

**Shauna Mageean  
Clerk  
Committee for OFMDFM  
Room 412  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX**

**04 October 2013**

**Dear Shauna**

**INTELLECTUAL PROPERTY BILL: FREEDOM OF INFORMATION PROVISIONS –  
LEGISLATIVE CONSENT MOTION**

1. The purpose of this letter is to provide the Committee with advance notice of the potential laying of a Legislative Consent Memorandum on the Freedom of Information (FOI) provisions in the Intellectual Property Bill. As FOI is a 'transferred' matter, the new provisions require a Legislative Consent Motion to be passed by the Assembly. It should be noted that since the FOI Act 2000 came into force, the Executive and Assembly have agreed to the extension of all amendments to Northern Ireland.
2. In 2012 the House of Commons Justice Committee carried out a post-legislative scrutiny of the FOI Act. It recommended a change to the law in respect of section 22 (information intended for future publication) in response to representations in favour of greater protection for pre-publication research made by the Higher Education sector. In particular, university representatives asserted that the research exemption in the Freedom of Information (Scotland) Act 2002 was working well, and that the Scottish approach should be adopted.
3. The UK government - in its November 2012 response - said it appreciated the importance of the UK maintaining and strengthening its position at the forefront of international research, and was therefore 'minded to amend FOIA to introduce a dedicated exemption, subject to both a prejudice and public interest test'. This new FOI exemption was approved by the Home Affairs Committee in November 2012, and was included in the Intellectual Property Bill introduced in the House of Lords on 9 May 2013. The Intellectual Property Bill was chosen as the legislative vehicle for the new exemption because it relates closely to intellectual property, especially in terms of its protection. The Bill completed its passage through the Lords on 30 July, and received its first reading in the Commons on 29 August.
4. Clause 20 of the Intellectual Property Bill creates a pre-publication exemption that will bring the FOI Act 2000 in line with the equivalent Scottish legislation, and provide the assurance sought by the Higher Education sector that sensitive research information is not subject to premature release. The new FOI Act section 22A exemption will mirror almost identically the corresponding clause in the FOI (Scotland) Act 2002, with two minor differences:

- Section 22A will require the exemption to be engaged if the information will, or is likely to, cause 'prejudice', rather than 'substantial prejudice' as in the FOI (Scotland) Act; and
  - Section 22A will allow public authorities, under certain circumstances, to 'neither confirm nor deny' that they hold the requested information, unlike the FOI (Scotland) Act.
5. These differences will ensure that section 22A is in keeping with the wording of the FOI Act 2000, whilst providing parity with the FOI (Scotland) Act in the protection of pre-publication research.
  6. Ministers hope that the OFMDFM Committee will be in a position to support an appropriate Legislative Consent motion when tabled for the Assembly's consideration in due course.

**Yours sincerely**

*Signed Colette Kerr*

**Colette Kerr**  
**Departmental Assembly Liaison Officer**

Shauna,

Please see below clarification for the Deputy Chair in relation to his query on 'colleges' raised during the session on the LCM.

Regards

Colette

Shauna,

Further to your request for examples of the implications of the Bill. Officials have advised;

No Decision Notices involving the pre-publication exemption are recorded on the Scottish Information Commissioner's website.

The Scottish government has confirmed that their exemption 'has never been "tested" with the Scottish Information Commissioner'. The Scottish government also noted that they could only identify a 'small number of cases on their 'Information Request Tracker', where the exemption had been used:.

- (i) two requests relating to information/research around bilingual road-signs (both refused);
- (ii) request for information relating to a feasibility study into the Dunoon-Gourock ferry (refused); and
- (iii) request for correspondence between the Scottish Government and the UK government, lottery organisations and other relevant bodies regarding the London Olympics (refused).

However it was noted that as none of the requests had been appealed to the Scottish Information Commissioner it was not possible to be **category** as to a) whether the exemption was applied correctly or b) would have been upheld.

Officials also consulted evidence submitted to the Westminster Justice Committee, as part of the Post-legislative Scrutiny of the FOI Act. There was one reference to the use of the Scottish pre-publication exemption: a request to Stirling University from a tobacco company seeking data on underage smokers collected in a study sponsored by Cancer Research. The University was concerned that the data would be used to market tobacco to young people, which could also have the effect of deterring sponsors. The exemption did not apply because the University was not intending to publish the data, and the request was eventually refused on the grounds of cost.

It is also worth noting that the new Freedom of Information Bill published by the Irish government seeks to repeal existing legislation (the Irish FOI Act 1997, as

amended in 2003). The Bill is to serve as a consolidated source of FOI law, and it is envisaged that it will pass through the Oireachtas relatively quickly, with the Irish government planning for it to be enacted this Autumn. The Bill retains the existing exemption relating to the disclosure of information before the completion of the research, which would be likely to expose the public body or any person who is or will be carrying out the research on behalf of the body or the subject matter of the research to 'serious disadvantage'.

It is difficult to speculate as to the impact of the proposed new (FOI Act section 22A) exemption. However, with prejudice **and** public interest tests to negotiate, it is considered that a public authority would need to have a strong case if it was inclined to use the exemption.

Regards

Colette

**From:** Lammey, David

**Sent:** 10 October 2013 10:34

**To:** Kerr, Colette

**Cc:** Maitland, Alan; Kerr, Sean; Wright, Johnny; Reynor, Stephanie; McCreedy, David (OFMDFM); dFM Office; Savage, Mandy; Sharkey, Charlene; Hylands, Brian; Monaghan, Kathy; Parkhill, Laura; Savage, Claire (OFMDFM); Gardner, Jeremy; McKibbin, Gail; Bullick, Richard; Parker, Vincent

**Subject:** OFMDFM Committee - FOI - LCM: query re- Colleges

Colette

As discussed, at the close of yesterday's session, the Committee Deputy Chair asked me to double check that 'colleges' (along with universities and other research institutions) were covered by the proposed new exemption.

Schedule 1 of the FOI Act sets out bodies covered by the Act's provisions. The names of individual colleges are not listed, as there are so many; rather the Schedule deals with the matter broadly. Paragraph 55 of Schedule 1 (which deals specifically with educational institutions in Northern Ireland) states that the Act's provisions covers the governing body of-

'(b) a college of education . . . in respect of which grants are paid under Article 66(2) or (3) of the Education and Libraries (Northern Ireland) Order 1986, or

(c) an institution of further education within the meaning of the Further Education (Northern Ireland) Order 1997'.

Should such bodies receive a request for information that covers pre-publication research materials held by them, then they would be able to consider engaging the new exemption (assuming it is passed into law).

I should be grateful if you would bring this update to the attention of the Committee Clerk.

Thanks,

David

Dr David Lammy  
Head of Information Management & Central Advisory Branch  
Office of the First Minister & Deputy First Minister  
Room A.5.16  
Castle Buildings  
Stormont  
BELFAST  
BT4 3SR

TEL: 02890528242 (or NICS internal number: 28242)