



Oifig an Choimisinéara Faisnéise
Office of the Information Commissioner

Annual Report 2010

troubled banks
NAMES
fees
bonuses IMF
dispute
nursing homes
vetting of foster carers
Major flaws
€200k jet hire 'inappropriate'
pay-outs for teachers

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Office of the Information Commissioner

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Foreword

I hereby submit my eighth Annual Report as Information Commissioner (the thirteenth Annual Report of the Information Commissioner since the establishment of the Office in 1998) to the Dáil and Seanad pursuant to section 40(1)(c) of the Freedom of Information Acts 1997 and 2003.

A handwritten signature in black ink, appearing to read 'Emily O'Reilly'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Emily O'Reilly

Information Commissioner
May 2011



Pat Whelan

Director General

Chapter I

THE country's leading banks wanted to ensure that NAMA, the toxic loans agency, was not covered under the Freedom of Information (FOI) Act when the bill was being drafted.

FOI opt-out sought by troubled banks

troubled banks

Universities paid Ibec
almost €900,000 in fees

Documents obtained under the Freedom of Information Act show the universities paid fees totalling €244,770 in 2008.

Chapter I: The year in review

Your right to information

The Freedom of Information Act, 1997, as amended by the FOI (Amendment) Act, 2003 (FOI Act) gives people a right of access to records held by many public bodies including Government Departments, the Health Service Executive and Local Authorities. It also gives people the right to have personal information about them held by these public bodies corrected or updated and gives people the right to be given reasons for decisions taken by public bodies, where those decisions expressly affect them.

The Access to Information on the Environment Regulations 2007 provides an additional means of access for people who want environmental information. The Regulations cover more organisations than the FOI Act. The Department of Environment, Heritage and Local Government has published a set of Guidance Notes which are available on the website of the Commissioner of Environmental Information at www.ocei.gov.ie.

It should be noted that these two functions are legally independent of one another, as indeed, are my respective roles of Information Commissioner and Commissioner for Environmental Information.

Introduction

I am pleased to introduce my eighth Annual Report as Information Commissioner. My Report covers the period from 1 January 2010 to 31 December 2010.

We are all too familiar with the current economic difficulties facing the country and the pressures that it has brought to bear on the lives of so many. Against this backdrop, it is evident that FOI has an important role to play in ensuring that an informed public debate can be held on all issues of national importance. In my Report for 2009, I raised concern about the number of important public bodies, such as the National Treasury Management Agency (NTMA) and the National Asset Management Agency (NAMA), which do not come within the remit of the FOI Act and the increasing number of public bodies being removed from the remit of the Act. Much to my disappointment, no action has been taken in 2010 to extend the Act to these additional bodies and, indeed, inadvertently it has once more come to my attention that the core functions of yet another public body, the Medical Bureau of Road Safety, have been removed from my remit without notification or consultation and in very unacceptable circumstances (see [chapter 2](#)). In my view, it is more important than ever that all public bodies be encompassed by the FOI Act. In particular, I believe that members of the public, who ultimately shoulder the burden of this country's debt as taxpayers, subject to the exceptions in the FOI Act, have a right to have all information at their disposal to analyse, in an informed manner, the decisions which have had, and will continue to have, such a profound effect on their lives. Therefore, I strongly advocate that all records held by bodies such as the NTMA, NAMA and the Central Bank of Ireland and not just records held by the Department of Finance concerning such important issues, be brought within the remit of the FOI Act.

As well as expressing my concern in the past over public bodies falling outside the remit of the FOI Act, I have also voiced my disapproval of the amendments made under the Freedom of Information (Amendment) Act, 2003, which had the effect of limiting the potential for public access to records relating to the thought process in and around Government actions. More recently, I have expressed my disagreement with the recommendation in the Report of the Independent Review Panel (also known as the "Wright Report"), entitled "Strengthening the Capacity of the Department of Finance", which states:

"3.6.4. Under Ireland's Freedom of Information law, policy advice tendered outside of Cabinet consideration is subject to public disclosure. A public airing of serious policy differences between a Minister for Finance and his advisors could have serious implications for financial markets. At a minimum, it would strain relationships between the Minister and his officials and this would be very damaging to the budgetary process",
and

“3.6.6. (10) The Panel strongly supports the public release of substantially more economic analysis by the Department. However, policy advice to the Minister for Finance in the preparation of the Government’s Budget should not be subject to release under Freedom of Information for at least five years”.

As I outlined in an address which I gave on Executive Accountability and Parliamentary Democracy in the National University of Galway, on 26 March 2011:

“as presented in the Wright Report, these observations on the negative impact of FOI appear to reflect views from the Department of Finance. They reflect also, we are told, the views of Secretaries General of some other Government Departments”.

I made the point that it is difficult to accept that very senior civil servants, with years of experience of dealing with legislation, could misunderstand so fundamentally what is actually provided for in the FOI Act. I stated that I was *“blue in the face from repeating, that FOI is not there to do harm and that the Act has more than enough exemptions to protect all of the important interests of the State”*.

I would also point out that section 31 of the FOI Act protects specifically the financial and economic interests of the State, including records relating to: rates of exchange or the currency of the State, taxes, revenue, the regulation of banking and insurance, interest rates, foreign investment, property transactions. Section 31 is subject to a public interest balancing test which means that the exemption will not apply if the FOI decision maker finds that, on balance, the public interest is better served by releasing the record than by withholding it.

Furthermore section 20 of the FOI Act protects the deliberative process of a public body. This means that, in the budget context, records can be withheld until such time as the deliberative process is over and the budget has been decided. This exemption was strengthened in 2003 when a provision was added enabling a Secretary General to certify that a record *“contains matter relating to the deliberative processes of a Department of State”*. Where this kind of certificate is issued, the record must be refused and there is no possibility of release in the public interest.

In my aforementioned address, I conclude that *“one can only wonder if the real concern of the Department of Finance is that, under the FOI Act, and except where a certificate under section 20 has been issued by the Secretary General, the ultimate decision on whether an exemption will apply is a decision outside of its control. Is it the case that the Department is unhappy with the prospect of an outside agency – my own Office as Information Commissioner, as it happens – making the decision on where the public interest lies? If this were the case, it does seem like an intention to evade accountability*

and, again if this were to be the case, it is the kind of unhelpful attitude that has no place in an Executive that takes accountability seriously”.

I welcome the commitments relating to freedom of information contained in the recent Programme for Government, Government for National Recovery 2011-2016, which states:

“We will legislate to restore the Freedom of Information Act to what it was before it was undermined by the outgoing Government, and we will extend its remit to other public bodies including the administrative side of the Garda Síochána, subject to security exceptions. We will extend Freedom of Information, and the Ombudsman Act, to ensure that all statutory bodies, and all bodies significantly funded from the public purse, are covered”,

and

“We will put in place a Whistleblowers Act to protect public servants that expose maladministration by Ministers or others, and restore Freedom of Information”.

I would urge that these commitments be implemented. These reforms would constitute important planks in the restoration of openness, transparency and confidence in public administration in Ireland.

In a time of ever-reducing resources in the public sector and evidence that the number of FOI requests is increasing, it is timely for public bodies to reflect on how they deal with FOI. In this regard, I call on public bodies to adopt a [mindset](#) of a presumption as provided in the FOI Act, that the information is to be released and of making more information publicly available, so as to save on ever decreasing resources of public bodies and at the same time engaging with FOI in the spirit in which it was introduced. In [chapter 2](#), I draw attention to a number of instances in which the practices of public bodies were a cause of concern to me.

In [Part II](#), I report on my work as Environmental Commissioner during 2010. This role is legally separate from my role as Information Commissioner and, although there is no statutory requirement for me to do so, I have followed on from my practice of the last two years by reporting on it with my Information Commissioner Annual Report.

Once again this year, it is interesting to reflect on some of the information which was brought into the public domain through FOI, which would otherwise have remained unknown. By way of illustration, I have spotlighted some of the FOI based headlines which appeared in published media reports:

Irish Times, January 2010

FOI opt-out sought by troubled banks

Emmet Oliver

Deputy Business Editor

THE country's leading banks wanted to ensure that NAMA, the toxic loans agency, was not covered under the Freedom of Information (FOI) Act when the bill was being drafted.

Sunday Business Post, March 2010

Serious questions raised over vetting of foster carers

The state is obliged to do background checks on individuals before paying them to look after a child. write

Ian Kehoe and John Burke

Irish Independent, February 2010

Dramatic rise in complaints of abuse at nursing homes

Shane Phelan

A RESIDENT of a nursing home was left to die alone and other elderly patients were threatened and bullied by staff in private care centres across the country.

Five years on from the Leas Cross scandal that shocked the public, these are among the complaints that were upheld by the HSE last year.

There was a dramatic rise in the number of complaints about the treatment of elderly people in private nursing homes, despite a number of high-profile, Government-sponsored initiatives.

Sunday Business Post, March 2010

Major flaws in €60 million HSE computer system

Audit showed catering staff had access to patient data

By John Burke and Ian Kehoe

A patient records system built by the Health Service Executive (HSE) at a cost of €60 million has been plagued by security flaws and operational problems.

Irish Times, May 2010

HSE warns 218 consultants over level of private work

MARTIN WALL
and EITHNE DONNELLAN

MORE THAN 200 consultants in hospitals across the State have been formally warned they are seeing too many private patients in public hospitals.

Sunday Business Post, July 2010

FitzPatrick told government €1.5bn would save Anglo

By Pat Leahy
Political Editor

Irish Independent, August 2010

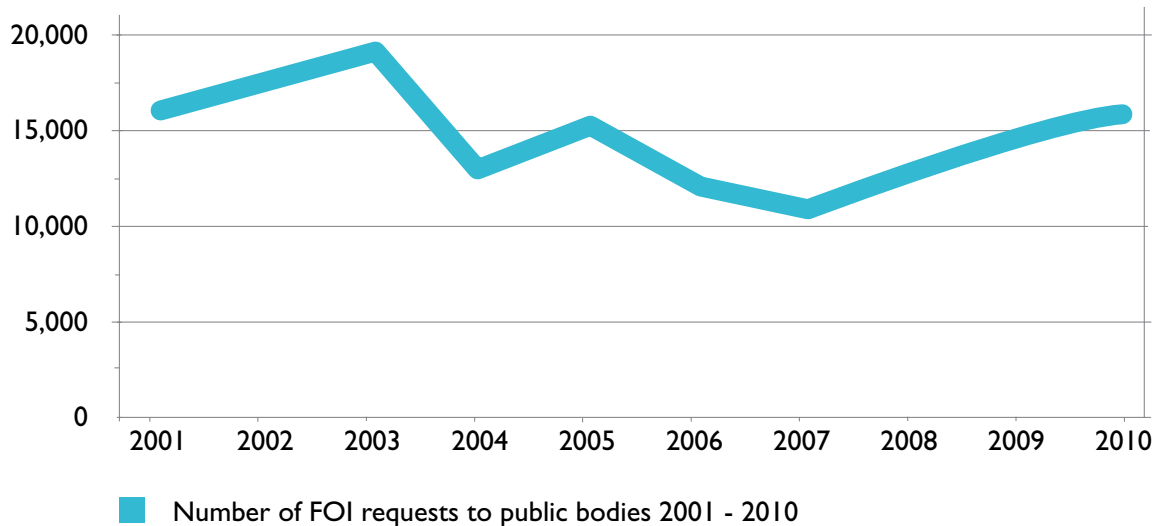
Private medical firm linked to fall in disability pay-outs for teachers

Michael Brennan
Deputy Political Editor

THE number of primary teachers being granted early retirement due to ill health has fallen sharply since a private medical company was hired to do the assessments.

Key FOI statistics for the year

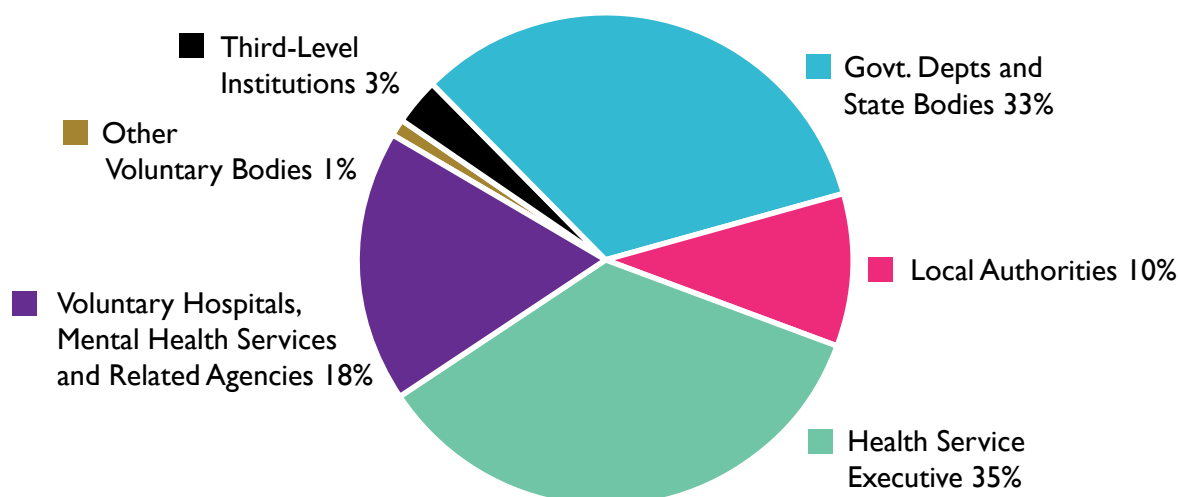
Number of FOI requests to public bodies 2001-2010



Some 15,249 requests were made to public bodies under the FOI Act in 2010. This reflects a continuation of the steady upward trend in FOI requests over the last few years. It represents an increase of 7% (959 cases) over the 2009 figure and a 20% (2,577 cases) increase over the 2008 figure. It is likely that the economic downturn has contributed to this increase.

The number of FOI requests on-hand by public bodies at end-December 2010 has risen by 15% over 2009, an increase from 2,140 cases to 2,466 cases. This backlog should be monitored and addressed by the public bodies concerned.

Sectoral breakdown of FOI requests to public bodies



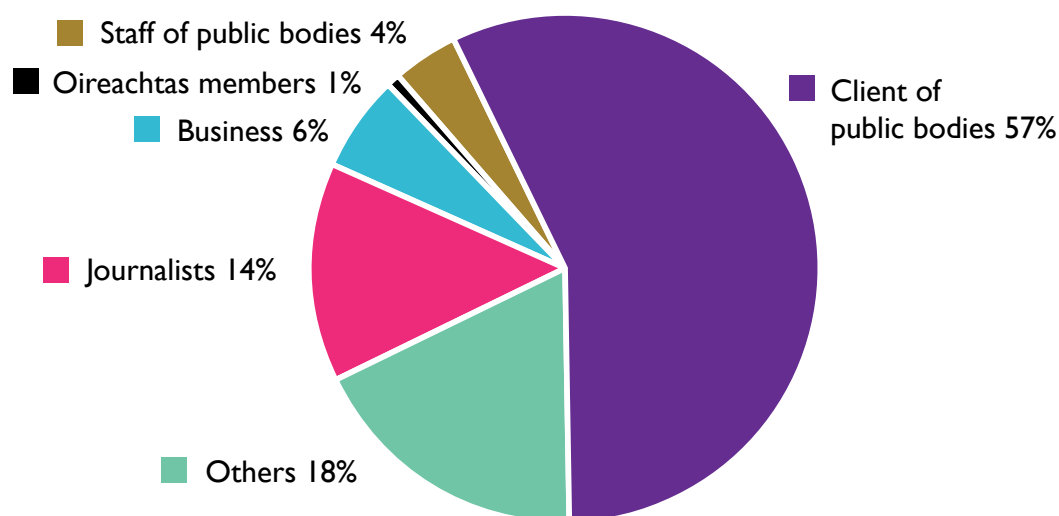
In total, the Health Service Executive (HSE) received the largest number of FOI requests in 2010 with 5,404 (up 13% on 2009); 5,091 were made to government departments and State bodies (up 8% on 2009); voluntary hospitals, mental health services and related agencies received 2,737 (up 10% on 2009); other voluntary bodies 97; local authorities received 1,522 (down 8% on 2009); and third-level institutions received 398 (down 19% on 2009).

