An Coimisinéir Faisnéise
Information Commissioner

Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

2019 Annual Report

Supporting the Right to Information

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An Coimisinéir Faisnéise
Information Commissioner

Annual Report 2019

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Foreword

I hereby submit my seventh Annual Report as Information Commissioner to the Dáil and Seanad pursuant to section 47(2) of the Freedom of Information Act 2014.

This is the twenty-second Annual Report of the Information Commissioner since the establishment of the Office in 1998.

Peter Tyndall
Information Commissioner
June 2020

Elaine Cassidy
Director General

Performance Summary

Public body compliance

7
statutory notices were issued to public bodies by my Office in 2019, the lowest since the introduction of the 2014 Act

19%
of reviews accepted by my Office were deemed refused at both stages of the FOI request; down from 28% in 2018

Demand for our services

29%
Reviews deemed refused at the second stage of the request down from 40% in 2018 to 29% in 2019

28%
Reviews deemed refused at the first stage of the request down from 40% in 2018 to 28% in 2019

458
We accepted 458 applications for review in 2019 - 5% more than 2018

97%
of all applications to my Office were accepted within ten days

613
applications for review made to my Office in 2019, - 13% increase over 2018 and the highest number in ten years

1 The year in review

Chapter 1: The year in review

Your right to information

Freedom of Information

The **FOI Act 2014** provides for a general right of access to records held by public bodies and also provides that records should be released unless they are found to be exempt. The Act gives people the right to have personal information about them held by 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 primary role of the Office of the Information Commissioner is to conduct independent reviews of decisions made by public bodies on FOI requests, where members of the public are dissatisfied with responses to those requests. As Information Commissioner, I have a further role in reviewing and publishing commentaries on the practical operation of the Act.

The FOI Act applies to all bodies that conform to the definition of public body in Section 6(1) of the Act (unless they are specifically exempt or partially exempt under the provisions of Section 42 or Schedule 1 of the Act). Bodies such as Government Departments and Offices, local authorities, the Health Service Executive, voluntary hospitals, and universities are included. As new public bodies are established, they will automatically be subject to FOI unless they are specifically exempt by order made by the Minister.

Access to Information on the Environment (AIE)

The European Communities (Access to Information on the Environment) Regulations 2007 to 2014 provide an additional means of access for people who want environmental information. The right of access under the **AIE Regulations** applies to environmental information held by or for a public authority. The primary role of the Commissioner for Environmental Information is to review decisions taken by public authorities on requests for environmental information. Both access regimes are legally independent of each other, as are my roles of Information Commissioner and Commissioner for Environmental Information.

Re-use of public sector information

The European Communities (Re-use of Public Sector Information) (Amendment) Regulations 2015 (**S.I. No. 525 of 2015**) provide that the Information Commissioner is designated as the Appeal Commissioner. As such, my Office can review decisions taken by public bodies in relation to requests made under the Regulations to re-use public sector information, including decisions on fees and conditions imposed on re-use of such information.

Introduction

In line with the trend in recent years, 2019 saw yet another rise in demand for my Office's services. We received more applications for review in 2019 than in any of the last ten years. However, dealing with the increased demand was only one of a number of challenges we faced during the year. We also faced challenges in the coordination of our move to new Office premises late in 2019 and in the development and roll out of a new case management system.

An extraordinary effort was required of our staff, and our ICT staff in particular, to ensure that the new system was fit for purpose and that all of our existing casework was successfully migrated to the new system. In addition, due to a considerable amount of goodwill, sheer determination and hard work by all of our staff, sometimes involving work late into the night and at weekends, we ensured a smooth and relatively incident free move to our new Offices in Earlsfort Terrace. I am very grateful for the commitment shown by all staff in the course of the move and for making it all happen so quickly and smoothly.

With so much going on, it is not surprising that we faced significant difficulties in dealing with the increase in demand for our services and in even maintaining the significant levels of output we had achieved in recent years. The additional challenges we faced during the year were unavoidable. We had already committed huge resources to delivering the case management system and we simply had no option but to move to a more suitable premises when we did. Nevertheless, we are now based in a premises that is fit for purpose and have a new case management system that we expect will serve us well in the coming years and will allow us to improve the level of service we can offer to our customers in the future.

Despite all of this, we still managed to achieve high output levels. While the number of FOI reviews processed in the year is down on last year the percentage reduction, at less than 3%, is negligible considering all of the other challenges we faced. It is also noteworthy that despite those challenges, we continued to roll out an outreach programme on engagement with bodies within remit with a view to improving the administration of FOI. As part of that programme, my Office carried out an investigation under section 44 of the FOI Act into the practices and procedures adopted by FOI bodies for the purpose of compliance with the provisions of the Act. I published my report following my investigation in early 2020. The report is discussed in more detail in Chapter 2.

During 2019, my Office was involved in a significant level of court activity. The tremendous impact such cases have on my Office's resources cannot be underestimated. During the year, the Court of Appeal delivered judgment on an appeal arising from one of my decisions that has the potential to have a profound effect on the way my Office processes reviews and, indeed, on the way the FOI regime operates in Ireland. In the case in question (The Minister for Communications, Energy and Natural Resources v the Information Commissioner and Others [2019] IECA 68), the Court of Appeal found that I had erred in my interpretation and application of a presumption provision in the Act. The provision says that a decision to refuse a request is presumed not to have been justified unless the FOI body can satisfy me that its decision was justified. The effect of the judgment is that the position my Office should adopt in relation to the presumption provision is now unclear. As such, I felt compelled to appeal that judgment to the Supreme Court. At the time of writing, the Supreme Court has not yet delivered its judgment on the matter.

In 2019, the Supreme Court delivered judgment on another case I had appealed. The appeal was of a judgment of the High Court in the Minister for Health v the Information Commissioner [2014] IEHC 231 wherein the Court found that the Department was deemed not to hold records of transcripts of a meeting an individual had with a retired judge who reviewed allegations of sexual abuse. The Supreme Court dismissed my appeal. I report on both judgments in more detail in Chapter 2.

In my 2017 Annual Report, I suggested that a formal review of the FOI Act should be considered. No such review has taken place to date. I remain of the view that there are certain aspects of the Act that would benefit from amendment. It seems to me that the formation of a new Government in 2020 presents an opportunity for commencing a review. Were this to happen, there are a number of issues I would wish to be taken into account. For example, I would like to see consideration being given to the introduction of an administrative tribunal to consider appeals against my decisions. In my view, such a tribunal would be considerably more cost effective and less resource intensive than superior court challenges. I intend to pursue the matter of a review of the FOI Act with the Central Policy Unit of the Department of Public Expenditure and Reform during 2020.

In part two of my Report, I report on my role as Commissioner for Environmental Information.

Peter Tyndall
Information Commissioner
Commissioner for Environmental Information

Office Developments in 2019

New Premises

My Office shares certain administrative services, such as Human Resources, Finance, Legal Services etc., with the Offices of the Ombudsman, the Commission for Public Service Appointments, and the Secretariats to the Referendum Commission and the Standards in Public Office Commission. We also share a single premises. All of the Offices have seen a marked increase in service demand in recent years with a commensurate need to increase staff resources. As such, our former premises in Lower Leeson Street was no longer fit for purpose. As the lease on the premises came to an end in 2019, we took the opportunity to relocate to a more appropriate premises, with considerable assistance from the Office of Public Works.

In December 2019, we moved to newly refurbished premises, 6 Earlsfort Terrace. As a public office, it was important that we remained readily accessible to the public. We are delighted that we have managed to retain a central location (opposite the National Concert Hall) for the convenience of all of our stakeholders. Importantly, the building is also accessible for visitors with physical disabilities. The Office space itself is of an open plan design and I am pleased to say that all staff worked together in a spirit of cooperation to ensure that any challenges arising in adapting our work practices to accommodate the new working environment were addressed. I am also pleased to report that the move took place with no disruption to our services.

Strategic plan and values 2019-2021

In recent years, my Office invested significant time and resources into transforming the way we work in order to optimise the use of our resources. In 2019, we developed a new strategic plan to allow us to build upon our achievements. The new plan sets out our vision which is to promote fairness, transparency, accountability and excellent public services and it identifies the following objectives as primary enablers in the achievement of our vision:

1. Drive and influence improvements in the public service.
2. Enable and support the public service in achieving and maintaining best practice standards.
3. Reinforce organisational capacity to provide an effective and efficient service to all of our stakeholders.
4. Enhance public awareness of our roles and how to access our services in order to optimise our impact on the public service.

As reflected in the objectives, the plan is customer-centred and focused on improving public services. My Office ensures that the customer remains at the heart of everything we do as supported by our values of fairness, independence, innovation, customer focus and empathy.

My Office continues to innovate and evolve in the face of changing challenges and opportunities. Work on the development and delivery of enhanced management information systems is now at an advanced stage. The improved knowledge management functionality will support reporting and decision-making. This in turn will further increase the effectiveness and efficiency of our processes.

Human Rights - Public Sector Duty

The Irish Human Rights and Equality Commission Act 2014 introduced a positive duty on public bodies to have due regard to human rights and equality issues. My Office is committed to providing a service to all customers that respects their human rights and their right to equal treatment and has adopted a proactive approach to implementing this duty. Our approach is underlined by our core organisational values of independence, customer focus and fairness, which are evident in both the culture of the Office and our internal policies and procedures. When processing reviews, we ensure that appropriate regard is had to human rights.

In 2018, we established a working group on our public sector duty. The group assessed the human rights and equality issues relevant to our functions and identified the policies, plans and actions needed to address those issues. On foot of this, a Public Sector Duty Committee was established. During 2019 a considerable amount of progress was made by the Committee on delivering the actions it set out.

Among other things, an e-learning module was introduced for all new staff members on human rights and equality. Furthermore, in support of the Office move, a considerable amount of work was carried out to ensure that our Office is accessible to staff and visitors. This included the development of a revised internal communications strategy which focused on ensuring staff members were aware of the availability of needs assessments and the assistive technologies that might be required.

Irish Language Scheme

During 2019, my Office, along with the Office of the Ombudsman, prepared its fourth draft scheme under the Official Languages Act 2003. The Scheme (available on **www.oic.ie**), was approved by the Minister for Culture, Heritage and the Gaeltacht and will remain in force for a period of 3 years from 8 April 2019, or until a new scheme has been approved.

Statutory notices issued to public bodies

During the year, my Office issued four statutory notices under section 23 and three statutory notices under section 45 of the Act. I am pleased to report that this is the lowest number of notices issued in a year since the introduction of the new Act in 2014. This level of compliance by public bodies with the requirements of the Act is a significant improvement over previous years. For example, my Office issued eleven notices under section 23 in 2015 and we issued at least ten notices under section 45 in 2017 and in 2018.

Notices issued under Section 23 of the FOI Act

Where a public body decides to refuse a request, whether wholly or partly, it is obliged to give the requester a statement of the reasons for the refusal. It is not sufficient for the body to simply paraphrase the words of the particular exemptions relied upon. The decision should show a connection, supported by a chain of reasoning, between the decision and the decision maker's findings. It should generally include

- any provisions of the FOI Act pursuant to which the request is refused,
- the findings on any material issues relevant to the decision, and
- particulars of any matter relating to the public interest taken into consideration for the purposes of the decision.

Where my Office considers that the statement of reasons given is inadequate, I am obliged, under **section 23**, to direct the head of the body to provide a statement containing any further information in relation to the above matters that is in the power or control of the head. As I have mentioned above, the section 44 investigation my Office carried out in 2019 included an examination of compliance by FOI bodies with the requirement to provide adequate reasons for refusing requests. As such, the report contains specific recommendations to enhance compliance by public bodies with section 23 requirements.

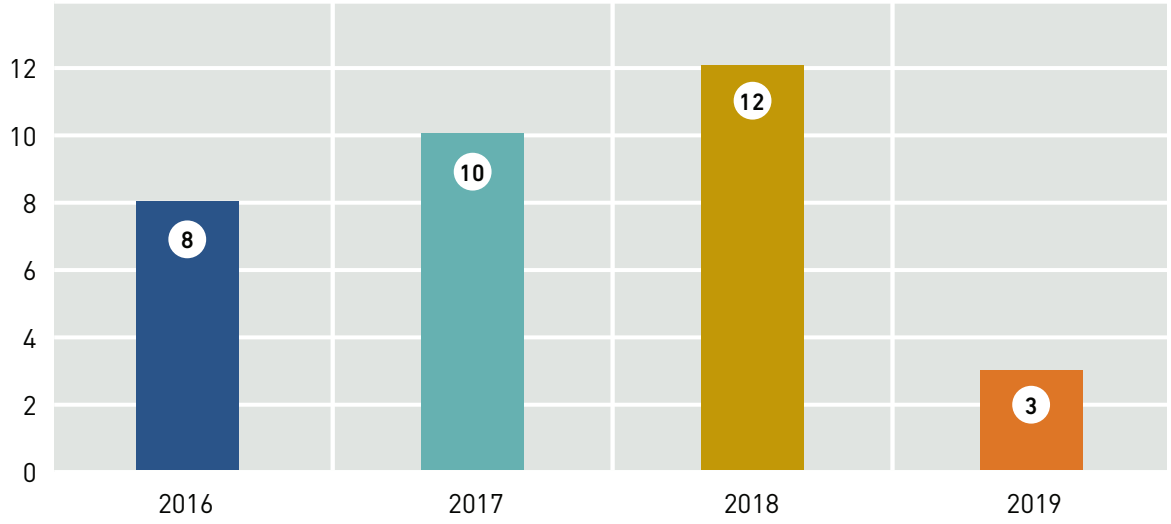
In 2019, we issued a notice under section 23 to the heads of the Department of Children and Youth Affairs, the Department of Employment Affairs and Social Protection, the Department of Public Expenditure and Reform and to the Chief Executive of Fingal County Council. In each case, we considered that the original and/or internal review decisions fell short of the requirements of the FOI Act, and we sought a more detailed statement from the public body in each case.

In its response to my Office, the Department of Children and Youth Affairs acknowledged that its response to the requester was not of the standard required either by my Office or by the Department. It said that the records at issue were since released in full to the requester. In his reply to my Office, the Secretary General of the Department said that he had asked his Department's FOI Unit to remind all its staff of the statutory time frame for responding to FOI requests and of the importance of complying with the requirements of the FOI Act. I was very pleased to note the Department's positive and proactive response in that case.

