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Information Assurance and Governance
Office of the Principal

Andrew Neish KC
Alumni for Free Speech

By email only to: info@affs.uk

02 May 2023

Request for a review of information request, our ref: 79-23

Dear Andrew,

Thank you for your email, 06 April 2023 through which you requested a review of the University's management to your information request. You question the University's ability to withhold information through application of the exemption available in the Freedom of Information (Scotland) Act 2002 (the "FOISA"), section 30, (c) '**Prejudice to effective conduct of public affairs**' (the "section 30(c) exemption").

I write to confirm the University's decision, following review.

The University's response

The review was held on Friday 21 April 2023. The review panel membership was:

- Vice-Principal (Strategy, Policy and Planning), Ester Ruskuc;
- Chief Legal Officer, Roy Drummond; and
- Head of Information Assurance and Governance, Christopher Milne (myself).

During the review, the panel received input from Information Assurance and Governance Officer, June Weir, who managed the University's response to your request.

The availability of the exemption

1. The applicant claims that the section 30(c) exemption is unavailable to the University and even if it did, the public interest test will favour release of the requested information.
2. The review was unable to accept the premise that the exemption is only available to Scottish Ministers and, therefore, unavailable to the University.
3. The Scottish Information Commissioner (the "Commissioner") has issued (to date) 224 decision notices that assess whether Scottish public authorities that fall under the provision of the FOISA had correctly withheld information or otherwise through application of the exemption. Those decisions include consideration of how authorities other than the Scottish Government have applied the exemption at parts (b) and (c).

4. In Decisions 098/22 and 097/22, the Commissioner found that the Robert Gordon University and the University of Strathclyde had correctly engaged the section 30(c) exemption to withhold information contained within examination papers. Therefore, the exemption is not restricted to the Scottish Government, as claimed.
5. The review found that the University had correctly engaged the section 30(c) exemption to withhold the information that the applicant contends should be released.

Intellectual property

6. The review established that the information in question is the intellectual property ("IP") of a third party, Marshall E-Learning. Furthermore, the licence agreements specifically exclude the circulation of the IP without the written permission of the rights holder. Release of this information in response to the request is expressly refused by the rights holder.
7. The review noted decisions from the Courts, the Commissioner (notably, [*Decision 049/2016: Mr Victor F J Jordan and the Scottish Environment Protection Agency*](#)) and the Information Commissioner (for the Freedom of Information Act 2000), which established that -
 - a. Intellectual property rights exist to reward either the creativity or significant work or both that goes into producing the material. They give the rights holder control over how the information is used, and by whom. It follows that, when considering whether information can be released, the relevant authority must consider what harm would, or would be likely to, result from the rights holder losing that control.
 - b. The Commissioner takes the view that a technical infringement of IP rights is not sufficient to engage the "harm" test. There must be some real loss suffered by the owner of the IP right, such as a monetary loss.
 - c. This harm involves a direct loss of the ability to exploit the relevant IP through licensing and therefore goes to the heart of the right as an element of property.
8. The review accepted the established position that the effect of release of information via the FOISA is disclosure into the public domain (the world at large) and not only to the requester.
9. Considering the points established (as noted in points 6 through 8, above) the review found that the IP rights owner will suffer loss and harm from release of their property in response to your request, and that such would not be inconsequential. I.e., disclosure would be more than a technical infringement of their IP rights.

The impact on the University's operations where the IP rights holder is harmed

10. The review panel could not accept the claims made in the request for a review that the University would not suffer significant harm should it infringe the IP rights of Marshall E-Learning. Release of the whole property of the rights holder (the contents of 2 e-learning courses, that are only available under commercial terms), would be beyond a technical infringement – the rights holder would lose control of their property, if released into the public domain, via the provisions of the FOISA. The rights holder would be entitled to seek recovery from the University, through the Courts - the effects of which for the University would be significant.