Top ten bodies who received most requests during 2010

Rank	Public Body	2010	2009	2008
1	HSE West (2)	1,953	1,647	1,362
2	HSE South (1)	1,926	1,756	1,548
3	Dept. of Social Protection (6)	859	556	485
4	Dept. of Education and Skills (5)	796	569	457
5	HSE Dublin North East (4)	713	694	631
6	Dept. of Justice and Law Reform (3)	598	844	718
7	HSE Dublin Mid-Leinster (7)	573	427	453
8	Mercy Hospital Cork (8)	403	416	200
9	Dept. of Finance (9)	337	272	180
10	Mater Hospital (-)	327	238	219

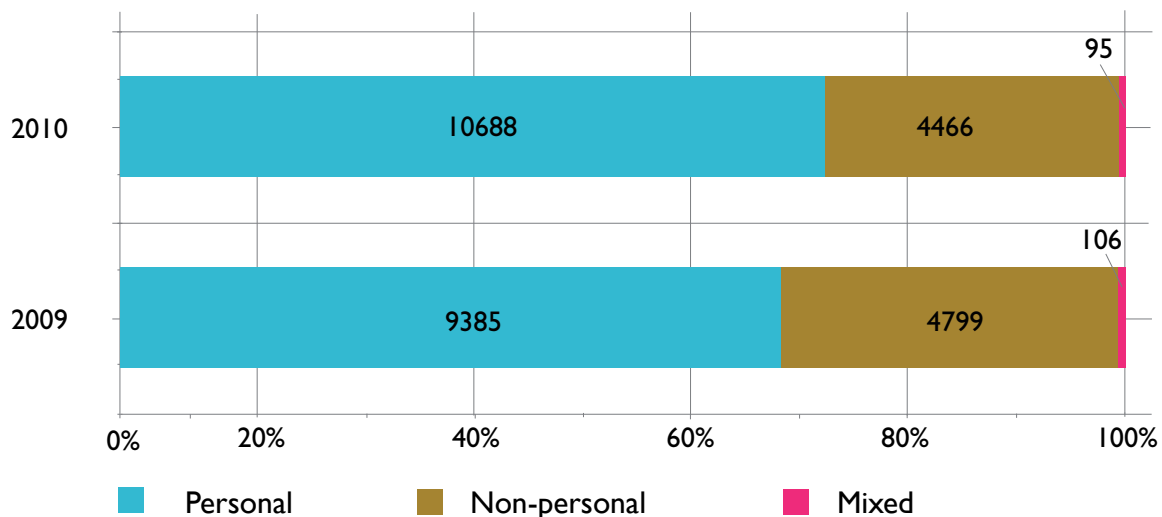
The table shows the top ten bodies subject to the most FOI requests during 2010 (the previous year's position is shown in brackets), with comparators for these bodies for 2008 and 2009. The rise in overall requests received by the HSE is reflected in each of the individual HSE regions which feature in the top 10. A noticeable feature is a dramatic increase in the number of FOI requests received by the Department of Social Protection (a 54% increase in requests over 2009 and a 77% increase over 2008). I commented last year on the large increase in FOI requests received by the Department of Finance since 2007. With a further 24% increase this year, there has now been an increase of 426% from the 64 cases received by the Department of Finance in 2007. While I have no specific data on the reasons for these changes, I think it is reasonable to surmise that they are due to increased interest in accessing records relating to the financial crisis and the economic downturn. More detailed tables showing a breakdown of requests received in each sector are contained in [chapter 4](#).

Type of requester to public bodies



The proportion of requests from different types of requester is very similar to the previous year.

Type of request to public bodies

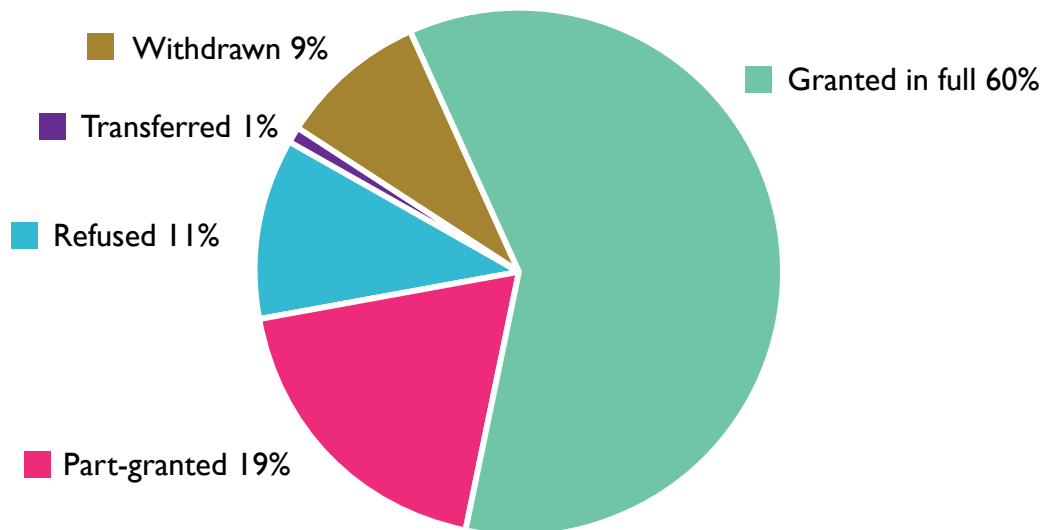


There has been an increase of 1,303 in requests for personal information which represents an increase of 14% on 2009, whereas there has been a small decrease in the number of non-personal and mixed cases. Overall in 2010, 70% of requests relate to access to personal information, 29% to non-personal information and 1% to mixed information.

Rates of appeal

In 2010, internal reviews against decisions of public bodies were sought in 595 cases. This represents 4% of the overall cases dealt with by public bodies. My Office accepted 220 cases for review in 2010, which amounts to 1.47% of the decisions made by public bodies.

Release rates by public bodies

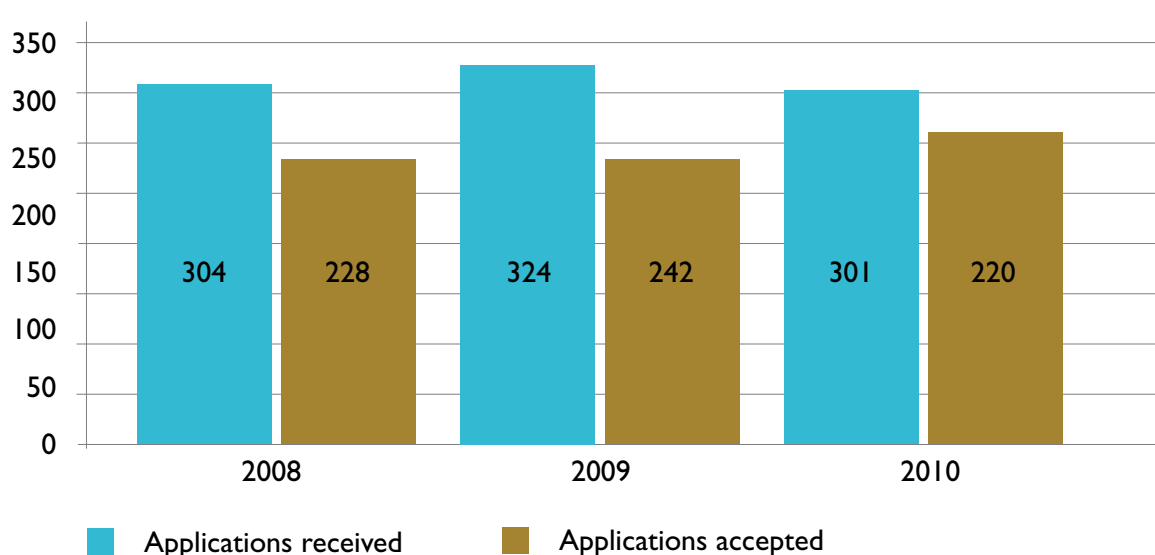


The differences between sectors in the rates of release are largely similar to previous years, although there was an increase in release rates for the voluntary hospitals, mental health services and related agencies to 76% (from 68% in 2009) and third-level institutions to 57% (from 46% in 2009). The HSE release rate remains at 71%, while the Civil Service remains the lowest sector at 41%. A detailed breakdown of the release rates in each sector is contained in [chapter 4](#).

Office of the Information Commissioner (OIC) caseload

Where a requester is not satisfied with the decision of the public body on his/her FOI request, he/she may apply to my Office for a review of that decision. In most circumstances, this review will constitute the third analysis and decision in that case. The decision which follows my review is legally binding and can be appealed to the High Court, but only on a point of law.

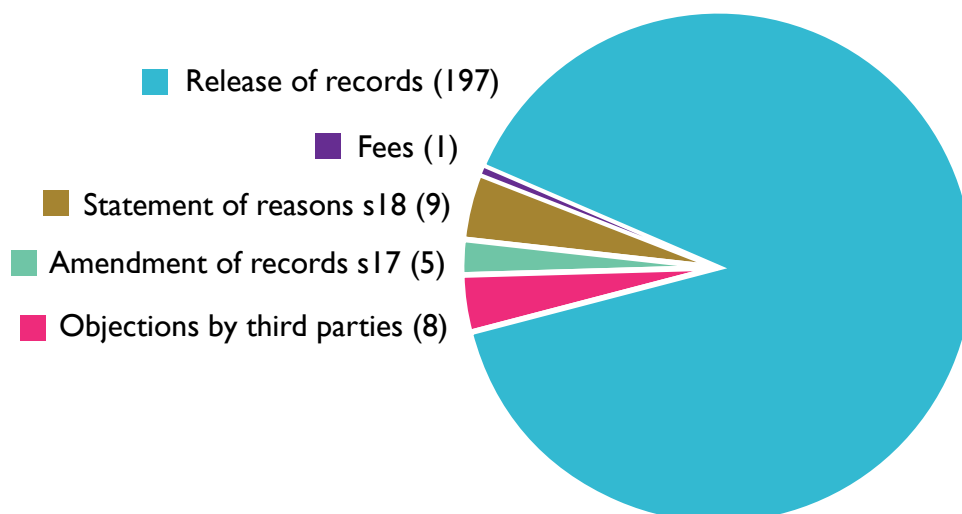
Applications to OIC 2008-2010



It is interesting to note that the number of applications to my Office in 2010 has declined by 7% even though the overall number of FOI requests to public bodies increased by almost 7% in the same period.

It can be seen from the table above that every year a number applications to my Office are not accepted for review. This is mainly due to applications being invalid or withdrawn by the applicant at an early stage.

Subject matter of review applications accepted by OIC



This year again, the vast majority of the 220 applications accepted by my Office concern applicants seeking access to records, having been refused access by the public body concerned. One application was made to my Office concerning fees imposed by a public body during 2010.

I would like to remind applicants of the provision in the FOI Act which allows them to apply to my Office for a review of a decision by a public body to impose a fee or on the level of fees sought by it. It could also be the case that the applicant could better define the scope of his/her request so as to reduce the level of fees. I do not know why so few applications for review concerning fees are made to my Office, but media coverage points up that it is an issue of concern to some applicants:

Irish Examiner

31 July 2010

“Defence forces demand over €8,000 for release of records”

Medical Independent

16 September 2010

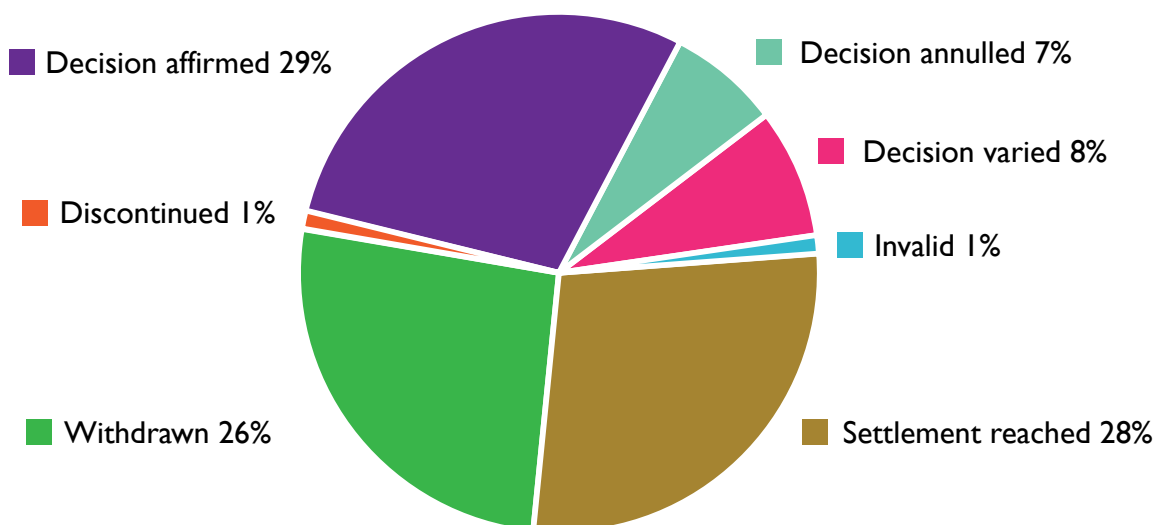
“HSE demands more than €72,000 for FOI request”

Applications accepted by OIC by type 2008-2010



The table above illustrates that there was a significant increase, over 2009, in the percentage number of cases accepted by my Office in which the applicant sought non-personal information, even though the overall number of non-personal FOI requests to public bodies is down from 2009. It is interesting to note that while 70% of overall FOI requests concern access to personal information, only 20% of applications accepted by my Office in 2010 concern requests for personal information.

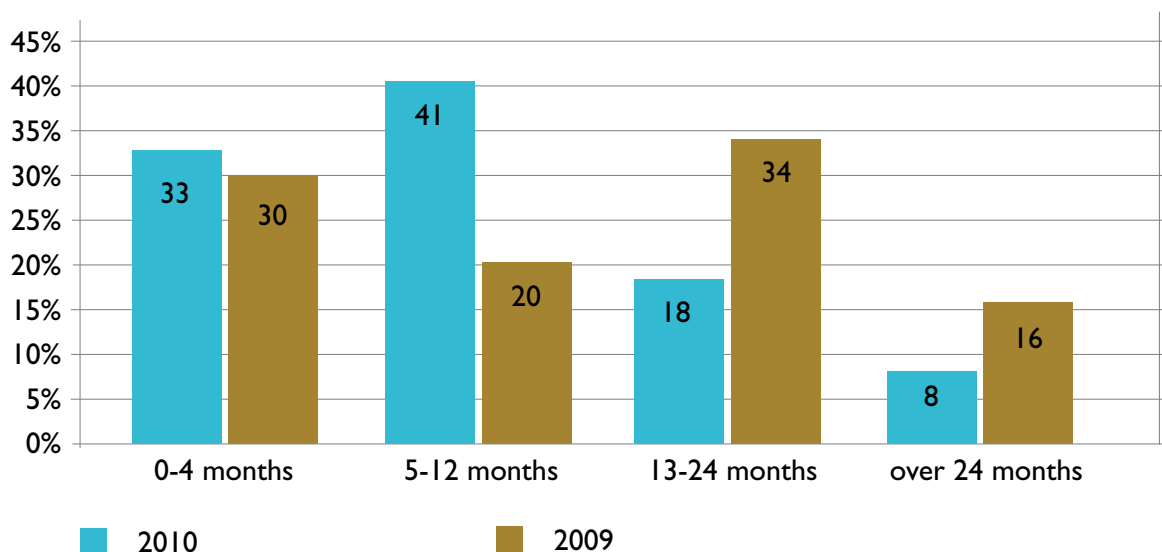
Outcome of completed reviews by OIC in 2010



During 2010, I reviewed decisions of public bodies in 228 cases, compared with 239 in 2009 and 259 in 2008. The number of reviews of a more complex and time consuming nature has continued to increase year-on-year, particularly, the reviews concerning the release of records containing information of a non-personal nature. There were 192 cases on-hand in my Office at end-December 2010, compared to 200 at the end of 2009 and 193 at the end of 2008.

It is also worth noting that additional records were released in approximately 43% of the cases for which reviews were completed by my Office in 2010, compared with 30% in 2009. A detailed analysis of the cases which went to formal decision is available in [chapter 3](#).

