

# Annual Report 2013



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**Annual Report 2013** 

## **Contents**

Foreword	4
Part I – Information Commissioner	
Chapter 1: The Year In Review	6
Your right to information	7
Introduction	8
Appointment as new Commissioner	10
Freedom of Information Bill 2013	11
Notices issued to public bodies under Section 37	11
Key FOI statistics for the year	14
Office of the Information Commissioner (OIC) caseload	19
Statutory Certificates issued by Ministers and Secretaries General	27
Staffing matters	29
Chapter 2: Issues Arising	30
Office workload	31
Section 32 non-disclosure provisions	33
Guidance notes on access to records of deceased persons	34
Garda Reports	36
Appeals to the Courts	37
Chapter 3: Decisions	40
Formal decisions	41
Annulled decisions	42
Significant decisions	43
Department of Health	43
Bray Town Council	44
Department of Justice and Equality	46
Department of Finance	47
Department of the Taoiseach	48 49
Department of Jobs, Enterprise and Innovation  Health Service Executive	49 50
Health Service Executive	50
Chapter 4: Statistics	52
Section I – Public Bodies - 2013	55
Section II - Office of the Information Commissioner – 2013	63

Part II - Commissioner for Environmental Information

Chapter 1: The Year in Review		
Introduction	69	
Appeals and enquiries	70	
Article 12(6) of the Regulations	71	
Issues arising	71	
Resources	71	
Limits of remit	73	
Threshold jurisdictional questions	74	
The need for improved administrative practices	75	
High Court and Supreme Court judgments	76	
Statistics	76	
Deemed Refusals	78	
Chapter 2: Decisions	80	
Department of Environment, Community and Local Government	81	
Department of Arts, Heritage and the Gaeltacht	82	
Department of Environment, Community and Local Government	83	
Bord na Móna	84	
Dublin City Council	85	
Appendices	86	
Appendix I Certificates issued under section 20 and section 25 of the FOI Act	87	
Appendix II Review under section 25(7) of Ministerial Certificates issued	90	
Appendix III Annual Energy Efficiency Report 2013	91	



#### **Foreword**

I hereby submit my first Annual Report as Information Commissioner (the sixteenth 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.

Peter Tyndall Information Commissioner May 2014



Bernadette McNally Director General

# Chapter 1: The Year In Review



## Chapter 1: The year in review

#### Your right to information

The Freedom of Information Act, 1997 as amended by the FOI (Amendment) Act, 2003 (the FOI Act) gives people a right of access to records held by Government Departments, the Health Service Executive, Local Authorities and many other public bodies. 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 European Communities (Access to Information on the Environment) Regulations 2007 to 2011 provide an additional means of access for people who want environmental information. The Regulations cover more organisations than the FOI Act. The Department of the Environment, Community and Local Government has published a set of Guidance Notes which are available on the website of the Commissioner for Environmental Information at www.ocei.gov.ie.

These two functions are legally independent of one another, as are my roles of Information Commissioner and Commissioner for Environmental Information.

#### Introduction

I am pleased to present my first Annual Report as Information Commissioner, which covers the period from 1 January 2013 to 31 December 2013. In Part II of this Report, as in previous years, I report on my work as Commissioner for Environmental Information.

As I took up office only in December 2013, it must be acknowledged that this Report principally reflects the work undertaken by the Office under the able stewardship of my predecessor, Emily O'Reilly. The year was notable for Emily's tremendous achievement in being elected by the European Parliament to the role of European Ombudsman.

I would like to pay tribute to Emily and to acknowledge her significant contribution to the work of the Office. Prior to her initial appointment as Ombudsman and Information Commissioner in June 2003, Emily was an accomplished journalist and author whose roles included many years as a political correspondent with prominent print and broadcasting media. As Information Commissioner, she was also appointed Ireland's first Commissioner for Environmental Information in 2007. Later, Emily oversaw the merger of the Commission for Public Service Appointments with her Office.

Like her predecessor, the late Kevin Murphy, Emily was called upon to decide upon the release of records in thousands of individual cases over the years. Her decisions have provided guidance on matters which are frequently complex such as the law of confidence, privacy rights and issues relating to state security. In particular she made many important decisions on the release of records in the public interest.

In one of her earlier decisions, in 2004, Emily directed the release of nursing home inspection reports in the public interest. Such reports are now published as a matter of course. In 2011, she directed the release of the names of judges where representations had been made to the Minister for Justice and Equality by political representatives on their behalf as lawyers seeking judicial appointment.

Public bodies have often changed working practices following Emily's decisions. Many public bodies now publish, as a matter of course, information which would previously have been unavailable, or would have required an FOI request to acquire it. It is clear to me that Emily played no small role in effecting such significant changes in attitudes to freedom of information in Ireland.

Emily's strong reputation at home and abroad was reflected in her appointment as European Ombudsman last year. Just as in her roles as Information Commissioner and Ombudsman in Ireland, I know that Emily will bring to her new role those qualities of professionalism, thoroughness and tenacity which stood her well in the preceding years. I wish Emily every success in her new position as European Ombudsman.

I intend to build on her legacy and that of her predecessor and I welcome, in particular, the significant new areas of work to be undertaken by my Office arising from the proposed amendment of the FOI Act and its extension to a range of additional public bodies. While the expected additional demand is set to increase the pressure on the already stretched resources available to my Office, I look forward to the challenge of maximising the use of all available resources to meet that expected additional demand and to address the unacceptable delays which, unfortunately, face many who currently use the services of the Office. On this point, I welcome the recent decision of the Department of Public Expenditure and Reform to allocate additional staff resources to my Office in advance of the passing of the FOI Bill.

While I will discuss the FOI Amendment Bill in more detail later in this Chapter, I believe it appropriate to draw attention here to the important role which the Central Policy Unit (CPU) of the Department of Public Expenditure and Reform has to play, in my view, in promoting FOI generally and in supporting those new bodies due to come within remit. I understand that the CPU has faced its own significant challenges in recent years in terms of reduced resources. However, I believe it to be a key player in ensuring the successful introduction of the new Bill and in helping all public bodies to fully embrace the principles of promoting greater openness, transparency and accountability which the FOI legislation is intended to achieve.

I welcome the Government commitment to the development of a code of practice for FOI aimed at ensuring that the obligations of public bodies under FOI are discharged to a high standard. I am aware that CPU has already undertaken significant steps in the development of the code and I look forward to its publication. However, the publication of the code of itself is not the end of the matter. It must be complemented by an adequately resourced, effective and readily available support service, particularly for those bodies coming within remit for the first time. While my Office fully intends to work with those bodies in preparation for meeting their new FOI obligations, I believe CPU has a critical role to play in offering ongoing support in the implementation of the new code of practice.

Finally, I look forward to working with all bodies subject to FOI, both current and those to whom a duty will be extended, to improve access to information for the people of Ireland. Minister Howlin has set out his agenda for Open Government and signalled Ireland's commitment to it by joining the Open Government Partnership. I want to ensure that my Office plays its part fully in the further development of openness and transparency in our public life.

#### Peter Tyndall

Information Commissioner &
Commissioner for Environmental Information

#### Appointment as new Commissioner

# Appointment of new Information Commissioner and Commissioner for Environmental Information

It was a great honour to be appointed by President Michael D. Higgins at a ceremony at Áras an Uachtaráin on 2 December 2013. The Minister for Public Expenditure and Reform, Brendan Howlin TD, also attended and welcomed my formal appointment as Ombudsman, Information Commissioner and Commissioner for Environmental Information.



Information Commissioner and Commissioner for Environmental Information, Peter Tyndall pictured at his appointment at Áras an Uachtaráin with President Michael D. Higgins and Minister for Public Expenditure and Reform, Brendan Howlin.

#### Freedom of Information Bill 2013

In her Annual Report for 2010, Emily O'Reilly welcomed the commitments relating to freedom of information contained in the Programme for Government, Government for National Recovery 2011-2016, which stated:

"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."

Although the length of time taken to pass the Bill has been disappointing, I am confident that the Bill will be enacted this year and that the additional public bodies will be, finally, subject to the FOI regime.

I would also like to take this opportunity to acknowledge the positive way in which the Government Reform Unit has engaged with my Office on the Bill and on the development of a code of practice for FOI. My Office took the opportunity to make extensive recommendations for change arising from its practical experience of the operation of the FOI legislation, the majority of which have been incorporated into the FOI Bill. My Office also contributed extensively to the review of the operation of the FOI Act which was undertaken by the Government Reform Unit. It was represented on both the internal and external review groups established to help undertake the review, with a view to developing the code of practice.

The purpose of the code of practice will be to ensure that the obligations of public bodies under FOI are discharged to a high standard. As I stated in my introduction, the code must, in my view, be complemented by an adequately resourced, effective and readily available support service, particularly for those bodies coming within remit for the first time, and I believe the Department's Central Policy Unit (CPU) has a critical role to play in offering ongoing support in the implementation of the new code. Indeed, I understand that the code itself will recognise the importance of the leadership role which CPU must play in supporting the achievement of the objectives of FOI. I am hopeful that the CPU will be adequately resourced to allow it to fulfil that critical role.

#### Notices issued to public bodies under Section 37

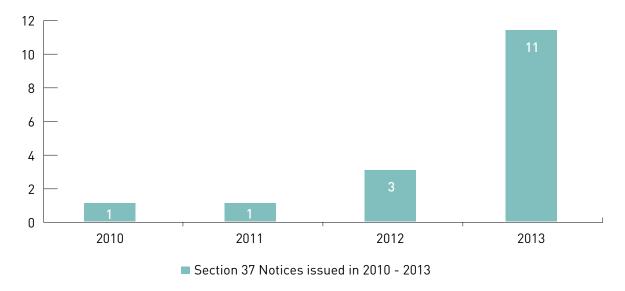
In previous Annual Reports, matters concerning statutory notices were considered at a later stage in the Report. However, this year, I have decided to give more prominence to an issue related to compliance.

Under the headings 'Compliance of public bodies' and 'Statutory notices', last year's Annual Report highlighted a number of instances where certain public bodies questioned their

obligation under section 37 of the FOI Act. Section 37 requires a public body to furnish my Office with any information which is deemed relevant for the purposes of a review.

My Office may contact the relevant public body at any stage in a review and may request copies of records. If a body fails to provide the records by a given date, my Office generally initiates further contacts in an attempt to obtain the records sought. There have been occasions in the past when public bodies failed to provide records despite several requests. In some extreme cases months have passed by without any positive response from the public body concerned. The non-response by a public body inevitably gives rise to my Office issuing a letter, addressed to the head of the body concerned. This 'Section 37 notice' informs the head of the body that my Office has sought access to records and provides a chronology of letters and communications issued by my Office. The section 37 notice requires the Head to furnish my Office with a copy of the information requested without further delay.

In previous years, my predecessors have recorded no more than three section 37 notices issued to public bodies in any one year. However, I was somewhat surprised to note that in 2013, my Office issued eleven section 37 notices, albeit to just five public bodies. Even more surprising is that three of those bodies were each issued with two section 37 notices in connection with a single review. It is disappointing to record that two of those public bodies were also mentioned in the Annual Report 2012.



The bodies in receipt of section 37 notices included the National Maternity Hospital (five notices), the Irish Greyhound Board (two), Cork County Council (two), the Department of Finance (one), and University College Dublin (one).

The five section 37 notices issued to the National Maternity Hospital concerned four reviews. For three of those reviews it took between three and four months for the records to be submitted to my Office. In one review, my Office issued two separate notices to the Hospital

in an effort to obtain records and subsequently, a response to certain questions related to the review. In the review in question, it took almost five months for my Office to receive all of the information required to allow the review to proceed.

Two section 37 notices issued to the Irish Greyhound Board in connection with a single review. For this review, it took six months before my Office received the required information. In the case of Cork County Council, two separate notices issued to the Council for two sets of records associated with a single review. It took a total of six months for the records to arrive in my Office, three months for each set. One section 37 notice issued to the Department of Finance and it took four months from the time the information was requested by my Office to the time it was received.

In each of these cases, I am mindful of the effect that delays have on the person who applies to my Office for a review. Consequently, the final example concerning a section 37 notice is, I believe, the most frustrating. In April 2013, my Office requested from University College Dublin (UCD) copies of the records typically associated with an FOI request made by a person to a public body. These "decision making records" are essential in helping my Office determine the validity of a request for review. Such records are usually received in my Office within five working days of the request being made to the body. My Office ultimately issued a section 37 notice to UCD and in late June 2013, two months after the application for review had been made, a reply was eventually received. The irony is that the reply by UCD confirmed that the review could not be accepted by my Office, as the requester had not actually made a valid FOI request to the College in the first instance. Such delays are, in my view, inexcusable.

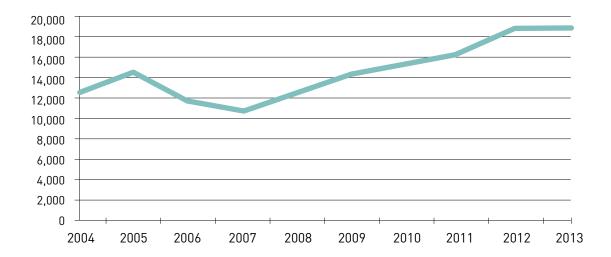
I regard the failure of public bodies to respond in a timely fashion to requests for information by my Office as an unacceptable delay to the review process. The FOI Act provides that I shall, in so far as practicable, make a decision within four months of receipt of an application for review. The length of time taken to deal with each application depends on a number of factors such as the number of cases on hand, the complexity of the issues involved, and the volume of records at issue. It is unacceptable that delays by public bodies in responding to what are generally straightforward requests can often add considerably to case processing times.

However, I am pleased to be in a position to conclude this point on a more positive note. During 2013, staff of my Office met with officials from the Department of Finance, the Irish Greyhound Board and the National Maternity Hospital to discuss the delays which arose in the cases in question and other general issues concerning the processing of FOI requests by those bodies. Indeed, the Department of Finance had taken the initiative of requesting such a meeting with my Office. In all three cases, the bodies concerned outlined proactive measures which had been taken to ensure that potential delays will be highlighted and addressed at the earliest opportunity. I strongly welcome the efforts taken by the bodies to resolve the matter of delays.

#### Key FOI statistics for the year

#### Number of FOI requests to public bodies 2004-2013

Certain FOI statistics traditionally collated by a Government Department were not available for inclusion in the 2012 Annual Report of the Information Commissioner. However, the statistics were eventually completed and forwarded to my Office for publication in late 2013. Key FOI statistics for 2012 are available on the OIC website at www.oic.gov.ie. I wish to acknowledge the efforts made by the Department of Public Expenditure and Reform to ensure that statistics for 2013 have been made available to my Office.



The number of requests made to public bodies in 2013 was 18,985 and is similar to the total for 2012 (18,953).

