had, the public interest in disclosure (especially given the real possibility that it is mandatorily imposing training on students and staff which is unlawful because it infringes their free speech rights) plainly outweighs any prejudice to the University's ability to conduct its public affairs.

It is in light of the above that AFFS requests the University to carry out an internal review pursuant to **Section 20** of the 2002 Act.

Given the extent to which (as explained in my letters to the Proctor and Mr Merrill) senior managers at the University are personally invested in the EDI agenda reflected in mandatory training, AFFS believes that it is vital that those responsible for carrying out the internal review have an open mind and no obvious conflicts of interest arising from earlier public statements or their own role in advocating or developing the EDI agenda at the University. We note in this regard that, pending Mr Ray Perman taking up his appointment on 1 August 2023, Professor Stuart Monro OBE, FRSE is Acting Senior Lay Member at the University. Given his role under the **Higher Education Governance (Scotland) Act 2016**, AFFS believes that Professor Monro could usefully be involved in the internal review of its FOI Request. In other cases involving Scottish universities, AFFS has found the involvement of the Senior Lay Member to be an effective counter balance.

Given Professor Monro's role, AFFS believes that he should be made aware of the issues and earlier correspondence giving rise to its request for an internal review in any event. For that reason, we are copying him into this letter. As we can find no direct email address for Professor Monro on the University's website, I would be grateful if you could ensure he receives a copy of this letter (and the earlier correspondence to which it refers) and confirm by return that that has been done.

Yours sincerely

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