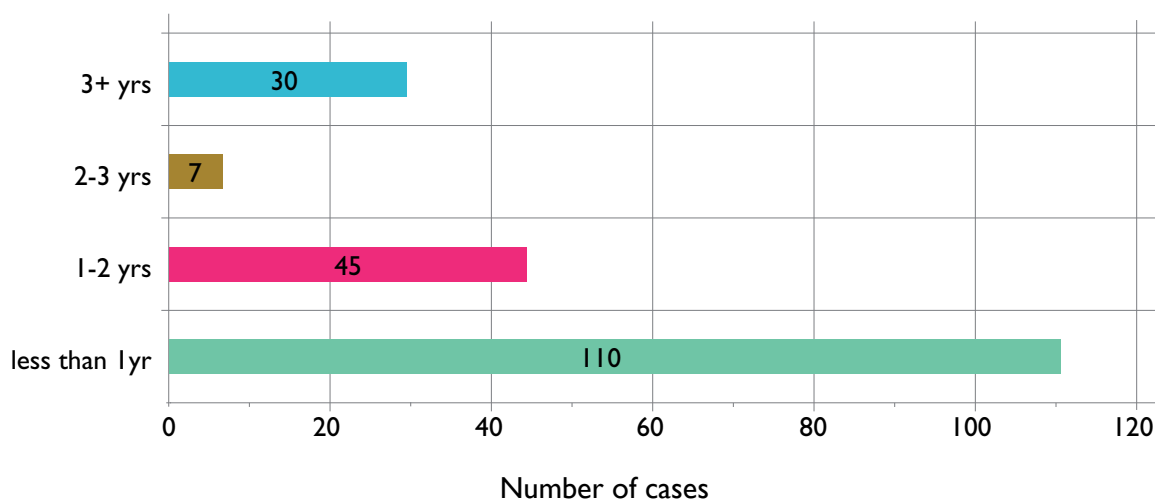
Age profile of cases closed by OIC



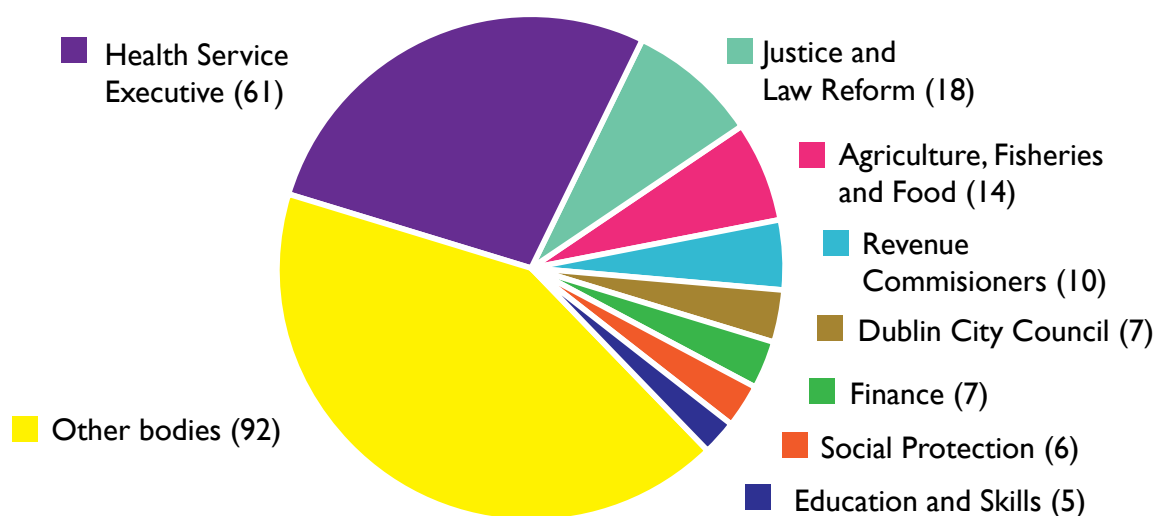
This table illustrates that 74% of cases which were closed in 2010, were closed within 1 year of being received in my Office. This represents a considerable improvement on the 50% closed within 1 year which was achieved in 2009 and is the result of specific initiatives aimed at improving case closure timescales. Also, the percentage number of cases closed within 4 months has risen to 33% from 30%. As regards older cases on-hand, it should be noted that all 30 cases, which are shown in the table below as being over three years old, relate to one individual applicant and date from 2006. The delay in completing these cases is connected to a case from that applicant, which my Office accepted on remittance from the High Court. I made a fresh decision on that case during 2010 which, as it was not appealed by the applicant, will allow my Office to progress the other 30 related cases remaining on hand. A total of 18 cases which

were more than two years old were closed during 2010, leaving, aside from the cases involving the applicant referred to above, seven cases dating from 2008.

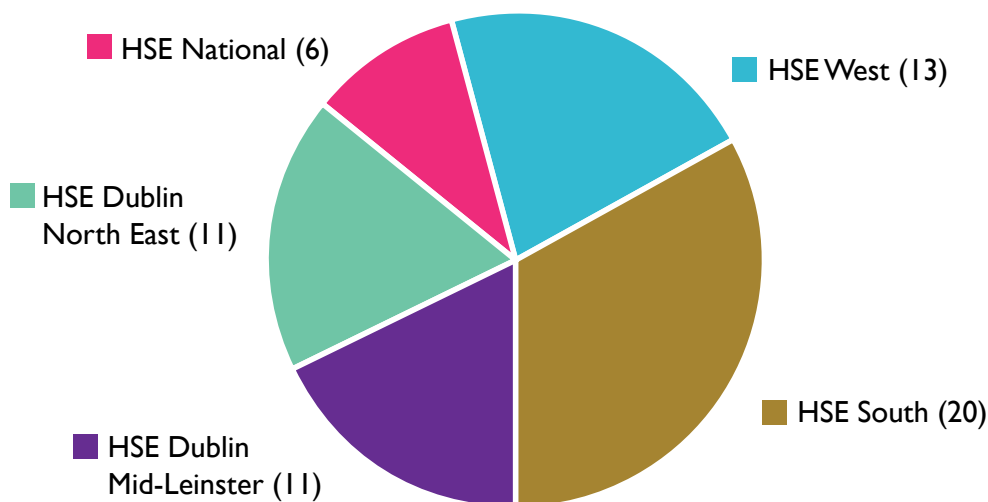
Age profile of cases on hand in OIC at end 2010



Breakdown by public body of applications for review accepted by OIC



Breakdown of HSE cases accepted by OIC



The above diagrams show a breakdown by public body of the cases which were accepted for review by my Office during 2010. Of the cases reviewed by my Office in 2010, 61 cases or 28% relate to the HSE, which is similar to 2009. There were increases, compared to 2009, in the number of applications to my Office concerning the Department of Justice and Law Reform, the Department of Agriculture, Fisheries and Food, the Department of Finance, and the Department of Education and Skills. The second diagram shows a breakdown of the 61 applications to my Office concerning the HSE. While overall the number of applications remains the same, there has been a modest increase in applications involving HSE Dublin North East, from 7 to 11 cases, over 2009.

Settlements and withdrawals

A considerable number of cases referred to my Office for review are settled or withdrawn (54% in 2010). In 2010, settlements were achieved in 63 cases, or 28% of cases closed during the year, while in a further 61 cases, or 26%, the applicant withdrew his/her application.

The FOI Act provides that at any stage during a review, I may try to effect a settlement between the parties on the records to be released. In some cases, applicants may agree to narrow the focus of the review by agreeing to exclude records which will add little or no value to the information they seek. In others, it might be agreed that additional records outside the scope of the original request be released without the need for me to arrive at a formal decision in the case. I would encourage public bodies, in the course of dealing with FOI requests, to engage directly

with applicants with a view to achieving settlements in those cases where a full granting of the request is unlikely.

Settlement
Irish Independent
22 November 2010

“Management consultant Ignatius Lynam has been paid more than €1,200 each day he has worked on the enquiry which is examining allegations against eight current FAS employees and six former staff members.....The records were released under freedom of information rules after the Office of the Information Commissioner ruled the content could be published in the public interest”.

Settlement
Irish Examiner
03 December 2010

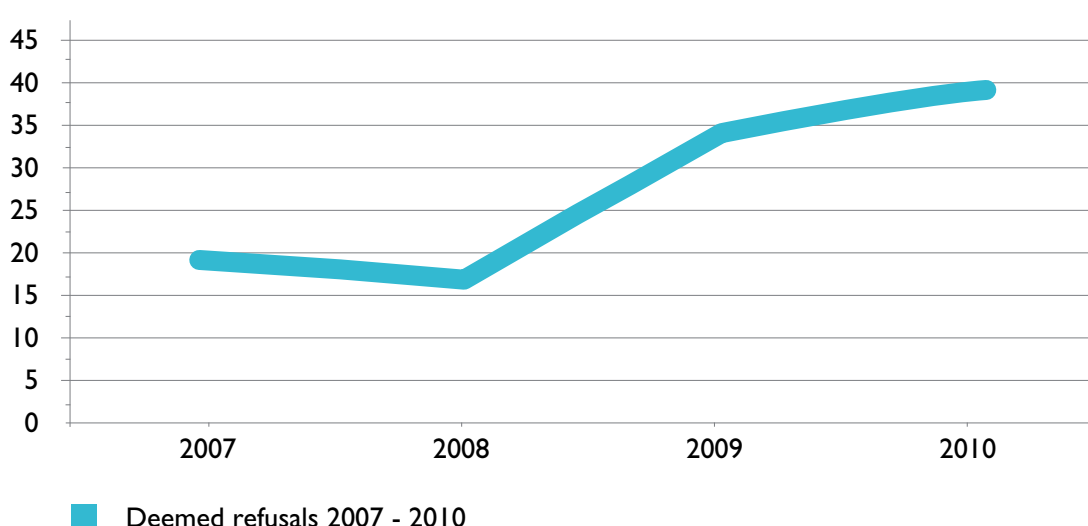
“More than €750,000 has been spent on security measures at the private homes and constituency offices of six politicians since 2006..... The information was only released following the intervention of the Information Commissioner Emily O’Reilly, after the OPW refused the original FOI request and also rejected a subsequent internal appeal on security grounds.”

In most cases, withdrawals occur after lengthy communications between staff in my Office and the applicant. My experience of examining these cases shows that many applications are made to my Office because the public body has not provided sufficient detail on the reasons for its refusal to release the records. Once the decision and the provisions of the FOI Act are explained to the applicant, it is often the case that he/she accepts that the records should not be released and does not require a formal decision. In this regard, I would call on public bodies to ensure that adequate information is provided in the original and internal review decisions so as to allow an applicant to clearly see and understand the reasons for refusal.

Deemed refusals

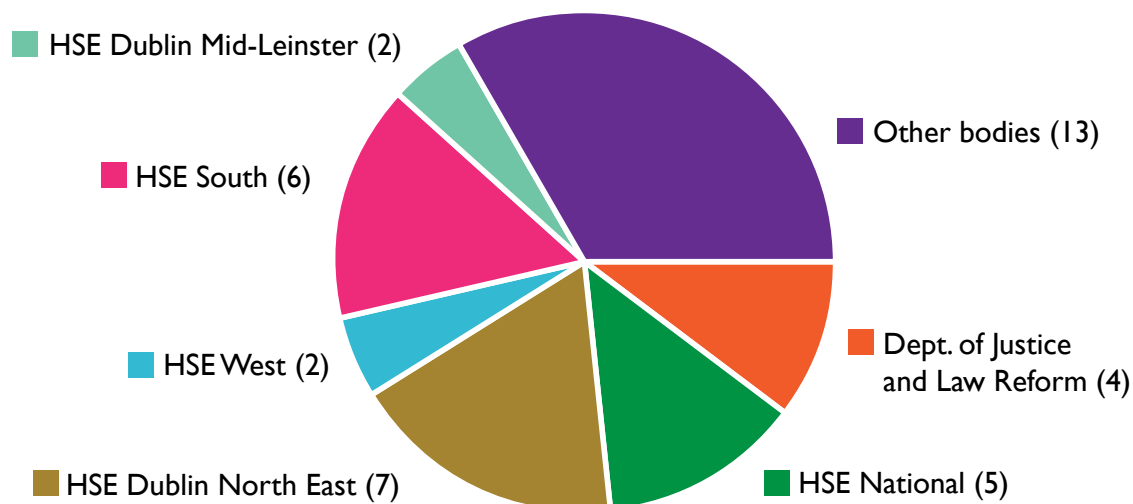
The FOI Act imposes statutory time limits on public bodies for the various stages of an FOI request, specifically, a decision on a request should issue within four weeks and, in the event of an application for internal review, a decision following internal review should issue within three weeks. A breach of these time limits (whether by means of no decision or a late decision at internal review stage) means that the requester has the right to take it as a deemed refusal of access, and is entitled to apply to my Office for review of any such deemed refusal.

Deemed refusals 2007-2010



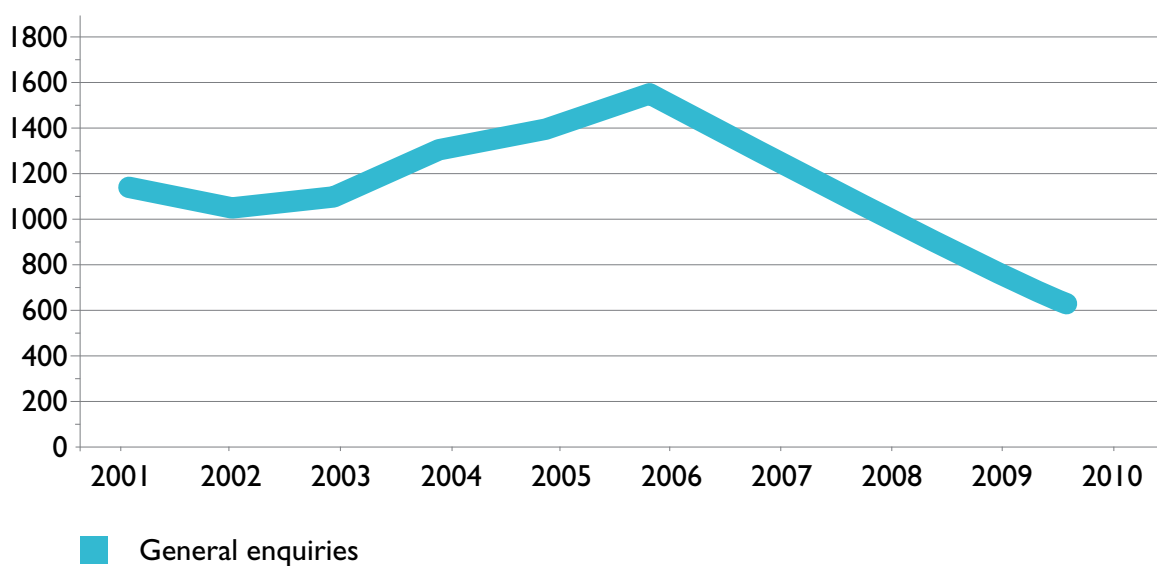
I consider deemed refusals to be particularly serious in that breaches of time limits directly affect the public's right of access to records. I am concerned that the level of deemed refusals has continued to increase (from 17 in 2008, to 34 in 2009 and to 39 in 2010), particularly as public bodies are aware that I will highlight such breaches of the legislation in my Annual Report. The HSE was responsible for 56% of the breaches in 2010, while receiving 35% of FOI requests.

Deemed refusals 2010



The HSE North East and the HSE South had the highest incidences of deemed refusals with seven and six breaches respectively. It is also of concern that breaches occurred in respect of 21 public bodies in 2010, compared to 18 bodies in 2009. While no breaches of the legislation should occur, the reduction in HSE Mid-Leinster from seven to two is a step in the right direction.

General enquires to OIC



In 2010, 622 enquiries were logged to my Office, consisting of 403 telephone calls, 175 e-mails, 38 letters and six personal callers. The majority of the enquiries were received from members of the public seeking advice and guidance on how to exercise their rights under the FOI Act. The main issues raised were: how to make an FOI request, whether a public body is within the remit of the FOI Act, advice on whether they could get access to the information which they were seeking through FOI, and advice on how to progress a review. While there has been a downward trend in enquiries since 2006, it is possible that this is due in no small part to there being a greater awareness by the general public of FOI and their right to access information under FOI.

Fees received by OIC

Up-front application fees for certain FOI requests, internal reviews and applications for review by my Office came into effect on 7 July 2003. Where a request for information other than the personal information of the requester is made, the fees payable are:

- €15 for an FOI request (reduced to €10 for medical card holders and their dependants),
- €75 for a request for internal review of an FOI request (reduced to €25 for medical card holders and their dependants),
- €150 for an application for review of an FOI request (reduced to €50 for medical card holders and their dependants), and
- €50 for an application, by the third party to whom the records relate, for a review by my Office of an FOI decision to grant public interest access to records, following section 29 consultation procedures.

During 2010, my Office received 122 applications for review in which a fee was paid. The total amount received in application fees by my Office in 2010 was €15,800, of which €7,350 was refunded leaving a net amount received of €8,450.

The refunds totaling €7,350 were issued for the following reasons:

- €5,850 because the applications in question were either rejected as invalid, withdrawn or settled,
- €1,350 because the public body had not issued a decision or internal review decision within the prescribed time limits and was therefore of “*deemed refusal*” status, and
- €150 which was not due as it related to an FOI request for personal information only.