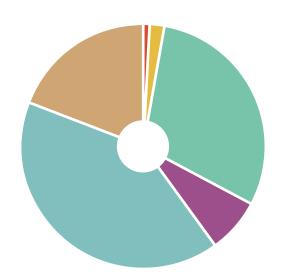
The number of requests on hand by public bodies at end-December 2013 was 3,232. This represents a near 30% increase in the number of cases on hand in 2013, over the 2012 total of 2,493. I am concerned that this increase may reflect a downturn in performance in responding to requests caused by insufficient priority being given to them. I will continue to monitor performance carefully.

#### Sectoral breakdown of FOI requests to public bodies

The charts in this section of my Report can be viewed in association with the tables of statistics in Chapter 4 and tables associated with previous Annual Reports, available on the website at www.oic.ie.



- Third Level Institutions 2%
- Govt. Depts. and State Bodies 30%
- Local Authorities 7%
- Health Service Executive 41%
- Voluntary Hospitals, Mental Health Services and Related Agencies 19%



As in other years, the Health Service Executive was the recipient of the largest number of FOI requests. FOI requests made to the HSE have increased at a rate of roughly 2% per year over the last four years. In 2010, the HSE received 35% of the total number of requests made to all public bodies. In 2013, the figure, as can be seen above, was 41%.

It is worth mentioning the number of FOI requests made to the Department of Social Protection over the same period of time. In 2010, the number of FOI requests made to the Department accounted for 5.6% of all FOI requests made to public bodies in the year. For 2013, this figure has increased to 11.2%. It is also notable that the number of FOI requests made to the Department has increased by 150% (from 859 to 2,148) over that four year period.

This increase is reflected somewhat in the number of applications for review concerning the Department of Social Protection which were accepted by my Office between 2010 and 2013. The figures of my Office show that in 2010, reviews accepted by my Office concerning the Department accounted for 2.7% of all reviews accepted in that year; whereas in 2013 the figure increased to 4.2%.

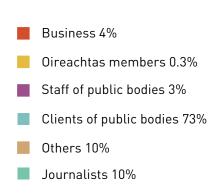
While I have no specific evidence supporting the reasons for such an increase, I believe it reasonable to conclude that the increase is directly related to the increase in the number of persons in need of social welfare services as a result of the severe economic climate.

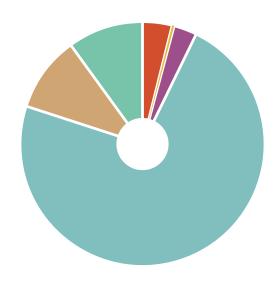
#### Top ten bodies who received most requests during 2013

Placing	Public Body	2013	2012	2011
1	HSE South	3,085	3,036	2,204
2	HSE West	2,522	2,429	2,153
3	Department of Social Protection	2,148	1,686	1,170
4	HSE Dublin North East	941	912	1,106
5	HSE Dublin Mid-Leinster	919	830	871
6	Department of Justice and Equality	550	594	690
7	St James's Hospital	488	469	597
8	Department of Education and Skills	328	417	506
9	Mater Misericordiae Hospital	308	339	404
10	Rotunda Hospital	279	298	258

As seen in the table above, the HSE and hospitals account for seven of the top ten public bodies in receipt of FOI requests in 2013.

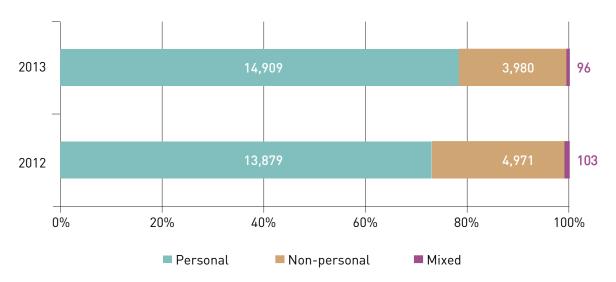
#### Type of requester to public bodies





The proportion of requests from different types of requester is similar to other years. However, in 2010, requests from journalists accounted for 14% of all requests made, while the figure for 2013 has fallen to 10%. The 2013 percentage figure is identical to that for 2011.

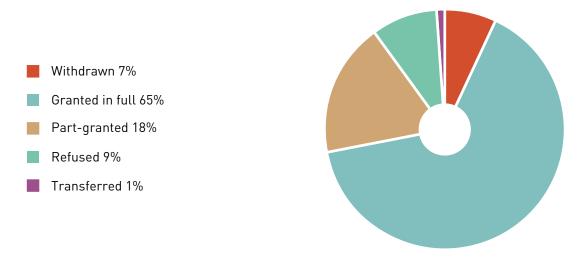
#### Type of request to public bodies



I note a reduction in the percentage rate of non-personal FOI requests made to public bodies. In 2012, the rate was 26.2%, whereas in 2013 the rate was 21%; the lowest in four years. The rates for 2010 and 2011 were 29% and 23.3%, respectively.

Again, while I am not in a position to comment authoritatively on any reason for the reduction, it is possible, in these straitened times, that the fees attaching to requests and reviews relating to records of a non-personal nature have a part to play. In this regard, I am pleased to note that a significant reduction in the levels of fees applying to requests for internal review and for review by my Office is proposed in the Freedom of Information Bill.

#### Release rates by public bodies



A detailed breakdown of release rates in each sector is contained in table 5, chapter 4. Release rates have remained fairly static over the past four years but I note that the percentage of requests where access to records was granted in full has increased from 60% in 2010 to 65% in 2013.

Civil Service Departments and Local Authority sectors are below average in granting access to records at 48% and 52% respectively but are above average in part-granting access. However, the 48% release rate for Civil Service Departments represents an increase on the 2012 rate of 42%. The Local Authority release rate remains unchanged.

The HSE, Voluntary Hospitals, Mental Health Services regulators and related Agencies are above average in granting access to records and below the average for refusing access. This may be due in part to the nature of the requests received, insofar as most requests made to the healthcare sectors are for access to records which are of a personal nature. Tables 8 and 9, chapter 4 (representing the healthcare sectors) show that requests for access to records of a personal nature represent 94% of the total received in 2013.

#### Office of the Information Commissioner (OIC) caseload

A requester who is not satisfied with a decision of the public body on an FOI request may apply to my Office for a review of that decision. The decision which follows my review is legally binding and can be appealed to the High Court only on a point of law.

#### Applications to OIC 2011-2013

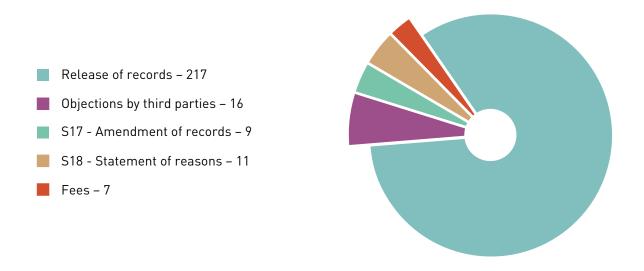


The number of applications made to my Office in 2013 was similar to 2012. However, the number of applications accepted for review during the year has increased by 10%.

It is worth noting that the total number of applications accepted for review by my Office in a year has increased by almost 50% since 2011. This has created an additional burden on the Office's resources.

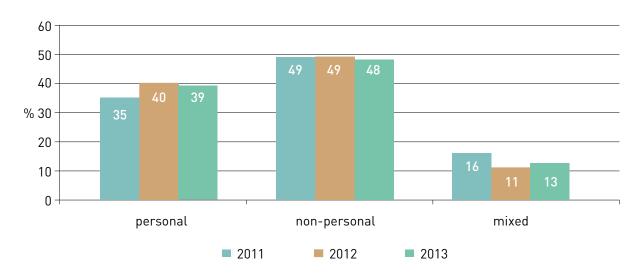
The difference between the number of applications received and accepted by my Office is mainly due to a number of those applications being invalid, or withdrawn by the applicant at an early stage.

#### Subject matter of review applications accepted by OIC

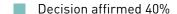


As in previous years, the vast majority of applications accepted by my Office in 2013 concerned the refusal by public bodies to grant access to some, or all, of the records requested.

#### Applications accepted by OIC by type 2011 – 2013

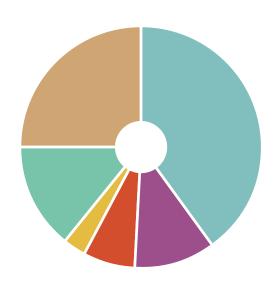


#### Outcome of reviews by OIC in 2013





- Decision varied 7%
- Discontinued 3%
- Settlement reached 14%
- Withdrawn 25%



In 2013, my Office reviewed decisions of public bodies in 258 cases. This represents an increase of 29% over the 2012 figure of 200. At the end of December 2013, my Office had 205 cases on hand, an increase of just three cases on the number on hand at the end of 2012.

#### Settlements and withdrawals

The combined percentage of cases that were settled, withdrawn, or discontinued during the year is 42%. The figure for 2012 was 48%.

Applications that are settled, withdrawn or discontinued may follow discussions between the applicant, the public body and staff from my Office. Withdrawals often follow as a result of the intervention of my Office and a more detailed explanation of a decision being given to the applicant by the public body concerned. I would add that while the focus for the year is mainly on decisions made by my Office, a considerable amount of work is involved in achieving outcomes such as withdrawals or settlements: Staff of my Office will, in many cases, liaise with the public body and/or the requester, sometimes over a considerable period of time, in an effort to effect a mutually acceptable outcome.

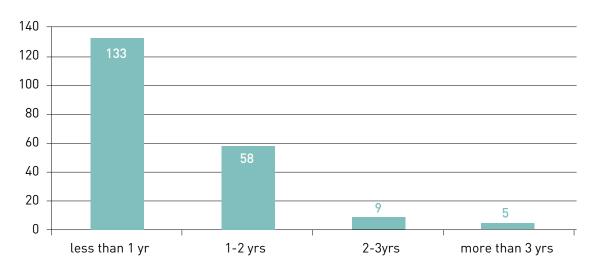
Settlements usually arise as a result of the public body releasing additional information during the course of a review.

#### Age profile of cases closed by OIC



This table provides information on how long it took for a review to be completed by my Office. The percentage rate of case closure within the four-month period provided for in the FOI Act has increased to 26% in 2013 from 19% in 2012. I comment more on this in Chapter 2 of my Report.

#### Age profile of cases on hand in OIC at end 2013

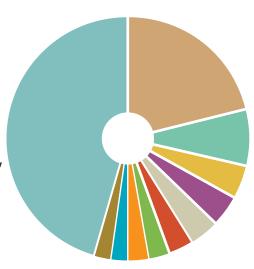


At the end of 2013, there were 72 cases on hand which are more than 1 year old. However, following a review of my Office's organisational structures and processes, a specific initiative has recently been introduced, aimed at prioritising the completion of older cases. Consequently, by the end of 2014, I anticipate a substantial reduction in the number of active cases that are more than one year old.

#### Breakdown by public body of applications for review accepted by OIC



- Department of Justice and Equality 20
- Department of Social Protection 11
- Office of the Revenue Commissioners 11
- Cork County Council 10
- Department of Education and Skills 9
- Department of Agriculture, Food and the Marine 7
- University College Dublin 7
- Department of Defence 6
- Department of Finance 6
- Other Bodies (5 requests or less) 118

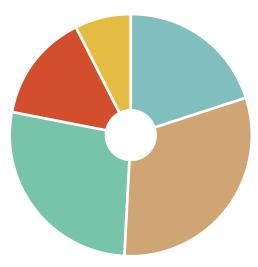


The above diagram shows a breakdown by public body of cases which were accepted for review by my Office in 2013. Previous Reports noted a decrease in HSE cases accepted. That trend continued in 2013 with the HSE cases representing 21% of all cases accepted for review, compared to 29% in 2012 and 34% in 2011. 'Other bodies' account for 45% of all applications for review accepted in 2013 and is similar to previous years.

#### Breakdown of HSE cases accepted by OIC



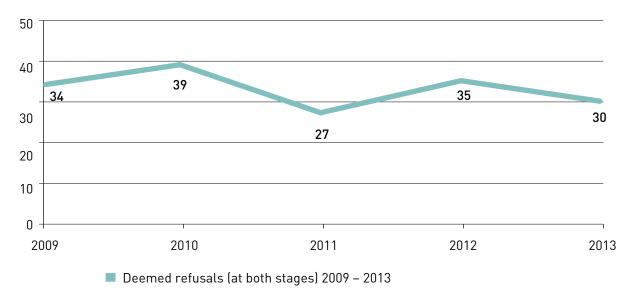
- HSE West 17
- HSE South 15
- HSE Dublin Mid-Leinster 8
- HSE Dublin North East 4



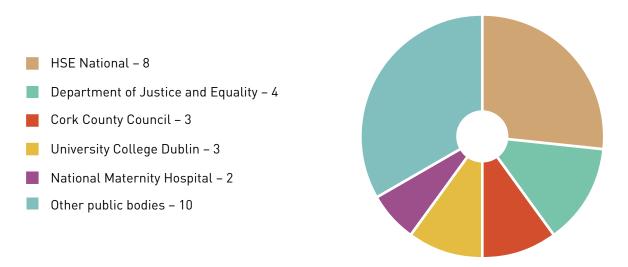
#### Deemed refusals

The FOI Act imposes statutory time limits on public bodies for the various stages of an FOI request. Specifically, a decision on an original request should issue within four weeks and, in the event of an application for internal review, a decision following receipt of that application should issue within three weeks. A breach of these time limits, whether by means of no decision at the original request stage, or a late decision at internal review stage, results in the requester having the right to regard a decision as a 'deemed refusal' of access. Following a deemed refusal at internal review stage, a requester is entitled to apply for a review to my Office.

#### Deemed refusals (at both stages) 2009 - 2013



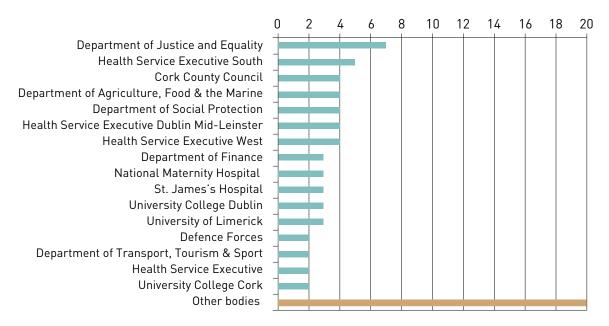
#### Deemed refusals by body 2013



The above graph and chart show the number of deemed refusals which occurred at both stages of applicants' FOI requests.

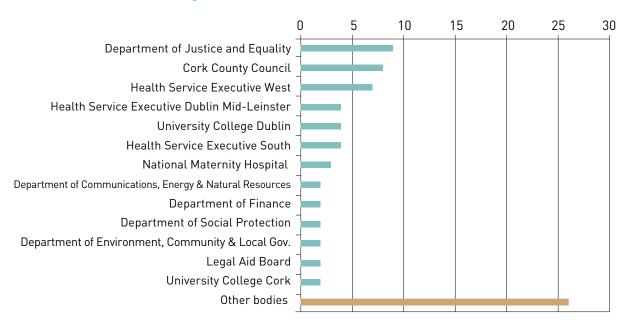
The Annual Report for 2012 referred to figures about deemed refusals by public bodies at the first (original request) and second (internal review) stages of the FOI request. For this year's report, I believe it would be useful to provide a visual reference to the refusals by public bodies at those stages.

