



Northern Ireland
Assembly

Committee for the Office of the First Minister
and deputy First Minister

OFFICIAL REPORT (Hansard)

Intellectual Property Bill:
Legislative Consent Motion

9 October 2013

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Members present for all or part of the proceedings:

Mr Chris Lyttle (Deputy Chairperson)
Mr Alex Attwood
Ms Megan Fearon
Mr Alex Maskey
Ms Bronwyn McGahan
Mr Stephen Moutray
Mr Jimmy Spratt

Witnesses:

Dr David Lammey	Office of the First Minister and deputy First Minister
Mr Alan Maitland	Office of the First Minister and deputy First Minister

The Deputy Chairperson: We will now be briefed by the Department on the legislative consent motion (LCM) on the Intellectual Property Bill and, specifically, on the freedom of information provisions in the Bill. The motion was considered by the Executive on Thursday 3 October and laid in the Assembly on Monday 7 October. The Committee has a set 15 days to make a report to the Assembly, so it must be approved by our meeting of 23 October. I remind members that the briefing is on the LCM rather than the wider issues around freedom of information.

We are joined by departmental officials Alan Maitland and David Lammey. Gentlemen, you are very welcome to the Committee. I ask you to make an opening statement and then take questions from members.

Mr Alan Maitland (Office of the First Minister and deputy First Minister): Thank you very much, Chair. We are very grateful to the Committee for giving us this opportunity to present. I am Alan Maitland, the director of HR and corporate services in the Office of the First Minister and deputy First Minister (OFMDFM) and David, one of my colleagues, is the head of information and the expert on this subject. If you are content, I will ask David to briefly present to you.

The Deputy Chairperson: Yes, absolutely.

Dr David Lammey (Office of the First Minister and deputy First Minister): Thanks very much. I want to set the context from which the new pre-publication exemption emerged. The context was the post-legislative scrutiny of the Freedom of Information Act in 2012. It was carried out by the Westminster Justice Select Committee, which invited representations from stakeholders, who were asked to give their views on how the Act was working.

In its evidence, the higher education sector argued that pre-publication research carried out by universities required greater protection under the Act. Representatives argued that the early release of research findings and data could have serious implications for the quality of research and, indeed, the reputation of research institutions, universities' competitive position at home and abroad and their relationships with commercial partners. They also pointed out that the research exemption in the Freedom of Information (Scotland) Act 2002 was working well and felt that that should be adopted.

That is really where this provision emerged from. The Government felt that it should be considered and that a legislative outcome would be the most appropriate way to deal with the issue.

The coalition Government's initial policy position was that the existing exemption under section 22 of the FOI Act, which covers information intended for future publication, offered considerable protection for research, but having listened to the various evidence given, they later decided to introduce a dedicated exemption that would provide "clarity and reassurance" to the higher education sector. So, basically, they felt that things were working quite well, but they were willing to take on board the views of the sector to give them greater assurance. Subsequently, the Home Affairs Committee approved the new exemption in November 2012, and it was included in the Intellectual Property Bill, which was first introduced in the House of Lords earlier this year in May. That Bill was chosen as the legislative vehicle for the new exemption because it closely relates to intellectual property, especially in respect of its protection.

Clause 20 of the Intellectual Property Bill then creates a pre-publication exemption that will bring our FOI Act 2000 into line with the Scottish legislation. In a nutshell, it provides assurance sought by the higher education sector that sensitive research information is not subject to premature release. To get a bit technical, the exemption creates a prejudiced-based test, which means that there has to be a likelihood that disclosure of information would cause prejudice to research interests. So, for the exemption to be engaged, the body that has received the request and holds the relevant information has to prove that there is a prejudice. If that is established, the exemption is engaged. Prejudiced-based exemptions are also called qualified exemptions. That simply means that a public interest test would then have to be carried out as well. The test of prejudice alone would not decide on whether information should be released or not.

The clause mirrors what is in the Scottish legislation apart from a couple of things. It is really down to the wording. The Scottish Act uses the term "substantial prejudice", whereas the term in the clause as it exists at the minute just says "prejudice", but that is in keeping with the rest of the wording of the FOI Act 2000.

Clause 20 also uses the expression "neither confirm nor deny", which, again, is a common expression in most of the exemptions. If the public authority feels that if the knowledge that there is information held could, in itself, provide prejudice, they do not need to say that they hold the information at all, but those would be very exceptional circumstances.

Basically, these differences just ensure that our wording of the Act is in keeping with that in Scotland. Just to confirm to you that freedom of information is a transferred matter. We could legislate for it here, but, in 2000, when the Freedom of Information Bill was going through Westminster, the then Executive decided that it would not introduce separate legislation and would go along with what Westminster was proposing. I would like to advise the Committee that, since that time, the Executive and the Assembly have agreed to the extension of all amendments of the FOI Act to Northern Ireland.