Statutory notices

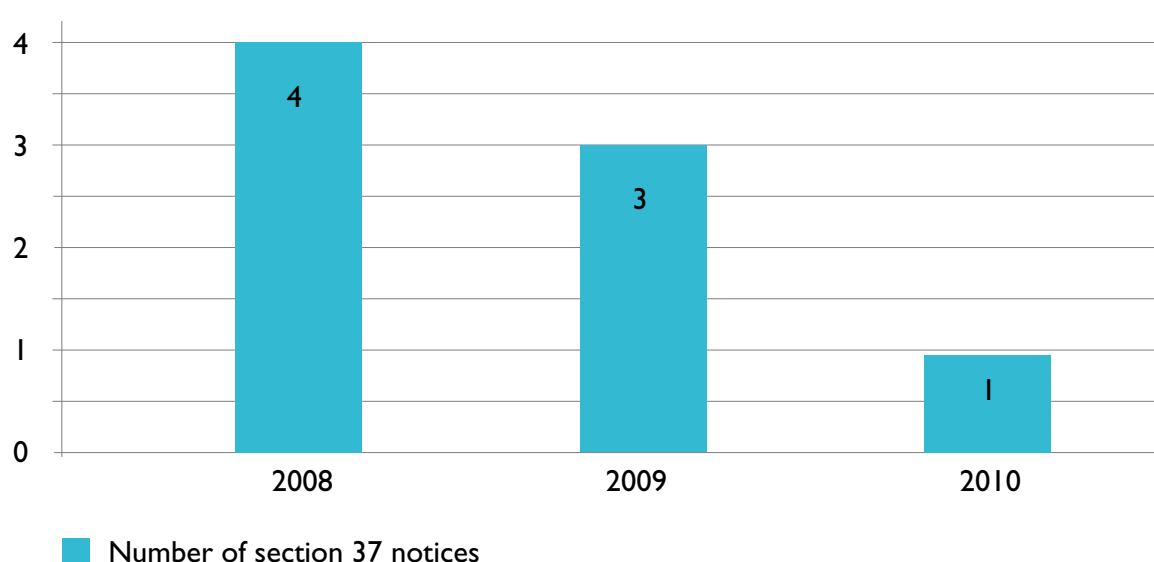
Once again, I must acknowledge the very high level of co-operation by public bodies in providing information in the form of submissions; records which are subject of review; statements of reasons for decisions etc. I value this level of co-operation. There are specific provisions in the FOI Act concerning the production of records and information to my Office. These include:

- **Section 35 of the FOI Act** which empowers me to direct the head of a public body, where I consider that the reasons given in support of a decision are not adequate, to direct that a full statement of reasons for the decision be provided to the requester concerned and my Office, and
- **Section 37 of the FOI Act** which empowers me to require the production of information and/or records, and to enter premises occupied by a public body for the purpose of acquiring any information which is required for the purpose of conducting a review.

In 2010, I served one notice under section 37 on a public body which had not co-operated with my Office following the normal issuing of correspondence. This notice was served on the HSE. However, while this Office should not have to rely on the issuing of such notices, it should be pointed out that this is not a sign of any systemic non-cooperation by the HSE, but rather it was one case in the 61 cases accepted for review by this Office in 2010.

There has always been a high level of co-operation by public bodies with reviews by my Office over the years. It is encouraging to see, in the table below, that the number of instances in which I have had to use my formal powers under section 37 has fallen over the last few years.

Section 37 notices



I did not find it necessary to issue any section 35 notices in 2010.

Statutory certificates issued by Ministers/Secretaries General

The FOI (Amendment) Act of 2003 introduced provisions whereby certain records could be removed from the scope of the FOI Act by means of certification by a Minister or by a Secretary General of a Department. The relevant provisions are contained in sections 19, 20 and 25 of the FOI Act which also provide that a report specifying the number of such certificates issued must be forwarded to my Office.

Section 19

Section 19 is a mandatory exemption which provides protection for records relating to the Government or Cabinet. The definition of Government was amended by the 2003 Act to include a committee of officials appointed by the Government to report directly to it and certified as such by the written certification of the Secretary General to the Government.

I have been informed by the Secretary General to the Government that no section 19 certificates were issued by him in 2010.

Section 20

Section 20 of the FOI Act is a discretionary exemption which may protect certain records relating to the deliberative process of a public body. In the case of a Department of State, the Secretary General may issue written certification to the effect that a particular record contains matter relating to the deliberative process of that Department. Where such a certificate is issued, the record specified cannot be released under the FOI Act. In effect, the exemption becomes mandatory. Any such certificate is revoked in due course by the issue of written certification by the Secretary General.

Having consulted with each Secretary General, my Office has been informed that no new section 20 certificates were issued during 2010.

I have also been informed that the certificate under section 20 issued by the Secretary General of the then Department of Justice, Equality and Law Reform on 11 August 2006 and referred to in previous Reports has not been revoked in line with the provisions of section 20(1A)(b). Therefore, it remains in force. A copy of the notification is attached at [Appendix I](#).

Section 25

Where a Minister of the Government is satisfied that a record is an exempt record either by virtue of section 23 (law enforcement and public safety) or section 24 (security, defence and international relations) and the record is of sufficient sensitivity or seriousness to justify doing so, that Minister, by issuing a certificate under section 25(1), may declare the record to be exempt from the application of the FOI Act. Each year, the Minister(s) in question must provide my Office with a report on the number of certificates issued and the provisions of section 23 or section 24 of the FOI Act which applied to the exempt record(s). I must append a copy of any such report to my Annual Report for the year in question.

Having consulted with each Secretary General, my Office has been informed that four new certificates were issued in 2010, three on 21 July 2010 by the then Minister for Foreign Affairs and a fourth on 13 March 2010 by the then Minister for Justice, Equality and Law Reform (*"the Minister"*). Two certificates were renewed by the Minister on 19 February and 13 March 2010, respectively, for a period of two years and a further three certificates, referred to in my 2009 Annual Report, remain in force. This means that a total of six section 25 certificates were in force concerning the Department of Justice and Law Reform at 31 December 2010. A copy of the notifications from the Secretaries General are attached at [Appendix I](#) to this Report. The certificates issued by the then Minister for Foreign Affairs will fall for review under section 25(7) of the FOI Act in 2011.

I was notified by letter dated 12 January 2011 that, pursuant to section 25(7) of the FOI Act, the then Taoiseach, the then Minister for Finance and the then Minister for Enterprise, Trade and Innovation, having reviewed the nine certificates that were in operation for the period ended November 2010, were satisfied that it was not necessary to request the revocation of any of the nine certificates in question. I attach a copy of the notification at [Appendix II](#) to this Report.

Appeals to the High Court

No High Court judgments were delivered in 2010 in respect of decisions of my Office.

A party to a review, or any other person who is affected by a decision of my Office, may appeal to the High Court on a point of law. Following the amendment of the FOI Act in 2003, the decision of the High Court can be appealed to the Supreme Court.

No relevant High Court judgments were delivered in 2010.

Review of enactments relating to non-disclosure of records

The Act provides for a review of section 32 of the FOI Act every five years. Such a review was due to be undertaken in 2009 but has still not been carried out.

Section 32 of the FOI Act obliges a public body within the First Schedule to refuse access to a requested record if disclosure of the record is prohibited by a provision of any enactment in statute. The only circumstance in which that obligation of secrecy is lifted is where the provision in question is listed in the Third Schedule to the FOI Act (enactments excluded from application of section 32). It is a very important provision because it subordinates the access provisions of the FOI Act to all non-disclosure provisions in statute except for those provisions which are contained in the Third Schedule to the FOI Act.

Section 32 includes a provision where its application is reviewed at five year intervals. That review is initiated with reports to the Joint Oireachtas Committee on Finance and the Public Service from individual Ministers on the various non-disclosure provisions of statutes within the scope of their Departments together with their reasoned views on whether any of the non-disclosure provisions should be amended, repealed or continued and whether they should be included in the Third Schedule. The reports are laid before both Houses of the Oireachtas and copied to me as

Information Commissioner: I provide to the Joint Committee, either on my own volition or if asked by it, my opinion and conclusions in relation to the matter.

The first such review was carried out in 1999 and the second such review took place in 2004. I commented in my previous Annual Report on the unsatisfactory nature of the 2004 review where the Committee voted on party political lines to support the relevant Minister in each case on which I disagreed with those Ministers' recommendations to retain existing non-disclosure provisions.

The third such review should have been initiated in 2009, in order to meet the timescales provided for in section 32(6) of the FOI Act. I drew the attention of the Joint Committee to the matter through its then Chairman and to the then Minister for Finance. I am very disappointed to report that no progress was achieved during 2010 and, at the time of the dissolution of the Dáil, four of the fifteen Ministers of the then Government had not provided their initiating reports to the Joint Committee as they were required to do in 2009, in accordance with the terms of section 32(3) of the FOI Act.

Given the importance of FOI, I am disappointed that the Joint Committee authorised by both Houses of the Oireachtas to take charge of the review process has failed to do so. I believe that it is important to conduct a review of section 32 without further delay.

Collation of statistics

I appreciate that collation of statistics is a time consuming task for public bodies, and I acknowledge the continuing efforts made by them to produce accurate statistics for this Report. However, there continues to be a difficulty with obtaining the statistics on a timely basis from some of the public bodies concerned. This issue has been raised with the appropriate authorities.

Staffing matters

I would like to thank my staff and colleagues in the Office for their support during 2010. In particular, I wish to thank the Director General, Pat Whelan and the Senior Investigators, Sean Garvey and Elizabeth Dolan for their contribution and also Ciarán O'Donohoe, Brenda Lynch, Phyllis Flynn, the staff of my Office and the staff of the Communications and IT Units for their help in compiling this Report.

The staffing complement of my Office remained unchanged in 2010.

Chapter 2

Lenihan paved way for some bank staff to receive payouts

ALLIED IRISH Banks successfully lobbied Minister for Finance Brian Lenihan last year for permission to pay bonuses to overseas staff and those with pre-existing contracts for bonus payments.

AIB asked Minister to waive curbs on bonuses

bank lending

Lenihan has insisted Nama will 'strengthen' credit

THE INTERNATIONAL Monetary Fund (IMF) told Minister for Finance Brian Lenihan last April that the National Asset Management Agency (Nama) would not lead to a significant increase in lending by the banks.

Nama

Chapter 2: Issues arising

In this chapter, I outline some of the issues which arose in relation to the operation of the FOI Act during 2010. The particular issues I wish to highlight are as follows:

- Public bodies not covered by the FOI Act,
- Removal of public bodies from the remit of the FOI Act,
- Purpose of FOI Act – create a culture of openness,
- Scarce resources could be saved by adopting a culture of publication and release of records,
- Unacceptable practices of public bodies,
- Judgments delivered by the Courts in 2010, and
- OIC reviews in the news.

Public bodies not covered by the FOI Act

Many key bodies remain outside the scrutiny of the Act, such as An Garda Síochána, the National Treasury Management Agency (NTMA) and the National Assets Management Agency (NAMA). I have voiced my concerns on many occasions in the past about this, including in my Annual Report for 2009.

Despite making many calls over the last number of years, it is disappointing to note that since 2006, no additional public bodies have been brought within the scope of the FOI Act. Accordingly, the public bodies listed below, among others, remain outside FOI:

- An Garda Síochána, the Garda Ombudsman Commission, the Office of the Refugee Applications Commissioner, the Office of the Refugee Appeals Tribunal, and the Judicial Appointments Advisory Board,
- The Central Bank of Ireland, Financial Services Authority of Ireland, NTMA, NAMA, the National Pension Reserve Fund Commission, the State Claims Agency, and

- The 33 Vocational Education Committees, the State Examinations Commission, the Residential Institutions Redress Board and the Central Applications Office.

I have long made the point that public bodies should not be outside the scope of the FOI Act, but rather they could seek to rely on the relevant exemption provisions contained within the FOI Act to refuse access to certain records which they consider should not be released.

Removal of public bodies from the remit of the FOI Act

I have expressed my disappointment numerous times in the past, including in my Annual Report for 2009, at the removal of public bodies that had been under FOI from the scope of the Act, without my Office being informed of such removal. Much to my disappointment this practice has continued.

Public bodies or the functions of public bodies that had been under FOI and were removed from the scope of the FOI Act, include:

- the enforcement functions of the Health and Safety Authority,
- the road safety functions now carried out by the Road Safety Authority, and
- the functions of the Land Registry and Registry of Deeds, now performed by the Property Registration Authority.

The Medical Bureau for Road Safety (MBRS) was specifically prescribed as a body coming within the remit of the FOI Act under regulations made in 2006. However, legislation was introduced by the then Minister for Transport and enacted by the Oireachtas on 20 July 2010, which restricted the application of the FOI Act to records relating to the general administration of the MBRS. Thus, records concerning the main functions of the MBRS are now exempt from the application of the FOI Act and such records can no longer be considered for release under the FOI Act. The change came shortly after the MBRS had argued, in the course of reviews conducted by my Office ([see chapter 3](#)), that its functions under the Road Traffic Acts should not be under the remit of FOI. I view this as a retrograde step in terms of openness and transparency.

Purpose of the FOI Act – create a culture of openness

The low level of applications for review to my Office would appear to signify that the general public is largely satisfied that public bodies are dealing with requests for access to records in an open and transparent manner. However, in this section, I have focused attention on two cases in which this approach was not followed.

The FOI Act has been in force in Ireland for over 12 years now, yet in some decisions, public bodies still do not seem to grasp the extent to which it confers on members of the public a statutory right of access to records held by those public bodies falling within its remit. The Courts, however, have acknowledged the profound change in public administration brought about by the FOI Act with respect to openness and accountability. For example, Mr. Justice McKechnie, in his judgment in *Deely v. The Information Commissioner* [2001] [IEHC 91](#) (text of judgment available at www.oic.gov.ie), had this to say about the FOI Act:

“[The Act’s] passing, it is no exaggeration to say, affected in a most profound way, access by members of the public to records held by public bodies and to information regarding certain acts of such bodies which touch or concern such persons. The purpose of its enactment was to create accountability and transparency and this to an extent not heretofore contemplated let alone available to the general public. Many would say that it creates an openness which inspires a belief and trust which can only further public confidence in the Constitutional organs of the State”

“The clear intention is that, subject to certain specific and defined exceptions, the rights so conferred on members of the public and their exercise should be as extensive as possible, this viewed, in the context of and in a way to positively further the aims, principles and policies underpinning this statute, subject only to necessary restrictions....”

This view of the extensive nature of the rights conferred by FOI has been endorsed by the Supreme Court, in *Barney Sheedy v. The Information Commissioner* [2005] [IESC 35](#) (text of judgment also available at www.oic.gov.ie), where Mr. Justice Fennelly commented:

“The passing of the Freedom of Information Act constituted a legislative development of major importance. By it, the Oireachtas took a considered and deliberate step which dramatically alters the administrative assumptions and culture of centuries. It replaces the culture of secrecy with one of openness. It is designed to open up the workings of

government and administration to scrutiny. It is not designed simply to satisfy the appetite of the media for stories. It is for the benefit of every citizen”.

I think it is fair to acknowledge the historically low level of cases referred to my Office for review. However, I report here on two cases where public bodies sought to withhold records in a manner which I would regard as not being in keeping with the “culture of openness” which the FOI Act seeks to promote.

Senator Marc MacSharry and HSE West – case no. [090192](#)

In this case, the arguments of the Health Service Executive (HSE) and the Health Information and Quality Authority (HIQA) amounted in effect to a class-based claim for exemption in relation to interim reports involving discussions with public sector staff, regardless of the particular contents or the timing of release of such reports.

The request in this case, which was made to the HSE, related to an interim report which derived from the quality review programme that was commenced by HIQA in 2008, in line with the National Cancer Control Programme. The focus of the interim report at issue in this case was the readiness of the symptomatic breast disease services at University College Hospital Galway (UCHG), one of eight designated specialist centres for cancer care in Ireland, in meeting the National Quality Assurance Standards for Symptomatic Breast Disease Standards. The quality review programme was due to be completed by December 2009, by which time all of the designated centres were expected to be fully operational and compliant with the standards. Notwithstanding the publication of HIQA’s final report during the course of my Office’s review on the matter, the HSE and HIQA argued that a culture of non-cooperation or reduced cooperation among HSE employees could result from the release of the interim report, which in turn would require HIQA to adopt a more confrontational, adversarial approach to the conduct of similar inspections and reviews in the future. However, neither the HSE nor HIQA identified the particular parts of the interim report which could result in what HIQA contended was “*a real and definite risk*” of inhibiting cooperation in the future. In relation to the public interest, HIQA argued that, in light of the information made available in the final report, full release of the interim report would not add significantly to the public’s understanding of its acts or decisions; thus, little weight should be attached to the public interest in granting the request.

Some records are exempt from release under the FOI Act if they fall into a certain class or category (e.g. section 19 provides for the exemption of Government records). In these cases, all that is required for the record to be exempt is that it falls into a particular category. However, in other sections the onus is on the public body to show that their disclosure would be likely to result in a particular harm (such as sections 20 and 21 which were relied upon in this case) for the records to be exempt. The HSE was arguing in effect that interim reports involving discussion with staff, as a class, should be exempt regardless of whether their release would give rise to any particular harm, the particular contents of the report or the timing of its release. I found that the approach of seeking a class-based claim for exemption in relation to such interim reports was untenable under section 21(1) of the FOI Act and that neither the HSE nor HIQA had met its burden of showing the claims for exemption applied in this case were justified.

In commenting on the public interest in the decision, I considered that there should be maximum openness and transparency with respect to how the designated specialist centres perform against national standards and that release of the interim report in full would simply provide the details regarding the gaps that were found on the day of the validation visit in September 2008. I noted that the interim report could be read in conjunction with the final report to give a more complete picture of the development and improvement in symptomatic breast disease services at UCHG under the National Cancer Control Programme. I also noted that its release under FOI would allow members of the public to ask informed questions regarding the progress that was made by UCHG during the quality review programme. I concluded that the public interest would be better served by granting than by refusing access to this information.