Notices issued under Section 45 of the FOI Act

Under **section 45**, I can require a public body to provide me with any information in its possession or control that I deem to be relevant for the purposes of a review. It is important that public bodies comply with the time frames set out by my Office, as delays impact on our ability to comply with the requirement that we issue decisions as soon as may be and, in so far as practicable, within four months of receipt of applications for review. In the vast majority of cases, public bodies supply the relevant information we need in a timely manner in order to progress reviews.

In 2019 my Office issued notices under section 45 to the Health Service Executive (HSE), to Athlone Institute of Technology (AIT) and to Fingal County Council.



In the case of the HSE, my Office requested a submission within two weeks in support of the HSE's decision to refuse a particular request. However, more than a month passed and despite repeated contact with the HSE, no reply was received. My Office issued a notice under section 45 to the Director General of the HSE and stated that the HSE's failure to furnish the submission meant that it was not possible for this Office to proceed with the review under section 22 of the FOI Act. A submission was subsequently received from the HSE within the timeframe set out in the section 45 notice.

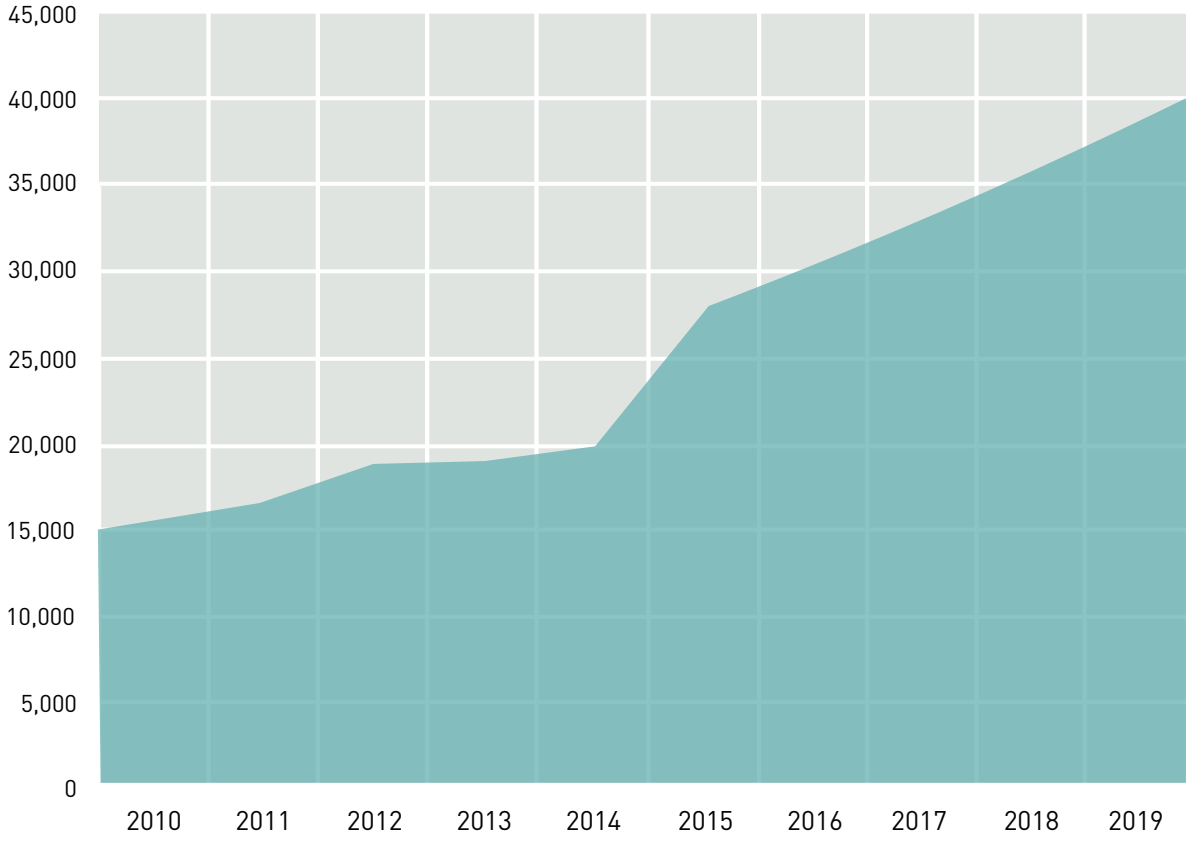
In the case of AIT, my Office sought copies of the records that were relevant to the review. In response, AIT's legal representatives said a number of relevant records were not provided to my Office as the decision of AIT was to refuse access to them under section 31(1)(a) (Legal professional privilege) and that their "disclosure" to my Office would constitute a waiver of privilege by AIT. My Office issued a section 45 notice in which it explained that it was entitled to access the records for the purposes of the review to determine whether the exemption cited was appropriately applied. The records were provided to my Office soon after.

In September 2019, my Office contacted Fingal County Council and sought copies of the main records that were the subject of the review. Following a request from the Council, my Office agreed to extend the deadline by one week. However, the Council subsequently requested additional time to provide the records due to ongoing legal proceedings, following which my Office agreed to a further extension of two weeks. Records were received on 4 November but they were not provided in a format that would allow for the review to proceed. For example, the redacted parts of certain records to which partial access had been granted were not identified in the copies provided. My Office issued a section 45 notice to the Council requiring it to provide the records in an appropriate manner.

Key FOI statistics for the year

This part of Chapter 1 provides more detail on FOI usage during the year under review. Further information is provided in the tables in Chapter 4.

Number of FOI requests to public bodies 2010 – 2019

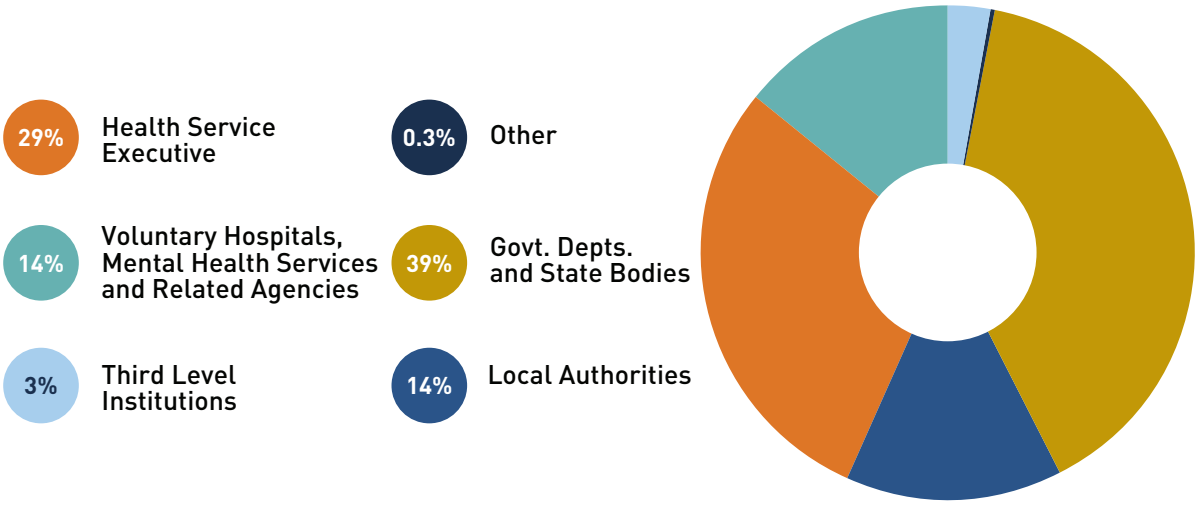


Public bodies reported a total of 39,904 requests received in 2019, an increase of 8% on 2018. In the five years since the introduction of the FOI Act 2014, which extended FOI to a range of new bodies, the number of requests made annually to public bodies has increased by 42%.

Top ten bodies who received most requests during 2019

	Public body	2019	2018	+-%
1	Health Service Executive	11,685	10,706	+9%
	HSE South area	4,560	3,823	+19%
	HSE West area	3,544	3,731	-5%
	HSE Dublin North East area	1,700	1,365	+25%
	HSE Dublin Mid-Leinster area	1,105	1,148	-4%
	HSE National	776	639	+21%
2	Department of Employment Affairs and Social Protection	2,647	2,510	+5%
3	St James's Hospital	1,445	945	+53%
4	TUSLA - Child and Family Agency	1,142	992	+15%
5	Dublin City Council	980	774	+27%
6	Department of Justice and Equality	894	827	+8%
7	Department of Health	582	480	+21%
8	Irish Prison Service	525	495	+6%
9	Tallaght Hospital	521	803	-35%
10	Department of Transport, Tourism and Sport	511	389	+31%

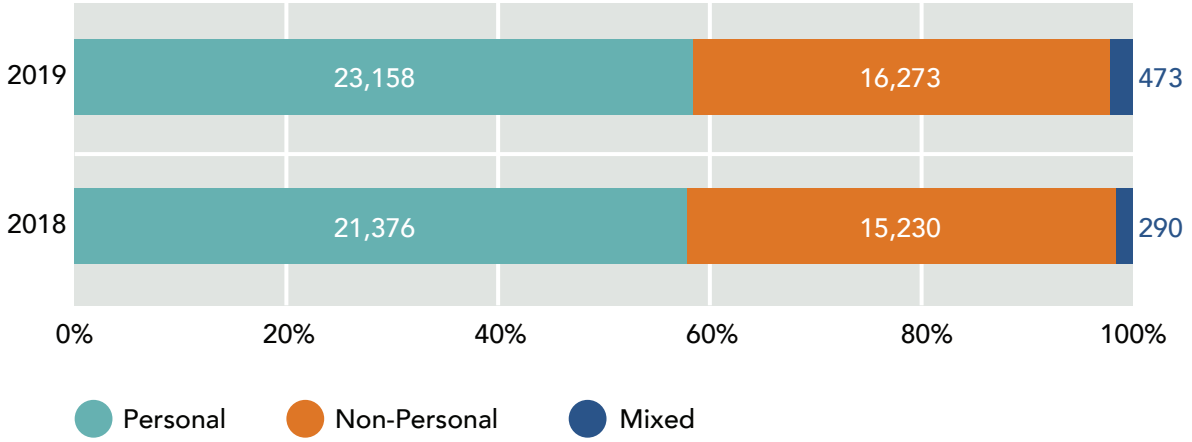
Sectoral breakdown of FOI requests to public bodies



Figures below show that many public bodies are experiencing increases in FOI activity. This is highlighted more clearly when the activity in FOI in 2019 is compared to 2017.

- The Department of Communications, Climate Action and Environment recorded a 28% increase, from 362 requests received in 2018 to 464 in 2019. The figure for 2019 also represents an increase of 138% over 2017.
- The Department of Transport, Tourism and Sport, with 511 requests, recorded an increase of 31% in 2019 and 48% over 2017.
- The Department of Health, with 582 requests, recorded an increase of 21% in 2019 and 66% over 2017.
- The Department of Children and Youth Affairs, with 169 requests, recorded an increase of 24% in 2019 and 92% over 2017.
- The Department of Rural and Community Development was established in July 2017. Since that time, the number of FOI requests made to the Department has increased from 14 in 2017 to 79 in 2019. Requests made to the Department in 2019 increased by 36% over 2018.
- Requests made to the Houses of the Oireachtas Service increased by 63% in 2019, from 167 requests in 2018 to 272 requests in 2019.
- Decreases in requests were recorded by the Department of Agriculture, Food and the Marine (29%) and the Department of Housing, Planning and Local Government (32%).
- A number of Local Authorities recorded significant increases in requests made in 2019: Cork City Council - 36%; Galway County and Westmeath County Councils - 34%; Waterford City and County Council – 29%; Dublin City and Wexford County Councils - 27%; and Kerry County Council - 23%.
- All but 2 Local Authorities have recorded increases in requests made in 2019 compared to 2017. During that time, 14 Authorities have recorded increases greater than 20%.
- Requests to Beaumont Hospital increased by 21% in 2019. When compared to 2017 requests have increased by 48%.
- Requests to St. James's Hospital increased by 53% in 2019 and by 84% over 2017.
- Tallaght Hospital recorded a 35% decrease in requests made in 2019.
- Requests to the Health Service Executive increased by 9% in 2019 and by 22% over 2017.
- Requests to the HSE South area increased by 19% in 2019 and by 33% over 2017.
- Requests to the HSE Dublin North East area increased by 25% in 2019 and by 56% over 2017.
- Other public bodies have recorded increases of as much as 100% over the 2018 figure but the majority of them receive less than 50 requests in a year. The International Protection Office, the Property Registration Authority, and IDA Ireland each received more than 50 requests in 2019 and since 2017 have recorded increases of 80%, 69%, and 63% respectively.

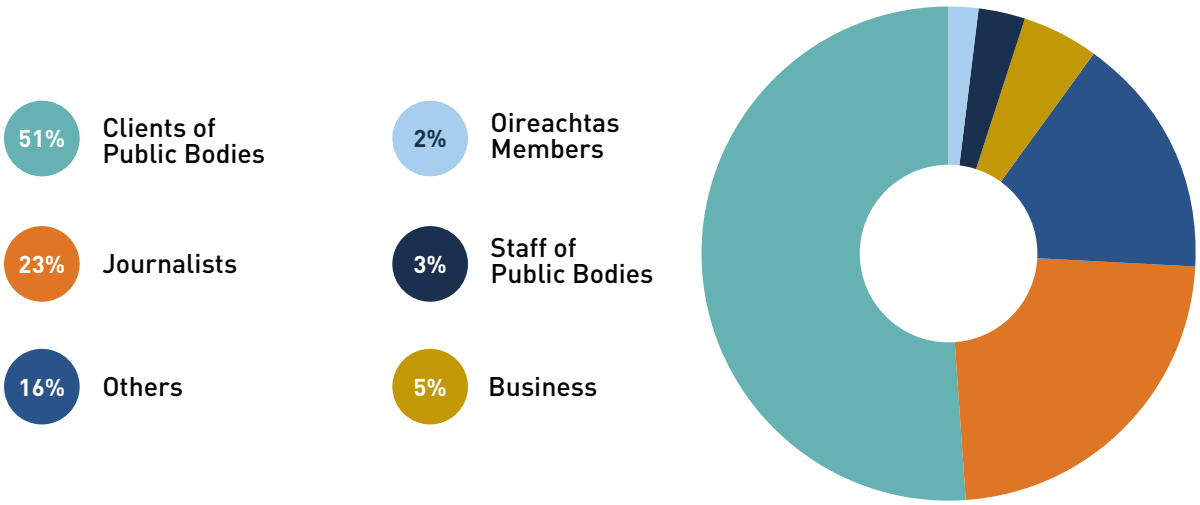
Type of request to public bodies



- 80% of requests made to local authorities were for access to non-personal information.
- 61% of requests made to Government Departments and State bodies were for access to non-personal information.
- Of the requests received by the HSE, 88% were for access to personal information.
- 88% of all requests received in the overall health sector, including the HSE and voluntary hospitals, were for personal information.

