



Confidential information

Information held by Edinburgh Napier University cannot simply be classified as "confidential" or "commercial in confidence" to enable it to be protected from disclosure under the FOISA. In line with guidance from the Scottish Ministers¹, before accepting any information from any party on a confidential basis, Edinburgh Napier University will give careful consideration to whether information is, in fact, confidential and also the public interest in disclosure.

Acceptance of confidentiality provisions by Edinburgh Napier University will only be in circumstances where there is judged to be a good reason and where confidentiality is capable of being justified to the Commissioner. All parties should note that information which is not subject to an exemption under the terms of the FOISA, or whose disclosure is required in the public interest, may have to be disclosed notwithstanding any agreement to the contrary. Edinburgh Napier University will consider very carefully any requests for information.

Where a party considers that information contained within a tender or a contract should not be disclosed under the FOISA, they should provide a Schedule to the Tender or the Contract, as appropriate, clearly identifying the information which they believe should not be disclosed, and stating why it should not be disclosed in terms of the exemptions provided in the FOISA. It is advisable to include details of how long it is considered that the information will remain confidential, as this is dependant on the type of information e.g. information provided by unsuccessful tenderers during a procurement exercise loses its sensitivity a short period after the procurement exercise concludes.

Where a request for information is received by Edinburgh Napier University in respect of information received from a third party the disclosure of which, without prior consent, would constitute an actionable breach of confidence, the University will contact the third party to establish whether the information requested is still to be regarded as confidential, to assist in determining whether an exemption in the FOISA applies to the information requested and to assist Edinburgh Napier University in establishing where the public interest lies in relation to disclosure.

All parties should note that a duty of confidence is not absolute and the courts have recognised three broad circumstances where confidential information can be disclosed, namely disclosures with consent, disclosures required by law and disclosures where there is an overriding public interest in favour of the disclosure.

Form of words

Commercial agreement

Where either Party is in receipt of an information request pursuant to the Freedom of Information (Scotland) Act 2002 or any analogous regulations in

1 Scottish Ministers Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002

respect of Confidential Information (or any other information) relating to this Agreement or to the Project (the “Request”) it shall make an analysis as to whether the Confidential Information or other information requested is capable of benefiting from an exemption from disclosure. In the event that the Party in receipt of the Request considers that disclosure is legally required and makes the requested disclosure, no liability shall attach thereto.

Non Disclosure Agreement

Notwithstanding the foregoing, the Company acknowledges that the University is subject to the Freedom of Information (Scotland) Act 2002, and whilst it will use reasonable endeavours to comply with the terms of this clause xxx, nothing in this Agreement will fetter the University’s discretion to comply with its obligations under the Freedom of Information (Scotland) Act 2002.

General

As a public authority, Edinburgh Napier University is subject to the Freedom of Information (Scotland) Act 2002 (FOISA) and Environmental Information (Scotland) Regulations 2004 (EIRS), and therefore any information provided to the University is deemed to be ‘held’ by the University for the purposes of the legislation (FOISA and EIRS).

Whilst the purpose of the legislation is to provide access to information and all information held by the University must be considered for release upon receipt of a valid request for information, the University will not disclose information to which an exemption/exception applies. It is therefore in the interests of those persons/parties providing information to the University to advise, in writing at the time of providing the information, the details of any information those persons/parties consider to be exempt/excepted. A schedule detailing which specific information (phrase/clause) is affected, which exemption/exception applies, the reasoning for this and the time period for which the information remains exempt must be provided. Blanket exemptions/exceptions cannot be accepted.

Example Exemption/Exception Schedule

Withheld Information	Exemption/Exception Engaged	Reasoning	Period Exempt/Excepted
Exact wording and position in document (page, paragraph, clause)	Please detail all exemptions/exceptions if multiples engaged	Including the Public Interest test argument if not absolute	Date or years/months