



## PHARMACOLOGY DEPARTMENT

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### **Appeal to Scottish Information Commissioner a concerning Napier University**

Both the response to my first request, and the internal review, rely entirely on Section 33(1)(b) of FOISA which exempts information from disclosure where its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person. Napier University claim that the alleged harm to their commercial interests is sufficient to override the public interest qualification.

My view is that the potential commercial losses are entirely hypothetical. In fact I would maintain that they universities are not commercial organizations within the meaning of FOISA. The university might, or might not, have a *financial* interest in the material but that does not constitute an exemption. In any case there is no concrete reason to think that there would be even a financial loss. There has been a movement in universities to make more and more course material freely available. No UK university has yet gone as far as the Massachusetts Institute of Technology, which makes almost all of its teaching material available freely. Perhaps the closest is the Open University. In no case has the availability of teaching material reduced enrolment in courses. If anything the opposite is the case: the teaching materials seem to act as advertisements for the course. That is not surprising because most people enrol on a course because they want a qualification at the end. Reading free teaching materials does not provide any sort of qualification and so providing it is most unlikely to cause a commercial loss, and could quite possibly have the opposite effect. The only exception that I can imagine to this case would be if the free teaching materials were of such low quality that they deterred from enrolling on the course. I think it can be assumed safely that Napier University is not claiming that this is the case.

Even in the unlikely case that there was a commercial loss, I believe that would be overridden by the Public Interest qualification. The university might claim that the quality of the materials can be guaranteed internal validation procedures and by external validation by the Quality Assurance Agency. This is not the case, particularly in the case of courses that are highly contentious in the scientific and medical worlds like herbal

medicine. Internal validations are done by people who are sympathetic to the subject and they deal only with processes and procedures, not with the content of the course. The same is true of the QAA, which is not allowed to take into account the content of the course. There is an obvious public interest in knowing about the quality of courses, which depend mostly on taxpayers' money, and the only way the public can know about that is to see what is actually taught on the course.

### *Legal precedents*

I have put these arguments as a academic, not as a lawyer. However the legal aspects of all of these questions have recently been considered in great detail by the Information Commissioner for England and Wales. I imagine that the similarities between the FOIA and FOISA are sufficiently great that these legal arguments will be interesting and relevant to the decision of the Scottish Information Commissioner.

A rather similar case, in which samples of teaching materials from the University of Central Lancashire (UCLan) or a BSc degree in homeopathy, resulted in a decision by the Information Commissioner (England and Wales), The decision notice is attached (info-commission-UCLAN-fs\_50140374.pdf). The decision concluded that universities were not "commercial" in the sense intended in FOIA, and that even if they were, the public interest argument would prevail. They therefore ordered that the requested material be released, It was not released because UCLan lodged an appeal against the judgement of the Information Commissioner. In England and Wales the appeal is heard by a Information Tribunal. The Tribunal was chaired by David Farrar QC and it recently promulgated its decision (attached UCLAN\_v\_IC\_&\_Colquhoun\_(EA-2009-0034)\_Decision\_08-12-09\_(w).pdf). The appeal was dismissed decisively and release of the materials was ordered. The parts of the decision that are likely to interest the Scottish Information Commissioner are perhaps the following.

- (1) The Tribunal disagreed with the IC and concluded that a university could have commercial as well as financial interests. However this did not influence at all the outcome because the Tribunal decided that there was no good reason to think that release of the materials would do any commercial harm to the university..
- (2) The Tribunal said very clearly that internal and external validation procedures did not provide an adequate reason to not release the materials.
- (3) In any case, the public interest argument was so strong that it would override other considerations.

Signed



David Colquhoun

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