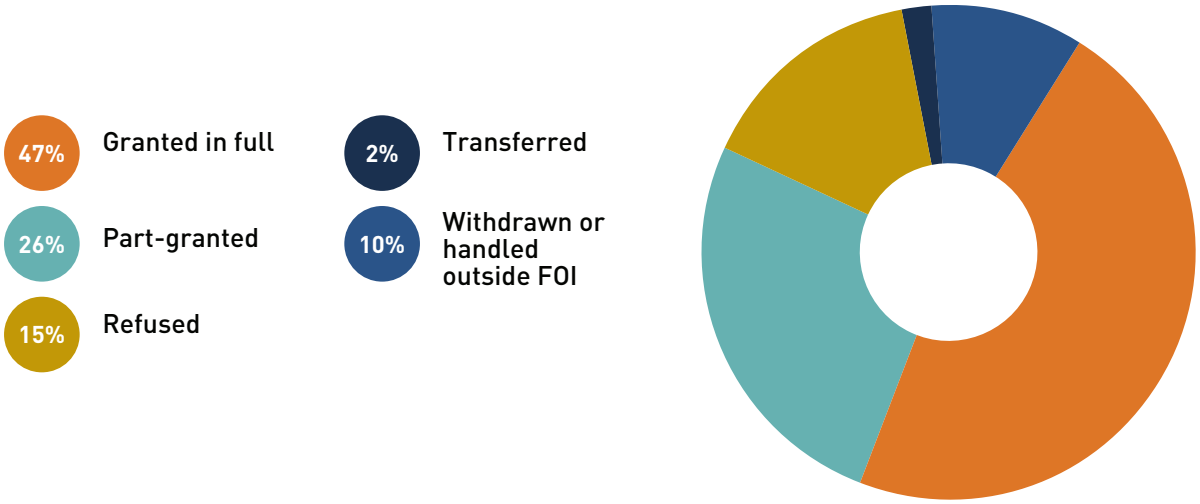
See Chapter 4, tables 6-11, for more details.

Category of requester to public bodies



The percentage of requests for each category of requester as identified above is similar to 2018. Requests from journalists increased by 2%.

Release rates by public bodies

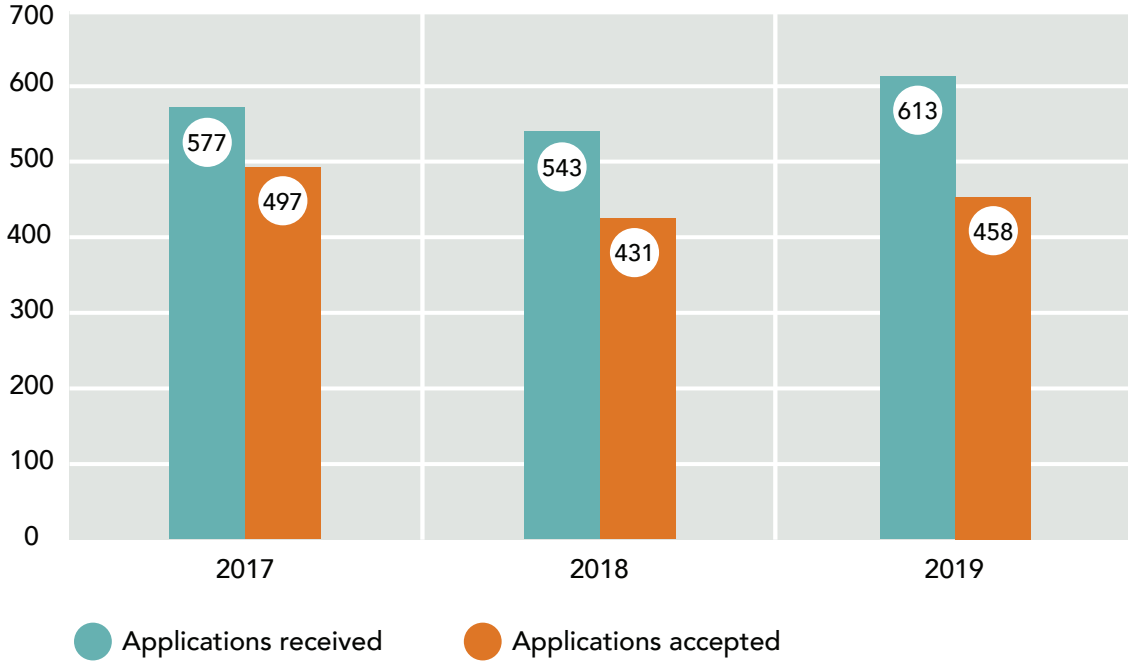


Release rates are very similar to 2018. The percentage of requests granted in full or in part, at 73%, is identical to 2018. Table 5 in Chapter 4 provides more detail on release rates by sector.

Office of the Information Commissioner caseload

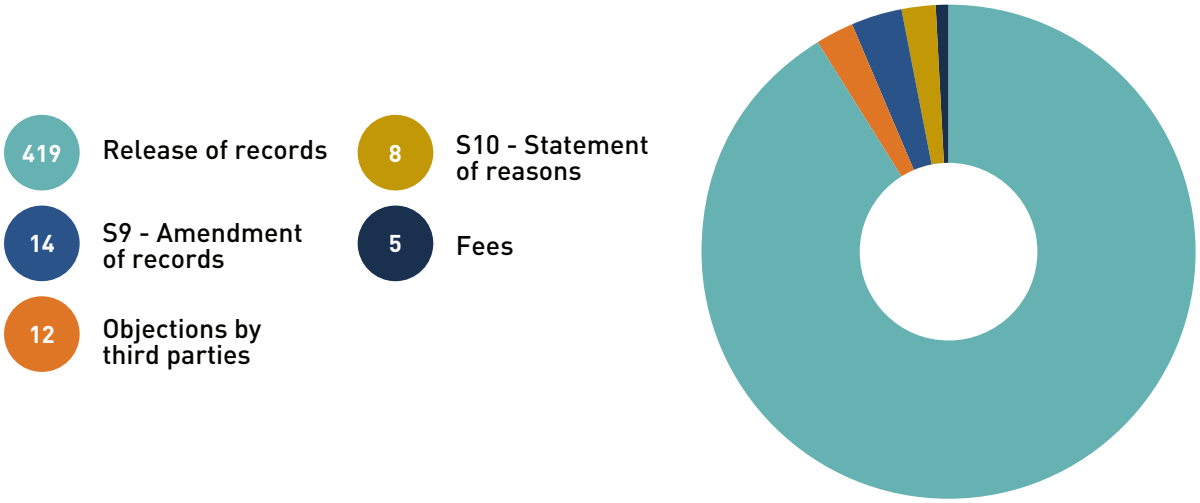
An application for review can be made to my Office by a requester who is not satisfied with a decision of a public body on an FOI request. Decisions made by my Office following a review are legally binding and can be appealed to the High Court only on a point of law.

Applications to OIC 2017 – 2019



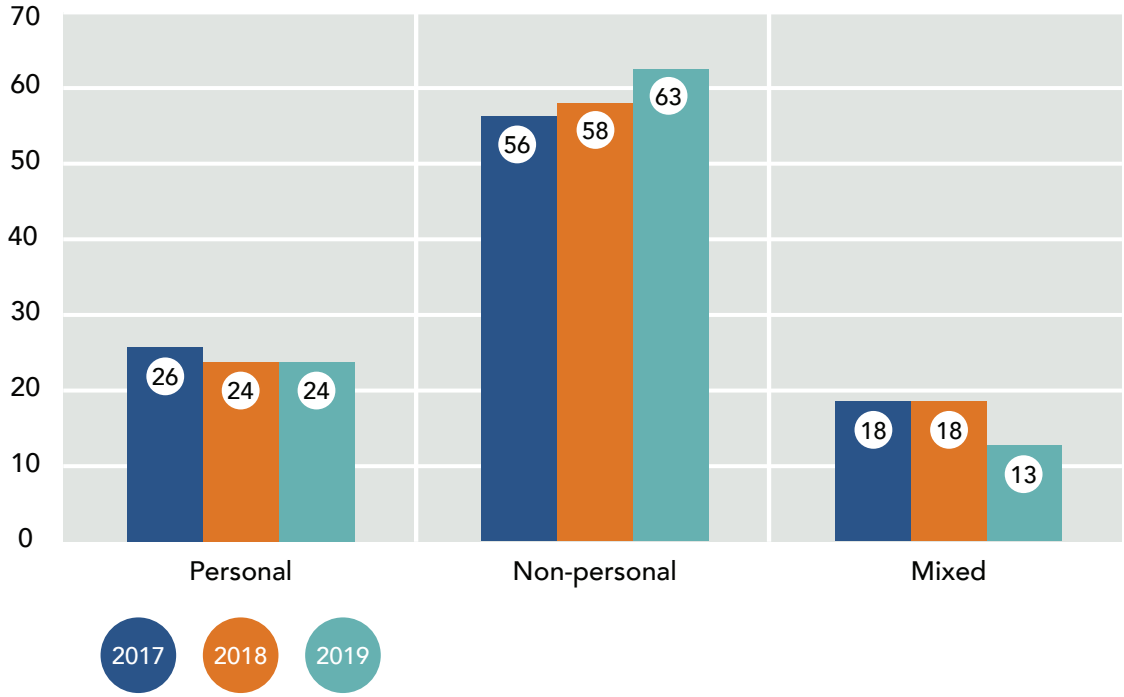
In 2019, my Office received a higher number of applications for review than it had in the previous ten years. While most applications are accepted by my Office, a number of invalid applications are rejected each year. Invalid applications arise mainly due to the failure of applicants to avail of internal review of the initial decision before applying to my Office for a review.

Subject matter of review applications accepted by OIC



Percentage of applications accepted by OIC by type 2017 – 2019

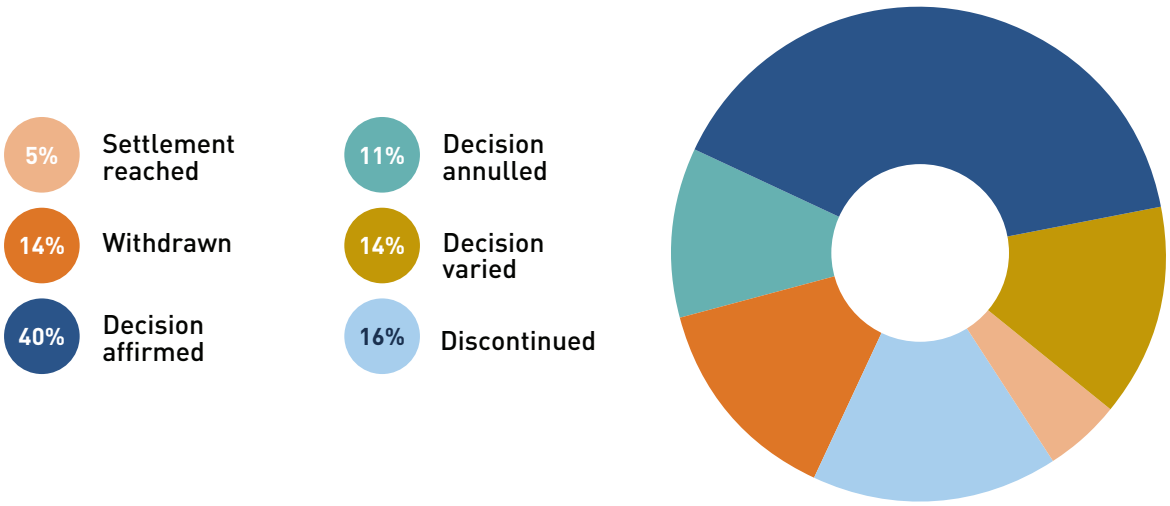
An application recorded by 'type' indicates whether the applicant is seeking access to records which are of a personal or non-personal nature, or a mix of both.



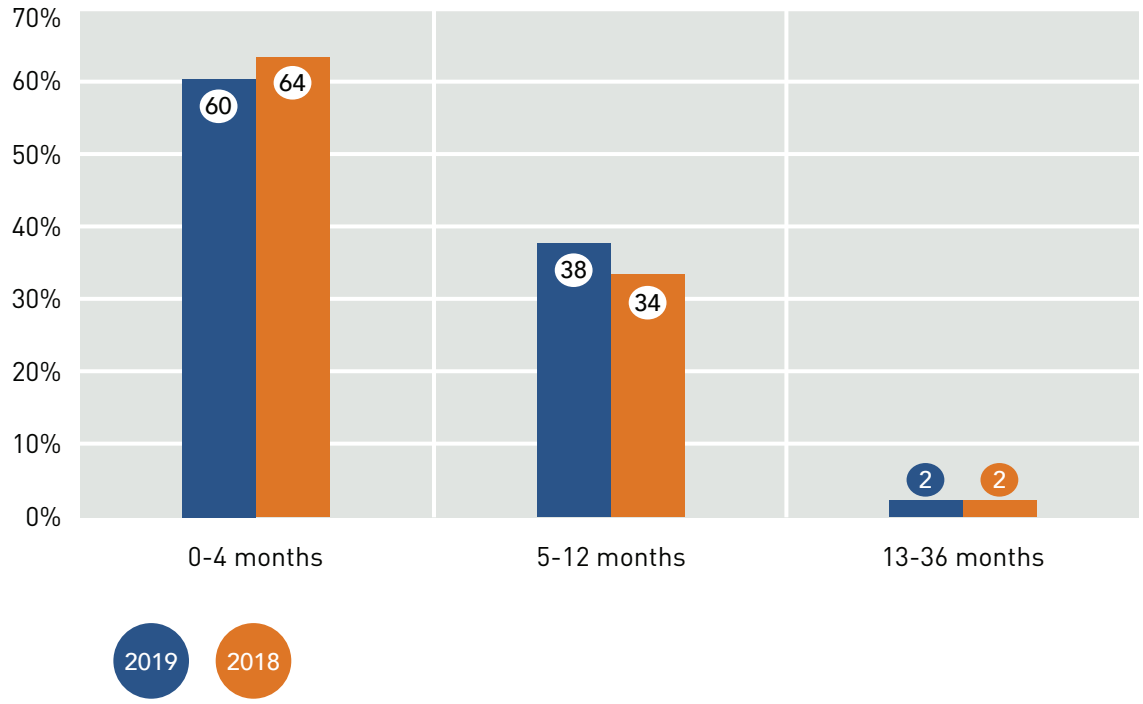
See Chapter 4, table 17 for a 3-year comparison

Outcome of reviews by OIC in 2019

My Office reviewed 430 decisions of public bodies in 2019, 65% of which were brought to a close by way of binding decision. The rates in the table below are similar to those of recent years.