11. If the University were to breach the terms of their licence agreements with Marshall E-Learning, there is a real risk that the licensor would withdraw and refuse to provide training materials to the University, upon which it presently depends, to support training for critical operational activities, including data protection, recruitment and selection and the diversity training.
12. The University is required to conduct its affairs with probity. It receives monies from the public purse, under conditions of grant set by the Scottish Government, via the Scottish Funding Council (the "SFC"). Furthermore, and as a charity registered in Scotland, the University is not free to act, as suggested in the request for a review. I.e., it is not open for the University to willingly disregard contractual obligations and to then commit public monies and resources to meet potential damages and litigation costs, at whatever level those may fall. Investigation, penalties and censure from the SFC and/or the Charities Commission could follow.
13. If the University were to act, as suggested, thereafter, some suppliers (not least those who make available their IP to the University) would be likely to either increase their commercial rates to offset any risk of default of agreements, or they could deny or withdraw their future business.
14. The University depends on the IP of numerous third-party suppliers to support core business activities, such includes:
 - a. (The Microsoft Corporation) access to and use of cloud-based computing systems, not least email, online conferencing and messaging services and file storage;
 - b. (Oracle) database technologies that are integral to the operation of our student record and finance systems;
 - c. (Marshall E-Learning and others) online training, for the University to meet obligations under health and safety law and in this instance equalities legislation; and
 - d. (Online publishers such as Elsevier) who make electronic journals and other publications available, for use as part of the University Library's collections.
15. The University could not afford avoidable inflated payment increases to such suppliers should it become known that it would be prepared to willingly default on licence agreements. Nor could the University secure the resources necessary to create its own platforms to provide the equivalent services 'in house'.
16. The effects of acting as suggested would have immediate and wide-spread implications which would threaten the University's operations.
17. The review panel concluded that when engaging the section 30(c) exemption, the University met the substantial prejudice threshold set by the FOISA.

The public interest test

18. The review panel were reminded that the public interest test for FOISA requires that a Scottish public authority may only withhold information to which a non-absolute exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

19. The review panel first considered the public interest where release of information held by Scottish public authorities can support transparency.
20. For the materials in question the review panel found that there presently is a significant degree of transparency of:
 - a. The content, nature and use of the diversity courses; and
 - b. Why and how the University and others makes use of these courses.
21. The materials the applicant seeks are not new, nor novel: they have been used and developed since 2019 and are widely used throughout UK universities, under commercial licence, from the rights holder.
22. The request for a review provides source materials, which are available in the public domain and commentary of those. This evidences where third parties, who view the use of these courses as contentious, have undertaken detailed analysis, review and commentary of the information they seek disclosure of, and how use of the training courses in their view, negatively impacts free speech and other freedoms provided in law.
23. The source materials include the letter 21 October 2021, from Toby Young, General Secretary, Free Speech Union (which is published on their website: <https://freespeechunion.org/letter-to-st-andrews-about-the-diversity-training-students-have-to-undergo-before-they-matriculate/>). From a review of the content of Student Diversity module and the quiz questions, Mr Young, with reference to human rights and equality legislation claims the University's mandatory requirement for students to complete and pass a diversity course is contrary to the principles of free speech and unlawful.
24. Equally, the reasons why the University uses these courses and details of their use have been subject to wider public scrutiny and review by third parties (interest groups and the media) – to which the University has provided full responses, those are in the public domain, or at least available to the applicant. These were provided in the request for a review and include reference to -
 - a. A letter from the University of St Andrews, Principal and Vice-Chancellor, dated 03 November 2021 (which is also available from Free Speech Union website) in response to Mr Young's letter. The Principal's response addresses the claimed areas of controversy and provides context for the use of the materials and confirms that students are not compelled to take this course i.e.,

"The questions with which you take issue are a small part of a suite of materials which are intentionally provocative and designed to encourage students to consider complex issues in the round and to question their own assumptions, because that is what good academic institutions do.

"We have encountered very few complainers in the past 5 years, have never penalised a student for failing to undertake the modules, and have a process which allows students to request to opt-out of the modules on personal grounds if they wish. Very few do.

“Someone would have to take the questions in our modules deliberately and wholly out of context to argue that they in any way restrict free speech or are authoritarian.”