#### Deemed refusals at 1st stage



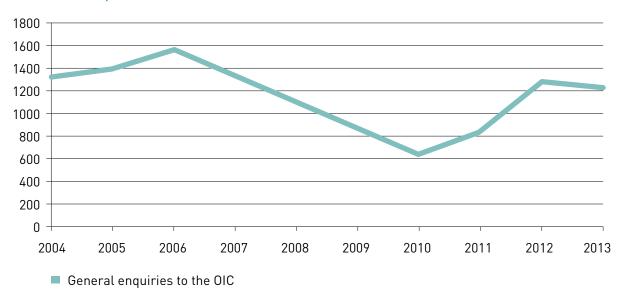
Of the 260 applications for review accepted by my Office in 2013, 29% were deemed refused by the public body at the first stage of the applicant's FOI request. Where a deemed refusal occurs at this first stage, the requester is entitled to write to the public body concerned and request an internal review.

#### Deemed refusals at 2nd stage



The figure for deemed refusals at the second stage is almost 30%. It is worth noting that in a situation where a request for access to records of a non-personal nature is deemed refused at the second 'internal review' stage, the requester has a right to contact my Office for assistance. In addition, in this situation, the requester is not obliged to pay a fee to my Office.

#### General enquiries to OIC



The number of general enquiries made to my Office in 2013 was similar to 2012.

#### Fees received by OIC

During 2013, my Office received 113 applications for review where a fee was paid. The total amount received in application fees by my Office in 2013 was  $\leq$ 13,975. A total of  $\leq$ 7,400 was refunded to applicants for the following reasons:

- €5,100, because the applications in question were either rejected as invalid, withdrawn or settled:
- €2,050, because the public body had not issued an internal review decision within the time limit and was therefore of 'deemed refusal' status (section 41 of the FOI Act refers);
- €250 was refunded to applicants because of situations either where decisions were annulled, or a fee was not due.

# Statutory Certificates issued by Ministers and 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 and 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 2013.

#### 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 2013.

A certificate under section 20 was issued by the Secretary General of the Department of Defence in March 2009 and was renewed in March 2011. I am informed by the Secretary General that the certificate is currently under review by the Department. 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 notified of the following certificates issued under Section 25 of the Freedom of Information Acts, 1997 and 2003.

Six section 25 certificates were in place concerning the Department of Justice and Equality at 31 December 2013, three of which were renewed by the Minister in 2013. A copy of the notification from the Secretary General is attached at Appendix I to this Report. Three certificates will fall for review under section 25(7) of the FOI Act in 2015.

Three new certificates were issued by the Minister for Foreign Affairs and Trade in 2013. These certificates will fall for review under section 25(7) of the FOI Act in 2015. A copy of the notification from the Secretary General is attached at Appendix I to this Report.

I was notified by letter dated 15 January 2014 that, pursuant to section 25(7) of the FOI Act, the Taoiseach, the Minister for Public Expenditure and Reform and the Minister for Jobs, Enterprise and Innovation, having reviewed the 12 certificates that were in operation for the period ended October 2013, were satisfied that it was not necessary to request the revocation of any of the 12 certificates in question. Of the twelve certificates reviewed, six were issued by the Minister for Foreign Affairs and Trade and six by the Minister for Justice and Equality. I attach a copy of the notification at Appendix II to this Report.

#### Staffing matters

2013 was a demanding but productive year for OIC and CEI staff. I have been very impressed by the commitment of staff to developing the service to be effective and efficient. I am also impressed by the professionalism and dedication to public service of my staff. I want to take this opportunity to thank them for their hard work during the year. My thanks also to Stephen Rafferty, Senior Investigator, and to Melanie Campbell and Edmund McDaid for their assistance in compiling this Report.

I want to offer a special thank you to the staff of all the Offices for their generous welcomes and warm wishes to me when I arrived in December. I also want to thank the Director General, Bernadette McNally, and the senior staff of the Management Advisory Committee, for their patience, advice and generosity of time in helping me to settle in. I look forward to working with the staff in the coming years.

### Over €433,000 paid to State Solicitor's office

# Fifth highest payment from DPP

DONEGAL'S State Solicitor is among the top ten highest paid solicitors working for the Director of Public Prosecutions, according to figures released under the Freedom of Information Act this week.

# HSE fails to provide details of discretionary medical card refusals

#### by Flachra Ó Cionnaith

The HSE has failed to provide any information on a key part of the discretionary medical card row two months after launching a public awareness campaign on it.

Donegal News Derry People 18-01-2013

Irish Examiner 31-12-2013

# Chapter 2: Issues Arising



## **Chapter 2: Issues Arising**

In this chapter I highlight issues which arose during the year concerning the operation of the FOI Act. Some of the issues are operational and relate to my Office, while others are matters which would need to be resolved at Government level, or by the Department of Public Expenditure and Reform.

The issues discussed are:

- Office workload
- Section 32 non-disclosure provisions
- Guidance Notes on access to records of deceased persons
- Garda reports
- Appeals to the Courts

#### Office workload

Last year, my Office commenced a process of reform, involving a complete review of organisational structures and processes, with the intention of improving case turnaround times and increasing case throughput. As an interim measure, a "triage" process was introduced to effect a more speedy resolution of cases where possible. Some improvement has already been made, with 26% of cases closed within a four-month period in 2013, compared to 19% in 2012. More importantly, the case closure rate of 258 cases for 2013 represents a 29% increase on the 200 cases closed in 2012. There was also a focus on closing the older cases on hand.

Unfortunately, however, demand has also increased with a rise in the number of cases accepted for review in 2013. As a consequence, the number of cases on hand at the end of 2013 remained effectively unchanged. In the coming year, I expect the workload of the Office to increase significantly with the passing of the FOI Bill and the many additional public bodies being brought within the FOI regime.

This growing workload highlights the need for continued reform of my Office and I am happy to report that considerable progress continues to be made on the organisational review. Benchmarking visits to our counterparts in England and in Scotland last year allowed us to examine other processes and systems for efficient decision making. We then completed a full examination of the two stages of our process; (i) from date of receipt of application up to the time when the case is ready for assigning, and (ii) from date of assignment to completion.

I have recently approved a range of amendments to the Office's review processes. The amendments include improvements to internal processes and new measures to improve engagement between this Office and public bodies. A process of informing public bodies of the proposed changes which will affect them will commence in the near future.

#### The new processes will include:

- A more rigorous approach to requesting information from public bodies. The general approach taken in England and Wales is that a review by the Commissioner represents the public body's "last chance to get it right". A similar approach is also used in Scotland and based on getting it "right first time". My Office will be adopting a similar approach.
- Guidance documents for OIC staff and public bodies alike will be a necessary accompaniment to the revised processes, and work to produce these and make them freely available is underway at present.

I am confident that when implemented, the changes will allow for a more streamlined review process which should impact positively on case turnaround times. Furthermore, I was pleased that the Department of Public Expenditure and Reform agreed to the allocation of additional staff to my Office. I was a little disappointed with the length of time it has taken to recruit the additional staff, but they are now beginning to take up their posts. The new staff will be of considerable assistance in enabling my Office to provide a more efficient and effective service for those who need it.

#### Section 32 non-disclosure provisions

Section 32 of the FOI Act provides for the mandatory refusal of access to certain records whose disclosure is prohibited, or whose non-disclosure is authorised, by other enactments. The section subordinates the access provisions of the FOI Act to all non-disclosure provisions in statutes except for those which are cited in the Third Schedule to the FOI Act. The Act provides for the review by the Joint Committee on Finance, Public Expenditure and Reform, every five years, of the operation of any enactments that authorise or require the non-disclosure of records, to determine whether they should be amended or repealed, or be added to the Third Schedule.

In her 2012 Annual Report, the former Commissioner, Emily O'Reilly, reported that the last such review was conducted in 2005 and a further review was, at that stage, several years overdue. In June 2013, she subsequently presented the Third Report of the Information Commissioner to the Joint Committee on Finance, Public Expenditure and Reform.

In her address to the Joint Committee, Ms O'Reilly said:

"I reported, in my Annual Report for 2012, that many new non-disclosure provisions have been introduced since the FOI Act became law in 1997. Indeed, Departments are reporting approximately 230 enactments containing non-disclosure provisions of which approximately 50% became law since 1 January 1998. I noted in my report that this means as many non-disclosure provisions have been introduced since 1997 as were introduced in the preceding 75 years. In my view, this highlights the importance of ensuring that reviews under section 32 are conducted in a timely fashion as required by the FOI Act."

Given the importance of the section 32 provision, I share the former Commissioner's view that reviews under section 32 should be conducted in a timely fashion in accordance with the statutory timeframe set out in the FOI Act. While I fully appreciate that her report raised many important issues for the Joint Committee and that thorough consideration of those issues is necessary, I am disappointed to note that the Joint Committee's report of its deliberations remains outstanding. The FOI Bill presented an excellent opportunity for including any amendments to the Third Schedule as recommended by the Joint Committee. It now appears that any such recommendations will not be published in time to be included in the Bill.

Notwithstanding the delay, it is important that full and detailed consideration is given to the issues raised in the former Commissioner's report. I fully appreciate her disappointment with the outcome of the previous review, where the Committee supported ministerial decisions in each of the 36 cases where she had recommended change, without offering explanation for their decisions. I am hopeful, in the interests of transparency and accountability, that the next report will take account of these concerns.

# Guidance notes on access to records of deceased persons

During 2013, my Office was called upon to review a decision of the HSE to refuse access to the medical records of the applicant's late husband (Case no. 100260 – Ms. C and the Health Service Executive). The request was refused under section 26 (information given in confidence) and section 28 (personal information).

Section 28(1) of the FOI Act provides for the mandatory refusal of a request where access would involve the disclosure of personal information (including personal information relating to a deceased individual). However, section 28(6)(b) provides that the Minister for Finance may make regulations for the grant of an FOI request in certain circumstances including where "the individual to whom the record concerned relates is dead and the requester concerned is a member of a class specified in the regulations." Regulations for this purpose were made by the Minister on 23 September 2009 - FOI Act, 1997 (Section 28(6)) Regulations, 2009 (S.I. No. 387 of 2009).

Article 4(1)(b) of the regulations provides, subject to the other provisions of the FOI Act, for the granting of a request for access to records of an individual who is dead to the following classes of requester:

- "(i) a personal representative of the individual acting in due course of administration of his or her estate or any person acting with the consent of a personal representative so acting,
- (ii) a person on whom a function is conferred by law in relation to the individual or his or her estate acting in the course of the performance of the function, and
- (iii) the spouse or the next of kin of the individual where in the opinion of the head, having regard to all the circumstances and to any relevant guidelines published by the Minister, the public interest, including the public interest in the confidentiality of personal information, would on balance be better served by granting than by refusing the request."

In the context of article 4(1)(b)(iii) above, the Minister for Finance has published "Guidance Notes on Access to records by parents/guardians / Access to records relating to deceased persons prepared under section 28(6) of the Freedom of Information Act, 1997".

The guidance notes in question set out to offer guidance as to the types of requester covered by all three categories of requester as set out in article 4(1)(b) and the steps to be taken by a decision maker when considering such requests. However, my Office found that the Guidance Notes published by the Minister have no standing in relation to article 4(1)(b)(i); they fall to

be considered only when dealing with the class of requester specified in article 4(1)(b)(iii). It considered that the only test for qualification as a member of a class specified under article 4(1)(b)(i) is that the requester be a personal representative of the individual acting in due course of administration of his or her estate or a person acting with the consent of a personal representative so acting.

As the guidance notes in question were drawn up and published by the Minister pursuant to S.I. No. 387 of 2009, there is no corresponding requirement in the Regulations that public bodies must have regard to those guidelines when dealing with the classes of requester covered by article 4(1)(b)(i) and 4(1)(b)(ii). My Office has brought this matter to the attention of the Central Policy Unit for further consideration.

In the case in question, my Office went on to consider the HSE's claim for exemption at section 26 of the FOI Act, relating to information obtained in confidence. Section 26(1)(a) provides for mandatory refusal of access to records where the records containing information given to any public body in confidence and on the understanding that it would be treated by it as confidential and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same or other persons and it is important to the body that such further information should continue to be given to the body.

However, section 26(2) provides that section 26(1) is not applicable to a record which is prepared by, among others, a member of the staff of a public body in the course of the performance of his or her functions, unless disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law and is owed to a person other than a public body or head or a director, or member of the staff of, a public body, or a person who is providing or provided a service for a public body under a contract for services.

The records at issue in this case were prepared by staff members of the HSE in the performance of their functions from information provided by the applicant's late husband. Therefore, my Office considered whether release of the records to his personal representative in accordance with Article 4(1)(b)(i) of the section 28(6) Regulations would constitute a breach of a duty of confidence owed by the HSE to the deceased. As section 28(6)(b) of the FOI Act provides for the release of the personal information of deceased persons in certain circumstances, my Office found that, in effect, it provides for what, on the face of it, is a limited breach of privacy and of confidentiality. Section 28(6)(b) and the section 28(6) Regulations provide for a process under which the personal and confidential information of a deceased person will be released to certain specified classes of person and to such classes only.

My Office took the view that to invoke section 26, in relation to personal information which is otherwise releasable by virtue of section 28(6)(b), is at odds with the intent of the FOI Act. Given the express provision in article 4(1)(b)(i) of the Regulations for the granting of

access to records of a deceased individual to the personal representative of that individual, my Office considered it untenable to find that such disclosure would be unauthorised or that an authorised disclosure to a specified individual (the personal representative of the deceased) in accordance with a statutory provision could be to the detriment of the deceased. It considered that if it was the case that all clinical records were to be exempt from disclosure on the basis that their release would constitute a breach of confidence, the provisions of article 4 and of section 28(6) would be made redundant. Accordingly, my Office found that release of the records would not give rise to a breach of a duty of confidence and that section 26(1)(a) did not apply. The decision of the HSE to refuse access to the records sought was annualled.

### Garda Reports

While An Garda Síochána is due to be brought within the FOI regime when the FOI Bill is passed, I am informed that the Act will apply only in relation to its administrative records. Nevertheless, there are many situations where public bodies legitimately hold records created by An Garda Síochána which relate to operational matters and to which the FOI Act provides a right of access unless they are otherwise exempt. I fully accept that there will be occasions where communications between An Garda Síochána and the Department of Justice and Equality should not be released on foot of an FOI request. However, it is not the case that such records will always be exempt from release.

In one such case (Case no. 130176 – Mr CB and the Department of Justice and Equality) my Office found that the Department was not justified in deciding to refuse access to a record held by the Department on the applicant's immigration file which had been created by An Garda Síochána (a summary of the decision can be found in chapter 3 of this Report). The Department had refused access to the record under section 26(1)(a) of the FOI Act on the ground that it had been provided to the Department in confidence.