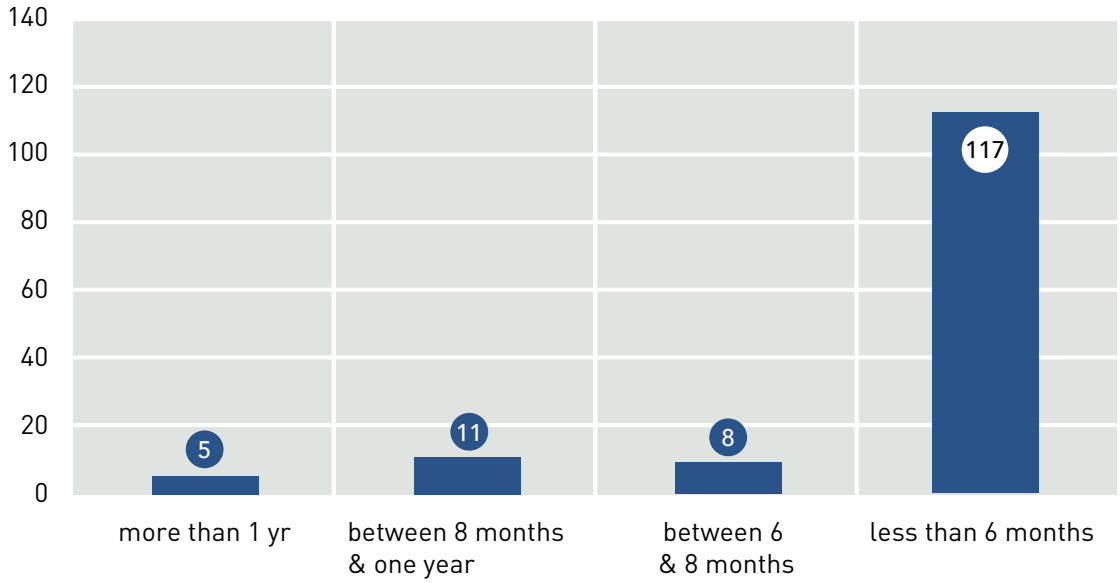
Age profile of cases closed by OIC



While the percentage of reviews closed within a four month period is down slightly on 2018, the achievement of this challenging target in 60% of cases is very satisfactory, particularly in the face of the various challenges my Office faced during the year as outlined in my introduction to this Report.

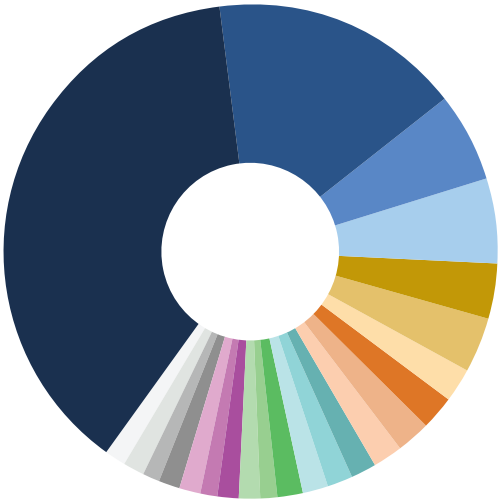
Age profile of cases on hand in OIC at end 2019

The number of cases on hand at the end of the end of 2019 was 141, an increase of 28 cases over 2018. 83% of all reviews on hand at the end of the year were less than six months old.



Breakdown by public body of applications for review accepted by OIC

In 2019, my Office accepted 458 applications for review covering 123 public bodies. Last year we accepted reviews covering 113 public bodies. It is interesting to note that the number of applications accepted involving the Health Service Executive has decreased from 103 in 2018 to 76 in 2019. I am not aware of any obvious reason for the decrease and unfortunately, unlike in previous years, my Office is unable to break down the information about the HSE into its area Offices.



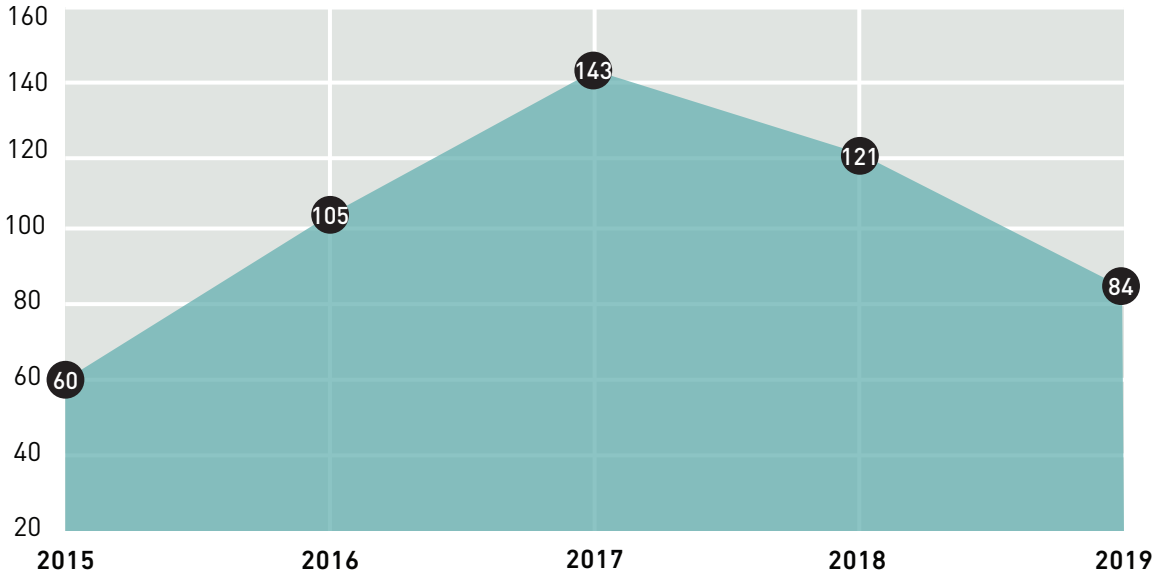
76	Health Service Executive
27	Department of Employment Affairs and Social Protection
26	TUSLA: Child and Family Agency
17	Department of Justice and Equality
16	Defence Forces Ireland
11	Department of Education and Skills
10	Department of Agriculture, Food and the Marine
10	Department of Foreign Affairs and Trade
9	Office of the Revenue Commissioners
8	Department of Public Expenditure and Reform
8	Dublin City Council
8	Irish Prison Service
7	An Garda Síochána
6	Department of Culture, Heritage and the Gaeltacht
6	Kildare County Council
5	An Bord Pleanála
5	Department of Finance
5	Galway County Council
5	IDA Ireland
5	National University of Ireland Maynooth
5	South Dublin County Council
5	St. James's Hospital
178	Total number of remaining accepted reviews concerning other public bodies

Deemed refusals

The FOI Act imposes statutory time limits on public bodies for processing FOI requests. Specifically, a decision on a request should issue to the requester within four weeks and a decision on a request for an internal review should issue within three weeks.

Where a public body fails to issue a timely decision either on the original request (first stage) or on internal review (second stage) as provided for at sections 13 and 21 of the Act respectively, the requester is entitled to treat the body's failure as a 'deemed refusal' of the request. Following a deemed refusal at the internal review stage, a requester is entitled to apply to my Office for a review.

Deemed refusals at both stages 2015 – 2019



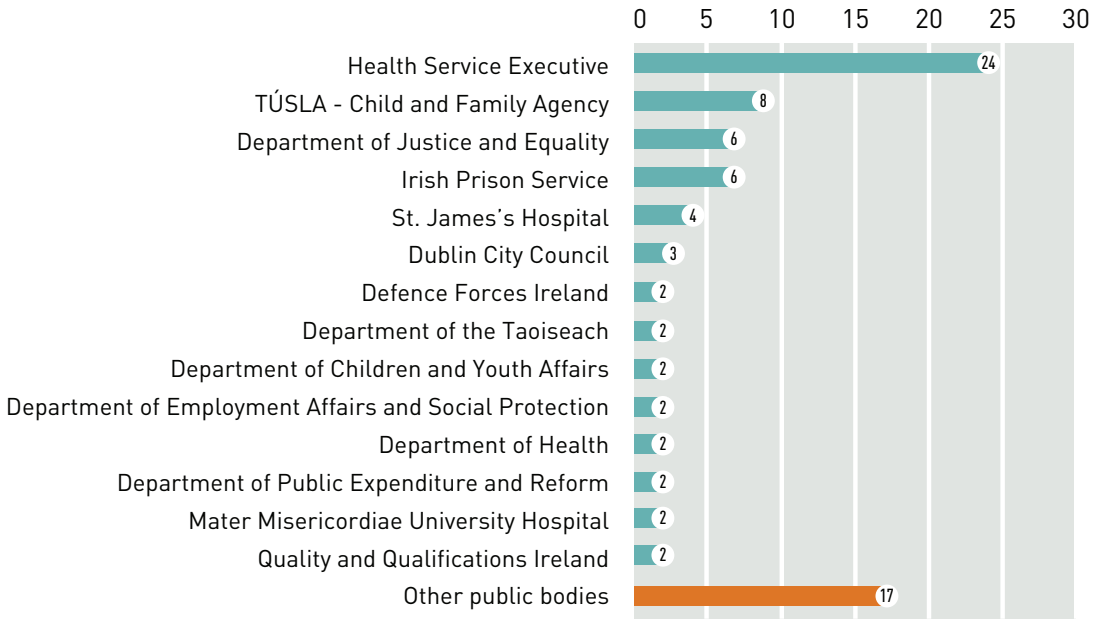
In previous Annual Reports I expressed my concern about the number and relatively high percentage of deemed refusals by public bodies and I expressed a hope for an improvement in the level of compliance. I am pleased to report a significant improvement across the three stages of reporting on deemed refusals by my Office in 2019.

Just under 19% of reviews accepted by my Office in 2019 were deemed refused by the public body at both stages of the request, compared to 29% recorded in 2017 and 28% in 2018.

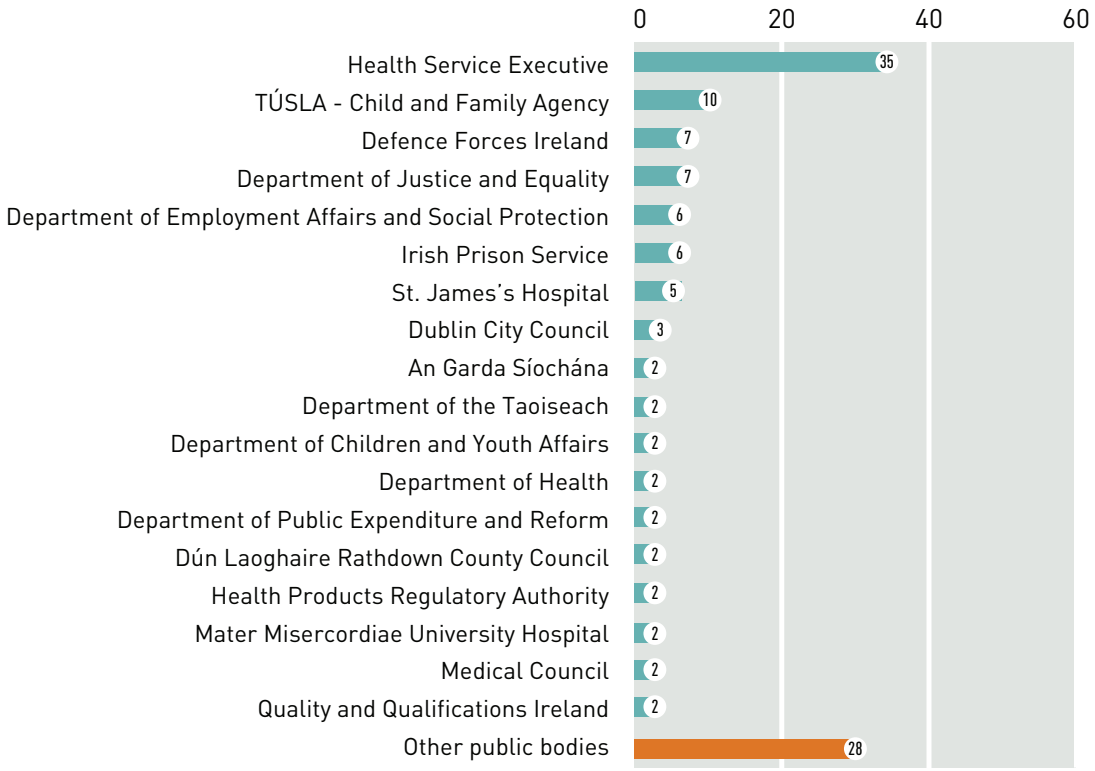
My Office recorded 28% of accepted reviews were deemed refused at the first stage (the original decision) of the FOI request during the year. Similarly, 29% of reviews were deemed refused at the second stage (the internal review). Each of these stages recorded 40% deemed refusals in 2018.

Chapter 4, table 18 provides further details.