25. The review panel also considered the points made in the request for a review as to why the public interest test, once applied, cannot sustain application of the exemption to withhold the requested information.
26. In the round, the request for a review contends that “...*there is no measurable risk*” of harm to third party suppliers (the rights holder or others) from the “*limited disclosure*” of training materials in response to an FOI request. And, even if such harm existed that could not outweigh the public interest.
27. The review found evidence to the contrary i.e., the instances noted herein, where the Courts and the Commissioner and the Information Commissioner recognised the harm to IP rights owners where their materials are placed in the public domain, through loss of control over their property and/or financial loss. And, as noted, where the review panel found that the IP rights holder could seek redress and/or act against the University to protect their property and such would be substantially prejudicial to the institution’s operations with that and other suppliers. Again, for the information in question the applicant seeks full disclosure for 2 courses, not partial release.
28. The review panel considered the contention that access to the said information is required to understand whether the University is/is not breaking the law as claimed in the request for a review. It is claimed that by imposing training and requiring students and staff to accept particular viewpoints the University may be breaching other laws.
29. The review panel returned to the response made by the Principal to Toby Young (03 November 2021). That affirms that an opt-out is available for students who do not wish to undertake the training that falls within the scope of your request and no penalty for non-completion has arisen. That response also confirmed that the University does not require students to accept beliefs – the training is purposely designed to challenge perceptions and to consider alternative viewpoints. Such also applies to staff.
30. The University has a range of obligations in equality law. The [Equality Act 2010](#) [Statutory Code of Practice Employment](#) provides that in evidencing how an employer meets their obligations, reasonable steps include implementing equality policies and providing and reviewing training.
31. The University as a seat of learning, public authority, and charity is obligated to operate lawfully, such includes meeting the obligations introduced, above. Access to training materials, widely used in the UK higher education sector, which are subject to review from that client base, is an efficient and effective means of providing training to assist the University in meeting its obligations in law, and not least, for the development of an inclusive and diverse culture that is critical to our institutional values, current and future successes.
32. The review panel, having considered the public interest arguments found –
 - a. There is a high level of knowledge and public debate on universities use of the materials - both sides of the debate have established in their own terms whether the training is/is not lawful. The review panel could not identify how public scrutiny could be enhanced in any meaningful way by full disclosure of the materials, given the detailed positions against and for the use of the course materials, which are openly available.

- b. If the University were to breach the terms of their licence, by releasing the requested information contrary to the instructions of the IP rights holder, there is a real risk that the licensor would, act to protect their property, and in future, refuse to provide (at least) the diversity training materials (students and staff) to the University. This would harm the University's ability to carry out training that is related to meeting legislative obligations and institutional objectives. Such would be contrary to the public interest.
- c. The University would face additional difficulties that would significantly impact on its operations, should it act as suggested in the request for review.
- d. Therefore, the public interest is served by continued application of the exemption to withhold the requested materials.

Commercial interests and the economy

33. During the University's review it was also established that release of the requested information would be likely to prejudice substantially the commercial interests of the IP rights holder, Marshall E-Learning. The University also withholds the student and staff diversity courses through application of the exemption from the FOISA, Section 33(1)(b) – **commercial interests and the economy** (the 33(1)(b) exemption).

Application of the 33(1)(b) exemption

34. [Guidance](#) from the Office of the Scottish Information Commissioner notes that –

- a. *“Commercial interests” is not defined in FOISA. There are not the same as financial interests. A person's or organisation's commercial interests will usually relate to the commercial trading activity they undertake, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment.*

35. As noted herein, the IP rights holder has commercial interests in their property – they derive income from sales and control access to their work through commercial licence agreements. This is their core business model.

36. Release of their whole property into the public domain will substantially harm the rights holder's ability to control their property and to derive maximum income from that. Additionally, the rights holder has invested resource, time and effort to develop these courses for sale. Release of the entire course materials would enable others so minded to develop competing courses, or materials for their own in-house use. The effect of either of those outcomes would be to deny the rights holder the ability to generate maximum return on their product development and investment. Therefore, release of the requested information will cause or be likely to cause substantial harm to their commercial interests.

Application of the public interest test

37. The review panel returned the finding that release of the requested materials would not bring about further transparency and by extension the public interest, given the well-developed debate and established positions around the content and use of these courses (see paragraph 32, a., above).

38. The review panel found that the public interest would not be served where the commercial interests of the IP rights holder are significantly harmed or may be significantly harmed as described. It is a matter of significant public interest that suppliers can further their commercial activities, so as to provide employment and other benefits such as revenue for the exchequer and the ability to provide current and future training courses for commercial markets.
39. Additionally, the public sector and stakeholders benefit where public authorities can access training materials from the marketplace at commercial rates. Suppliers are likely to increase costs for accessing training materials for public authorities where they fear loss of control of their property and/or the ability to maximise revenue, for fear that contents will be disclosed in response to freedom of information requests.
40. The review found that in the circumstances, the public interest is best served by withholding the requested information.

Unconscious bias courses

41. Finally, the review noted that the request for training materials for unconscious bias, fell outside the scope of your information request – that was not part of the suite of required staff trainings until academic year 2022/23. The University will respond to that request outside this review, in the normal manner.

This concludes the University's response to the request for a review.

If you are dissatisfied with the outcome of the review, you can seek a decision from the Scottish Information Commissioner in writing by providing details of:

- Your name;
- An address for correspondence;
- Your original request; and
- Why you are unhappy with the way your request for review has been dealt with.

You will find details on the different ways to contact them and make an appeal on their website at: <https://www.itspublicknowledge.info/home/ContactUs/ContactUs.aspx>

Should you then be dissatisfied with the decision made by the Commissioner then you are entitled to appeal on a point of law to the Court of Session.

Yours sincerely,

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