Upon conclusion of the review, I wrote to the Secretary General of the Department to express my disappointment at the Department's ongoing repeated attempts to exempt Garda records as a class without having proper regard to the tests in section 26(1)(a). This is a matter that had been dealt with by my Office on many occasions in past decisions. In my letter, I drew attention to my Office's approach to the application of Section 26(1)(a) and I urged the Department to revisit its approach in future similar cases. I also offered to meet with the Secretary General if it would be considered useful.

I am pleased to report that the Department has responded positively to my letter. The Department has explained that prior to receipt of my letter, it had commenced a forward-looking review of the entire area of FOI, data management, record keeping and related matters, which is ongoing. It indicated that it is happy to meet with my Office to consider how the difficulties I outlined may be best addressed. I have asked my staff to follow up with the Department on the matter. I am heartened by this positive initiative by the Department

to conduct the review in question and I look forward to developing an even closer working relationship with the Department in the years ahead.

### Appeals to the Courts

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, a decision of the High Court can be appealed to the Supreme Court.

Five appeals of decisions made by my Office were made to the High Court in 2013, four by the applicant and one by the relevant public body. Of these, one was withdrawn by an applicant during the year and the remaining cases were due for hearing in 2014.

On the face of it, five High Court appeals in one year might not appear significant. However, for a relatively small Office, the amount of resources required, both financial and non-financial, to manage such appeals is significant. Each appeal involves a considerable amount of preparatory work by the staff of my Office, not to mention attendance at Court by those involved, and meetings with legal teams. The resources afforded to such cases obviously result in reductions in the limited resources available to conduct reviews. I am concerned about the significant impact that appeals to the Courts have on the core work of the Office and I intend to explore whether alternative, less costly appeal mechanisms may have a role to play in reducing the impact on the Office's resources in the future, whilst at the same time respecting the rights of citizens and agencies within remit to appeal my decisions.

No Supreme Court judgments were delivered in 2013.

One High Court judgment was delivered in 2013 in respect of a decision of my Office. The full text of the judgment is available on **www.oic.gov.ie**. What follows is a summary of the main points in the case.

# LK and the Information Commissioner and the Health Service Executive [2013] IEHC 373. Judgment of Ms Justice Iseult O'Malley, 24 July 2013

#### **Background**

A mother applied to my Office for a review of a decision of the Health Service Executive to refuse a request for access to a copy of a social worker's report concerning childcare proceedings and her child. My Office upheld the decision of the HSE to refuse access to the record in question. The woman appealed my decision to the High Court.

#### Issue

The HSE refused access to the report under section 22(1)(b) of the FOI Act, on the ground that the report related to court proceedings which were held 'in camera'. Section 22(1)(b) of

the FOI Act provides for the mandatory refusal of a request where the record concerned is such that the public body knows or ought reasonably to have known that its disclosure would constitute contempt of Court. The HSE explained that the report, prepared for the Court, arose out of the HSE's investigation under Section 20 of the Child Care Act 1991, that Court proceedings under the Guardianship of Infants Act 1964 and Child Care Act 1991 are held in camera and thus, the in camera rule applies. The HSE also explained that the District Court had previously made an order that the applicant should not be given a copy of the report.

The in camera rule (i.e. that proceedings be held otherwise than in public) applies to Court proceedings under the Child Care Act 1991. It is a contempt of Court for any person to disseminate information emanating or derived from proceedings held in camera without prior judicial authority. My Office found that the record was captured by the in camera rule and that the record was exempt from release under section 22(1)(b) of the FOI Act. The applicant appealed that decision to the High Court.

#### Conclusion of the Court

The Court held that my Office was bound by section 22(1)(b) to refuse disclosure if it considered that disclosure would constitute contempt of Court. It held that my Office has no authority to disregard either the statutory provisions relating to the in camera nature of the child care proceedings or the Court order made in the case.

As O'Malley J. explained,

"It is no part of his powers to decide that the order was wrong, or that the appellant's right to a copy of the report under s.27 of the Child Care Act should prevail over such an order. Neither the status of the appellant as a party to the District Court proceedings nor the purpose for which she wishes to use the report are relevant to his powers in this respect."

Having regard to the in camera nature of the District Court proceedings and to the express order of the District Judge in relation to the report, the Court found that my Office had no option but to refuse disclosure.

The decision of my Office (Case no 120002, Ms X and the Health Service Executive) can be viewed at www.oic.ie/decisions.

# Government urged to make FoI law more transparent

#### by Noel Baker

The National Newspapers of Ireland yesterday urged the Government to scrap the €15 fee payable for freedom of information requests and called for proposed changes to FoI law to be expanded to allow for more openness and transparency.

Irish Examiner 08-02-2013



Irish Examiner 11-02-2013

# Chapter 3: Decisions

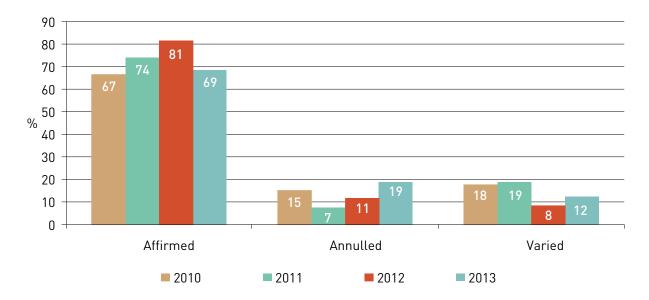


# **Chapter 3: Decisions**

# Formal decisions

In 2013 a total of 258 cases were reviewed by my Office. As I mentioned earlier, this total is comprised mainly of formal decisions, settlements, or withdrawals. The outcomes of the reviews which went to formal decision in the years 2010 to 2013 are highlighted in the table below.

#### Percentage comparison of formal decisions 2010 - 2013



#### Annulled decisions

The table records an increase in decisions that were annulled by my Office in 2013 over 2012. Decisions of public bodies may be annulled by my Office for a variety of reasons. For example, where a public body is considering refusal of a request under section 10(1)(c) of the FOI Act on the ground that granting the request would cause a substantial and unreasonable interference with, or disruption of, its work, it must first offer assistance to the requester to amend the request under section 10(2). Where a public body fails to do so, the decision may be annulled by my Office and the public body directed to conduct an entirely new review of the original request.

#### Decisions annulled under Section 29

My Office may also annul decisions of public bodies where timelines associated with the provisions of section 29 of the FOI Act were not adhered to by the body concerned.

Section 29 of the FOI Act applies to cases where the public body has decided that the record(s) in question qualify for exemptions under one or more of the relevant exemptions in the FOI Act (i.e. sections 26, 27 and 28 - relating to information that is confidential, commercially sensitive or personal information about third parties, respectively) but that the record(s) should be released in the public interest. Where section 29 applies, the public body is required to notify an affected third party before making a final decision on whether or not the exemption(s), otherwise found to apply, should be overridden in the public interest. The requester or an affected third party, on receiving notice of the final decision of the public body, may apply for a review of that decision to this Office directly.

Section 29 provides for the processing of such requests within a specified timeframe. However, where the timeframe is not adhered to, my Office will annul the decision and direct the public body to consider the request anew, in compliance with the time requirements of section 29. In 2013, this form of section 29 annulment was made by my Office on nine occasions.

The following are a number of formal decisions which issued during 2013. The full text of each decision is available on my Office website (www.oic.gov.ie).

# Significant decisions

#### Mr. X and the Department of Health - Case no: 120170

In this case, the Department of Health refused the applicant's request for a copy of a transcript of a meeting he had with Mr Justice Thomas Smyth in connection with an inquiry conducted by Mr Justice Smyth into certain matters relating to Our Lady of Lourdes Hospital Drogheda, known as the "Drogheda Review". The Department refused the request on the ground that it did not hold the records in question for the purposes of the FOI Act.

Mr. Justice Smyth was appointed by the then Minister for Health, Mary Harney, on 15 January 2010 to carry out the review, the purpose of which was to advise on whether a further investigation into the procedures and practices operating at the Hospital during the period 1964 to 1995, to protect patients from sexual abuse while undergoing treatment or care at the hospital, would be of benefit.

During the course of his review, the reviewer met with former patients, including the applicant, in or around May 2010. He submitted his report to the Minister in September 2010. The Department informed my Office that on conclusion of the review at the end of September 2010, the reviewer wrote to the Department enclosing his written report and seven boxes of records of the review, six of which contained copies of transcripts including, presumably, the transcript of the applicant's meeting. The Department claimed that it was the common understanding of the Minister and the reviewer that all documentation should be the property of the reviewer. According to the Department, the reviewer pointed out that the transcripts were his property which he had lodged with the Department for safekeeping only. The Department argued that the records sought remained the property of the Drogheda Review.

Section 6(1) of the FOI Act confers a general right of access to records held by a public body. While the term "held" is not defined in the Act, section 2(5)(a) of the Act provides that a reference to records held by a public body includes a reference to records "under the control" of that body. It is clear to me that the intent of section 2(5)(a) is to ensure that records which are not physically held by a public body but are under its control are deemed to be held by it for the purposes of the FOI Act. Having regard to the ordinary meaning of the word "hold", my Office found that the relevant records were held by the Department in this case because it had physical possession of the records in question. My Office noted that the FOI Act does not appear to be concerned with the question of whether or not a particular public body ought to be in possession of given records. Rather, it simply confers a right of access to a requester to records "held" by such a body. In any event, given their subject matter, it seemed to my Office that it was entirely appropriate that the records were in the possession of the Department in this case. For the avoidance of doubt as to whether the records sought were held by the

Department, my Office also considered the Department's arguments that the records in question were not under its control.

My Office noted that the term "Drogheda Review" simply reflected the name by which the review undertaken became known, given the nature of the issues being examined, and that the review itself was completed. My Office found, therefore, that the records could not be deemed to be under the control of the "Drogheda Review" as no such entity exists. On the matter of whether the records were held by the reviewer in the context of the FOI Act, my Office noted that the appointment of Mr Justice Smyth was subject to terms and conditions as set out in a specified 'terms of reference' document and in a letter of 18 December 2009. That letter, which contained details of the fee to be paid, also contained an instruction that "the records of the enquiry should be preserved" and indicated that they could be used by any subsequent statutory tribunal. Furthermore, no evidence was presented to my Office to suggest that the reviewer would have any further role in the matter once he had concluded his report to the Minister. My Office found that once the reviewer had completed the review and given the final report and related records to the Department, those records were then under the control of the Department.

(Note: This decision was appealed to the High Court by the Department. The case was heard by Mr Justice O'Neill in January 2014 and judgment was reserved. Judgment is awaited at the time of writing.)

#### Mr X and Bray Town Council - Case no: 110161

Bray Town Council established a limited company (Bray Swimming Pool Sports & Leisure Centre, to which I will refer as the "company"). The Council is the company's only member/shareholder. In May 2011, the applicant sought any records held by the Council, as shareholders of the company, in relation to the breakdown of the company's 2008 and 2009 income and expenditure figures. The Council refused the request on the basis that it did not hold the records and had no right of access to any such records held by Council staff in their capacity as officers of the company.

A review such as this, conducted under section 34 of the FOI Act, cannot examine any loss of transparency and accountability arising from a public body's transfer, to a private company, of functions that would previously have been subject to FOI. This review was concerned only with whether or not the body has justified its refusal of the records at issue.

The first aspect of the review was whether records held by the Council in its capacity as shareholder of the company were exempt under section 27(1)(b) of the FOI Act. Section 27(1)(b) provides for the refusal of a record if, among other things, it contains financial, commercial, scientific or technical, or other information whose disclosure could prejudice the competitive position of that person, in the conduct of his or her profession or business.

The records at issue were the company's draft unabridged accounts for the years 2008 and 2009, which the company was legally required to send to the Council as shareholder. Abridged versions of such documents had been published by the Companies Registration Office (the CRO). However, additional details were contained in the documentation sent to the Council, including a breakdown of the company's profit and loss account and tangible fixed assets for the years 2008 and 2009.

The company argued that release of these details to the world at large would enable competitors to understand how its business is run, notwithstanding that they date from 2008 and 2009. My Office accepted that competitors could use an insight into the finances of a private company to that company's detriment (particularly when it would not be able to gain a similar insight into competitors' finances), such that release of the records could prejudice the company's competitive position in the conduct of its business. My Office found section 27(1)(b) to apply to the details at issue.

My Office was satisfied that any public interest there may be in the release of commercially sensitive information, regarding a limited company that is not subject to the FOI Act, was adequately met by the various requirements of company legislation (such as the CRO's publication of various material). The Office also considered the low standard of proof required to be met in order for section 27(1)(b) to apply in the first place to recognise the public interest in ensuring the release of material under FOI does not impact inappropriately on commercial interests. On balance, my Office found that the public interest weighed in favour of withholding the details at issue.

It seemed that additional records were held by the company, which may or may not have been relevant to the request as framed in this particular case. My Office considered any information therein of a commercially sensitive nature likely to be exempt under section 27.

For completeness, however, the second aspect of the review considered whether the Council controlled those records such that it may be deemed to hold them, as provided for at section 2(5)(a) of the Act. Once records are held by a public body, they are subject to FOI.

The applicant contended that the Council controls the company, and its records. My Office considered that companies have separate legal personalities to those who own and/or manage them and that the company in this case must be legally seen as a separate entity to the Council. It was also my Office's understanding, from company case law, that it is not the majority, or 100%, ownership of a company that determines if an owner controls a company, but rather the extent to which the owner takes an active role in that company's day-to-day operations.

The Council said that the company's CEO makes decisions on day-to-day, operational matters and makes recommendations to the company's Board of Directors (the Board) on more strategic issues. The Council argued that it did not control the Board or the company even though the Board included two current and one former local authority staff. Company law

requires Directors to make decisions in the interests of the company, such that they must declare conflicts of interest and abstain from decision making where such conflicts arise. Thus, it seemed to my Office that the relevant former and current local authority staff made such decisions in their capacity as officers of the company, rather than as local authority officials, and thus did not accept that the Council can be said to control those (strategic, rather than operational) Board decisions. Neither did it seem that the Town Manager or the Town Council's elected members have any role in approving the Board's decisions, other than deciding on matters that are required to be taken at a general meeting.

My Office accepted that the Council does not control the company or have any role in its day-to-day operations. Furthermore, it was satisfied that the Council has no legal entitlement to any records that came into the possession of current or former local authority staff as a result of their roles as company Directors. Thus, my Office found that further records as held by the company, which might be of relevance to the request, cannot be deemed to be held by the Council further to section 2(5)(a) of the FOI Act.

(Note: This decision was appealed to the High Court by the applicant. The case was awaiting a hearing at the time of writing.)

#### Mr CB and the Department of Justice and Equality – Case no: 130176

This review concerned the refusal by the Department of Justice and Equality of a request for access to a record from the applicant's immigration file. The record in question comprised an application from An Garda Síochána for a Removal Order under Article 20 of the European Communities (Free Movement of Persons) Regulation 2006, in respect of the applicant. Access was refused under sections 23(1)(a) and 26(1)(a) of the FOI Act.