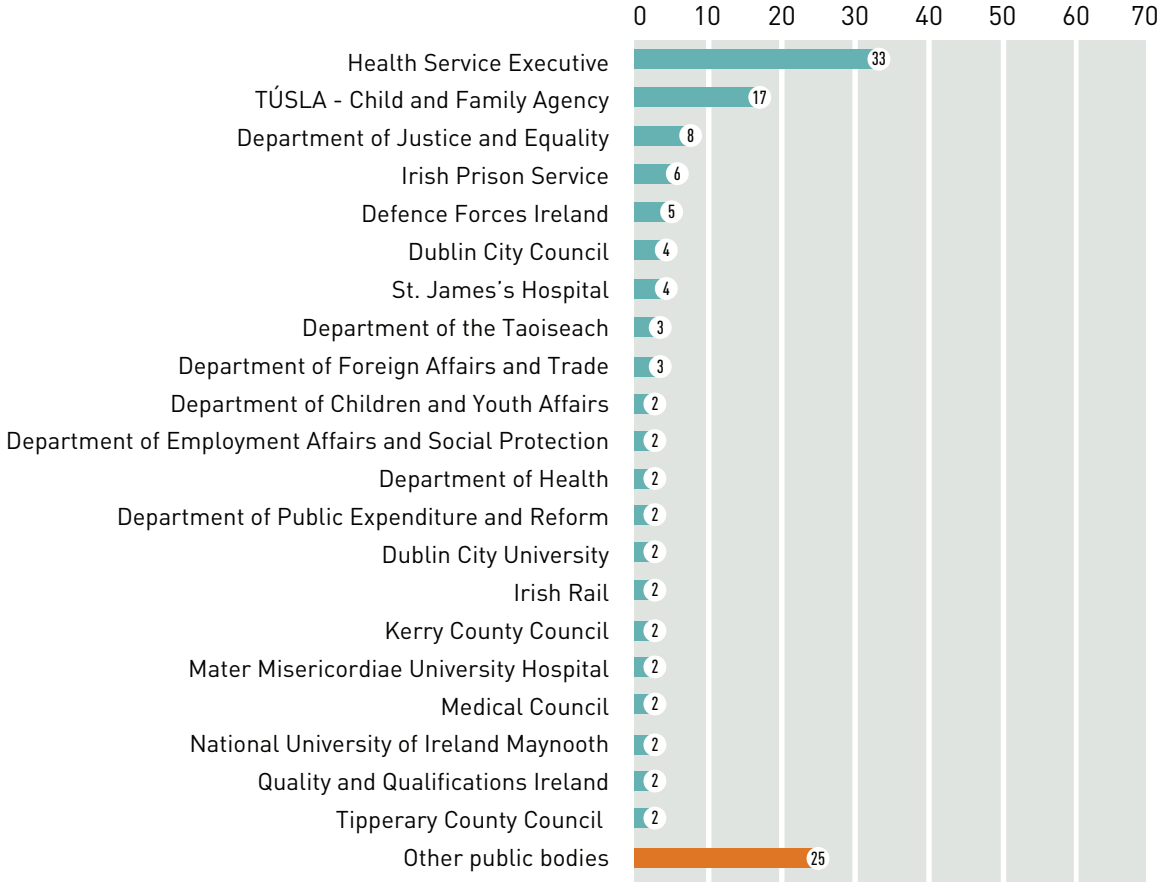
Deemed refusal at both stages by public body – 2019



Public body - deemed refusal at 1st stage of FOI request



Public body - deemed refusal at 2nd stage of FOI request



Statutory Certificates issued by Ministers

Section 34 of the FOI Act

Where a Minister of the Government is satisfied that a record is an exempt record, either by virtue of **section 32** (Law enforcement and public safety), or **section 33** (Security, defence and international relations) and the record is of sufficient sensitivity or seriousness to justify his or her doing so, that Minister may declare the record to be exempt from the application of the FOI Act by issuing a certificate under **section 34(1)** of the Act.

Each year, Ministers must provide my Office with a report on the number of certificates issued and the provisions of section 32 or section 33 of the FOI Act that applied to the exempt record(s). I must append a copy of any such report to my Annual Report for the year in question.

Section 34(13) of the FOI Act provides that

"Subject to subsections (9) and (10), a certificate shall remain in force for a period of 2 years after the date on which it is signed by the Minister of the Government concerned and shall then expire, but a Minister of the Government may, at any time, issue a certificate under this section in respect of a record in relation to which a certificate had previously been issued ..."

My Office has been notified of the following certificates renewed or issued under Section 34 in 2019.

- The Minister for Justice and Equality renewed three certificates and issued two new ones in 2019.
- The Minister for Foreign Affairs and Trade issued three certificates in 2019.

All certificates referred to above fall for review in 2021.

A copy of the notifications from the Department of Justice and Equality and the Department of Foreign Affairs and Trade are attached at **Appendix I** to this Report.

Review under section 34(7)

I was notified by the Department of the Taoiseach that pursuant to section 34(7) of the FOI Act, the Taoiseach, the Minister for Finance and Public Expenditure and Reform and the Minister for Business, Enterprise and Innovation carried out a review of the operation of subsection 34(1) of the Act.

The Department stated that sixteen certificates were reviewed. Ten certificates were issued by the Minister for Justice and Equality and six by the Minister for Foreign Affairs and Trade. The Department concluded that the Taoiseach, the Minister for Finance and Public Expenditure and Reform and the Minister for Business, Enterprise and Innovation are satisfied that it is not necessary to request revocation of any of the certificates reviewed.

A copy of the notification is attached at **Appendix II** to this Report.

Acknowledgment

I would like to take this opportunity to record my thanks to all of the staff of the Offices of the Information Commissioner and the Commissioner for Environmental Information, under the leadership of Senior Investigators Liz Dolan and Stephen Rafferty, for their hard work, determination and dedication in delivering a high quality service in a highly challenging and demanding year. My thanks also to Bernard McCabe and Edmund McDaid for their assistance in compiling this Report.

2 OIC activity in 2019

Chapter 2: OIC activity in 2019

In this Chapter I set out a summary of some of the key OIC activities and issues concerning the operation of the FOI Act that arose during the year. I also set out a brief summary of activity in connection with my role as Appeal Commissioner under the European Communities (Re-use of Public Sector Information) (Amendment) Regulations 2015.

OIC outreach programme 2019

My Office has continued the roll out of a comprehensive outreach programme in 2019. The programme comprises three streams, namely:

- Increased direct engagement with FOI decision makers through various fora, including presentations and seminars,
- Increased direct engagement with public bodies through section 44 investigations and the development of a self-audit toolkit, and
- Increased engagement with public bodies at senior management level.

In particular, my Office delivered a series of sector specific presentations to TUSLA/HSE decision makers across the country in cooperation with TUSLA, as well as in other fora.

In my 2018 Annual Report, I commented upon the high level of cases where public bodies failed to make decisions on FOI requests and applications for internal review within the statutory timeframes and I stated my intention to carry out an investigation under section 44 of the Freedom of Information Act, 2014. In 2019, my Office carried out an investigation into compliance by FOI bodies with the statutory timeframes for processing requests and the requirement to provide adequate reasons for refusing requests.

Five bodies were investigated, namely the Defence Forces, Dún Laoghaire-Rathdown County Council, the Office of the Revenue Commissioners, TUSLA – Child and Family Agency and University College Dublin. Based on the findings of the investigation, I made specific recommendations to each of the bodies concerned, as well as a suite of general recommendations addressed to all FOI bodies.

Among other things, the report recommends that:

- Resources should be commensurate with the body's requirements in achieving statutory compliance, so that the rights provided for under the Act may be exercised in full;
- Senior Management should visibly endorse FOI and the importance placed by the body on compliance with the statutory obligations provided for under the Act;
- A common approach to tracking and documenting details of the processing of FOI requests should be adopted across the body. Tracking should account for the various statutory deadlines;
- Particular attention should be given in decision-making to the requirements of harm based exemptions and meaningful explanation of public interest test considerations;
- To reduce the burden of FOI processing, bodies should publish as much information as possible, particularly of the sort that is regularly requested from the body under FOI.

My Report was published in January 2020 and is available on my Office website **here**. Arising from my recommendations, each of the five bodies has prepared an action plan for improvement, the implementation of which has already commenced. I intend to keep progress on these plans under review over the course of the year.

Work was also undertaken on the development of a self-audit toolkit focusing on adherence to statutory timeframes for processing requests and is being piloted this year.

My Office has also had high-level engagements with senior management in a number of public bodies regarding their FOI operations. We held a number of very positive meetings with the Department of Justice and Equality regarding the ongoing implementation of measures it identified for improving its FOI service delivery.

Section 6 Determinations

Bodies are deemed to be public bodies for the purposes of the FOI Act if they fall within one or more of the categories described in section 6(1) of the Act. Where a dispute arises between a body and my Office as to whether or not it is a public body, I must submit the dispute to the Minister for Public Expenditure and Reform for a binding determination (section 6(7) refers). The Central Policy Unit (CPU) published a policy and procedures document in 2016 for dealing with such disputes.

In recent years, I expressed some concerns about the practical operation of the provision. A further issue that arose during 2019 concerned the time taken to resolve disputes. The CPU Policy envisages that the Minister's determination will be given within twenty five working days of receipt of a request by my Office for a determination.

Office of the Registrar of Political Parties

In September 2019, my Office sought a determination in respect of the Office of the Registrar of Political Parties. I considered that the Office was a public body for the purposes of the Act under section 6(1)(b) of the Act on the ground that it is an entity established by or under any enactment, the enactment being section 25(1) of the Electoral Act 1992, as amended.

At the time of writing, some six months after I sought a determination, my Office has not received the determination sought. This is not the first time my Office has encountered lengthy delays in the issuing of determinations.

Office of the Secretary General to the President

In my 2017 Annual Report, I reported that following a referral from my Office, the Minister made a determination under section 6(7) of the Act that the Office of the Secretary General to the President was a public body for the purposes of the Act. I subsequently reported in my 2018 Annual Report that the CPU informed my Office in May 2018 that, on the advice of the Attorney General, the Minister had reopened his earlier determination as to whether or not the Office is a public body for FOI purposes.

In June 2018, my Office informed the CPU that our position on the matter remained as set out in our previous correspondence, namely that the Office was established by or under the Presidential Act 1938 and as such, is an entity to which section 6(1)(b) of the FOI Act applies. My Office also drew the CPU's attention to a legally binding decision that I had issued in a case following the Minister's earlier determination that the Office is a public body for the purposes of the Act.

In light of the Minister's decision to reopen his earlier determination, I suspended a new application which I received in April 2018 concerning an FOI request made to the Office, pending a resolution of the matter.

At the time of writing, I have not yet been notified of the Minister's revised determination on the matter, almost two years after I had received notification that the Minister had reopened his earlier determination. While I understand that the advice of the Office of the Attorney General was sought, it is difficult to understand how it can take so long for a determination to issue. However, I have no option under the Act other than to await the outcome of the Minister's consideration of the matter. This is yet further evidence, in my view, of the need to revise this provision, and of the need to conduct a review of the overall operation of the Act.

Frivolous and vexatious requests

The FOI Act provides for the discretionary refusal of requests by public bodies on certain administrative grounds. One such ground (section 15(1)(g)) is where the body considers that the request is frivolous or vexatious or forms part of a pattern of manifestly unreasonable requests from the same requester. The Act also contains a similar provision (section 22(9)(a)(i)) that allows me to refuse to accept an application for review or to discontinue a review where I consider the application to be frivolous or vexatious.

The Act affords important rights to requesters. As such, the refusal of requests under section 15(1)(g) is not something that should be undertaken lightly. I have said many times that the Act demands that public bodies meet very high standards in dealing with requests and that this is as it should be, but the corollary is that the Act assumes reasonable behaviour on the part of requesters.

All public bodies, my Office included, face a constant challenge of meeting increased service demands with scarce resources. Nevertheless, processing FOI requests is a core function of public bodies and is not something that should be afforded lesser weight than other statutory functions when balancing competing demands. On the other hand, I am keen to ensure that requesters do not abuse the important rights afforded to them under the FOI Act. I am also concerned to ensure that the scarce resources of my Office are not abused.

My Office has noted a marked increase in the level of resources we have had to devote to dealing with frivolous or vexatious requests and applications for review, albeit from a small number of individuals. It is a source of immense frustration for all those charged with operating the FOI regime that such individuals appear to have no regard for the significant administrative burden that this creates.

Unfortunately, it appears that some see FOI as a valid mechanism for prolonging long-running grievances with public bodies or for forcing bodies to revisit and overturn adverse decisions previously taken. Occasionally, the focus of attention subsequently switches to my Office when we make a decision following a review that does not go the way of the requester. I have set out below some examples of my Office having to deal with such cases.

In 2018 I discontinued 13 related applications for review on the basis that the applications or the applications to which the reviews related were vexatious. All 13 related to a long-running dispute the applicant had with a particular public body and a specific service provider. I was satisfied that submitting FOI requests had become an integral part of the applicant's strategy in pursuing his grievance and that the 13 applications formed part of a pattern of conduct in terms of his use of FOI, with no regard shown by the applicant for the significant burden the pursuit of his grievance had placed on the body.

When I discontinued those cases, I provided the applicant with a detailed explanation as to why I deemed his use of FOI to be an abuse of the FOI process. However, this did not stop the applicant from making additional requests to the same body and applying to my Office for reviews of the decisions taken. Indeed, my Office discontinued three further applications for review from the applicant during 2019 and refused to accept four further applications for review.

In 2016, in case **160308** I affirmed a decision of the Department of Foreign Affairs and Trade to refuse a request for information relating to the electoral observation roster on the ground that the request was vexatious. I concluded that it was entirely appropriate to have regard to the broader issue of the manner in which a requester has engaged with a public body to date on a particular matter in considering whether a request was frivolous or vexatious.

The applicant appealed my decision to the High Court. Among other things, the Court found that I was entitled to take the applicant's alleged motivation and his other interactions with the Department into account in arriving at my decision. The Court was also satisfied that I properly came to the view that the request was to further the applicant's personal grievance and it was within my remit to classify that as vexatious. As was his right, the applicant appealed that judgment to the Court of Appeal. At the time of writing, that case has not yet been heard.

In the meantime, the applicant made further requests to the Department in relation to the election observation roster. In case **OIC-53287**, I affirmed the decision of the Department to refuse access to records relating to the applicant and election observation on the ground that his request was vexatious. I was satisfied that the request represented a continuation of that same pattern of conduct relating to the applicant's use of FOI that I found to be an abuse of process in Case 160308. I found that the request was yet another example of the applicant having shown little or no regard for the significant burden that his use of FOI in relation to the election observation roster had placed on the relevant section of the Department.