Ms. X and the Health Service Executive (HSE) – case no. [090154](#)

In this case, I found that the applicant should have access to draft reports of the investigations into her husband's death which had been refused by the Health Service Executive.

This case involved a request for access to draft reports of the investigations into the death of the applicant's husband following a surgical procedure at Kerry General Hospital. In both the original and internal review decisions, the HSE seemed to make class-based exemption claims in relation to any draft report, regardless of whether their release would give rise to any particular harm or irrespective of the nature of

the information contained in such reports. I saw no inconsistencies between the draft reports on the one hand and the final report on the other which could give rise to any risk of misunderstanding, nor, in my view, did the contents of the reports support the view that any individual staff member was shown in a more unfavourable light in the draft reports than what was revealed by a perusal of the final report. I noted the amendments identified by the hospital appeared to be merely in the nature of stylistic or editorial changes that were made in incorporating the draft reports into the final report.

In my decision, I considered that any request for a draft investigative report must be dealt with on its merits in light of the contents of each particular record concerned and the relevant facts and circumstances of the case. I found that the HSE's claims for exemption under section 21(1)(a) and (b) of the FOI Act were unfounded. I noted in the decision that medical practitioners were generally expected to conduct themselves in a professional and cooperative manner in relation to investigations. I also did not accept the claim by the HSE that the routine methods of investigation used could reasonably be expected to be prejudiced by the release of a draft report following the conclusion of the investigation. In terms of the public interest, I considered that there was a strong public interest in ensuring that the applicant, as the deceased patient's next of kin, was fully informed of the care and treatment he received prior to his death. I also considered that there was a strong public interest in ensuring that the applicant was fully informed of the processes as well as the outcome of the investigations into the circumstances of her husband's death.

Scarce resources could be saved by adopting a culture of publication and release of records

In the current climate, with resource pressures on public bodies, I would urge them to adopt a mindset, when dealing with FOI requests, of making more information publicly available, so as to reduce the resources required by them in the processing of FOI requests.

Against the current economic background and the resulting reduction in public sector numbers, public bodies face unprecedented challenges in terms of demands on their resources and their ability to maintain a high quality service to the public. It is evident from the statistics in chapter 1 that spending cuts result in the public making greater use of FOI. I would encourage public bodies to develop practices of making more information publicly available through their websites, so as to reduce the resources required in processing FOI requests. I would also urge them to consciously adopt a mindset, when dealing with FOI requests, which presumes that the request will be granted, subject only to the necessary restrictions. This would avoid the need for the public body to expend increasingly scarce resources by engaging a second officer in an internal appeals process and considerable additional resources in dealing with cases which are subsequently referred to my Office for review.

While, overall I am satisfied that there is a high level of cooperation by public bodies with requests for access to records under FOI, there are still some practices which are a cause for concern and to which I draw attention below.

I highlight two cases, which were finalised by my Office during the year, in which there were unacceptable delays by the public bodies in the release of the records.

In both cases, the applicants eventually were granted access to a significant number of records. The cases highlight situations in which records could have been released in a more timely fashion with the resultant saving of both time and resources of the public body in question and my Office, and providing a better service to the customer in the process.

In one such case (case number [100062](#)), the Sunday Times newspaper sought certain details, from the Department of Environment, Heritage and Local Government (the Department), on the pay and expenses of the lawyers working for the Mahon

Tribunal (the Tribunal) and records relating to when the Tribunal might finish its work. Efforts were made by my staff to bring about a settlement between the parties. Both the applicant and the Tribunal were willing to settle the case based on the proposals from my Office. However, the Department continued to dispute the release of part of one of the records, despite the Tribunal's confirmation that it had no objection to its release. While I fully accept a public body's right to require a formal decision on any application affecting it, in my view the Department's insistence on a formal decision in this case, where the Tribunal had no objection to release of the relevant record, was unnecessary and amounted to a wasteful use of the resources of my Office.

In a second case, the Sunday Times sought certain records from the Department of Finance (the Department) relating to the Government guarantee of Irish banks (see case number 090028 in chapter 3). The FOI request encompassed approximately 100 records amounting to in excess of 800 pages. The Department made several lengthy submissions outlining why it contended that each and every page of the records concerned should be withheld. Several exemptions were quoted in respect of most records, all of which had to be dealt with by my Office as part of the review. Eventually a settlement was reached in which many records were released. The Department cited "*unprecedented pressures*" on its staff in the banking area since September 2008 in explaining delays in corresponding with my Office, yet committed a significant level of staff resources in preparing lengthy submissions arguing for exemption of records it subsequently accepted could be released without a binding decision by my Office. I believe that the release of some of these records at an earlier juncture could have saved a substantial amount of time and resources of both the Department and my Office.

Unacceptable practices of public bodies

The Health Service Executive (HSE) frustrated the operation of the FOI Act

The behaviour of the HSE was unacceptable and had the effect of frustrating the operation of the FOI Act.

In the Sunday Times and the HSE case, case no. [090191](#), records were sought concerning a financial settlement between the HSE and a private ambulance contractor. This request was poorly dealt with by the HSE. There were delays and confusion in the handling of the case and in the provision of a complete set of records. These problems have never been satisfactorily explained to me although my Office invited the HSE to provide reasons for what happened. In addition, my Office encountered misleading and incomplete responses to its efforts to clarify and examine the issues and the records under review. My Office had to issue a section 37 notice (see chapter 1) requiring the HSE to furnish the outstanding record showing the amount paid as a result of a High Court case in 2008. The HSE's behaviour in relation to the request and the review had the effect of frustrating the operation of the FOI Act in relation to access to records and delaying my Office's review and investigation into whether or not the refusal of records was justified.

In my decision, I found that the HSE had failed to meet its burden of proof, under section 34(12)(b), of showing that the exemptions upon which they sought to rely, sections 20, 21 and 27 of the FOI Act, were applicable. I found that the HSE also failed to consider the public interest as is required under the provisions of the FOI Act.

Edited version of record for FOI request purposes

Roscommon County Council (the Council) prepared an edited version of a report for release under the FOI Act.

In ABC Ltd. and Roscommon County Council, case no. [080284](#), access was sought by the applicant to the Report on Tenders in respect of a regional water supply contract. In the course of the review, it came to my attention that a document entitled "*Edited Version for Access to Information Purposes*" had been prepared by the Council and that this was released, rather than the original redacted report. In my decision, I pointed out that the practice of preparing a record separate to the original had the potential to prevent decision makers from considering each record on its merits by reference

to the exemption provisions of the FOI Act and the necessary public interest balancing test. Arguably, the edited version has no status in that the request was clearly for the original records created. Any version of a record released in redacted form under FOI should enable an applicant to see that parts have been deleted and the decision under the FOI Act should indicate the reasons why such extracts qualified for exemption.

Poor handling of case by local authority but positive response by it to comment

Cork County Council (the Council) incorrectly adopted the approach that any record held by its legal section automatically attracted legal privilege and that any record attracting legal privilege was outside the scope of the FOI Act. In response to criticism from my Office in its decision, the Council organised extensive training for its staff in FOI.

In X and Cork County Council, case no. [090217](#), the applicant sought records held by the Council relating to the Waste Management Act. In its internal review decision, the Council informed the applicant that it had located an additional 85 relevant records which had not been disclosed in its original decision. During the course of the review by my Office, it came to light that the Council had incorrectly considered that any record held by its legal section automatically attracted legal privilege. It had also claimed that it understood that any records attracting legal professional privilege were automatically rendered outside the scope of the FOI Act and apparently it did not consider that it should notify the applicant of the existence of such records and that they were not being released to him. The Council subsequently examined the records and released the majority of them to the applicant.

I take heart from the very positive reaction of the Council to comment from me in this case, including the provision of extensive training in FOI for staff and the provision of information to decision makers to assist them in making high quality decisions under FOI.

Judgments delivered by the Courts in 2010

Supreme Court case

In last year's Report, I referred to and provided a summary of the High Court judgment in the case of the Governors and the Guardians of the Hospital for the Relief of Poor Lying – In Women, Dublin and the Information Commissioner [2009] IEHC 315 Judgment of Mr. Justice Patrick McCarthy, 2 July 2009. I referred to the hospital having appealed to the Supreme Court against the findings and through the legal mechanism of a Notice to Vary, I have also raised certain other questions for determination in that appeal.

This case was heard by the Supreme Court on 14-15 June 2010 and judgment has been reserved in the case.

High Court Cases

There were no High Court judgments delivered in 2010 on cases taken against decisions of my Office.

OIC reviews in the news

As in previous years, decisions taken on FOI reviews by my Office have given rise to considerable media comment, a sample of which I set out below.

Irish Independent

15 March 2010

HSE blasts top crèche for use of harsh discipline

Shane Phelan

Investigative Correspondent

“.....vehemently disputed some of the HSE's findings, attempted to block the release of the report to the Irish Independent under the Freedom of Information Act. However, the Office of Information Commissioner Emily O'Reilly ruled the report should be released.”

Irish Medical Times

2 April 2010

Information Commissioner annuls HSE charges decision

Medico-legal

“Ed Madden, BL, on a recent Information Commissioner case in which a former patient of Cork University Hospital challenged a decision to charge him for copies of x-rays.”

Irish Times

30 August 2010

IMF queried bank's sell-off strategy

Simon Carswell

“The International Monetary Fund queried as far back as April 2009 the value of Allied Irish Bank's disposing of assets to generate capital, saying it assumed the market had priced this in. The IMF questioned the sales in meetings for its 2009 assessment of the Irish economy. The opinion is contained in records released under the Freedom of Information Act by the Department of Finance following an appeal by the Irish Times to the Information Commissioner against the withholding of certain files by the Department.”

Industrial Relations News

27 January 2011

Freedom of Information body backs AGSI request over ICTU

Colman Higgins

“The AGSI body is entitled to information about the refusal of the Department of Justice, Equality and Law Reform to allow it to affiliate to the ICTU, according to the Information Commissioner.”

Irish Medical News
10 January 2011
Transforming the HSE South
Priscilla Lynch

“The planned reconfiguration of acute services in the HSE South including: Cork University Hospital (CUH); Mallow General Hospital; Bantry General Hospital; Mercy University Hospital (MUH); South Infirmary Victoria University Hospital (SIVUH); and Kerry General Hospital (KGH), was initially shrouded in secrecy and the HSE was roundly criticised for hiding its plans on the region and attempting to begin rolling them out before publishing its vision.

the report was finally released to IMN after a successful appeal to the Information Commissioner under the Freedom of Information Act (FOI).”

Chapter 3

Anglo

The HSE's internal audit team examined foster care only in the southern region.

Serious questions raised over vetting of foster carers

FitzPatrick told government €1.5bn would save Anglo

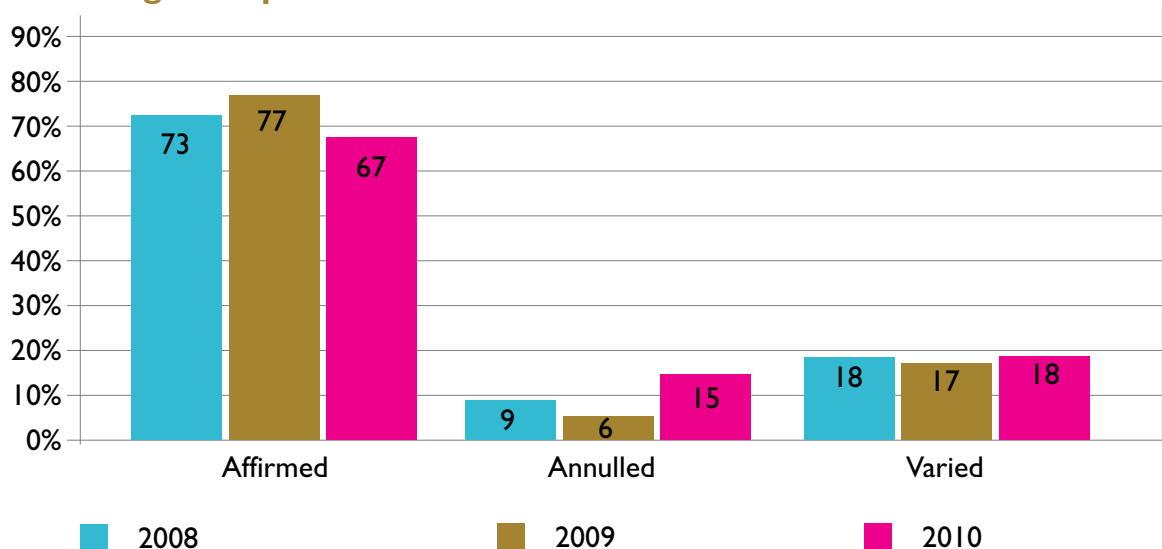
Former Anglo Irish Bank executives Sean FitzPatrick and David Drumm put pressure on the government to provide massive financial help to the ailing bank just days before their controversial exits from the company, according to confidential documents.

Chapter 3: Decisions

Formal decisions

A total of 228 cases were dealt with by my Office in 2010. As outlined in chapter 1 of my Report, this total is comprised of formal decisions, settlements, withdrawals, invalid and discontinued cases. In this chapter, I will deal with the 43% of cases which went to formal decision. The table below compares the outcome of the cases which went to formal decision for the years 2008, 2009 and 2010.

Percentage comparison of formal decisions 2008-2010



It can be seen, in cases which went to formal decision, that the Office completely overturned the decision of public bodies in a greater percentage number of cases in 2010, than it had in comparative years (15% in 2010, compared with 6% in 2009 and 9% in 2008). In addition, the Office affirmed the decision of the public body in fewer cases during 2010 than it had in the comparative years (67% of cases in 2010, compared with 77% in 2009 and 73% in 2008).

I focus here on a small number of the 99 formal decisions issued during 2010 to highlight points of interest to public bodies and FOI users alike. The full text of these decisions and, indeed, other decisions of interest, is available on my Office website (www.oic.gov.ie).

Significant decisions

Medical Bureau of Road Safety (MBRS)

I issued decisions on two cases concerning records relating to the functions of the MBRS under the Road Traffic Acts. The MBRS is a public body whose functions include analysing blood, breath and urine specimens for the presence of alcohol and drugs, in the context of the road safety legislation. It also issues certificates for presentation in connection with prosecutions for alleged intoxicated driving and provides expert forensic evidence to assist the courts.

In these cases, the MBRS asserted that FOI should not be allowed to “*provide a parallel system whereby the defence could obtain what is in effect disclosure in a criminal case*”. Effectively, the MBRS claimed that the FOI Act should not apply to records relating to its functions under the Road Traffic Acts, despite the fact that, in 2006, through the passing of Regulations by the Oireachtas, the MBRS was prescribed as a body coming within the remit of that Act.

Mr. H and the MBRS - case no. [090073](#)

The applicant sought access to all documentation pertaining to the receipt, analysis and certification of urine samples provided by him at a certain Garda station. The MBRS argued that a distinction should be made between administrative information and information related to the criminal investigation of an individual. In its view, the disclosure of information relating to its forensic investigative procedures over and above what is required under the Road Traffic Acts should be a matter solely for the courts. According to the MBRS, the creation, through FOI, of a “*parallel process for disclosure of information in criminal proceedings...would undermine and interfere with [its] statutory obligations under the Road Traffic Acts*”, “*would also undermine and interfere with the function of the prosecution services in their duty to put before the court evidence in relation to an alleged criminal offence as they deem proper*” and “*would also undermine and interfere with the jurisdiction of the Judges of the criminal courts*”.

In my decision, in releasing the records, I observed that the MBRS had statutory functions under the Road Traffic Acts, but it was also under a statutory obligation to make records available upon request under the FOI Act, unless it met its burden of

proof under section 34(12)(b), of showing that an exemption was applicable, which is not overridden by any public interest test attaching to the exemption in question. I found that the MBRS did not show how any of the harms under sections 23(1)(a)(i), (ii) and (iv) could reasonably be expected to occur based on the contents of the records at issue. Moreover, based on my own examination of the records, I found nothing in the contents of the records that could reasonably be expected to impair any of the law enforcement and public safety measures protected under sections 23(1)(a)(i), (ii) and (iv).

Mr.W and the MBRS - case no. [080260](#)

The applicant sought general information concerning the intoxilyzer machine, used to measure the concentration of alcohol in the breath, including details of its manufacture, installation, programming, testing, maintenance repair and operation. In refusing to release any of the records, the MBRS pointed out that it is a matter for the courts to determine what information must be made available to the defence and prosecution in order to ensure the fairness of criminal proceedings. It argued that no records relating to its forensic investigative role, including records relating to the testing, maintenance etc. of the intoxilyzer should be made available outside of court proceedings (or otherwise as required under the Road Traffic Acts).