On the applicability of section 26(1)(a), the Department argued that the record in question was intended to remain confidential. It argued that there was a risk that the extent and quality of information received by the Minister in the future would be prejudiced if the contents of correspondence which is clearly intended to be confidential is disclosed. It went on to say that it was clearly the intention of the Oireachtas, when the FOI legislation was enacted, to safeguard the confidentiality of communications from the Garda authorities.

In essence, it appeared to my Office that the Department was arguing for the protection of all communications from An Garda Síochána as a class. As my Office has explained to the Department on many occasions in the past, section 26(1)(a) does not protect records as a class. Regard must be had to the contents of the records. There are four separate requirements to be satisfied for section 26(1)(a) to apply, namely

- that the information was given in confidence, and
- that the information was given on the understanding that it would be treated as confidential, and

- that the disclosure of the information would be likely to prejudice the giving to the body
  of further similar information from the same person or other persons in the future, and
- that it is of importance to the body that such further similar information should continue to be given to the body.

I accept there may be circumstances in which the content of communications between An Garda Síochána and the Department would be such as to meet the requirements for Section 26(1)(a) to apply. In this case, however, my Office found that this was not such a case.

My Office noted that all of the information in the refused record was included in other records which were released in response to the original FOI request. The applicant was aware of the existence of the record at issue, not only from the FOI request, but also as it was referred to in the other records. The applicant knew from the other records that the Garda authorities had provided the Department with the information contained in the record. In the circumstances, my Office found that the four requirements for section 26(1)(a) to apply were not met.

It is noteworthy that during the course of the review, my Office invited An Garda Síochána to make a submission on the matter and it chose not to do so. As I outlined in chapter 2, I raised the matter of the Department's treatment of Garda records with the Secretary General of the Department and received a very positive response. I am satisfied that we have identified a mechanism for resolving the issues outlined.

#### Mr X and the Department of Finance – Case no: 120102

I reviewed a decision of the Department of Finance to refuse access to two letters, dated 15 October 2010 and 19 November 2010, sent by the President of the European Central Bank (ECB), Jean-Claude Trichet, to the then Minister for Finance in 2010. The Department relied on a number of exemptions for its refusal of the records, including section 24(2)(e) of the FOI Act. Section 24(2)(e) is a mandatory exemption which provides, amongst other things, that a public body shall refuse access to a record containing information communicated in confidence from an institution or body of the European Union.

The Department stated that it was totally opposed to the release of the records. It stated that it was the intention of the ECB when sending the letters that they be treated as confidential and that this was clearly indicated by the fact that one record was marked "strictly confidential" and the other was marked "secret". It also stated that the ECB had refused to release the letters under the Public Access Scheme. The Department referred to a letter from the ECB to the applicant in which the ECB refused to give the applicant access to the letters. In that letter the ECB had described the records as "strictly confidential communications concerning the then extraordinarily severe and difficult situation". It was apparent that the Department accepted that the records at issue were communicated in confidence.

It is important to note that, unlike some other exemptions in the FOI Act, section 24(2)(e) is not subject to a 'harm' test, nor is it subject to a public interest balancing test. This means that there is no requirement to identify a harm that might arise in the event of a record being released or to consider whether the public interest would, on balance, be better served by its release. If a record is of a class or type captured by the exemption, this is sufficient for the exemption to apply. My remit in such cases is limited to determining whether a public body is justified in refusing access to records in accordance with the provisions of the FOI Act. However, I would add that a refusal to grant access to records under section 24(2)(e) does not equate to a general prohibition on release of the records outside of the FOI process.

Having had regard to the Department's submissions and to the contents of the records at issue, I was satisfied that the records contained information communicated in confidence from an institution or body of the European Union and that section 24(2)(e) of the FOI Act applied.

#### Mr. X and the Department of the Taoiseach – Case no: 100171

My first decision as Information Commissioner coincided with the first case to require a formal decision on the question of the applicability of the so-called 10-year rule under section 19. Section 19 is a mandatory exemption relating to meetings of the Government. For instance, section 19(1)(a) applies to exempt records which have been, or are proposed to be, submitted to the Government for their consideration by a Minister of the Government or the Attorney General and were created for that purpose. Section 19(1)(c) applies to exempt what may be described as "briefing papers".

Section 19(3)(b) provides that the exemptions in subsection (1) do not apply if the record concerned relates to a decision of the Government that was made more than 10 years before the receipt of the request by the head concerned. However, section 19(2), which relates in essence to Cabinet discussions, applies indefinitely.

In this case, the Department basically sought to apply the indefinite section 19(2) protection to records disclosing the views taken by the Ministers prior to the meetings, as well as to the statements made at the meetings. With certain limited exceptions, I found that section 19(2) did not apply to the records concerned.

Some of the records, which were over 15 years old at the time of my decision, concerned industrial grant applications. In light of arguments presented by the Department of Jobs, Enterprise and Innovation, I also had cause to emphasise that section 31, relating to the financial and economic interests of the State and public bodies, is not a class-based exemption, including in relation to industrial grant information.

# Mr. X and the Department of Jobs, Enterprise and Innovation – Case no: 110023

One of the earliest decisions I issued was in a very interesting case involving complex issues of international law relating to various export control arrangements between Ireland and other States. The request related to a certain aviation company that was under investigation by United States (US) authorities. The alleged business activities of the third party company and its directors had in fact received extensive publicity as a result of multiple-count US indictments against them. Of particular relevance was a published article written by the applicant, a journalist, entitled, "Minister aided wanted trader".

I found that the Department's decision to refuse access to the records concerned was justified under sections 24 and 26 of the FOI Act, because they contained confidential communications relating to international relations and also because of a duty of confidence owed to the affected third parties in the circumstances of the case. In reaching my decision, I accepted that the effective administration of the export control regime requires a high level of intelligence-sharing between States, especially Member States of the European Union (EU), as well as between public bodies such as the Department concerned in this case and the Department of Foreign Affairs and Trade. I also accepted that it requires, where relevant, that companies engaged in the international trade of goods are willing and able to provide the competent authorities with detailed information regarding their proposed business transactions.

In relation to the publicity that certain matters had received, and in particular the alleged involvement of a certain former Minister of State, I drew a distinction between information that is in the "public domain" on the basis of an undisclosed or anonymous source, on the one hand, and primary documentation relating to the matters concerned, on the other. I also acknowledged that the direct involvement of a Minister of State in a licensing matter would generally tend to undermine the reasonableness of any expectation of confidentiality insofar as it relates to information about the Minister's involvement. In this case, however, I accepted that the sensitivities were such that no reasonable person could have failed to understand that confidentiality was expected.

#### Mr. X and the Health Service Executive - Case no: 100286

The question presented in this case was whether the Health Service Executive (the HSE) was justified in refusing the applicant's request for access to further records relating to a Family Centre assessment of his 11-year-old daughter, who had been referred to the Centre by a Social Work Department because of allegations of sexual abuse by the applicant. As the records contained the personal information of the applicant's child and of her mother, they were exempt from release under section 28(1) of the FOI Act, but subject to the other provisions of the section. The Office found that none of the overriding provisions of section 28 applied.

Of particular significance was the acknowledgement that, unlike the Supreme Court case of McK v. The Information Commissioner [2006] IESC 2, the Constitutional rights of parents were not a consideration in determining whether it would be in the child's best interests to disclose her personal information to the applicant under section 28(6) of the FOI Act and the 2009 Regulations [S.I. No. 387 of 2009]. The applicant was not married to the child's mother and was not a parent in a family recognised by the Constitution. Furthermore, the applicant had never lived together with his child and her mother and they had never constituted a household together, nor was he the legal guardian of his child. Having regard to the arguments presented by the applicant in favour of release, the mother's refusal to consent to the release of the records, and the fact that release under FOI is without any restriction on future use, my Office found in the circumstances that the best interests of the applicant's child would not be served by the release to the applicant of her personal information.

#### Mr. X and the Health Service Executive – Case no: 100186

This case was very similar in nature to case no: 100286 in that it concerned the question of whether the HSE was justified in refusing the applicant's request for access to further records relating to a complaint involving allegations of sexual abuse by the applicant of his young daughter, but also other alleged incidents of domestic violence. Again, the records were exempt under section 28(1) of the FOI Act, but subject to the other provisions of the section. However, as a marital father, the applicant was entitled to the Constitutional presumption of parental primacy for the purposes of section 28(6). Nevertheless, the circumstances of the Supreme Court case of McK v. The Information Commissioner [2006] IESC 2 were found to be distinguishable from those presented in this case.

The Supreme Court's repeated references to medical information or medical care were taken as an indication that, while the nature or content of the records in question may not be determinative, it is a relevant factor. It was also noted that, under the Constitution, both parents in a marital family are presumed to be acting in the best interests of their child, which presents especial difficulties where, as here, the parents are not acting in accord. The Office had regard to the highly sensitive nature of the records and to the fact that (unlike family law proceedings) no conditions are attached when records are made available to a

requester under the FOI Act. The Office also took the view that the applicant had already acquired a sufficient knowledge of the information regarding his daughter to enable him to exercise his parental role in making "appropriate decisions for the child".

The Office found that provision of that same information to the applicant, in the form of copies of records released under the FOI Act, would not enhance his capacity to make "appropriate decisions for the child". On the other hand, the provision of copies of those records to the applicant carried some potential to impact negatively on the best interests of the child. Accordingly, the Office found in the circumstances of this case that the best interests of the applicant's child would not be served by the release to the applicant of those records disclosing his child's personal information and that section 28(6)(a) therefore did not apply. As none of the other overriding provisions was found to apply, the records at issue were found to be exempt under section 28(1) of the FOI Act.

# Report backs call to extend reach of FoI law

#### by Seán McCárthaigh

An Oireachtas committee has backed calls from information commissioner Emily O'Reilly to extend freedom of information legislation to all new state bodies and to remove some existing exemptions.

# Unnatural deaths of children in care double

by Kate Doyle

The number of children and teenagers who died of unnatural causes while in the care of the HSE more than doubled last year.

Figures supplied under the Freedom of Information Act show that 16 young people died in 2012, up from six in 2011.

Irish Examiner 27-06-2013

Irish Examiner 21-03-2013

# Chapter 4: Statistics



# **Chapter 4: Statistics**

# Section I - Public Bodies - 2013

Table 2: FOI requests dealt with by public bodies and subsequently appe	hale
Table 2. To requests deatt with by public bodies and subsequently appe	atcu
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 serv	/ices
regulators 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 Department of Public Expenditure and Reform, the HSE, the Local Authorities FOI Liaison Group, the Department of Health, 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 - 2013

Table 13:	Analysis of applications for review received
Table 14:	Analysis of review cases
Table 15:	Applications for review accepted in 2013
Table 16:	Outcome of completed reviews – 3-year comparison
Table 17:	Subject matter of review applications accepted – 3-year comparison
Table 18:	Applications accepted by type – 3-year comparison
Table 19:	General enquiries
Table 20:	Deemed refusals due to non-reply by public bodies

# Section I – Public Bodies - 2013

Table 1: Overview of requests dealt with by public bodies

Requests on hand - 01/01/2013	2,451
Requests received in 2013	
Personal	14,909
Non-personal	3,980
Mixed	96
Total	18,985
Total requests on hand during year	21,436
Requests dealt with	18,204
Requests on hand - 31/12/2013	3,232

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

	Number	Percentage
FOI requests dealt with by public bodies	18,204	100%
Internal reviews received by public bodies	653	4%
Applications accepted by the Commissioner	335	2%

Table 3: FOI requests received - by requester type

Requester Type	Number	Percentage
Journalists	1,843	10%
Business	786	4%
Oireachtas Members	54	0%*
Staff of public bodies	569	3%
Clients	13,822	73%
Others	1,911	10%
Total	18,985	100%

<sup>\*</sup> Actual percentage figure is 0.3%

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

Request Type	Number	Percentage
Requests granted	11,738	65%
Requests part-granted	3,367	18%
Requests refused	1,677	9%
Requests transferred to appropriate body	233	1%
Requests withdrawn or handled outside FOI	1,189	7%
Total	18,204	100%

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

	% granted	% part granted	% refused	% transferred	% withdrawn or handled outside of FOI	% Total
Civil Service departments	48%	29%	14%	1%	8%	100%
Local Authorities	52%	29%	14%	1%	4%	100%
HSE	75%	14%	7%	1%	3%	100%
Voluntary Hospitals, Mental Health Services Regulators and Related Agencies	76%	4%	7%	2%	11%	100%
Third Level Institutions	52%	33%	6%	0%	9%	100%
Other Bodies	49%	32%	4%	0%	15%	100%

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

	Personal	Non- personal	Mixed	Total
Civil Service Department/Office				
Department of Social Protection	2060	84	4	2148
Department of Justice and Equality	417	130	3	550
Department of Education and Skills	206	116	6	328
Department of Agriculture, Food and the Marine	165	109	1	275
Office of the Revenue Commissioners	123	103	0	226
Department of Finance	9	211	0	220
Department of Health	15	190	0	205
Defence Forces	131	18	1	150
Houses of the Oireachtas Service	2	102	0	104
Department of Public Expenditure and Reform	13	86	0	99
Department of the Environment, Community and Local Government	7	91	0	98
Department of the Taoiseach	5	86	0	91
Department of Foreign Affairs and Trade	19	69	0	88
Department of Transport, Tourism and Sport	10	74	0	84
Department of Arts, Heritage and the Gaeltacht	6	50	0	56
Office of Public Works	3	42	1	46
Department of Jobs, Enterprise and Innovation	5	37	2	44
Department of Defence	12	25	3	40
Department of Communications, Energy and Natural Resources	1	38	0	39
Department of Children and Youth Affairs	2	28	0	30
Public Appointments Service	15	2	4	21
Valuation Office	19	0	0	19
Office of the Ombudsman	6	12	0	18
Office of the Director of Public Prosecutions	6	7	0	13
Central Statistics Office	4	3	0	7
Office of the Attorney General	2	5	0	7
Office of the Information Commissioner	1	2	1	4

Office of the Chief State Solicitor	2	1	0	3
Ordnance Survey Ireland	0	2	0	2
Office of the Comptroller and Auditor General	0	1	0	1
Office of the Director of Corporate Enforcement	0	0	0	0
Office of the Registrar of Friendly Societies	0	0	0	0
Office of the Appeals Commissioners for the Tax Acts	0	0	0	0
Total	3,266	1,724	26	5,016

Table 7: FOI requests received by local authorities

Local Authority*	Personal	Non- personal	Mixed	Total
Dublin City Council	120	120	0	240
Cork County Council	6	87	0	93
Cork City Council	37	31	4	72
Mayo County Council	13	43	0	56
South Dublin County Council	28	26	0	54
Fingal County Council	14	34	0	48
Galway County Council	4	43	0	47
Dún Laoghaire/Rathdown County Council	17	29	0	46
Louth County Council	12	25	3	40
Clare County Council	10	25	4	39
Donegal County Council	4	35	0	39
Kildare County Council	4	28	7	39
Limerick City Council	16	23	0	39
Kerry County Council	5	29	2	36
Sligo County Council	8	23	0	31
Galway City Council	11	17	0	28
Laois County Council	14	13	0	27
Meath County Council	4	23	0	27
Tipperary SR County Council	4	18	2	24
Wexford County Council	13	11	0	24
Wicklow County Council	5	18	0	23