In yet another example, my Office engaged in very substantial email correspondence with an applicant whose grievance stemmed from a course he had undertaken in the Dublin Business School (DBS) in 2013. He subsequently engaged in extensive correspondence with Quality and Qualifications Ireland (QQI) in connection with a complaint he had concerning DBS and he submitted a complaint about DBS to QQI in 2015.

The applicant first approached my Office in relation to his use of FOI concerning his dealings with QQI in November 2016. Since then he has engaged in a very significant level of correspondence with my Office. In November 2019, I discontinued a review of a decision of QQI on the applicant's request for records relating to DBS on the ground that the application for review was vexatious. I found that the applicant's use of FOI had, at that stage, become an integral part of his strategy in pursuing the matter with QQI notwithstanding the fact that it had long since adjudicated upon his complaint. I found that the applicant had little or no regard for the significant burden which his use of FOI in pursuit of his grievance had placed on QQI and that the manner of the applicant's engagements with QQI and with my Office formed part of a pattern of conduct amounting to an abuse of the FOI process.

In December 2019, I refused to accept another application for review from the applicant concerning QQI on the ground that was yet another example of the pattern of conduct that I found to be an abuse of process in the earlier case.

In case **OIC-53420**, I found that Dublin City University (DCU) was justified in its decision to refuse an applicant's request for records relating to the absence of DCU staff members from a particular room in DCU on an open day on the ground that the request was vexatious. Having considered the particular subject matter of the request and the nature of the applicant's engagements with DCU on the matter, I considered that the applicant's request was made in bad faith. I did not accept that the request comprised a genuine attempt to avail of the important right of access to records held by DCU.

Rather, I considered that the applicant was attempting to use FOI to compel DCU to address his particular complaint concerning the alleged absence of specific staff on the open day, even though the programme Chair had already explained the arrangements that were made on the day and notwithstanding that he received several offers of assistance to address any queries he may have had on the day.

In conclusion, I will repeat that the FOI Act affords important rights to requesters. However, frivolous and vexatious requests run the risk of causing reputational harm to the FOI regime. My Office will continue to ensure that frivolous or vexatious requests are properly identified as such and that related reviews are dealt with using the minimum resources necessary and closed down as early as possible, so that our resources can be devoted to delivering an efficient and effective access regime.

Section 37(8) of the FOI Act

Section 37(8) of the Act provides for the making of regulations by the Minister for Public Expenditure and Reform for the grant of an FOI request in certain circumstances where the requester is the parent or guardian of the individual to whom the record relates or where the individual to whom the information relates is deceased. The relevant regulations are the Freedom of Information Act 2014 (Section 37(8)) Regulations 2016 (the Regulations).

Under section 48(1), the Minister may draw up and publish guidelines for the effective and efficient operation of the Act to assist FOI bodies in the performance of their functions under the Act. In 2017, the Minister published updated guidance on the operation of the provisions of section 37(8). Public bodies must have regard to the guidelines in the performance of their functions under this Act.

The Regulations provide for a right of access by parents or guardians to records relating to minors or certain incapacitated individuals where the public body considers that access to the records would, having regard to all the circumstances, be in the best interests of the individuals. They also provide for a right of access by certain categories of requester to records relating to deceased individuals.

The relevant categories are as follows:

i. a personal representative of the individual acting in due course of administration of the individual's 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, or

iii. the spouse or the next of kin of the individual where the body considers, having regard to all the circumstances, that the public interest, including the public interest in the confidentiality of personal information, would on balance be better served by granting than by refusing to grant the request.

Every year since the introduction of the Act, my Office has come across cases where the Regulations were wrongly applied or not applied or even considered in cases where it would have been appropriate to do so. 2019 was no different.

Where I find that a body has wrongly failed to consider the Regulations in the course of its decision making on a request, I generally annul the decision of the body and direct it to undertake a fresh decision making process, having due regard to the provisions of the Regulations. I appreciate the Regulations are quite complex but there is simply no excuse for a body failing to consider them at all in circumstances where it is appropriate that it should do so. I have set out below a sample of two cases my Office dealt with in 2019 involving a consideration of the Regulations.

In case **OIC-59851** Fingal County Council refused the applicant's request for all personal data and medical records it held in relation to her late husband. The Council refused the request on the ground that the records contained personal information relating to her late husband. In her application for review to my Office, the applicant said she was the personal representative of her late husband's estate and she submitted documentation in support of that claim.

During the course of the review, the Council asserted that it had considered the Regulations and concluded that the public interest would not, on balance, be better served by granting the request. I was not convinced by the Council's assertion that it considered the Regulations when processing the request given the absence of any mention of the Regulations in its decision letters. I noted that even if it did, it did not appear to have had due regard to the accompanying guidance issued pursuant to the provisions of section 48(1). I found there was no evidence to suggest that the Council had regard to all the circumstances and the relevant factors to be considered as provided for in the guidelines. I annulled the decision of the Council and remitted it back for a fresh decision making process.

In cases **OIC-53380** & **OIC-53512** the applicant submitted a request to the Department of Employment Affairs and Social Protection for access to records relating to his adult daughter who has an intellectual disability and has lived in a residential community for a number of years. The records mainly concerned her financial affairs, including payment of her disability allowance and her expenditure.

In early 2019, I annulled the Department's refusal of the request as it had failed to consider the Regulations and I directed it to undertake a fresh decision-making process on the applicant's FOI request, having regard to the Regulations. In its subsequent consideration of the request, the Department again refused access to the records sought.

The applicant sought a review by my Office of that decision. What was in dispute was whether access to the records would, having regard to all the circumstances, be in the best interests of the applicant's daughter. I noted that the applicant was involved in a dispute with the residential community about the management of his daughter's finances.

Having regard to all the circumstances, including the fact that the applicant was, at the time of my decision, caring for his daughter for at least three or four days a week, I found that it would be in the best interests of the individual for access to the records to be granted to the applicant.

Section 41 - non-disclosure provisions

Section 41 of the Act provides for the mandatory refusal of access to records whose disclosure is prohibited, or whose non-disclosure is authorised, by other enactments. It subordinates the access provisions of the Act to all non-disclosure provisions in statutes except for those cited in the Third Schedule to the Act. The section also provides for the review by a Joint Committee of both Houses of the Oireachtas 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.

All Government Ministers are obliged to furnish to the Joint Committee a report on the provisions of any enactments within their respective area of governance that authorise or require the non-disclosure of records, specifying whether they consider any of the provisions should be amended, repealed, or added to the Third Schedule. Ministers are required to lay their reports before the Oireachtas and to furnish my Office with a copy. I am entitled to furnish my opinion and conclusions on the reports to the Joint Committee and, indeed, must do so if requested by the Joint Committee.

In essence, the process is concluded when the Joint Committee, having completed its review of the operation of the non-disclosure provisions, presents a report to each House of the Oireachtas of the results of the review. It may include in its report recommendations in relation to the amendment, repeal, or continuance in force of any of the provisions. Under section 41(6), the first reports by the Ministers must be furnished to the Joint Committee within 30 days after the fifth anniversary of the day on which the last report was furnished under the FOI Acts 1997 & 2003 and subsequent reports must be furnished every five years thereafter.

I noted in my 2018 Annual Report that the relevant Joint Committee has only once completed the review process, in 2006. I stated my intention to contact all government departments and the clerk of the Joint Committee to follow up on outstanding reports on the process in 2019 and will continue the process in 2020 with a view to furnishing a report to the Joint Committee before the end of the year.

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. A decision of the High Court can be appealed to the Court of Appeal. Three new appeals of decisions of my Office were made to the High Court in 2019, of which one was appealed by the applicant and two by the relevant public body.

My Office appealed two High Court judgments to the Supreme Court in 2019. The judgments under appeal are described in more detail below. Proceedings were suspended in three ongoing High Court Appeals while judgment was deferred in another High Court appeal pending the outcome of those Supreme Court appeals.

Eight appeals were concluded during the year, five High Court, two Court of Appeal, and one Supreme Court appeal. Of the five High Court appeals concluded, two were withdrawn, one by the body and one by the applicant. One case was remitted back to my Office on consent. A fourth appeal was dismissed by the Court on the ground that no point of law had been identified by the applicant.

Written judgments were delivered in one High Court appeal, two Court of Appeal appeals, and one Supreme Court appeal, all of which are summarised below. The full judgments are available on our Office website at **www.oic.ie**.

High Court Judgment - University College Cork and the Information Commissioner [2018 No 12 MCA]

Background and issue

The High Court delivered its decision on 3 April 2019. The case concerned a request for access to records relating to a €100,000,000 loan agreement between UCC and the European Investment Bank for capital development purposes. UCC refused access to the records on the basis that they contained commercially sensitive information (section 36(1)(b) of the FOI Act).

In my decision, I annulled UCC's refusal to grant access to the records concerned. I found that UCC had not met the burden of proof to show that it was justified in refusing access to the loan agreement under section 36(1)(b). While I accepted that UCC had outlined a potential harm arising from the release generally of the type of the other records at issue, I found that it had not explained how such harm might arise having regard to the contents of the specific records concerned.

UCC appealed my decision to the High Court on a number of grounds. The main issues before the Court were whether I erred in my conclusion that UCC had not justified its decision to refuse access to the records sought and whether it was required to identify specific information in the records which would give rise to harm.

Conclusions of the Court

The Court annulled my decision. It concluded that the onus was not on UCC to satisfy me that its decision to refuse access to the records sought was justified. It also concluded that I had misapplied the threshold for competitive prejudice in section 36(1)(b). It remitted the matter to my Office to reconsider in light of its judgment.

Note: my Office appealed the High Court's judgment to the Supreme Court. The case was heard in January 2020 and judgment was reserved.

Court of Appeal Judgment - The Minister for Communications, Energy and Natural Resources v the Information Commissioner [2019] IECA 68

Background and issue

This case concerns the question of access to a concession agreement between the Department of Communications, Energy and Natural Resources and a private company, enet. Under the agreement, enet manages a network of fibre optic cables which is State-owned and which enables telephone and broadband services.

In my decision, I directed release of the agreement. I concluded that the release of the agreement would not involve a breach of a duty of confidence between the parties. I accepted that it contained commercially sensitive information for the purposes of section 36(1)(b), but concluded that on balance, the public interest would be better served by releasing the agreement. In making this finding, I took into account that enet was the successful bidder in a tender process for the use of a State-owned asset which generates revenue.

The Department appealed my decision to the High Court. The issues before the Court were whether I had been correct in finding that, under section 22(12)(b), the Department's decision to refuse the request was presumed not to have been justified unless it satisfied me otherwise, and whether I had erred in the way in which I had applied the exemptions set out in sections 35 (confidentiality) and 36 (commercial sensitivity). The High Court upheld my decision and the Department appealed that judgment to the Court of Appeal.

Conclusions of the Court

The Court of Appeal delivered its judgment on 3 March 2019 and allowed the Department's appeal. It concluded that I had approached my task on an incorrect legal basis in applying the presumption under section 22(12)(b). On section 36, the Court found that I had erred in my application of the public interest test in referring to "exceptional circumstances" and a business being "totally undermined". On section 35, the Court concluded that I was correct in applying section 35(2).

As I noted in my introduction to this Report, I have appealed this judgment to the Supreme Court, given its wider repercussions for the way in which my review function operates.

Court of Appeal Judgment - F.P. v The Information Commissioner & Ors [2019] IECA 19

Background and issue

An appeal was made against the judgment of McDermott J in the High Court upholding my decision in Case 090261/62/63 involving the application of the public interest test under section 28(5)(a) of the FOI Act, 1997. The question presented was whether the public interest in granting the applicant's requests for access to records relating to himself and his former step-daughter outweighed the public interest in protecting the privacy rights of the individuals (apart from the applicant) to whom the information related.

In my decision, which I reported on in my Annual Report for 2014, I concluded that the answer was no, notwithstanding evidence of malicious allegations of child sexual abuse having been made against the applicant. McDermott J upheld my decision in F.P. v The Information Commissioner [2016] IEHC 771.

Conclusions of the Court

The Court of Appeal rejected all eight grounds that the applicant relied upon in bringing his appeal. In addressing the "core issue" (i.e. "whether the trial judge was correct to determine that my decision that the public interest in providing access to the joint personal information sought by the applicant was outweighed by the public interest in upholding the privacy of the child and mother in this case"), the Court found that I correctly stated that the actual or perceived reasons for a request must be disregarded in the context of the public interest test under section 28(5)(a) of the FOI Act except insofar as they reflect a true public interest, i.e. insofar as the concerns raised in relation to the request may also be matters of general concern to the wider public.

The Court considered that the example that I used in my decision regarding the correlation between concerns over the misuse of tax money and the very strong public interest in ensuring maximum openness and transparency in relation to public expenditure, clarified "the distinction between a real public interest served by providing access to certain requested documents and the purely private interest of the applicant in having access to the documents requested (i.e. so that he can, for example, ascertain further detail of the allegations, consider any remedies he might pursue, or seek to have the record corrected, as he sees it, to be 'unfounded')". The Court confirmed that the fact that any access to the records would be consistent with openness and transparency (or serve any of the other interests identified by the applicant) "does not transform the appellant's interest in obtaining access into a public interest". The Court considered that the applicant's wish for access to the records for his own purposes was his own private interest, in contrast to the type of public interest identified in my decision.

The Court also confirmed that "considerable deference", i.e. "a wide margin of appreciation" will be afforded to me as the "expert decision-maker" under the FOI Act. The Court stated: "It is not sufficient, even were it to be the case, that in the exercise of the same discretion, the court hearing an appeal might itself have reached a different decision. There must be a clear error of law established." No such error was found in this case.

The Court found that the other questions raised in the applicant's grounds of appeal were "less central" and or even "somewhat incidental" additions, but in addressing these matters, the Court confirmed that the granting of access to personal information, including joint personal information, is potentially a release to the "world at large". The Court found that I was correct in bearing this fact in mind when balancing the public interest in openness and transparency against the public interest in upholding the rights to privacy of any third parties involved.

The Court described it as "a factor to be put in the balance, as is any proposed declaration by the applicant, or similar undertaking, in order to guarantee that such privacy will be protected", but noted that "at the end of the day, it is for the Commissioner to weigh up the different relevant factors, and decide whether the public interest in disclosure outweighs the public interest in upholding privacy by refusing the request".