In my decision, I found that the MBRS and Lion Laboratories were justified in refusing access to the source code of the Lion Intoxilyzer 6000IRL on the basis that it was commercially sensitive as it was a trade secret and also that confidentiality provisions applied. With regard to the records at issue relating to the installation, testing, maintenance and repair of the intoxilyzer, procedures for testing of the intoxilyzer evidential breath testing systems, similar arguments to those advanced by the MBRS in case no. 090073, as outlined above, were relied upon to refuse the applicant access to the records in question. In this case, I similarly found that the MBRS had not met its burden of proof with respect to the particular records at issue and, therefore, that the claims for exemption under sections 23(1)(a)(i) to (iv) had not been justified. In addition, I found that no reasons had been advanced to support the assertion made by MBRS that disclosure of the records at issue would constitute contempt of court. Therefore, I directed that the records should be released.

[Note: Shortly after the making of these decisions, the then Minister for Transport introduced legislation which was enacted by the Oireachtas in July 2010 exempting the functions of the MBRS – as opposed to the general administration of the MBRS – from the [scope](#) of the FOI Act.]

Incorporeal meeting of Government

Sunday Times and the Department of Finance (the Department) – case no. [090028](#)

The applicant sought certain records relating to the decision announced on 30 September 2008 concerning the Government guarantee for Irish banks. The Department released many records administratively and a formal decision was required on just two records. These records related to two meetings held in the early hours of 29/30 September 2008 concerning the introduction of a bank guarantee. The issue to be decided was whether the records concerning these meetings should be withheld under section 19(1)(c) on the basis that they contained information for a member of Government for use by him primarily for the purpose of the transaction of business of the Government at a meeting of Government – in this case an incorporeal Government meeting. The Department advised my Office that it understood from the Government Secretariat that *“the procedures used for incorporeal meetings of the Government are used very sparingly and only in circumstances where a decision of the Government is urgently required and the circumstances preclude the convening of a normal meeting of the Government. Incorporeal meetings involve Ministers being briefed, usually by telephone about the matter to be decided upon”*.

In view of the fact that the relevant Government meeting did not involve the normal physical gathering of members of the Government, the standard records associated with a Government meeting, such as a Memorandum of Government etc., did not exist in this case.

The key question was whether the information in the two records was used primarily for the purpose of Government business. I considered that due to the unprecedented circumstances of this case and the extraordinarily tight timelines involved that the records did contain information for use primarily at the incorporeal meeting of Government that was held by telephone on the night in question. As section 19 of the FOI Act does not contain any public interest provision, I did not have any discretion to apply public interest tests in this case, but rather, once I decided that section 19(1)(c) applied, I was obliged to find that the records in question were exempt from release.

Remuneration of former Chief Executive Officer (CEO) of the National Treasury Management Agency (NTMA)

A public service body (“Body”) and former Chief Executive Officer (CEO), C/O a firm of solicitors (“the applicants”) and the Department of Finance (“the Department”) – case no. [090149](#)

The applicant sought access to records held by the Department of Finance concerning the remuneration of the former Chief Executive of the NTMA. It should be noted that the NTMA is not prescribed, under the First Schedule of the FOI Act, as a body which comes within the remit of the FOI Act. The Department, in its original decision, found that the information contained in the records, which were identified as being relevant to the request, constituted the personal information of the former CEO of the NTMA but that the records should be released in the public interest. This decision was appealed to my Office by the representatives of the former CEO under section 29 of the FOI Act.

I found that the information in question was the personal information of the former CEO, but I was satisfied that, on balance, it should be released in the public interest. With regard to section 29 of the FOI Act, I found that the representatives of the former CEO had failed to meet the burden of proof under section 34(12)(a) of the FOI Act necessary to show that the decision of the Department to grant access to the information at issue was not justified. Accordingly, the relevant records were released.

Chapter 4

THE number of primary teachers being granted early retirement due to ill health has fallen sharply since a private medical company was hired to do the assessments.

Society paid Fingleton €2.4m in 2008

THE FORMER chief executive of Irish Nationwide Michael Fingleton was paid a total of €2.4 million by the building society in 2008, according to a Department of Finance document released to Fine Gael.

Private medical firm linked to fall in disability pay-outs for teachers

Chapter 4: Statistics

Section I - Public Bodies - 2010

Table 1:	Overview of FOI requests dealt with by public bodies
Table 2:	FOI requests dealt with by public bodies and subsequently appealed
Table 3:	FOI requests received - by requester type
Table 4:	Overview of FOI requests dealt with by public bodies
Table 5:	Analysis of FOI requests dealt with by public service sector
Table 6:	FOI requests received by civil service departments/offices
Table 7:	FOI requests received by local authorities
Table 8:	FOI requests received by the HSE
Table 9:	FOI requests received by voluntary hospitals, mental health services and related agencies
Table 10:	FOI requests received by third-level education institutions
Table 11:	FOI requests received by other bodies
Table 12:	Fees charged

(Note: Figures for the above tables are supplied by the Civil Service Users Network, the HSE, the Local Authorities FOI Liaison Group, the Department of Health and Children, the National Federation of Voluntary Bodies and the Liaison Group for the Higher Education Sector, and collated by the Office of the Information Commissioner.)

Section II - Office of the Information Commissioner - 2010

Table 13:	Analysis of applications for review received
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Table 20:	Deemed refusals due to non-reply by public bodies

Section I - Public Bodies - 2010

Table 1: Overview of FOI requests dealt with by public bodies

Requests on hand - 01/01/2010	2,139
Requests received in 2010	
Personal	10,688
Non-personal	4,466
Mixed	95
Total	15,249
Total requests on hand during 2010	17,388
Requests dealt with in 2010	(14,923)
Requests on hand - 31/12/2010	2,465

Table 2: FOI requests dealt with by public bodies and subsequently appealed

	Number	Percentage
FOI requests dealt with by public bodies	14,923	100%
Internal reviews received by public bodies	595	4.0%
Applications accepted by the Commissioner	220	1.47%

Table 3: FOI requests received - by requester type

Requester Type	Number	Percentage
Journalists	2,156	14%
Business	950	6%
Oireachtas members	144	1%
Staff of public bodies	618	4%
Clients of public bodies	8,687	57%
Others	2,694	18%
Total	15,249	100%

Table 4: Overview of FOI requests dealt with by public bodies

Request Type	Number	Percentage
Requests granted	8,892	60%
Requests part-granted	2,877	19%
Requests refused	1,580	11%
Requests transferred to appropriate body	200	1%
Requests withdrawn or handled outside FOI	1,374	9%
Total	14,923	100%

Table 5: Analysis of FOI requests dealt with by public service sector

	%	%	%	%	%	%
	granted	part -granted	refused	transferred	withdrawn/ handled outside FOI	Total
Civil Service Departments	41	30	15	2	12	100
Local Authorities	57	25	13	0	5	100
HSE	71	14	8	1	6	100
Voluntary Hospitals, Mental Health Services and Related Agencies	76	5	7	1	11	100
Third-level Institutions	57	30	3	0	10	100
Other Bodies	51	30	7	0	12	100

Table 6: FOI requests received by civil service Departments/Offices

Civil Service Department/Office	Personal	Non -personal	Mixed	Total
Department of Social Protection	814	44	1	859
Department of Education and Skills	663	128	5	796
Department of Justice and Law Reform	469	129	0	598
Department of Finance	21	316	0	337
Office of the Revenue Commissioners	115	79	0	194
Department of Agriculture, Fisheries and Food	99	93	1	193
Department of Health and Children	26	150	0	176
Department of the Environment, Heritage and Local Government	9	126	0	135
Department of Transport	2	111	1	114
Department of the Taoiseach	3	107	0	110
Department of Enterprise, Trade and Innovation	14	90	0	104
Houses of the Oireachtas Service	0	96	0	96
Department of Foreign Affairs	7	79	1	87
Defence Forces	67	15	0	82
Department of Defence	10	52	0	62
Department of Communications, Energy and Natural Resources	4	51	0	55
Department of Tourism, Culture and Sport	1	51	0	52
Office of Public Works	2	48	0	50
Department of Community, Equality and Gaeltacht Affairs	0	40	0	40
Office of the Information Commissioner	7	8	2	17
Office of Director of Public Prosecutions	2	11	1	14
Office of the Attorney General	3	7	0	10
Public Appointments Service	7	1	2	10
Office of Chief State Solicitor	1	4	0	5
Valuation Office	0	5	0	5
Office of the Ombudsman	3	0	0	3

Central Statistics Office	0	3	0	3
Office of the Comptroller & Auditor General	0	2	0	2
Office of Appeal Commissioners for the Tax Acts	1	1	0	2
Office of the Director of Corporate Enforcement	0	1	0	1
Ordnance Survey Ireland	0	1	0	1
Office of the Registrar for Friendly Societies	0	0	0	0
Totals	2,350	1,849	14	4,213

Table 7: FOI requests received by local authorities*

Local Authority	Personal	Non-personal	Mixed	Total
Dublin City Council	110	96	4	210
Cork County Council	13	107	0	120
Mayo County Council	9	68	0	77
Clare County Council	12	52	5	69
Fingal County Council	9	56	0	65
Galway County Council	2	54	0	56
Cork City Council	24	29	0	53
Dún Laoghaire-Rathdown County Council	8	42	2	52
Meath County Council	9	40	0	49
Kerry County Council	4	32	12	48
South Dublin County Council	8	38	0	46
Kildare County Council	11	35	0	46
Wexford County Council	17	22	7	46
Galway City Council	10	31	0	41
Limerick City Council	30	11	0	41
Donegal County Council	2	36	0	38
Louth County Council	8	22	8	38
Laois County Council	20	18	0	38
Roscommon County Council	4	27	1	32

Longford County Council	5	27	0	32
Westmeath County Council	8	22	0	30
Wicklow County Council	3	26	0	29
Sligo County Council	7	21	0	28
Limerick County Council	0	24	2	26
Leitrim County Council	7	19	0	26
South Tipperary County Council	4	21	0	25
Offaly County Council	5	18	0	23
Kilkenny County Council	4	19	0	23
North Tipperary County Council	0	21	0	21
Cavan County Council	5	16	0	21
Carlow County Council	3	17	0	20
Waterford County Council	1	14	0	15
Waterford City Council	2	12	0	14
Monaghan County Council	0	12	0	12
Totals	364	1,105	41	1,510
Regional Authorities	0	8	0	8
Regional Assemblies	0	4	0	4

*County Council figures include any FOI requests received by Town and Borough Councils

Table 8: FOI requests received by the HSE

HSE Area*	Personal	Non-personal	Mixed	Total
HSE West	1,867	86	0	1,953
HSE South	1,874	52	0	1,926
HSE Dublin North East	680	33	0	713
HSE Dublin Mid-Leinster	552	19	2	573
HSE National Requests	4	235	0	239
Totals	4,977	425	2	5,404

*Figures represent the regional structure of the HSE

Table 9: FOI requests received by Voluntary Hospitals, Mental Health Services and Related Agencies

Hospital/Service/Agency	Personal	Non-personal	Mixed	Total
Mercy University Hospital, Cork	396	7	0	403
Mater Misericordiae Hospital	312	15	0	327
St James's Hospital	285	9	1	295
Royal Victoria Eye and Ear Hospital	225	0	0	225
St Vincent's University Hospital	164	14	0	178
Rotunda Hospital	153	22	2	177
Tallaght Hospital (Adelaide and Meath Hospital, Incorporating the National Children's Hospital)	131	15	0	146
Beaumont Hospital	121	19	0	140
South Infirmary - Victoria Hospital, Cork	117	4	0	121
Children's Hospital, Temple Street	96	9	0	105
Coombe Hospital	92	5	0	97
Our Lady's Hospital for Sick Children, Crumlin	83	10	0	93
St. John's Hospital, Limerick	90	1	0	91
National Maternity Hospital, Holles Street	81	8	0	89
Other Hospitals/Services/Agencies	276	66	5	347
Totals	2,622	204	8	2,834

Table 10: FOI requests received by third-level education institutions

Third-Level Education Body	Personal	Non-personal	Mixed	Total
Waterford Institute of Technology	1	68	1	70
University College, Dublin	23	27	0	50

University of Dublin (Trinity College)	14	20	0	34
University College Cork	10	18	1	29
University of Limerick	7	18	2	27
National University of Ireland, Galway	8	15	0	23
Dublin Institute of Technology	12	10	0	22
Dublin City University	5	11	0	16
Limerick Institute of Technology	4	8	0	12
Higher Education Authority	0	11	0	11
Other Bodies	15	86	3	104
Totals	99	292	7	398

Table 11: FOI requests received by other bodies

Public Body	Personal	Non-personal	Mixed	Total
Social Welfare Appeals Office	116	1	0	117
RTE	7	68	0	75
FÁS	14	50	1	65
National Roads Authority	0	38	0	38
Dublin Docklands Development Authority	0	36	0	36
The Office of the Chief Medical Officer	34	0	0	34
Health and Safety Authority	0	24	9	33
Enterprise Ireland	0	31	0	31
Courts Service	1	21	0	22
Teagasc	16	6	0	22
Probation Service	18	1	0	19
Pobal	0	19	0	19
IDA Ireland	0	18	0	18
Údarás na Gaeltachta	0	17	0	17
Legal Aid Board	14	3	0	17
Fáilte Ireland	0	16	0	16

Commission for Communications Regulation	11	5	0	16
Environmental Protection Agency	0	14	1	15
The National Council for Special Education	5	8	0	13
Arts Council	5	7	0	12
Irish Medicines Board	2	9	0	11
Blood Transfusion Service Board	5	5	0	10
Standards in Public Office Commission	0	9	0	9
The Broadcasting Authority of Ireland	0	9	0	9
An Bord Pleanála	1	8	0	9
Commission for Taxi Regulation	2	7	0	9
The Irish National Stud	0	9	0	9
The Railway Procurement Agency	0	8	0	8
Shannon Development	0	8	0	8
Irish Sports Council	0	5	3	8
The National Education Welfare Board	3	4	0	7
Commission for Energy Regulation	0	7	0	7
Bord na gCon	0	6	0	6
The National Gallery of Ireland	2	4	0	6
National Consumer Agency	1	5	0	6
The Irish Film Board	1	5	0	6
Sustainable Energy Ireland	0	6	0	6
The Northern Regional Fisheries Board	0	4	1	5
Other Bodies (130 bodies with less than 5 requests each)	18	78	8	104
Totals	276	579	23	878

Table 12: Fees charged

	Original Request €	Search & Retrieval €	Internal Review €	Refunds €	Net Fees €
Government Departments and State Bodies	24,040	12,400	4,895	1,846	39,489
Local Authorities	17,116	4,608	4,175	483	25,416
Health Service Executive	5,336	2,164	550	2,942	5,108
Voluntary Hospitals, Mental Health Services and Related Agencies	2,110	2,518	675	70	5,233
Third-level Institutions	4,325	929	325	353	5,226
Other Bodies	8,685	4,843	1,850	989	14,389
Totals	61,612	27,462	12,470	6,683	94,861

Section II - Office of the Information Commissioner - 2010

Table 13: Analysis of applications for review received

Applications for review on hand - 1/1/2010	16
Applications for review received in 2010	<u>301</u>
Total applications for review on hand in 2010	317
Discontinued	6
Invalid applications	56
Applications withdrawn	9
Applications rejected	1
Applications accepted for review in 2010	<u>220</u>
Total applications for review considered in 2010	(292)
Applications for review on hand - 31/12/2010	25

Table 14: Analysis of review cases

Reviews on hand 1/1/2010	200
Reviews accepted in 2010	<u>220</u>

Total reviews on hand in 2010	420
Reviews completed	(228)
Reviews carried forward to 2011	192

Table 15: Applications for review accepted in 2010

Health Service Executive		61
HSE South	20	
HSE West	13	
HSE Dublin Mid-Leinster	11	
HSE Dublin North East	11	
HSE National	6	
Department of Justice and Law Reform		18
Department of Agriculture, Fisheries & Food		14
Office of the Revenue Commissioners		10
Dublin City Council		7
Department of Finance		7
Department of Social Protection		6
Department of Education and Skills		5
Others (bodies with less than 5 applications each)		92
Total		220

Table 16: Outcome of completed reviews - 3 year comparison

	2010	%	2009	%	2008	%
Decision affirmed	66	29	75	32	82	31
Decision annulled	15	7	6	2	10	4
Decision varied	18	8	16	7	21	8
Discontinued	2	1	5	2	7	3
Invalid	3	1	0	0	0	0
Settlement reached	63	28	49	21	54	21
Withdrawn	61	26	84	36	85	33
Reviews completed	228	100	235	100	259	100

Table 17: Subject matter of review applications accepted - 3 year comparison

	2010	%	2009	%	2008	%
Refusal of access	197	89	201	83	195	85
Objections by third parties to release of information about them or supplied by them	8	4	17	7	12	5
Amendment of records under section 17	5	2	7	3	7	3
Statement of reasons under section 18	9	4	11	5	13	6
Decision to charge a fee	1	1	6	2	1	1
Applications accepted	220	100	242	100	228	100

Table 18: Applications accepted by type - 3 year comparison

	2010	%	2009	%	2008	%
Personal	45	20	63	26	71	31
Non-personal	136	62	123	51	127	56
Mixed	39	18	56	23	30	13
Total	220	100	242	100	228	100

Table 19: General enquiries

Year	Number
2010	622
2009	857
2008	1,100
2007	1,315
2006	1,551
2005	1,396
2004	1,306
2003	1,090
2002	1,047
2001	1,136
Total	11,420

Table 20: Deemed refusals due to non-reply by public bodies

Public Body	No original or internal review decision		
	2010	2009	2008
HSE Dublin North East	7	2	1
HSE South	6	4	3
HSE National	5	1	-
Department of Justice and Law Reform	4	3	3
HSE Dublin Mid-Leinster	2	7	2
HSE West	2	3	-
University College Cork	1	1	-
Department of Finance	1	1	-
Department of Agriculture, Fisheries and Food	1	-	2
Department of Education and Skills	1	-	-
Tallaght Hospital* (Adelaide and Meath Hospital, incorporating the National Children's Hospital)	1	-	-
Brothers of Charity Southern Services	1	-	-
Department of Tourism, Culture and Sport	1	-	-
Limerick County Council	1	-	-
Louth County Council	1	-	-
National Archives	1	-	-
Office of Tobacco Control	1	-	-
Rotunda Hospital	1	-	-
Teagasc	1	-	-
Total 2010	39		



Oifig an Choimisinéara um Faisnéise Comhshaoil
Office of the Commissioner for Environmental Information

**Part II - Commissioner for
Environmental Information**

Chapter I

Waste
energy
legislation
health
landscape
Regulations
Society
Environment

Chapter 1: Introduction

My role, which is additional to those roles I have as Ombudsman and Information Commissioner, is to decide on appeals by members of the public who are not satisfied with the outcome of their requests to public authorities for environmental information. My functions are set down in the Access to Information on the Environment Regulations 2007 (S.I. No. 133 of 2007).