Westmeath County Council	3	15	0	18	
Limerick County Council	0	17	0	17	
Tipperary NR County Council	0	17	0	17	
Offaly County Council	5	10	1	16	
Monaghan County Council	0	14	1	15	
Kilkenny County Council	1	13	0	14	
Roscommon County Council	4	9	1	14	
Carlow County Council	1	11	0	12	
Longford County Council	3	8	1	12	
Waterford County Council	5	6	1	12	
Waterford City Council	8	4	0	12	
Leitrim County Council	4	7	0	11	
Cavan County Council	3	7	0	10	
Total	386	839	27	1,252	
Regional Authorities	0	1	0	1	
Regional Assemblies	0	0	0	0	
*County Council figures include any FOI requests received by Town and Borough Councils					

Table 8: FOI requests received by the HSE (excluding certain agencies covered in Table 9)

HSE area*	Personal	Non- Personal	Mixed	Total	
HSE South	3,018	62	5	3,085	
HSE West	2,469	101	2	2,572	
HSE Dublin North East	907	34	0	941	
HSE Dublin Mid-Leinster	879	40	0	919	
HSE National Requests	0	292	0	292	
Total received	7,273	529	7	7,809	
*Figures represent the regional structure of the HSE					

Table 9: FOI requests received by voluntary hospitals, mental health services regulators and related agencies

Hospital/Service/Agency	Personal	Non- Personal	Mixed	Total
Mercy University Hospital, Cork	694	4	0	698
St James's Hospital	480	5	3	488
Mater Misericordiae Hospital	295	13	0	308
Rotunda Hospital	262	15	2	279
Tallaght Hospital	259	5	0	264
Beaumont Hospital	183	20	0	203
St. John's Hospital, Limerick	186	2	0	188
National Maternity Hospital, Holles Street	166	8	0	174
St. Vincent's University Hospital	122	13	0	135
Our Lady's Hospital for Sick Children, Crumlin	127	6	1	134
Temple Street Children's Hospital	122	8	0	130
South Infirmary - Victoria Hospital, Cork	122	4	0	126
Coombe Hospital	95	9	0	104
National Rehabilitation Hospital, Dún Laoghaire	40	3	0	43
Hospitaller Order of St. John of God	39	0	0	39
Mental Health Commission	21	9	0	30
St. Vincent's Hospital, Fairview	27	3	0	30
Royal Victoria Eye & Ear Hospital	28	0	0	28
Health Information & Quality Authority	5	10	5	20
Food Safety Authority of Ireland	0	18	0	18
Central Remedial Clinic	16	0	0	16
Dublin Dental School & Hospital	13	2	0	15
Enable Ireland	13	1	0	14
Drug Treatment Centre Board	12	1	0	13
Inc. Orthopaedic Hospital, Clontarf	6	3	0	9
Medical Council	5	4	0	9
St. Michael's Hospital, Dún Laoghaire	5	4	0	9
St Patrick's Hospital, Cork	0	8	0	8
Other Hospitals/Services/Agencies	9	13	0	22
Total	3,352	191	11	3,554

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

Third Level Education Body	Personal	Non- Personal	Mixed	Total
Waterford Institute of Technology	4	115	3	122
University College Dublin	46	21	1	68
University College Cork	15	19	0	34
University of Dublin (Trinity College)	18	12	1	31
National University of Ireland Galway	13	13	0	26
Dublin Institute of Technology	7	12	0	19
University of Limerick	8	6	1	15
National University of Ireland Maynooth	5	6	0	11
St Patrick's College, Drumcondra	5	5	0	10
Dublin City University	4	6	0	10
Galway-Mayo Institute of Technology	7	1	0	8
Other bodies	22	46	4	72
Total	154	262	10	426

Table 11: FOI requests received by other bodies

Public body	Personal	Non- Personal	Mixed	Total
Social Welfare Appeals Office	109	0	0	109
RTÉ	4	82	0	86
Office of the Chief Medical Officer	71	1	0	72
Probation and Welfare Service	34	1	0	35
Courts Service	2	26	0	28
Legal Aid Board	24	0	0	24
Solas - Further Education and Training Authority	4	17	0	21
Commission for Energy Regulation	7	11	0	18
Irish Sports Council	0	18	0	18
National Roads Authority	0	18	0	18
IDA Ireland	0	17	0	17
Broadcasting Authority of Ireland	0	15	0	15
Fáilte Ireland	0	14	0	14

National Council for Special Education	10	4	0	14
Commission for Communications Regulation	10	3	0	13
National Transport Authority	2	11	0	13
Arts Council	1	10	1	12
Health & Safety Authority	0	12	0	12
Irish Medicines Board	0	12	0	12
Enterprise Ireland	1	8	2	11
Irish Blood Transfusion Service	4	5	2	11
National Educational Welfare Board	9	2	0	11
Pobal	0	11	0	11
Teagasc	3	7	1	11
An Bord Pleanála	0	9	0	9
Irish Greyhound Board	0	9	0	9
Sustainable Energy Authority of Ireland	7	2	0	9
Údarás na Gaeltachta	0	9	0	9
Environmental Protection Agency	0	6	0	6
Standards in Public Office Commission	1	4	1	6
Other Bodies (128 bodies with less than 6			_	
requests each)	23	74	8	105
Total	326	418	15	759

# Table 12: Fees charged

	Original Request	Search and Retrieval	Internal Review	Refunds	Net Fees
Government Departments and State Bodies	€28,505.38	€23,135.98	€6,480.00	€2,677.12	€55,444.24
Local Authorities	€12,658.06	€6,316.04	€3,575.00	€270.00	€22,279.10
Health Service Executive	€7,054.70	€1,405.00	€825.00	€715.00	€8,569.70
Voluntary Hospitals, Mental Health Services and Related Agencies	€2,336.35	€2,379.34	€150.00	€90.00	€4,775.69
Third Level Institutions	€3,390.00	€357.60	€300.00	€100.00	€3,947.60
Other Bodies	€31.00	€146.65	€0.00	€0.00	€177.65
Total	€53,975.49	€33,740.61	<b>€</b> 11,330.00	€3,852.12	€95,193.98

# Section II - Office of the Information Commissioner – 2013

Table 13: Analysis of applications for review received

Applications for review on hand - 01/01/2013	29
Applications for review received in 2013	334
Total applications for review on hand in 2013	363
Discontinued	4
Invalid applications	61
Applications withdrawn	6
Applications rejected	2
Applications accepted for review in 2013	260
Total applications for review considered in 2013	333
	·
Applications for review on hand - 31/12/2013	30

Table 14: Analysis of review cases

Reviews on hand - 01/01/2013	203
Reviews accepted in 2013	260
Total reviews on hand in 2013	463
Reviews completed	258
Reviews carried forward to 2014	205

Table 15: Applications for review accepted in 2013

Health Service Executive		55
HSE National	11	
HSE West	17	
HSE South	15	
HSE Dublin Mid-Leinster	8	
HSE Dublin North East	4	
Department of Justice and Equality		20
Department of Social Protection		11
Office of the Revenue Commissioners		11
Cork County Council		10
Department of Education and Skills		9
Department of Agriculture, Food and the Marine		7
University College Dublin		7
Department of Defence		6
Department of Finance		6
Others (bodies with less than 5 applications each)		118
Total		260

Table 16: Outcome of completed reviews - 3-year comparison

	2013	%	2012	%	2011	%
Decision affirmed	104	40%	84	42%	32	16%
Decision annulled	29	11%	12	6%	3	2%
Decision varied	18	7%	8	4%	8	4%
Discontinued	8	3%	6	3%	35	17%
Settlement reached	35	14%	39	20%	49	25%
Withdrawn	64	25%	51	25%	70	34%
Invalid	0	0%	0	0%	3	2%
Reviews completed	258	100%	200	100%	200	100%

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

	2013	%	2012	%	2011	%
Refusal of access	217	84%	212	90%	157	90%
Objections by third parties to release information about them or supplied by them	16	6%	8	3%	6	3%
Amendment of records under section 17	9	3%	8	3%	5	3%
Statement of reasons under section 18	11	4%	6	3%	5	3%
Decision to charge a fee	7	3%	2	1%	1	1%
Applications accepted	260	100%	236	100%	174	100%

Table 18: Applications accepted by type - 3-year comparison

	2013	%	2012	%	2011	%
Personal	102	39%	94	40%	61	35%
Non-personal	125	48%	115	49%	86	49%
Mixed	33	13%	27	11%	27	16%
Total	260	100%	236	100%	174	100%

Table 19: General enquiries

Year	Number
2013	1218
2012	1262
2011	824
2010	622
2009	857
2008	1100
2007	1315
2006	1551
2005	1396
2004	1306

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

Refusal of original and internal review decisions			
Public Body	2013	2012	2011
Department of Justice and Equality	4	3	7
HSE Dublin Mid-Leinster	4	-	-
University College Dublin	3	1	1
Cork County Council	3	1	-
HSE National	2	12	9
National Maternity Hospital	2	1	-
HSE West	1	1	1
University College Cork	1	-	-
Department of Finance	1	-	4
Department of Social Protection	1	-	-
National College of Art and Design	1	-	-
Defence Forces	1	-	-
Teagasc	1	-	-
Commission for Communications Regulation	1	-	-
Department of Environment, Community and Local Government	1	1	-
Adelaide and Meath Hospital (AMNCH)	1	1	-
Department of Communications, Energy and Natural Resources	1	-	-
HSE South	1	-	3
Total	30		

# Charity 'unable to respond to FoI requests'

#### by Conor Ryan

Investigative Correspondent

A Brothers of Charity service has said it appointed and trained a Freedom of Information officer, but a legal loophole means it is unable to respond to requests.

Irish Examiner 13-05-2013

# FOI delays now a 'worrying trend'

#### Allison Bray

**THE Information Commission**er has criticised a growing number of public bodies for putting Freedom of Information requests on the backburner due to manpower constraints.

Irish Independent 15-05-2013

# Adoption Authority still exempt from FoI requests

#### by Conall O Fátharta

The Adoption Authority (AAI) is still exempt from Freedom of Information (FoI) requests, despite legislation being amended to include the AAI more than two years ago.

Irish Examiner 08-05-2013

# **Fees for FOI** requests 'difficult to justify'

PAMELA DUNCAN Charging fees for freedom of information requests is difficult to justify, the Committee on Finance, Public Expenditure and Reform heard yesterday.

Irish Times 21-03-2013



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

# Chapter 1: The Year in



# Chapter 1: The Year in Review

# Introduction

My appointment as the Information Commissioner in December 2013 meant that I also became the Commissioner for Environmental Information under the European Communities (Access to Information on the Environment) (AIE) Regulations. The AIE Regulations are based on Directive 2003/4/EC on public access to environmental information and provide for a separate access regime in Ireland from that of the Freedom of Information (FOI) Act. Thus, my role as Commissioner for Environmental Information is legally independent of the role I have as Information Commissioner. Nevertheless, the operation of the Office of the Information Commissioner (OIC) necessarily impacts upon the performance of the Office of the Commissioner for Environmental Information (OCEI), as discussed below.

The right of access under the AIE Regulations applies to "environmental information" held by or for a "public authority" within the meaning of the Regulations. My role as Commissioner for Environmental Information is to review decisions of public authorities on appeal by applicants who are not satisfied with the outcome of their requests for environmental information. A right of appeal to my Office also arises where the body or person to whom an AIE request has been made contends that it is not a public authority within the meaning of the Regulations. My decisions on appeal are final and binding on the affected parties, unless a further appeal is made to the High Court within two months of the decision concerned.

For further information on the operation of the AIE regime in Ireland, please visit my website at www.ocei.gov.ie, which includes links to the previous Annual Reports of this Office, the website of the Department of the Environment, Community and Local Government, and Directive 2003/4/EC.

# Appeals and enquiries

During 2013, nineteen appeals were received by my Office, an increase of six from the previous year. My Office recorded that eight of these appeals involved a deemed refusal of the request concerned at the original and/or internal review decision-making stage; this is over twice as many deemed refusals as the year before. A deemed refusal occurs when the public authority fails to issue a decision on the request within the relevant time limit specified in the Regulations (usually one month).

Sixteen appeals were closed during the year. Of these, five resulted in formal decisions, the highlights of which are set out in the chapter following. All five decisions are published in full on my Office's website at www.ocei.gov.ie.

Two cases were deemed to have been withdrawn as settled because agreement was reached on the release of information through this Office's intervention. In the first case, Dublin City Council agreed to release a copy of the contract with Covanta Energy Corporation for the construction and operation of an incinerator at Poolbeg, Dublin, subject to the deletion of certain specified financial information. The second case involved a request made to Ordnance Survey Ireland by Friends of the Irish Environment (FIE) for access to the 1973 aerial survey. The review by this Office required consideration of complex issues relating to copyright law, but ultimately a satisfactory settlement, which included access on a phased basis to "screen shot" copies of the photographs for FIE's internal use, was ultimately worked out. Yet another appeal, which involved a request made to the Marine Institute for research data relating to the mortality rates of migrating salmon, was ultimately withdrawn after all of the requested environmental information was made available to the applicant, a process that was greatly facilitated by this Office.

Two further appeals were withdrawn, one before and one shortly after acceptance, because the requested information was made available by the relevant public authorities, albeit belatedly. An additional appeal was withdrawn following contacts with my Office because of the passage of time and improvements made in the meantime in relation to an online access system within the Forest Service. The remaining appeals closed in 2013 were deemed to be invalid, primarily for failure to adhere to the relevant timescales under the Regulations.

Less than a third of the appeals arose from requests to government departments and local authorities last year. Other public authorities whose decisions were appealed included the Environmental Protection Agency, Sustainable Energy Ireland, Coillte, the ESB Networks, An Garda Síochána, Eirgrid Plc, and the Commission for Energy Regulation.

Nineteen cases were on hand at the end of the year, an increase of three from the year before. My staff recorded 46 general enquiries about the Regulations.

# Article 12(6) of the Regulations

Article 12(6) gives me certain powers in dealing with an appeal. 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 any premises occupied by a public authority so as to obtain environmental information.

I am pleased to report that I had no need to invoke this provision in 2013.

# Issues arising

In her Annual Reports, my predecessor highlighted a number of practical difficulties the OCEI has encountered in relation to the operation of the AIE regime. Given the growing backlog, I must again address the issue of resources. I also wish to call attention to the limits of my remit, the problems presented by threshold jurisdictional questions, and the need for better administrative practices by public authorities with respect to the processing of AIE requests or, better yet, avoiding AIE requests in the first instance through the active dissemination of environmental information in compliance with Article 5 of the Regulations.