Supreme Court Judgment - The Minister for Health v the Information Commissioner [2019] IESC 40

Background and Issue

On 27 May 2019, the Supreme Court delivered its judgment on an appeal taken by my Office against a judgment of the High Court in the case of the Minister for Health v Information Commissioner. It dismissed the appeal.

The applicant had applied to my Office for a review of the decision of the Department of Health to refuse his 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, commonly referred to 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 Acts 1997 & 2003.

The Department argued that the transcripts were the property of Mr. Justice Smyth and were lodged with it for safekeeping only. My Office found that the records were both held by, and under the control of, the Department under section 2(5)(a) of the Act. My Office annulled the Department's decision and directed it to process the FOI request. The Department appealed my decision to the High Court.

The High Court found that mere lawful possession of a document was not sufficient to make the document amenable to disclosure under the FOI Act on the basis that it was "held" by the public body within the meaning of section 6(1) of the FOI Act. It found that for a document to be held within the meaning of the Act, it must be either lawfully created by the public body in question or lawfully provided to that public body or lawfully obtained by the public body, in connection with the functions or business of that public body and the document must not be subject to any prior legal prohibition affecting its disclosure.

On the matter of whether the records were under the control of the Department, the Court found that because of his independent status as reviewer and because the documents at issue were brought into existence by Mr. Justice Smyth for the purposes of the Review, the only party who could assert any proprietorial interest or any other form of legal control over the documents was Mr. Justice Smyth. It found that the records were not held by, or under the control of, the Department for the purposes of the FOI Act and it upheld the Department's appeal. My Office appealed that decision to the Supreme Court.

Conclusions of the Court

The Supreme Court dismissed my appeal. It found that the High Court erred in finding that a relevant criterion in deciding whether a record is "held" is whether or not the record is subject to any prior legal prohibition affecting its disclosure. However, it found that for a record to be "held" within the meaning of the Act, the public body must not only be in lawful possession of the record in connection with or for the purpose of its business or functions but also must be entitled to access to the information in the record.

The Supreme Court agreed with the High Court that Mr. Justice Smyth was entitled to settle the terms upon which he would obtain cooperation from persons who contributed to the Review and was entitled to impose terms and conditions when sending the records to the Department, and that the Department accepted them into their custody on those terms. It found that the Department did not have a right of access to the records and that they were not held by the Department for the purposes of the Act.

Re-use of public sector information

Under the European Communities (Re-use of Public Sector Information) Regulations 2005 (the PSI Regulations), an individual or a legal entity may make a request to a public sector body to release documents for re-use. The PSI Regulations provide that, on receipt of a request in respect of a document held by it to which the PSI Regulations apply, a public sector body must allow the re-use of the document in accordance with the conditions and time limits provided for by the Regulations.

Under Regulation 10 of the Regulations, decisions of public sector bodies can be appealed to my Office. My Office received five such appeals in 2019.

A new PSI Directive

Following an extensive consultation and review, the European Commission decided that action at EU level was necessary in order to address the remaining and emerging barriers to a wide re-use of public sector and publicly funded information. The 2003 PSI Directive has been repealed and replaced in order to further stimulate digital innovation and to bring it up to date with the advances in digital technologies, such as Artificial Intelligence and the Internet of Things.

On 20 June 2019, the European Parliament and the Council of the European Union adopted Directive (EU) 2019/1024 on Open Data and the re-use of public sector information. The new Directive has an expanded scope and seeks to increase opportunities and reduce market entry barriers for businesses. The Directive is intended to make re-use easier, making the default position that re-use of documents should be free of charge and without conditions as much as possible. The new Directive will impose a positive obligation on public sector bodies to make public data available as open data (rather than on request) and to make all existing documents available unless access is restricted. The Directive also imposes an obligation to make high value datasets available for re-use free of charge. The new Directive must be transposed into Irish law by 16 July 2021.

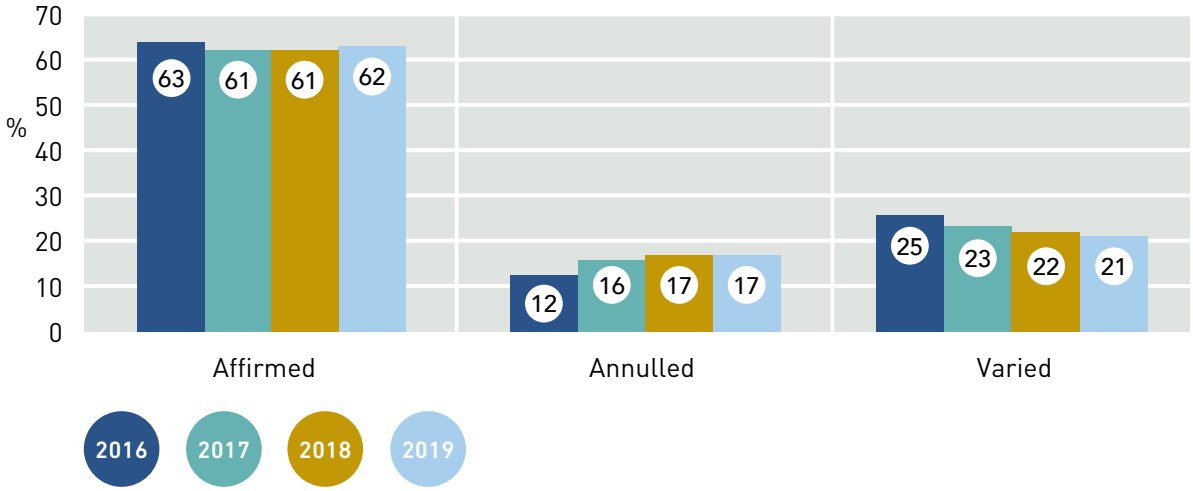
3 Decisions

Chapter 3: Decisions

Formal decisions

My Office reviewed 430 cases in 2019, of which 279 were concluded by issuing a formal decision on the review.

The table below provides a percentage comparison of the outcomes of the reviews which were completed by way of formal decision in 2019.



Of all the reviews completed in the year, almost 65% were concluded by way of a formal decision. The remaining reviews were closed by way of discontinuance, settlement or withdrawal. For a three-year comparison of the outcome of all reviews completed in the year, see Table 15, Chapter 4.

Decisions of interest

The cases in this Chapter represent a sample of cases my Office reviewed during the year that were concluded by way of a formal decision. All formal decisions issued by my Office are published in full at **www.oic.ie.**

Unjustified use of frivolous or vexatious provision - Cases OIC-53556 and OIC-53561

In Chapter 2 I expressed my concerns about the marked increase in the level of resources required to deal with frivolous or vexatious requests and applications for review. However, my Office has also dealt with cases where we deemed the provision to be wrongly applied having regard to the particular circumstances arising. The following cases provide one such example.

In Cases **OIC-53556** and **OIC-53561** the Department of Culture, Heritage and the Gaeltacht refused the applicant's requests for access to information relating to a ferry contractor over two three month periods under section 15(1)(g) on the ground that the requests were frivolous or vexatious. The Department argued that the requests formed part of a pattern and, as the applicant had refined a previous request to a three month period to avoid search and retrieval fees, the requests were vexatious as he was attempting to gain the information originally requested, while circumventing search and retrieval fees.

I considered that while in certain cases an FOI body may find requests submitted in place of a previous request in order to circumvent provisions of the Act to be vexatious, this was not such a case. The requests sought access to information that is regularly collated. As the Department had previously accepted that some of the information sought was suitable for release, I saw no reason why it should not be prepared to release such information routinely, for example through publication. Greater proactive publication of information on matters of general interest is a significant tool in managing the number of FOI requests made on such matters.

While the applicant had submitted six requests relating to ferries within a relatively short timeframe, I found that this, of itself, did not mean they were vexatious. Two streams of data were sought and the requests at issue were made with a view to obtaining information which the Department had previously accepted should be released, at least in part, without the need to pay search and retrieval fees. I highlighted, however, that repeated requests for information which has been refused run the risk of being vexatious and the appropriate approach is to avail of the appeal rights provided for in the Act. On balance, I found that the Department was not justified in deeming the requests to be vexatious on the ground that they formed part of a pattern of conduct that amounts to an abuse of process or an abuse of the right of access.

I took the view that the number of requests made was not excessive by reasonable standards nor were the requests at issue excessively broad or unusually detailed. I was also satisfied that they were not made for their nuisance value and without reasonable or legitimate grounds. As such, I found that the requests at issue did not form a pattern of manifestly unreasonable requests.

In the circumstances, I found that the Department was not justified in deeming the applicant's requests to be vexatious on the ground that they were submitted to circumvent having to pay search and retrieval charges and I directed the Department to conduct a fresh decision making process on the applicant's requests.

Whether details of teacher numbers in Education and Training Board (ETB) schools is exempt information - Cases OIC-53553, OIC-53554 and OIC-53550

In Cases **OIC-53553**, **OIC-53554** and **OIC-53550** three ETB schools refused access to the number of teachers allocated to each of the schools under their remit. ETBs are partially included bodies for the purposes of the FOI Act. Records that would enable the compilation of information (that is not otherwise available to the general public) concerning the comparative performance of schools in respect of the academic achievement of students enrolled therein are excluded.

In the cases in question, the ETBs argued that releasing allocations could allow for comparison between ETB schools regarding resources and the achievement of students in examinations and assessments, which can be linked to enrolment and projected enrolment, thus allowing for the compilation of league-tables between ETB schools.

I accepted that school league-tables might contain information on teacher numbers. However, I did not believe that it followed that this enabled people to compare the performance of schools. I distinguished the number of teachers allocated to a school from information on the academic or extra-curricular performance of its students.

The ETBs also argued that the information was exempt under section 30 of the FOI Act on the ground that releasing details of the teacher numbers could have a significant adverse effect on its management. Among other things, it argued that disclosing the information could compromise its ability to effectively manage personnel and industrial relations functions, which could lead to adverse effects on operational management, including strategic and workforce planning for the future.

Section 30 is a harm based exemption. In such cases, I expect the public body to identify the function relating to management concerned and identify the significant adverse effect on the performance of that function which is envisaged. I expect the body to explain how and why, in its opinion, release of the information at issue could reasonably be expected to give rise to the harm envisaged, i.e. how release of teacher numbers in the individual schools could reasonably be expected to have a significant adverse effect on the performance by the ETBs of their personnel and management functions.

It seemed to me that the arguments presented were no more than assertions of the potential consequences of release but they contained no details of how those harms might arise. A mere assertion of an expectation of harm is not sufficient. I was not satisfied that the ETBs had shown how the harms identified might arise, nor had they shown that the adverse effect on the functions in question would be significant. I directed the release of the information.

Unjustified reliance on blanket confidentiality clause to refuse access to contract concerning development of publicly owned land – Case OIC-53430

In **Case OIC-53430** Wicklow County Council refused access to a copy of its agreement with a developer to develop the Florentine Shopping Centre in Bray. It argued that the agreement was exempt under sections 32, 35 and 36 of the FOI Act. Its main argument was that disclosure of the agreement would breach a duty of confidence provided for by a confidentiality clause in the agreement. It argued that it was contractually obliged to keep the agreement confidential and that section 35(1)(b) applied.

That section provides for the refusal of a request where disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment or otherwise by law. However, under section 35(2), the exemption does not apply to a record prepared by a public body unless the duty of confidence is owed to a person other than an FOI body or its staff or a service provider.

In this case, the Council failed to identify any party other than itself or the developer to whom such a duty of confidence might be owed. This, of itself, was sufficient for the claim under section 35(1)(b) to fail. I noted, in any event, in circumstances where FOI law has been in force for over 20 years and where the Council publicly tendered for the development of publicly owned land, that the parties could not reasonably have had a mutual expectation of confidentiality over the entire agreement which governed the development.

I then turned to the Council's claim of commercial sensitivity. I accepted that the agreement contained commercially sensitive information. Nevertheless, I found that the public interest in transparency was best served by the release of the majority of the agreement.

The extent to which the Adoption Act 2010 serves to prohibit the release of adoption records – Cases OIC-53238 and OIC-53262

Section 41 of the Act provides for the refusal of a request where the disclosure of the record concerned is prohibited by any other enactment, apart from specific provisions set out in Schedule 3 of the Act. In effect, the non-disclosure provision overrides any right of access under FOI, unless that particular provision is specified in Schedule 3. I take the view that in order for section 41(1)(a) to apply, a provision must exist that explicitly prohibits the release of the records, that is clear in its meaning and effect, and that can be interpreted only as prohibiting disclosure of the information in question.

In Cases **OIC-53238** and **OIC-53262** the applicants sought access to their adoption records from TUSLA. They were refused access to any correspondence from the Adoption Authority, on the ground that TUSLA was prohibited from releasing it. I consulted with the Adoption Authority, who argued that the information was prohibited from release under section 88 of the Adoption Act and therefore section 41 of the FOI Act applied. However, I did not accept that section 88 of the Adoption Act was a prohibition for the purposes of section 41.

I considered that section 88 is a provision which is directed at the courts and provides the circumstances in which they can make an order regarding Adoption Authority records. I found that section 41 did not apply.

As some of the records at issue also contained personal information relating to deceased persons, I found that the question of whether the applicants were entitled to seek access to those records as the next of kin remained to be considered. Therefore, I remitted both cases for TUSLA to consider that issue.

Whether all five categories of next of kin as described in the Freedom of Information Act 2014 (Section 37(8)) Regulations 2016 are entitled to be treated as the next of kin for the purpose of accessing records of deceased persons – Case OIC-53968

In case **OIC-53968** the applicant sought access to all medical records held by the HSE relating to her late son on the basis that she was his next of kin. The HSE refused the request under section 37(1) of the Act on the basis that the records sought comprised personal information relating to the applicant's late son and that she was not the next of kin for the purposes of the FOI Act.

Subject to certain exceptions, section 37(1) of the FOI Act provides that a public body must generally refuse a request where access to the records sought would involve the disclosure of personal information relating to an individual (including a deceased individual) other than the requester. Such exceptions are provided for in subsections (2) and (5) of section 37.

Furthermore, as I explained in Chapter 2, under section 37(8) of the Act, the Minister made regulations for the grant of an FOI request in certain circumstances where the requester is the parent or guardian of the individual to whom the record relates or where the individual to whom the information relates is deceased.