The Directive and the Regulations

The regime of access to environmental information is based on Directive 2003/4/EC. The Directive has, as its key provision, the establishment of a right of access to environmental information held by public authorities. Implementation of the Directive in Ireland was brought about on 1st May 2007 when the Regulations, made by the then Minister for the Environment, Heritage and Local Government, came into effect.

What is environmental information?

The definition of “*environmental information*” in the Directive and in the Regulations is broad. It covers information “*in written, visual, aural, electronic or any other material form*”. It identifies six separate categories:

- the state of the elements of the environment (e.g. air, water, soil, land, landscape, biological diversity),
- factors affecting, or likely to affect, the elements of the environment (e.g. energy, noise, radiation, waste, other releases into the environment),
- measures designed to protect the elements of the environment (e.g. policies, legislation, plans, programmes, environmental agreements),
- reports on the implementation of environmental legislation,
- analyses and assumptions used within the framework of measures designed to protect the environment, and
- the state of human health and safety, the food chain, cultural sites and built

structures in as much as they may be affected by the elements of the environment.

Promoting access to information

The expectation in the scheme of the Directive and the Regulations is that access requests will generally be granted. There is also a requirement that public authorities should organise information on the environment which they hold “*with a view to its active and systematic dissemination to the public*”. The outcome of the independent, external review of a decision on a request by a public authority - which under the 2007 Regulations is carried out by my Office - is binding on the public authority.

Public authorities

Unlike the situation under the FOI Act, the Regulations do not identify the specific public authorities which are subject to the Access to Information on the Environment (AIE) regime. Rather, the Regulations provide a broad definition of what constitutes a public authority; they refer to:

- Government or other public administration bodies (including public advisory bodies) at national, regional or local level,
- any natural or legal person performing public administrative functions under national law and in relation to the environment, and
- any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person encompassed by either of the first two categories.

Some commercial State bodies not already subject to either the FOI Act or to the Ombudsman Act are potentially covered by these Regulations. Where there is a dispute as to whether a body is a public authority, the person seeking the information has a right of appeal to my Office.

Charges

Unlike access under FOI, there is no upfront fee required to make a request. Neither is there any charge for the internal review application. However, there is a fee for appeal to my Office. This is set at €150 with a reduced fee of €50 for medical card holders and their dependants and third parties affected by the disclosure of the environmental information concerned.

A public authority may charge a fee where it makes information available. However, any such fee must be “reasonable having regard to the Directive”. Where a public authority proposes to charge fees, it is obliged to make a list of fees chargeable available to the public. There is a right of appeal (internal and external) on the grounds that the fee charged is excessive.

Refusal grounds

The Regulations provide that a request may be refused in order to protect:

- the confidentiality of personal information,
- the interests of a person who has voluntarily given information,
- the environment to which the information relates,
- the confidentiality of the proceedings of public authorities,
- Cabinet discussions,
- international relations, national defence or public security,
- the course of justice, and
- commercial or industrial confidentiality and intellectual property rights.

There is also provision for a public authority to notify an applicant that it does not hold the information sought. All of the exemption grounds are subject to restrictions under Article 10 of the Regulations. For instance, requests relating to emissions into the environment cannot, in most cases, be refused. In all cases, a potential exemption is subject to a public interest test and grounds for refusal must be “interpreted on a restrictive basis”.

Where no decision is notified by the public authority, there is provision for a right of appeal based on a deemed refusal.

Guidance

The Department of the Environment, Heritage and Local Government (the Department) published a set of Guidance Notes, which includes the text of the Regulations and Directive. These are available on the Department’s website at www.environ.ie and on my Office’s website www.ocei.gov.ie. The guidance gives useful detail to which public authorities are obliged to have regard; it does not purport to be a legal interpretation of the Regulations.

Appeals received in 2010

During 2010, 23 appeals were received by my Office (18 in 2009). Twenty one appeals were closed during the year. Ten formal decisions were issued - summaries of these are set out in the chapter following. Two cases were deemed to have been withdrawn as settled once the records were released following my Office's intervention. Five cases were withdrawn and a further four appeals were deemed invalid on the grounds that the appeal was premature or an internal review had not been requested. Fifteen cases were on hand at the end of the year. My staff recorded seventeen general enquiries about the Regulations.

While half of the appeals arose from requests to local authorities and government departments, other public authorities whose decisions were appealed included CIE, Coillte, the Commission for Energy Regulation, EirGrid plc and University College Dublin. Among the issues still under consideration is the complex matter of whether the National Asset Management Agency (NAMA) and Anglo Irish Bank are public authorities within the meaning of the Regulations. Most of the appeals during the year arose from disputes as to whether any or further environmental information within the scope of a request was held, the format in which it was available or whether the body was a public authority for the purposes of the Regulations, as opposed to cases where my Office had to decide whether or not the exceptions provided for in the Regulations had been properly applied.

Appeal decisions are published in full on my Office's website at www.ocei.gov.ie.

Issues arising in 2010

Level of activity during 2010

As discussed in my Report for 2009, the level of activity in appeals and in applications under the Regulations has been low. I identified two main reasons for this - the level of the fee for making of an appeal to my Office (normally €150) is discouraging appellants and there is a lack of awareness generally regarding the rights of members of the public under the Regulations. While there has been a steady increase in the number of appeals received, the number for 2010 is still quite low, given that the Regulations have now been in place for over three years. My staff continue to be in touch with the Department of the Environment, Heritage and Local Government in relation to the operation of the Regulations and especially the matter of awareness raising amongst public authorities as well as with the public itself.

Of the 23 appeals received in 2010, 17 were from persons who had previously had contact with this Office and are known to have an interest in environmental matters. Three individuals accounted for 14 of the appeals.

Of the ten decisions issued in 2010, six of these related to appeals from one individual and the issues which arose in these appeals were similar.

Handling of requests by public authorities

Appeals dealt with more recently brought to light numerous instances of poor handling by public authorities of requests made under the Regulations and, where relevant, these are referenced in the formal decisions which I issued. It is a matter of some concern to me that, almost four years after the Regulations came into effect, the level of awareness among public authorities of the statutory requirements remains low. Issues identified include:

- failure to adhere to statutory deadlines for issuing of decisions and internal review decisions (CEI/10/002* – An Bord Pleanála, CEI/10/0008* – University College Dublin),
- failure to engage properly with applicants in clarifying requests where appropriate,
- failure to properly advise applicants of their rights of appeal,
- failure to properly identify information relevant to a request, either claiming that no relevant environmental information is held or that the information sought is not environmental information when this simply could not be the case (CEI/08/0006* – Kildare County Council)*, and
- failure to properly apply the exceptions to release provided for in the Regulations and failure to properly consider the public interest in the release of the information sought (CEI/08/0012* – Department of the Environment, Heritage and Local Government)

It is vitally important that public authorities have in place proper procedures for dealing with requests under the Access to Information on the Environment Regulations and that I, as Commissioner, can rely on the validity of statements made to me by public authorities in dealing with appeals. Decisions made by me are final and binding on the affected parties, unless appealed to the High Court within two months of the decision. It is vital that all public authorities cooperate with my Office diligently and fully.

Communication between applicants and public authorities

It seems to me that, in general, there is an onus on applicants and public authorities to cooperate where necessary to ensure that requests are dealt with properly in the first instance and thereby avoiding the need for appeals to my Office to clarify and rule on matters that could have been cleared up at a much earlier stage.

* Decisions published on website www.ocei.ie

Notice under Article 12(6) of the Regulations

This Article provides that as Commissioner, I may do certain things in dealing with an appeal. These include that I may:

- require a public authority to make environmental information available to me,
- examine and take copies of environmental information held by a public authority, and
- enter on any premises occupied by a public authority so as to obtain environmental information.

I have only found it necessary to invoke this provision on one occasion to date in case [CEI/08/0006](#) in which I issued my decision in 2010 (see chapter 2).

What constitutes a public authority?

While this issue has arisen previously and I have addressed it in earlier decisions, during 2010, I have been asked to adjudicate on whether NAMA and Anglo Irish Bank are public authorities for the purposes of the Regulations. This point raises significant issues of statutory interpretation and at the time of writing was still under active consideration.

My role as Commissioner

In a number of decisions, I found it necessary to emphasise that it is outside my remit as Commissioner to adjudicate on how public authorities carry out their functions generally. This means that my Office does not have the authority to investigate complaints against public authorities or to provide an alternative dispute resolution mechanism with respect to actions taken or not taken by public authorities; my role is confined to that prescribed in relation to appeals against decisions on requests for access to environmental information.

This issue has arisen in cases where much of the applicant's submissions concern criticisms of public authorities or where it is clear that the appeal to my Office is another element of a protracted engagement with a public authority.

High Court judgment

My decision in case [CEI/07/0005](#) - Mr Gary Fitzgerald and the Department of the Taoiseach - was appealed to the High Court in December 2008. My decision in this case, summarised in my 2008 Annual Report, directed the release of one record which was regarded as being a report of discussion at Cabinet on Ireland's greenhouse gas emissions. In arriving at my decision, I found that the request related to information on emissions into the environment and I did not find it possible to interpret the part of the Regulations covering that matter as being in conformity with the provisions and objectives of the Directive.

The appeal was heard in July 2009 and judgment was delivered by Mr Justice O'Neill on 4 June 2010. The High Court held that I had erred in law and upheld the Taoiseach's appeal.

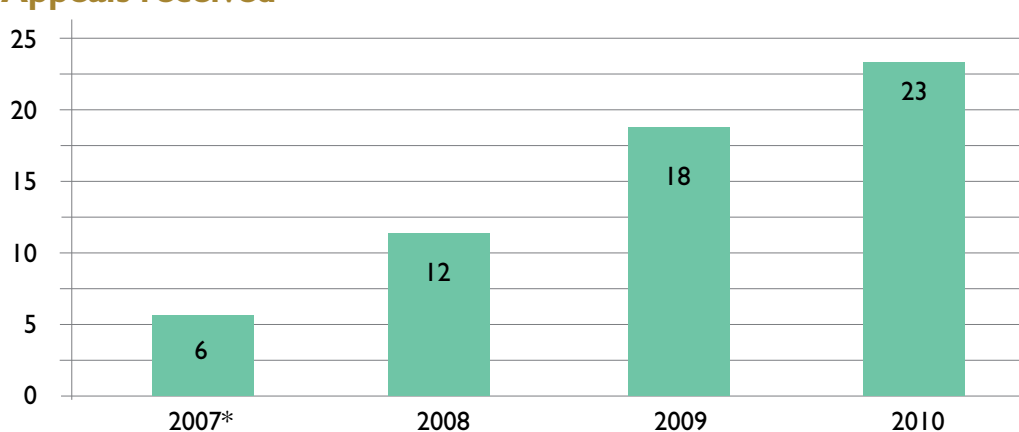
The Court found that the jurisdiction given to me was confined to the Regulations and that I had exceeded my jurisdiction and was not entitled to embark on a consideration of whether the Regulations correctly transposed the Directive, and that I had no jurisdiction to disapply the Regulations, in particular Article 10(2). The Court also found that a meeting of the Government was "*internal communications of public authorities*" and governed by Article 9(2)(d) of the Regulations and not "*proceedings of public authorities*" as governed by Article 8(a)(iv). The Court refused my application for a reference to the European Court of Justice under Article 234 of the Treaty of the European Union stating that the High Court is not a court of last resort in Ireland with competence to deal with the issues which have arisen in this case.

The Court noted that Article 12(9)(a) of the Regulations permits me to refer any question of law to the High Court for determination.

My Office appealed this judgment to the Supreme Court on 17 August 2010 and a date for hearing is awaited.

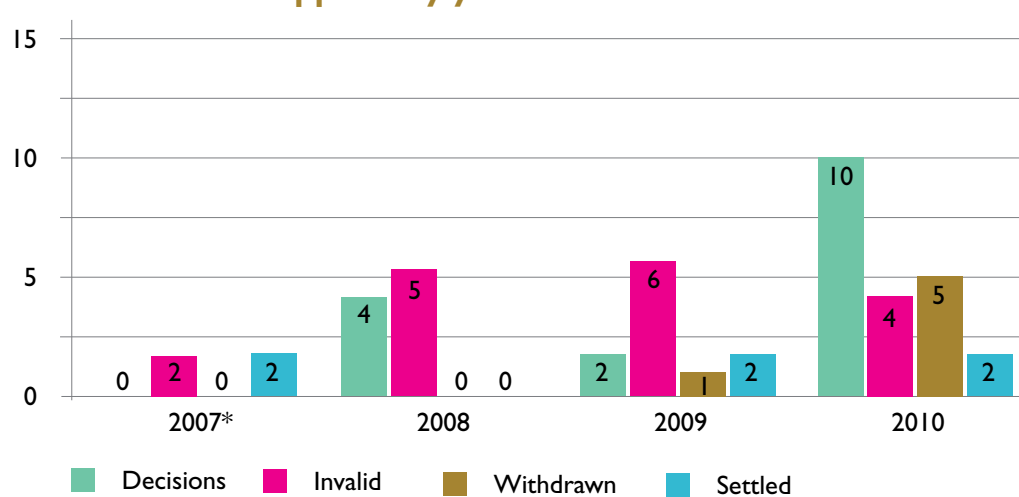
Statistics

Appeals received



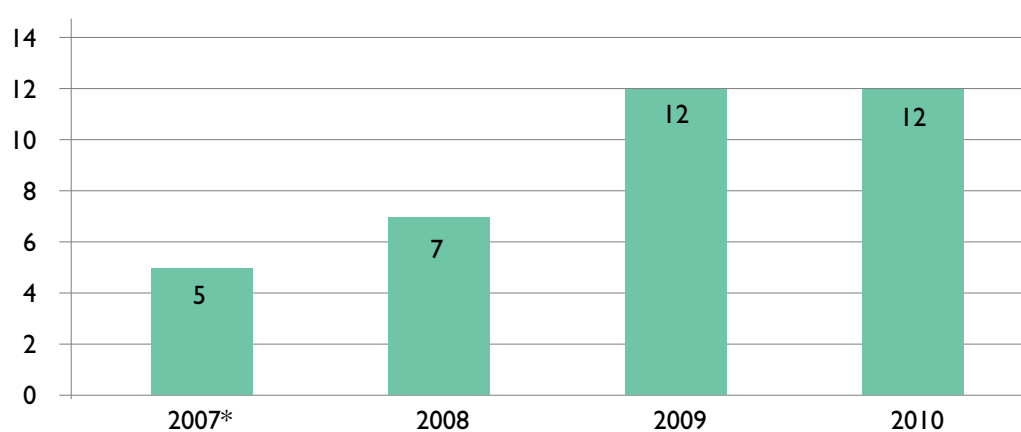
*The Office was established with effect from 1 May 2007.

Outcome of CEI appeals by year



*The Office was established with effect from 1 May 2007.

Appellants to CEI



*The Office was established with effect from 1 May 2007.

Chapter 2

Waste
energy
legislation
health
landscape
Regulations

diversity
Environment

Chapter 2: Decisions

What follows is a summary of the decisions made in 2010. The full text of these can be found on my website www.ocei.gov.ie

CEI/09/0005 - Peter Sweetman & Associates and An Bord Pleanála (the Board) - Decision of 24 February 2010.