### Resources

The OCEI has historically been inadequately resourced. Although it is legally independent from the OIC, the OCEI does not receive a separate funding allocation from the State. Rather, Article 12(10) of the AIE Regulations provides that the Commissioner for Environmental Information shall be assisted by the staff of the OIC and "by such other resources as may, from time to time, be available to that office".

Ireland, through the Department of the Environment, Community, and Local Government, submitted its first National Implementation Report on the implementation of the Aarhus Convention in Ireland to the secretariat of the Aarhus Convention on 31 December 2013. The Department had prepared two preliminary draft reports and invited comments from stakeholders, members of the public and other interested parties, but this Office was not among the parties that were expressly invited to comment. However, specific issues that were reportedly raised in the context of the submissions received by the Department included the lack of resources of the OCEI and the time taken for appeals to be heard (with the average length of time for an appeal being calculated at 12.3 months).

The Implementation Report correctly notes that "the OCEI is funded through the general government allocation to the Office of the Ombudsman and that it is a matter for that Office to allocate the funding to the various bodies under its remit as it deems appropriate". Nevertheless, I wish to clarify that, following correspondence with the Department on the

matter, this Office wrote directly to the Department of Public Expenditure and Reform in February 2012 to request a specific financial allocation for the OCEI, particularly in relation to the legal costs that are incurred in the performance of the Commissioner's functions under the AIE Regulations. To date, no such financial provision for the OCEI has been made, which leaves me in a difficult position given the number of complex or novel legal issues that continually arise in applying the AIE Regulations. However, as the Implementation Report acknowledges: "the significant economic challenges facing the State arising from the financial crisis have presented significant funding difficulties for all public service organisations, including the Office of the Ombudsman".

I am pleased that, at the time of writing, four new Administrative Officers are due to join the OIC shortly. The additional staff resources, together with the implementation of reforms arising from the organisational review recently carried out, should significantly improve case turnaround and throughput overall. As the OIC and the OCEI share staff resources, the two Offices necessarily employ similar structures and processes; thus, the OIC organisational review is likely to impact both directly and indirectly on the processing of AIE appeals. Nevertheless, the OIC still has very few resources to spare for the time being. I am expressly required under the FOI Act to complete reviews within four months of the receipt of the application in so far as practicable, an obligation I must have regard to in relation to any decision on the distribution of resources within my Vote. The number of new FOI cases is rising, with a further significant increase in demand expected when the FOI Bill is enacted into law. Moreover, many FOI reviews and the majority of AIE appeals are of a timeconsuming nature due to such factors as the volume of records involved, the complexities of the subject matter and/or the legal issues arising, delays in the receipt of required information from the bodies concerned, the need for third party consultation, and the expectations of the applicants. The organisational review is likely to have only a limited impact on the individual turnaround times for these types of cases.

However, the number of AIE appeals is also rising, with the result that the backlog has grown despite an increase in the closure rate. The consequent delays in bringing AIE appeals to completion are certainly regrettable, though, as my predecessor acknowledged, the delays will be difficult to overcome given the demands of the AIE regime as it currently operates in Ireland on the one hand and the dearth of available resources on the other. Nevertheless, in my Strategic Plan, I am committed to striving to provide a high quality and timely service to members of the public in the performance of my functions under both the FOI Act and the AIE Regulations. Accordingly, measures have already been taken to increase staff resources in the OCEI, and it is hoped that new structures, processes, training programmes and knowledge management systems will be in place in the near future that will ultimately improve output and reduce the backlog in both Offices.

### Limits of remit

Some confusion seems to exist among the public and public authorities alike in relation to my role under the AIE Regulations. My sole statutory function as Commissioner for Environmental Information is to decide on appeals that have properly been made under Article 12 of the Regulations. I do not have any specific statutory role in relation to alleged bad practice by public authorities under the Regulations nor do I have jurisdiction to investigate cases which have not been formally appealed. I note in particular that my Office has no enforcement powers in relation to Article 5 of the Regulations.

Article 5 imposes significant obligations on public authorities that are crucial to the effective administration of the AIE regime. The requirements of Article 5 include the following:

- informing the public of their rights under the Regulations and providing information and guidance on the exercise of those rights;
- making all reasonable efforts to maintain environmental information held by or for the public authority in a manner that is readily reproducible and accessible by information technology or by other electronic means;
- ensuring that environmental information compiled by or for the public authority is up-todate, accurate and comparable;
- maintaining registers or lists of the environmental information held by the public authority and designating an information officer for such purposes or providing an information point to give clear indications of where such information can be found.

Article 5 of the Regulations is based largely on Article 7 of the Directive, which in turn derives from Article 5 of the Aarhus Convention. According to the State's Aarhus Convention Implementation Report, it was submitted during the public consultation exercise that limiting the jurisdiction of the OCEI to cases relating to Article 4 of the Convention [relating to access to environmental information upon request] is a challenge in the implementation of Article 5. The State responded to this submission by making the following observation: "However, the Aarhus Convention does not require that a review procedure be in place for article 5 of the Aarhus Convention."

Whether the absence of a review procedure for the Article 5 obligations is an oversight or not, I am not in a position to assume functions that have not been conferred on me by statute. It would of course be inappropriate for me to act in an ultra vires manner in any event, but I also do not have the resources to stray outside the limits of my remit. I have referred above to an appeal involving a request made to the Marine Institute for research data relating to the mortality rates of migrating salmon. The request was made by an academic institution which initially declined to withdraw the appeal even after all of the requested environmental information had apparently been made available to it. The applicant did not expressly dispute that all relevant information held by the Marine Institute had been released, but rather sought to have certain information clarified. In other words, it seemed that the applicant

effectively sought to ensure that the released information was up-to-date and accurate. I wish to stress that it is not within my remit to enforce the requirement that a public authority ensure that environmental information compiled by or for it is up-to-date, accurate and comparable. My Office has no further role in the matter once a public authority has agreed to release all of the requested information, regardless of whether the accuracy of the information is in dispute. In such cases, I consider it appropriate to exercise my discretion to deem the appeal to be withdrawn under Article 15(5) of the Regulations.

# Threshold jurisdictional questions

Another area of confusion relates to the scope of the jurisdiction of the entire AIE regime. In the UK, a single request covering both environmental and non-environmental information can be accepted as valid in relation to both types of information and then be dealt with through the same overall process under the FOI Act and/or the Environmental Information Regulations (EIRs) as appropriate. In Ireland, public authorities and bodies are obliged to offer some assistance to an applicant, where relevant, in making a valid request, but in any event, the request must explicitly state whether it is made under the AIE Regulations or under the FOI Act. If it is made under the AIE Regulations, it may then be rejected on the basis that it is not for "environmental information", since the right of access under AIE applies only with respect to environmental information as defined in Article 3(1) of the Regulations; despite the obligation to offer assistance, there is no automatic default mechanism for the request to be dealt with under the FOI Act. If the matter is then appealed to my Office, the question of whether the request is for environmental information or not must be resolved definitively as a threshold jurisdictional matter, since my powers as Commissioner for Environmental Information likewise apply only with respect to environmental information. The same quandary arises where the body or person to whom the AIE request has been made contends that it is not a public authority within the meaning of the Regulations. Moreover, I note that, provided that the public authority (actual or disputed) appears to be acting in good faith, it would not be a good use of this Office's very limited resources to deal with substantive issues in the alternative while valid threshold questions of jurisdiction remain outstanding.

As discussed in the first decision I issued upon becoming Commissioner for Environmental Information (see Case CEI/12/0004, Mr. Gavin Sheridan and Dublin City Council (20 Dec. 2013), available at www.ocei.gov.ie) it seems to me that the most sensible approach for dealing with appeals involving valid threshold jurisdictional issues in the circumstances is as follows: Once a determination on the threshold question is made, the case should be closed, administratively if agreement is reached but otherwise by way of a binding decision. If it is determined that the matter is within the remit of AIE, and no appeal to the High Court is made, the public authority should then deal with the request in accordance with the Regulations. If the appellant remains dissatisfied with the handling of his/her request following internal review and thus appeals again to this Office with respect to the original request, then the matter will be reopened administratively without payment of a new fee

and given priority treatment by this Office insofar as it is practicable to do so. If, however, it appears that the threshold jurisdictional questions have been raised merely as a delaying tactic, then an alternative approach may be taken.

# The need for improved administrative practices

Although this Office has no enforcement powers in relation to Article 5 of the Regulations, it has previously observed that compliance with its information management requirements would ultimately reduce the staff resources required for the search and retrieval of environmental information. The active dissemination of the environmental information held by a public authority through publication on its website could obviate the need for a formal access request in the first instance. As noted above, one appeal was withdrawn last year following improvements made in relation to an online access system within the Forest Service.

Compliance with Article 5 and the other administrative provisions of the Regulations would also reduce the number of valid and invalid appeals being received by my Office. The statutory deadlines for issuing decisions on AIE requests and on internal review are mandatory. A public authority is required to answer a request within one month of its receipt. Where appropriate for reasons of volume or complexity, the Regulations allow for an extension of the deadline for making an original decision on a request for a period no later than two months from the date on which the request was received, but the applicant must be notified in writing of the extension before the expiry of the original one-month deadline. Failure to meet the statutory deadlines results in a deemed refusal of the request, which in turn starts the period running for seeking internal or external review of the refusal decision. Unlike the FOI Act, the AIE Regulations do not make any provision for the extension of the period in which to make an internal review request, which can result in applicants failing to meet the relevant deadline where public authorities have complicated matters through belated replies.

It would be helpful, and good administrative practice generally, if public authorities were to acknowledge AIE requests upon receipt and advise the applicants of the applicable deadlines for taking action on the requests, including in relation to internal review and, where relevant, the right of appeal to this Office. Other relevant administrative provisions include the requirement to offer assistance in making a request for environmental information, the requirement to offer assistance in the preparation of a more specific request where necessary, and the requirement to take all reasonable efforts to contact any affected third party where relevant; these requirements do not, in and of themselves, affect the statutory deadlines for making a decision on a request, however.

"It would be helpful .... if public authorities were to acknowledge AIE requests upon receipt and advise the applicants of the applicable deadlines for taking action on the requests"

# High Court and Supreme Court judgments

A party to an appeal to my Office or any other person affected by my decision may appeal to the High Court on a point of law from the decision. Judgment in the case of National Asset Management Agency v. Commissioner for Environmental Information [2013] IEHC 86, was delivered by the High Court (Mac Eochaidh J) on 27 February 2013, upholding the decision of my predecessor in Case CEI/10/0005, Mr. Gavin Sheridan and the National Asset Management Agency (13 Sept. 2011), in which she found that NAMA is a public authority within the meaning of the Regulations. NAMA appealed the judgment to the Supreme Court, which is due to hear the matter on 7 April 2014. An appeal to the High Court in a similar case dealing with the scope of the public authority definition, CEI/10/0007, Mr. Gavin Sheridan and Anglo Irish Bank (29 Sept. 2011), has been stayed by agreement pending the outcome of NAMA's appeal.

Another appeal to the High Court brought by Bord na Móna in relation to CEI/12/0003, Mr. Andrew Jackson and Bord na Móna (23 Sept. 2013) was withdrawn following delivery of a judgment by the European Court of Justice that was considered to have a direct bearing on the appeal.

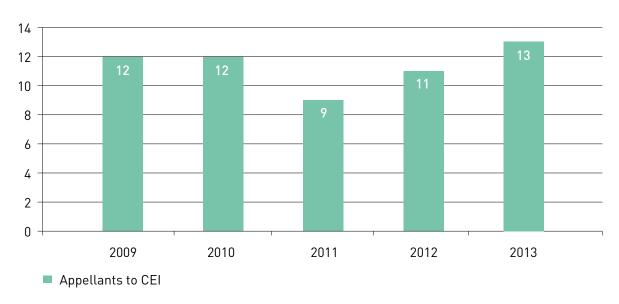
My Office withdrew its appeal to the Supreme Court against the judgment of Mr. Justice O'Neill in An Taoiseach v. Commissioner for Environmental Information [2010] IEHC 241 (Case CEI/07/0005) in early 2014. I considered that it would not be prudent to pursue a Supreme Court appeal which I had been advised was unlikely to be successful, particularly in light of the severe financial constraints within which the Office is obliged to operate in the current difficult economic climate.

### **Statistics**

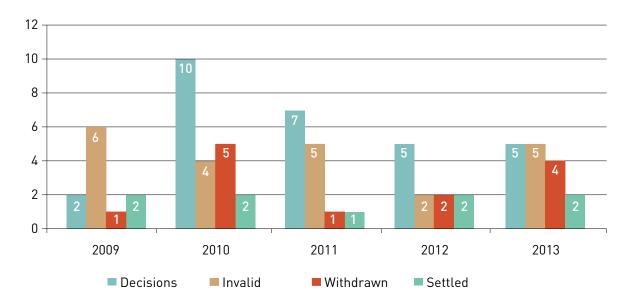
### Appeals received: 19



### Number of appellants to CEI: 13



### Outcome of CEI appeals by year



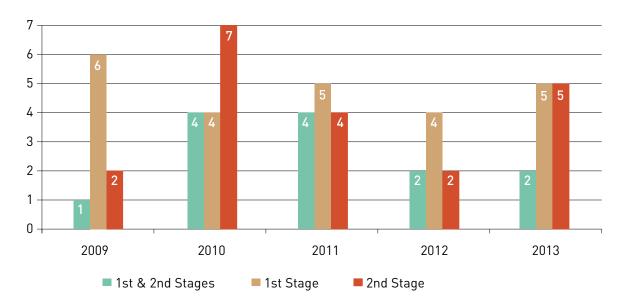
### Outcome of CEI appeals by year

- 5 decisions
- 5 invalid
- 4 withdrawn
- 2 settled

### Deemed Refusals

A deemed refusal occurs when the public authority fails to issue a decision on the request within the relevant time limit specified in the Regulations (usually one month).

In 2013, my Office recorded deemed refusals concerning seven public authorities who had not responded to a request within the time limits provided for in the Regulations.



## Deemed refusal at first stage of the request

Five applications to public authorities were recorded by my Office as deemed refusals at the first stage of the request. The public authorities are:

- Environmental Protection Agency,
- Sustainable Energy Ireland,
- Department of Communications, Energy and Natural Resources,
- · Coillte, and
- Eirgrid.

### Deemed refusal at second stage of the request

Five applications to public authorities were recorded by my Office as deemed refusals at the second stage of the request. The public authorities are:

- Sustainable Energy Ireland,
- ESB Networks (two applications),
- An Garda Síochána, and
- Eirgrid.

### Deemed refusals at both stages of the requests

Two of the applications mentioned above were recorded by my Office as having deemed refusals at both stages of the request. The public authorities are:

- Sustainable Energy Ireland, and
- Eirgrid.

# Nama subject to information requests following ruling

by Ann O'Loughlin

A High Court ruling yesterday means Nama is subject to Access to Information on the Environment (AIE) requests.