In respect of consultation, we consulted with colleagues in the Department for Employment and Learning because it is the parent Department here for higher education. It, in turn, consulted with higher education institutions and reported that no issues had been raised.

There are a couple of other things to mention. The Intellectual Property Bill meets human rights and equality requirements. That has been tested by the Ministry of Justice at Westminster, which is the lead Whitehall Department for freedom of information. No public expenditure implications are anticipated, and there is no regulatory impact on business.

The Deputy Chairperson: Thank you, David. That was a very thorough presentation. I appreciate that it was concise; I liked the "in a nutshell" sentence. I think that that sums it up. It is, effectively, higher education institutions being exempt from FOI to protect research and intellectual property. Is that correct?

Dr Lammeey: Yes.

The Deputy Chairperson: I cannot imagine that there would be any major objections to that. Do members have questions or comments?

Mr Maskey: I am not sure. You say that the Department might want to put this forward in due course. What is the time frame for due course?

Dr Lammey: The position of the Bill at Westminster is that it has passed the House of Lords and had its First Reading in the House of Commons. I believe that they just returned to business yesterday, so dates for the Second Reading will be announced. It is likely to be in a couple of weeks' time. If we are to be included in the Bill, and the provision is to extend to Northern Ireland, the Assembly needs to signify that agreement before the end of the month.

The Deputy Chairperson: Are there any other questions or comments?

Are colleges included in the remit of the clause? Have they been consulted?

Dr Lammey: They would be included, if they are engaged in research. It is more the subject matter of research, but most of that is carried out at university level. Depending on the nature of the college's business, it is quite possible that it could happen there. As long as the colleges are covered by the Freedom of Information Act, and I assume that they would be, they would be able to utilise the exemption.

The Deputy Chairperson: Can you check that, just to confirm it for us?

Dr Lammey: Certainly.

The Deputy Chairperson: Are there any other questions, members?

Mr Maskey: Are there any examples of what might be exempt or of what somebody might say they want to be exempt? FOI is an important facility, so I would not want to be restricting anything that does not need to be restricted.

Dr Lammey: Obviously, I am speculating, but Queen's University could be carrying out medical research, for instance. That research could be at an advanced stage, and there could be knowledge about that activity, because grant funding was, perhaps, provided to the university to carry out the research. Somebody could write in and ask, "How is the research going? Could we see some evidence of progress? Have you come to any initial conclusions?" That would be a potential scenario. The university would have to decide whether it would be prejudicial to release information at that stage. A possible consideration would be about whether it would be in the public interest to allow some of that information out. It might be from the point of view of providing accountability that progress has been made and the research has not come to a dead end.

If it is something to do with cancer research, it might be a bit of a fillip for everybody to hear that at a later stage there will, perhaps, be some announcement of progress. It is a case-by-case basis. That is the basic slogan that comes with FOI. You have to judge every request on its merits. A prejudice test would have to be accompanied by consideration of whether it would be in the public interest to allow even a certain amount of information out at an advanced stage. Perhaps, it is something that is intended for publication, but which has not reached a conclusion.

The Deputy Chairperson: OK, David. If you have specific examples, perhaps you could feed them through to the officials to assist in the preparation of our report. Is that OK, Alex? Or, do you want to come back in?

Mr Maskey: Yes. I apologise if I have missed this, but what would be the net effect for us here, if we did not agree to the legislative consent motion? I know that you gave me a speculative answer, and I appreciate that. However, if a Department gives somebody a grant to do something, you would expect there to be some accountability along the line. I would expect an organisation doing research to say, "Yes, we're getting on fine. Thank you very much. That's all you're getting." We already know that people do not give what is described as commercially sensitive information in such things as contracts and procurement. I am always reluctant to restrict FOIs where I do not think they are necessary.

Dr Lammey: Applying an exemption does not necessarily mean that you do not disclose anything. This exemption also requires a public interest test, so the balance of the arguments for and against has to be tested. People who do not accept the view of a university, for instance, which says that it does not want to give any information out, can appeal that to the Information Commission who is the regulator and who can make a judgement call. Applying the exemption alone does not mean that you have shut the door on putting anything into the public domain.

Mr Maskey: What is the net effect, if we do not agree to the LCM?

Dr Lammey: To be honest, as I said in my initial comments, the coalition Government's view was that there is considerable protection in the existing exemption, but that this new exemption is to satisfy those in higher education who felt that the wording could be a little bit tighter. To be frank, it is a sort of clean-up job to get the wording into line with what Scotland has and so that everybody in the UK is treated on an equal footing.

Mr Maskey: They should have better things to do with their time. Thanks for that.

The Deputy Chairperson: OK, members. Officials will bring us a report to confirm for submission to the Assembly. Thank you, gentlemen.