Background

On 23 March 2009, the applicant sought “*digital copies of the transcripts of the hearing into Metro North... as soon as they are received by the Board*”. The Board refused the request on the basis of Article (9)(2)(c) of the Regulations as the request concerned material in the course of completion. At the time of the request, the hearing into Metro North had not begun – it was scheduled to commence on 1 April 2009.

Findings

I was not satisfied that the Directive or the Regulations gave me the jurisdiction to direct a public authority to release information in records which had not been created at the time of the request. I also looked at the provisions of Article 4(1) and 4(2) and was satisfied that Article 4(1) would apply to the information sought in that it is required to be made available under another statutory provision.

Appeal decision

I found that the Board was justified in refusing the request but I varied the basis for the decision.

CEI/09/0007 Ms. Una Caulfield, Director, Residents for Realignment Ltd. and An Bord Pleanála (the Board) – Decision of 24 February 2010

Background

This case is very similar to CEI/09/0005 above. In this case, the applicant's request of 5 March 2009 asked the Board "*to broadcast the Oral Hearing into Metro North on the web, and to make transcripts of the hearing available online at the end of each day.*" The Board refused the request on the basis of Article 9(2)(c) and that the Regulations did not apply to the request for webcasting.

Findings

As above, I was not satisfied that it was within my remit as Commissioner to direct the Board to arrange for webcasting of the hearing or to release transcripts which were not held by the Board at the time of the request. I noted in my decision that, subject to technical, operational and resource issues, there is nothing to prevent the Board from making the information sought available as soon as it becomes available or at some point earlier than it is required to be made available.

Appeal decision

I found that the Board was justified in its decision to refuse the request and varied the basis for the decision.

CEI/09/0006 Percy Podger and Associates on behalf of Hands Across the Corrib Ltd. and An Bord Pleanála (the Board) – Decision of 30 March 2010

Background

The applicant sought a transcript of the oral hearing into the Galway City outer bypass. The Board advised that "*a transcript of the hearing has not and will not be made*". The Board provided an audio recording on compact disc (CD) of the proceedings of the hearing. The applicant advised this Office in his appeal that he had been unable to access the material on the CDs provided and it was not in the format requested. My Office examined the CDs and agreed that the material on them was not reasonably accessible, as the program required was not easily available and no instructions were provided as to how to access the material on the CDs. The Board was asked to provide new copies of the audio recordings to this Office and to the applicant. This Office was then able to access the material on the CDs.

Findings

Article 7(3) of the Regulations provides for information to be sought in a particular form or manner unless it is already available to the public or access in another form or manner would be reasonable. While the Board said that no transcript was made, it did give an undertaking to provide one, referring to the audio recording. I did not consider it reasonable that the Board be required to prepare a transcript of a 21 day hearing where the hearing was held in public and an audio recording was available. Given the responsibilities placed on public authorities by the Directive and Regulations, I believe that there is also an onus on applicants to cooperate with the process. I believe it is unfortunate that the applicant did not attempt to resolve with the Board the difficulties he had with the original CDs and that he declined to confirm to my Office as requested if the fresh CDs provided were accessible.

Appeal decision

I found that the Board was not required in the circumstances of this case to provide a transcript which it did not hold. I found that in refusing the request, the Board should have given reasons why the information was being provided in another format and should have ensured easy accessibility of the information in the alternative format.

CEI/08/0006 Mr. John Colgan and Kildare County Council (the Council) – Decision of 15 March 2010

Background

The applicant requested information relating to the installation of a sewer across the Liffey (Salmon Leap) bridge at Leixlip. The Council refused the request saying it had no information as the installation of the sewer was a private agreement. The applicant appealed to my Office and the Council eventually identified some 53 files relating to the refurbishment of the bridge, though the material specifically relating to the sewer was limited.

In this appeal, I found it necessary to serve a notice under Article 12(6) of the Regulations on the Council as, despite repeated reminders, the Council did not respond adequately to my Office's request for information to be provided to enable it to proceed with the appeal. This was the first and only time to date that I have found it necessary to invoke this provision of the Regulations.

The Council offered the applicant the opportunity to examine the files identified and this took some considerable period of time. Ultimately, I determined that the scope of the request was in fact quite narrow and as my appeal could only deal with material

within the scope of the request, much of the material identified by the Council was not relevant to the appeal.

The issues to be determined included:

- whether the information sought was held by or for the Council,
- whether information existed which had not been identified or released by the Council,
- whether contractors engaged by the Council were public authorities for the purposes of the Regulations, and
- whether the exceptions claimed by the Council in relation to a small amount of information were justified.

Findings

I found that the Council was not justified in its original decision to refuse the request on the basis that it did not hold any environmental information within the scope of the request.

I found that Article 7(5) of the Regulations allowed the Council to refuse a request in relation to further records (other than those made available during the review) on the basis that the information was not held by or for it.

I found that, for the purposes of this particular request, the contractors engaged on the project were not “*public authorities*” within the meaning of the Directive and the Regulations.

In relation to a small amount of information, I found that the Council’s decision to refuse access under Articles 8(a)(iv) and 9(1)(c) on the grounds that disclosure would adversely affect confidentiality was not justified in the circumstances of this case and directed the release of that information.

Appeal decision

I found that the Council’s original decision was not justified. I directed the release of a small amount of information within the scope of the original request and found that Article 7(5) applied to any further information which the applicant contended should be held by the Council.

Article 7(5) decisions – Information not held

As each of the following six decisions relate to Article 7(5) of the Regulations and were from the same applicant, Mr. Pat Swords, I have presented them as a group. In each case, I found that the public authority was justified in refusing access to information sought on the basis of Article 7(5) of the Regulations which provides for a public authority to refuse access to information sought on the basis that the information is not held by or for that authority. In each case, it is not in dispute that the information to which the Article 7(5) finding applied, if held, would come within the definition of environmental information in the Regulations and Directive.

Five of the cases dealt only with this provision of the Regulations, as follows:

- CEI/09/0016 Mr Pat Swords and Department of Communications, Energy and Natural Resources – Decision of 28 Sept 2010 – aspects of renewable energy programme,
- CEI/10/0002 Mr Pat Swords and An Bord Pleanála – Decision of 16 July 2010 – the Corrib gas pipeline and related planning matters,
- CEI/10/0003 Mr Pat Swords and Industrial Development Authority (IDA) – Decision of 2 June 2010 – supporting information for comments made by the Chief Executive of the IDA about the wind energy programme,
- CEI/10/0004 Mr Pat Swords and EirGrid PLC – Decision of 14 June 2010 - the official response of Eirgrid to the Poyry report, and
- CEI/10/0008 Mr Pat Swords and University College Dublin (UCD) – Decision of 2 July 2010 – supporting information for comments by UCD academics about the Corrib gas pipeline and wind generation of electricity.

The final decision also dealt with the definition of environmental information.

CEI 09/0015 Mr Pat Swords and RTÉ – Decision of 10 May 2010

Background

On 26 October 2009, the applicant made a request for environmental information to RTÉ under the Regulations, seeking:

1. the criteria RTÉ uses with regard to assessment of environmental impact, environmental pollution, acceptable risk, unacceptable risk, unacceptable hazard,
2. the qualifications of RTÉ personnel who are reporting on matters relating to industrial development and implementation of the Environmental Acquis with regard to objectivity and accuracy,

3. the names and qualifications of all RTÉ researchers who in the last 3 years have been responsible for editing and producing programmes relating to the Corrib Gas development in North West Mayo, and
4. RTÉ's policy with regard to its obligation under the Aarhus Convention for dissemination of environmental information.

The applicant made criticisms of RTÉ's reporting of environmental matters, especially the coverage of the installation of the gas pipeline and terminal in Co Mayo.

The applicant's position was that RTÉ is a public body under Directive 2003/4/EC with obligations relating to dissemination of environmental information, such as detailed regulatory submissions prepared by the developer in the Corrib Gas case.

RTÉ's position was that it is a public authority for the purposes of the Regulations, but that the request did not cover environmental information and in any event it did not hold the information sought at 1 and 4.

Findings

I found that RTÉ did not hold the information sought in 1 and 4.

I concluded that the information sought in 2 and 3 does not fall within the definition of environmental information as set out in the Directive and Regulations.


Appeal decision

In this appeal, I also found that items 2 and 3 of the request did not come within the definition of environmental information.

Appendices

Appendix I

Certificates issued under section 20 and section 25



AN ROINN GNÓTHAÍ EACHTRACHA
DEPARTMENT OF FOREIGN AFFAIRS
BAILE ÁTHA CLIATH 2
DUBLIN 2

28 January 2011

Mr Pat Whelan
Director General
Office of the Information Commissioner
18 Lower Leeson Street
Dublin 2

Received
02 FEB 2011
Office of the
Information Commissioner

Ombudsman and
Information Commissioner
03 FEB 2011
Received

**Notification under Sections 20 and 25 of the
Freedom of Information Acts, 1997 and 2003**

Dear Mr Whelan,

I refer to your recent letter on the above subject.

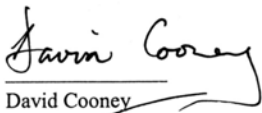
I confirm that, during 2010, I did not issue any certificates under Section 20 of the Freedom of Information Acts.

On July 21 2010 the Minister for Foreign Affairs issued three certificates under Section 25 of the Freedom of Information Acts, by reference to which the records requested are exempt under Section 23 and Section 24. The certificates related to three requests for the same set of records.

In addition on 18 November 2010 the Minister for Foreign Affairs renewed certificates issued under Section 25 in 2009.

Please find enclosed copies of the certificates issued in 2010.

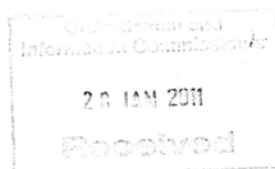
Yours sincerely,


David Cooney
Secretary General



OIFIG AN ARD-RÚNAÍ, AN ROINN DLÍ AGUS CIRT, COMHIONANNAIS AGUS ATHCHÓIRITHE DLÍ
OFFICE OF THE SECRETARY GENERAL, DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM

Mr Pat Whelan
Director General
Office of the Information Commissioner
18 Lwr Leeson Street
Dublin 2



**Notification under Section 20 and Section 25 of the
Freedom of Information Acts, 1997 and 2003**

Dear Mr Whelan, *Pat*

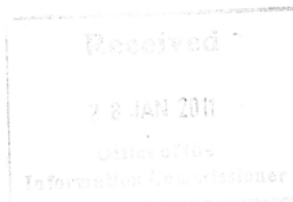
I refer to your letter dated 17 January 2011 in relation to certificates issued by Secretaries General and Ministers under Sections 20 and 25 of the Freedom of Information Acts, 1997 and 2003.

Please note that a certificate under Section 20 was issued by myself on 11 August, 2006 in relation to Risk Registers. This Department has a total of six Section 25 Ministerial Certificates. One new certificate was issued during 2010, and a further two were renewed by the Minister last year. Please find enclosed a copy of all three certificates as referred to above.

Yours sincerely,

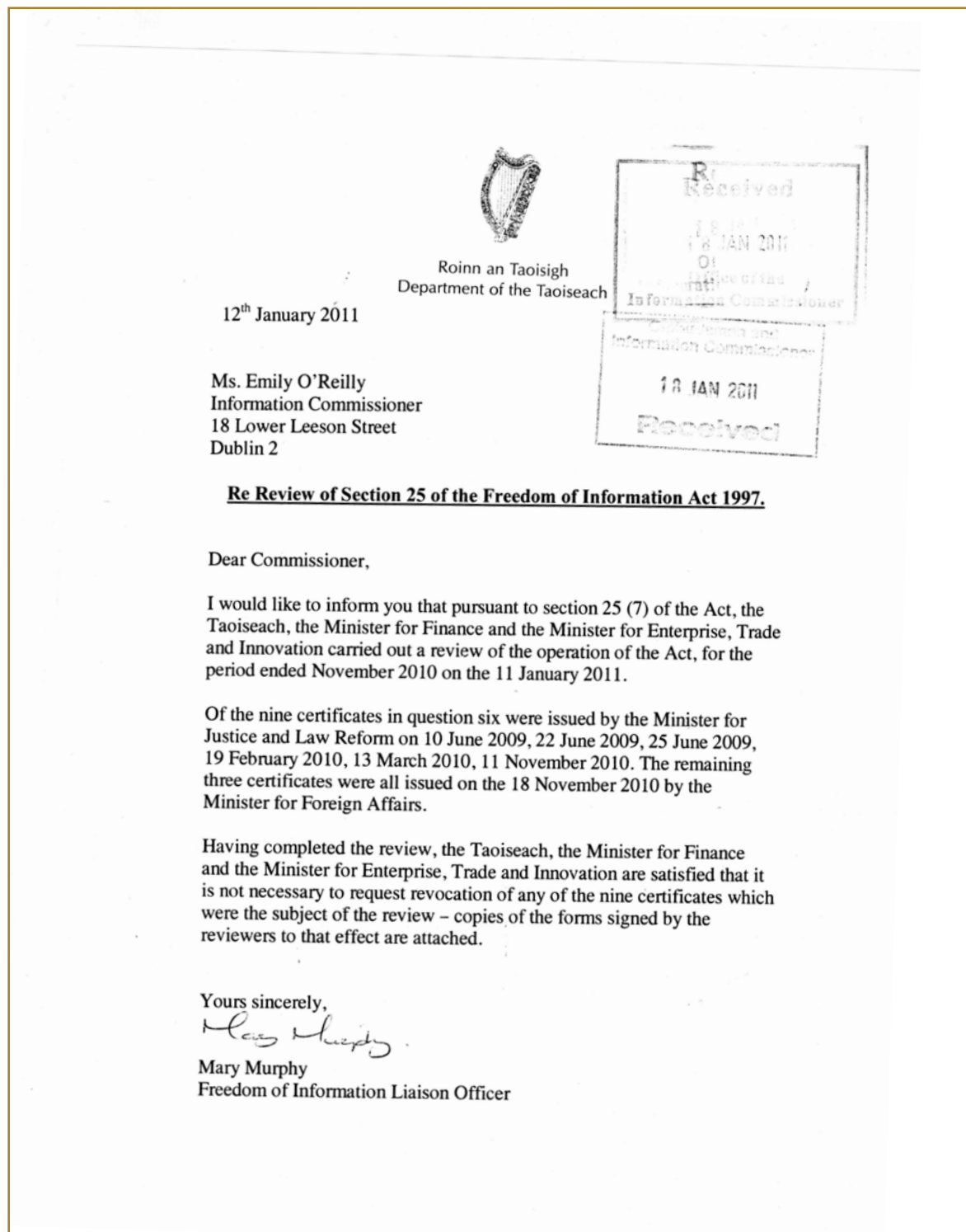
Sean
Sean Aylward
Secretary General

26 January 2011



Appendix II

Review under section 25(7) of Ministerial certificates issued



Appendix III

Annual Energy Efficiency Report 2010

In 2010, the Office of the Information Commissioner consumed 139.98 MWh of energy, consisting of:

Electricity 93.46 MWh

Fossil Fuel (Gas) 46.52 MWh

The procurement unit in the OPW ran a tender last year for energy providers, which we asked to be included in. On foot of the tender we have changed both our gas and electricity supplier in an attempt to reduce costs. The OPW will also monitor bills to ensure the tender achieves the required savings.

Vector Enterprises has been nominated by the Office of Public Works to implement an Energy Conservation Initiative across OPW managed facilities. The aim of the initiative is to reduce our energy, and all OPW managed buildings, usage by 20%.

The plans consist of four stages.

1. Planning: They will begin by auditing our energy systems (building energy audit) using a generic building plan. An after-hours audit which is used to determine energy consumption during non - working hours will also be undertaken.

2. Operation: Staff awareness of energy consumption and the methods of reducing it will be increased. A general presentation will be made to all staff regarding how we will progress energy reduction. It is intended that a poster campaign to highlight energy consumption, and monthly reports, will be delivered to all staff. It was also suggested an awards scheme could be introduced to encourage staff participation.

3. Communication: Vector's plans include regular meetings (every six weeks) with an appointed energy officer to go over issues that may arise, and to assess the ongoing monitoring of the building. This monitoring is provided by remote access. The electricity and gas feeds into this building have now been linked to a central computer which will record weekly and monthly energy consumption. Profiles of these recordings will be shown to an appointed energy officer in the relevant building.

4. Review: This is to ensure continual improvement - this will be recognised at this time as a saving of 20% in CO₂ emissions. This will of course reduce our energy bills.

Organisation Chart

Senior Investigators



Elizabeth Dolan



Seán Garvey

Investigators

Melanie Campbell
Brenda Lynch
Brian Murnane
Alison McCulloch
Anne Moran
Marie O'Brien
Ciarán O'Donohoe
Anne O'Reilly
Colin Stokes

Support Unit

Phyllis Flynn
Anne Harwood
Bernie Kelly
Robert Cullen-Jones
Iris Kilbey