# FOI request for horse meat records refused

Department says that 'on balance, there is no public interest in releasing the records'

### PAMELA DUNCAN and ALISON HEALY

The Department of Agriculture has refused to release a large number of records under the Freedom of Information (FOI) Act that relate to test results taken during the horse meat controversy.

Irish Examiner 28-02-2013

Irish Times 30-03-2013



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

# Chapter 2: Decisions



# **Chapter 2: Decisions**

In this chapter, I report on the decisions made in 2013. The full text of these decisions can be found on my website at www.ocei.gov.ie.

Case CEI/11/0007, Mr. Pat Swords and Department of Environment, Community and Local Government (the Department) – Decision of 20 February 2013

Whether the Department was justified in charging a fee for the costs involved in searching for and retrieving the information requested

The Department proposed to charge a search and retrieval fee of €146.65 for processing the applicant's request for records "relating to public participation and the development of policy and legislation". The former Commissioner, Ms. Emily O'Reilly, found that it is neither permissible, nor is it reasonable having regard to the Directive, for a public authority to impose search and retrieval fees for the work involved in processing an AIE request. She observed that such work is not part of the supply of information for which it is permissible to charge a fee; nor is charging for search and retrieval compatible with the prohibition on charges for the examination in situ of information requested. She considered that allowing for such a charge would also run contrary to the purpose of the AIE Directive and the information or records management practices that are required of public authorities under the AIE regime.

She noted in particular that, under the current AIE regime, the environmental information held by public authorities is meant to be systematically organised, catalogued, and at least ready for active dissemination to the public. She found that charging for search and retrieval costs is inconsistent with these intentions. She accepted, however, that costs connected with compiling or copying of the information may be included in a charge for making environmental information available under the Regulations.

Case CEI/12/0008, Ms. Attracta Uí Bhroin and Department of Arts, Heritage and the Gaeltacht (the Department) – Decision of 13 March 2013

Whether the Department was justified in refusing the appellant's request for a list of AIE requests on the ground that the information concerned is not environmental information within the meaning of the Regulations

In Case CEI/11/0001, Mr. Gavin Sheridan and Central Bank of Ireland (26 March 2012), available at www.ocei.gov.ie, Ms. O'Reilly accepted, with some reservation, that official travel by car is an activity within ambit of paragraph (c) of the definition. However, she questioned whether the definition of environmental information was intended to encompass the activities of individual staff members of public authorities as compared to higher level measures and activities such as policies, legislation, plans, programmes, and environmental agreements, i.e. the examples given in paragraph (c). In this case, she gave this question further consideration in light of her decision in CEI/11/0007, Mr. Pat Swords and Department of Environment, Community and Local Government, which is referenced above.

Ms. O'Reilly considered that the corollary to the requirements of the AIE regime must necessarily be that public authorities are permitted to take a reasonable, objective and pragmatic approach to the definition of environmental information. Moreover, she noted that, in the recent "Report from the Commission to the Council and the European Parliament on the experience gained in the application of Directive 2003/4/EC on public access to environmental information", dated 17 December 2012, the European Commission drew a distinction between the access rights that exist for environmental information, described as "information in any form on the state of the environment or on the state of human health and safety", on the one hand, and for "general administrative information" on the other.

Ms. O'Reilly accepted that the AIE Regulations and Directive are measures designed to protect the elements of the environment, but in an indirect and aspirational manner only. She considered that the link between AIE requests, including the administrative action taken on the requests, and any environmental impact, is too remote and subject to too many variables for information on the requests to qualify as environmental information within the meaning of paragraph (c) the definition. Moreover, while public access to environmental information may eventually lead to a better environment through more effective public participation in environmental decision-making, she did not accept that the processing of AIE requests by public authorities is itself "designed" to protect the elements of the environment or that it otherwise qualifies as a measure or activity within the meaning of paragraph (c) of the environmental information definition. She concluded that the Department's decision to refuse the appellant's request was correct. She noted, however, that the applicant was entitled to make a request for the records sought under the Freedom of Information Act.

CEI/12/0005, Mr. Pat Swords and Department of Environment, Community and Local Government (the Department) – Decision of 20 September 2013

Whether the Department was justified in refusing the appellant's request in relation to public consultation on climate policy and legislation

In this case, Ms. O'Reilly found that the Department was justified in refusing the applicant's request under Article 9(2)(a) and (b) of the Regulations. Article 9(2) of the Regulations allows a public authority to refuse to make environmental information available where the request (a) "is manifestly unreasonable having regard to the volume or range of information sought", or (b) "remains formulated in too general a manner, taking into account Article 7(8)". Where a request is made in too general a manner, a public authority is required under Article 7(8), as soon as possible and at least within one month of receipt of the request, to invite the applicant to make a more specific request and to offer assistance to the applicant in the preparation of such a request.

Ms. O'Reilly considered that the term "manifestly unreasonable" is sufficiently clear to denote, without further explanation, any request of broad or indeterminate range which has been made in bad faith or which otherwise appears to have been made for some purpose unrelated to the access process. It was readily apparent in this case that the applicant did not seek access to any identifiable environmental information which he genuinely believed may be held by the Department. Rather, he sought to challenge the Department's reliance on the mandatory greenhouse gas mitigation targets underlying the national climate policy and legislation development programme and to raise questions about the Department's intention to take "due account" of "all" submissions made in the context of the public consultation exercise being carried out at the time his request was made. While Ms. O'Reilly acknowledged that there is controversy over the commitments which have been made at national and EU level to reduce greenhouse gas emissions, she nevertheless found that the applicant's request represented a misuse of the right of access under Article 6 of the AIE Regulations. She concluded that the request was subject to refusal under Article 9(2)(a) in the circumstances.

Alternatively, Ms. O'Reilly found that Article 9(2)(b) applied. Although the Department had made only a limited effort to assist the applicant in accordance with Article 7(8), it was evident from his rapid and abrupt response to the Department's message that it was unlikely he would modify his request so as to render it more specific. The Commissioner stated that, while the AIE Regulations impose significant obligations on public authorities, it was incumbent upon the applicant to act reasonably and in good faith in making his request. She also considered that, as a general matter, "the public interest served by disclosure" is outweighed by the interest served by refusal where, as here, the request appears to have been made for some purpose unrelated to the access process.

Case CEI/12/0003, Mr. Andrew Jackson, Friends of the Irish Environment, and Bord na Móna (BnM) – Decision of 23 September 2013

Whether BnM was justified in its refusal of the appellant's request on the ground that it is not a public authority within the meaning of the Regulations

The issue presented in this case was whether BnM is a public authority within the meaning of the Regulations. In determining the matter, Ms. O'Reilly examined the history of BnM and had regard to the statutory duties and powers that remain applicable to the company, which, as she noted, is publicly owned. She also had regard to its oversight arrangements with the Department of Communications, Energy and Natural Resources.

Ms. O'Reilly emphasised that BnM's functions are statute-based and include specific duties in relation to the environment, namely, turf, bogs, and "other lands", which are all elements of the environment. She also noted that BnM carries out activities and provides services in relation to the environment. While she accepted that BnM performs its functions on a commercial basis, she considered that it does so for the benefit of the public, not for "private profit". She concluded that BnM is a public authority within the meaning of Article 3(1)(b) of the Regulations in that it is a legal person "performing public administrative functions under national law, including specific duties, activities or services in relation to the environment". In addition, she found that BnM is a public authority within the meaning of Article 3(1)(c) of the Regulations in that it is a legal person "having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b)".

BnM appealed from the decision to the High Court, but sought an adjournment of the proceedings pending delivery of the judgment of the European Court of Justice in Case C-279/12, Fish Legal and Shirley v. Information Commissioner et al. After the awaited judgment was delivered on 19 December 2013, BnM withdrew its appeal.

# CEI/12/0004, Mr. Gavin Sheridan and Dublin City Council (the Council) – Decision of 20 December 2013

Whether the Council was justified in refusing access to certain items of information relating to Greyhound Waste and the transfer of the waste collection service on the ground that the information concerned is not environmental information within the meaning of the Regulations

In this, my first decision as Commissioner for Environmental Information, I outlined a framework for dealing with cases which raise valid threshold jurisdictional questions and also provided further clarification regarding the scope of the environmental information definition. The records at issue included an Asset Purchase Agreement providing for the transfer of the Council's waste collection service to a private operator, but also the list held by the Council of the potentially interested parties who were contacted as prospective bidders for the purchase, emails dealing with administrative arrangements, and other records relating to the negotiations over the commercial terms of the agreement. The Council had refused the request in full on the basis that it was not a request for "environmental information" within the meaning of the AIE Directive upon which the Regulations are based.

I have restated in Chapter 1 the approach I outlined for dealing with appeals such as this which involve valid threshold jurisdictional issues. In this case, I also adopted my predecessor's approach to the environmental information definition. I clarified, however, that while the definition is broad, the examples it provides are meant to illustrate the types of information that it encompasses. In relation to paragraph (c) of the definition, I observed that whether the link between the information concerned and the effect on the environment is sufficient to bring the information within the ambit of the definition is a matter of judgment that may depend upon the circumstances of the case. I noted that, if in doubt, it is appropriate to have regard to the purpose of AIE as reflected in Recital (1) of the Directive, emphasising that AIE is about environmental decision-making, not the general administrative activities of public authorities. Moreover, I explained that, given the obligations on public authorities that AIE imposes, it is vital to the integrity of AIE that it not be seen by the public as merely an alternative access mechanism for information that is more readily understood as falling within the ambit of the FOI Act.

I found that waste collection is an activity within the meaning of Article 3(1)(c) of the environmental information definition and that the Asset Purchase Agreement providing for the transfer of the waste collection service to a private operator is information on that activity and thus likewise qualifies as environmental information. However, I found that the link between the remaining items of information at issue and any effect on the relevant environmental elements and factors is simply too remote to bring them within the ambit of the definition of environmental information under the Regulations. I varied the decision of the Council accordingly.

# Appendices



# **Appendices**

# Appendix 1

Certificates issued under section 20 and section 25 of the FOI Act



7<sup>th</sup> February 2014



Ms Bernadette McNally, Director General, Office of the Information Commissioner, 18 Lower Leeson Street, Dublin 2

# Freedom of Information Acts 1997 and 2003 ("the FOI Act") Notification under Section 20 and Section 25

Dear Ms McNally,

In response to your recent correspondence in relation to Section 20 and Section 25 certificates I would like to confirm that the Department of Defence have **not** issued any such certificates in 2013.

I would also like to confirm that a Section 20 Secretary General Certificate issued by the Department of Defence on 4 March 2009 was renewed in March 2011 and is currently under review.

Yours sincerely,

Cliona O'Sullivan,

Freedom of Information Office, Department of Defence.

ACKNOWLEDGED

Office of the Ombudsman

Cuirfear fáilte roimh chomfhreagras i na Gaeilge,

Bóthar an Staisiúin, An Droichead Nua, Contae Chill Dara Station Road, Newbridge, Co. Kildare

Teileafón / Telephone: (045) 492000 Glao Áitiúil / LoCall: 1890 25 1890 R-Phost / E-mail: customer@defence.ie Láithreán Gréasáin / Web:www.defence.ie

# Appendix I



OIFIG AN ARD-RUNAÏ, AN RIONN DLÍ AGUS CIRT AGUS COMHIONANNAIS OFFICE OF THE SECRETARY GENERAL, DEPARTMENT OF JUSTICE AND EQUALITY

Ms Bernadette McNally 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 Ms McNally,

I refer to your letter dated 16 January 2014 in relation to certificates issued by Secretaries General and Ministers under Sections 20 and 25 of the Freedom of Information Acts, 1997 and 2003.

This Department has a total of six Section 25 Ministerial Certificates. Three certificates were renewed by the Minister last year. Please find enclosed a copy of all three certificates as referred to.

Yours sincerely,

Brian Purcell Secretary General

February 2014

# Appendix I



An Roinn Gnóthaí Eachtracha agus Trádála Baile Átha Cliath 2

**Department of Foreign Affairs and Trade** Dublin 2

23 January 2014

Ms Bernadette McNally Director General Office of the Information Commissioner 18 Lower Leeson Street Dublin 2 Information Commissione
2 7 JAN 2014

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

Dear Ms McNally,

I refer to your letter of 16 January on the above subject.

I confirm that, during 2013, I did not issue any certificates under Section 20 of the Freedom of Information Acts.

On 21 July 2013, the Tánaiste and Minister for Foreign Affairs and Trade, Mr Eamon Gilmore T.D., 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 24.

Please find enclosed copies of the certificates issued in 2013.

Yours sincerely

David Cooney
Secretary General

# Appendix II

## Review under section 25(7) of Ministerial Certificates issued



Roinn an Taoisigh Department of the Taoiseach



√ January, 2014

Mr. Peter Tyndall Information Commissioner, Office of the Information Commissioner, 18 Lower Leeson Street, Dublin 2.

Re: Review of Certificates issued under Section 25 of the Freedom of Information Act, 1997 (as amended by Section 20 of the Freedom of Information Act, 2003)

Dear Commissioner,

I would like to inform you that pursuant to the above Acts, the Taoiseach, the Minister for Public Expenditure and Reform and the Minister for Jobs, Enterprise and Innovation carried out a review of the operations of the Act, for the period ended 31<sup>st</sup> October 2013 on 14<sup>th</sup> January 2014.

Of the twelve certificates reviewed, six were issued by the Minister for Foreign Affairs and Trade and six by the Minister for Justice and Equality.

Having completed the review, the Taoiseach, The Minister for Public Expenditure and Reform and the Minister for Jobs, Enterprise and Innovation are satisfied that it is not necessary to request revocation of any of the twelve certificates which were the subject of the review — copies of the forms signed by the reviewers to that effect are attached.

Yours sincerely,

Carol Woodley-Tyrne

Department of the Taoiseach

c.c: D/FF&T, D/J&E, D/PE&R, D/JE&I

Tithe an Rialtais, Baile Átha Cliath 2. Government Buildings, Dublin 2.

# Appendix III

### Annual Energy Efficiency Report 2013

Monthly Energy Report	OPW - Office of Public Works Office of the Ombudsman
Dec 2013	

### Sullillary

### Month to month

Energy usage has decreased by -22.0% from 58,955kWh in Dec 2010 to 45,999kWh in Dec 2013. As a result, C02 emissions for this period have decreased by -17% from 19,886kg to 16,507kg, (-3,379Kg).

#### Annua

The base year used for all these calculations is 2010.

Compared to this base year, energy consumption on site has decreased by -48,105kWh or -10.4% over the last 12 months.

In terms of total CO2, production has decreased by -12.1%, since 2010 or by -24,953Kg.

Normalised for weather variations, CO2 has decreased by -8.3%, since 2010 or by -17,132Kg

	Energy use - Dec 2013					
	Annualised energy usage					
	Description	Electricity	Gas	Total		
	Benchmark Year	284,062	179,086	463,148		
	Previous 12 months	245,683	169,360	415,043		
	% Difference	-13.5%	-5.4%	-10.4%		

More details on the Energy Report are available at www.oic.ie