I noted in my decision that the HSE had to consider the two potential possible ways in which the applicant may be entitled to access her late son's records. Firstly, it had to consider whether one or more of the exceptions provided for in subsection (2) and (5) serve to disapply the exemption in subsection (1). In considering those exceptions, the applicant's relationship to the individual about whom the information relates is irrelevant. However, I found that the HSE also had to consider whether the applicant is entitled to access the records under the Regulations as a member of a class specified therein.

I found that none of exceptions in subsections (2) and (5) served to disapply section 37(1) in this case. I then considered the potential right of access under the Regulations, which provide that notwithstanding section 37(1), a request may be made for records which involves the disclosure of personal information relating to a deceased individual and shall, subject to the other provisions of the FOI Act 2014, be granted, where the requester belongs to one of a number of classes, including the following:

> "... the requester is the spouse or the next of kin of the individual and, in the opinion of the head, having regard to all the circumstances, the public interest, including the public interest in the confidentiality of personal information, would on balance be better served by granting than by refusing to grant the request".

For the purpose of the Regulations, next of kin is defined as

(a) issue,

(b) parent,

(c) brother or sister,

(d) a niece or nephew, or

(e) any other person standing nearest in blood relationship to the individual in accordance with section 71(2) of the Succession Act 1965.

I found that the Regulations do not provide that all five categories of next of kin are entitled to be treated as the next of kin. Instead, they provide that the definition shall operate so that, where more than one paragraph of it is applicable in a given case, the person falling within whichever paragraph is numerically the lowest shall alone be regarded as the next of kin of the individual concerned. In other words, a parent of the deceased may be regarded as the next of kin only where there are no surviving children. Similarly, a brother or sister of the deceased may be regarded as the next of kin only where there are no surviving children or parents.

As the HSE had indicated that the deceased was survived by his sons, the deceased's sons were the next of kin within the meaning of the Regulations and not the applicant. I found therefore that the HSE was justified in refusing access to the applicant's request on the ground that the Regulations do not provide for a right of access to the records.

The release of illegible records cannot be regarded as a right of access to the information in the records having been granted – Case 180382

Under the FOI Act, a person may request access to a record in a specific form or manner. However, access can be provided in another form or manner where a public body determines that it would be significantly more efficient. In Case **180382** the applicant sought notes taken by an interview board and requested that they be provided in their original handwritten format and transcribed into a typed format. She also sought a transcribed copy of the handwritten Interview Marking Sheet she received following her interview. The HSE refused to provide typed versions of the interview notes under s15(1)(a) on the ground that no such records existed. Its position was that the only version of the interview notes that did exist had been released to the applicant and no typed version existed.

Section 12(1)(c) of the Act provides that a person requiring access in a particular form should specify the form or manner. Section 17 provides that access shall be granted in that form or manner unless (amongst other things) access in another form or manner would be significantly more efficient.

The HSE argued that it was significantly more efficient for it to provide the records in the form in which they were held. It argued that in order to make a transcript of the records, the interview board would have to be reconvened and that the potential of adding a further administrative burden to interview board members would make the process increasingly unattractive to potential board members.

I found that although the Act does not expressly identify to which of the parties (requester or public body) the test of "significantly more efficient" is meant to apply, it is appropriate to have regard to the requirements of both parties. I found the HSE's arguments to be somewhat overstated. I also found that a key issue in the case was that the records sought were, in part, illegible, to the extent that granting access in the original format could not reasonably be regarded as the applicant having been given access to the information contained in the records. I therefore annulled the HSE's decision and directed it to provide a transcript of the interview notes to the applicant.

No provision in the Act that allows for the separation of a joint request – Case 180335

While personal information contained in a record is exempt from release under section 37, the exemption does not apply where the personal information relates to the requester. In case **180335** the applicants submitted a joint request to TUSLA for records held on a file in relation to their son. As well as containing sensitive personal information about their son, it also contained substantial sensitive personal information relating to them and to third parties.

TUSLA issued a decision to the mother, in which it decided to part-grant the request. While the father was informed that he would receive a separate response, he did not receive one. In the course of the review by my Office, TUSLA subsequently sent a decision to the father. Among other things, TUSLA withheld from each applicant information relating to the other applicant.

In my decision, I said that while I saw no issue with a public body advising joint requesters, in advance of processing a request, of the potential consequences of making a joint request and of the potential for the release of sensitive personal information to both parties, there is no provision in the Act that allows a public body to separate a joint request into two separate requests, regardless of any concerns it may have about the sensitivity of the information at issue.

I found that, notwithstanding the sensitivity of the information contained in the relevant records relating to each of the applicants, the fact remained that they made a joint request for all records relating to themselves and their son. As such, by making a joint request, subsection (2)(a) served to disapply section 37(1) in so far as the information contained in the records related to either or both of the parties. I annulled the decision and directed TUSLA to consider the request afresh.

Decision to refuse access to school Fire Safety Assessments not justified – Case 190017

In case **190017** the Department of Education and Skills relied on a number of exemptions to refuse access to reports of fire safety assessments conducted of a number of specified schools built by a named construction company.

The Department said it had commenced legal proceedings against the construction company in relation to a number of school projects that were the subject matter of the request. It argued that a deliberative process was ongoing between the Department, the National Development Finance Agency, the Office of the Attorney General and the Chief State Solicitor's Office with a view to making decisions in relation to how to remedy the defects as well as making decisions on how to proceed in relation to legal proceedings. It argued that the release of the reports at that time would undermine the entire process.

In addition to showing that a record contains matter relating to the deliberative processes of a public body, a body must also show that release of the record would be contrary to the public interest. The Department argued that the reports were in draft form and were therefore not appropriate for public release. It argued that any safety issues that may be contained in the reports had not yet been agreed and that to release them at that stage would only serve to unnecessarily undermine the public confidence in the school buildings.

While I accepted that the reports were marked "Draft", I noted that they appeared to be complete versions of audits conducted. I was not satisfied that the Department had shown that release of the records would be contrary to the public interest.

The Department also argued that the reports were covered by litigation privilege as confidential communications between the Department and a third party, their dominant purpose being that the findings of the reports were relied upon in relation to proceedings already issued and would be relied upon in relation to further future litigation under active consideration. It argued that when the reports were commissioned, litigation was in contemplation, particularly in light of the widespread nature of the issues involved and the large number of schools affected.

I found that even if I accepted that the reports were created for the purpose of contemplated/pending litigation, an equal purpose was to confirm compliance with the statutory fire safety requirements or recommend appropriate remedial actions. I was not satisfied that the Department had established that the dominant purpose for the creation of the fire safety assessment reports was apprehended or threatened litigation.

The Department further argued that release of the reports would breach the sub judice rule and amount to contempt of court as release would tend to interfere with the due administration of the proceedings already issued and which were in active contemplation.

A matter may be sub judice where it is under judicial consideration and therefore prohibited from public discussion elsewhere. The mere fact that proceedings have been issued is not sufficient, of itself, to make out the case that breach of the sub judice rule would arise by release of the records or that their disclosure would constitute a contempt of court. I found that the Department had not explained how release of the records would be a breach of the sub judice rule.

The Department also argued that release of the reports could give rise to a number of harms relating to law enforcement and public safety. I was not persuaded by the Department's arguments. Similarly, I did not accept the Department's arguments for withholding the reports on the ground that they were commercially sensitive. I noted that it was in the public domain, that there were fire safety concerns in relation to certain schools and that a number of schools were temporarily closed due to those concerns. It was also in the public domain that the Department had initiated court proceedings against the named company in relation to fire safety issues arising at certain schools constructed by that company. Given the level and nature of information which was already in the public domain it was not apparent to me that the release of the reports could prejudice the company's competitive position due to adverse publicity or could prejudice negotiations with the company. I found, in any event, that the public interest would be better served by the release of the records.

Finally, the Department argued that the records were exempt under section 42(f). That section provides that the FOI Act does not apply to a record held or created by the Office of the Attorney General, other than a record relating to general administration. The Department argued that the records at issue are held by the Attorney General's Office. I took this to mean that copies of the reports which the Department itself held and considered in response to the FOI request are also in the Attorney General's Office.

Section 42(f) is restricted to records held or created by the Office of the Attorney General. Where a record is held by, but was not created by, that Office, section 42(f) does not serve to protect all other copies of that record, or the original of the record, held by other bodies. I found that section 42(f) did not apply.

In conclusion, I found that the Department had not justified its refusal of the request and I directed the release of the reports.

Note: My decision in this case has been appealed by the Department to the High Court.

4 Statistics

Chapter 4: Statistics

Section I - Public Bodies - 2019

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

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

Table 3: FOI requests received - by requester type

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

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

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

Table 7: FOI requests received by local authorities

Table 8: FOI requests received by the HSE

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

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

Table 11: FOI requests received by other bodies

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 - 2019

Table 12: Analysis of applications for review received

Table 13: Analysis of review cases

Table 14: Applications for review accepted in 2019

Table 15: Outcome of completed reviews – 3-year comparison

Table 16: Subject matter of review applications accepted – 3-year comparison

Table 17: Applications accepted by type – 3-year comparison

Table 18: Deemed refusals due to non-reply by public bodies

Section I – Public Bodies - 2019

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

Requests on hand - 01/01/2019	**7,138**
Requests received in 2019	
Personal	23,518
Non-personal	16,273
Mixed	473
Total	**39,904**
Total requests on hand during year	47,042
Requests dealt with	41,176
Requests on hand - 31/12/2019	**5,866**

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

	Number	Percentage
FOI requests dealt with by public bodies	41,176	
Internal reviews received by public bodies	1,083	2.6%
Applications accepted by the Commissioner	458	1.1%

Table 3: FOI requests received - by requester type

Requester Type	Number	Percentage
Journalists	9,278	23%
Business	1,976	5%
Oireachtas Members	618	2%
Staff of public bodies	1,052	3%
Clients	20,519	51%
Others	6,461	16%
Total	**39,904**	

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

Request Type	Number	Percentage
Requests granted	19,510	47%
Requests part-granted	10,805	26%
Requests refused	6,093	15%
Requests transferred to appropriate body	799	2%
Requests withdrawn or handled outside FOI	3,969	10%
Total	**41,176**	

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

	granted	part granted	refused	transferred	withdrawn or handled outside of FOI
Civil Service departments	25%	38%	22%	2%	12%
Local Authorities	41%	25%	24%	1%	9%
HSE	66%	21%	5%	2%	5%
Voluntary Hospitals, Mental Health Services Regulators and Related Agencies	70%	7%	7%	2%	14%
Third Level Institutions	51%	26%	15%	1%	7%
Other bodies	73%	16%	3%	1%	7%

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

Civil Service Department/Office	Personal	Non-personal	Mixed	Total
Department of Employment Affairs and Social Protection	2,367	269	11	2,647
Department of Justice and Equality	402	490	2	894
Department of Health	14	568	0	582
Department of Transport, Tourism and Sport	8	501	2	511
Department of Education and Skills	75	428	2	505
Department of the Taoiseach	11	478	0	489
Department of Communications, Climate Action and Environment	8	456	0	464
Department of Finance	3	422	0	425
Department of Agriculture, Food and the Marine	116	265	0	381
Department of Foreign Affairs and Trade	43	321	0	364
Office of the Revenue Commissioners	150	187	0	337
Department of Housing, Planning and Local Government	4	305	0	309
Department of Public Expenditure and Reform	12	293	0	305
Department of Culture, Heritage and the Gaeltacht	8	217	0	225
Department of Business, Enterprise and Innovation	34	177	0	211
Department of Children and Youth Affairs	2	167	0	169
Department of Defence	147	19	0	166
Office of Public Works	4	150	0	154
Department of Rural and Community Development	1	78	0	79
Standards in Public Office Commission	0	28	0	28
Office of the Ombudsman	9	11	0	20
Office of the Information Commissioner	2	3	0	5
Office of the Commissioner for Environmental Information	1	1	0	2
Commission for Public Service Appointments	0	1	1	2
Total	**3,421**	**5,835**	**18**	**9,274**

Table 7: FOI requests received by local authorities

Local Authority	Personal	Non-personal	Mixed	Total
Dublin City Council	269	707	4	980
Fingal County Council	78	209	0	287
Cork City Council	55	202	0	257
South Dublin County Council	116	137	2	255
Limerick City and County Council	42	181	0	223
Cork County Council	33	167	13	213
Galway County Council	52	136	21	209
Meath County Council	22	180	0	202
Kildare County Council	30	140	4	174
Dún Laoghaire/Rathdown County Council	41	132	0	173
Mayo County Council	20	140	0	160
Clare County Council	21	136	0	157
Galway City Council	30	115	9	154
Tipperary County Council	18	135	1	154
Donegal County Council	7	141	0	148
Kilkenny County Council	7	140	0	147
Wexford County Council	35	106	0	141
Wicklow County Council	36	100	0	136
Roscommon County Council	5	126	2	133
Louth County Council	27	99	2	128
Kerry County Council	23	95	1	119
Laois County Council	24	90	0	114
Waterford City and County Council	19	92	0	111
Westmeath County Council	14	96	0	110
Leitrim County Council	5	101	0	106
Cavan County Council	7	98	0	105
Longford County Council	7	95	0	102
Offaly County Council	16	82	0	98
Carlow County Council	12	81	0	93
Monaghan County Council	1	83	0	84
Sligo County Council	0	83	0	83
Total	**1,072**	**4,425**	**59**	**5,556**
Regional Assemblies	0	2	0	2

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

HSE area*	Personal	Non-Personal	Mixed	Total
HSE South	4,368	119	73	4,560
HSE West	3,256	285	3	3,544
HSE Dublin North East	1,588	107	5	1,700
HSE Dublin Mid-Leinster	1,031	74	0	1,105
HSE National	0	776	0	776
Total received	**10,243**	**1,361**	**81**	**11,685**
*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
St James's Hospital	1,427	14	4	1,445
TUSLA - Child and Family Agency	938	183	21	1,142
Tallaght Hospital	514	7	0	521
Beaumont Hospital	453	49	1	503
Mater Misericordiae University Hospital	382	29	0	411
Our Lady's Hospital for Sick Children, Crumlin	293	13	0	306
Rotunda Hospital	273	27	0	300
National Maternity Hospital, Holles Street	251	26	0	277
St. Vincent's University Hospital, Merrion	221	22	1	244
St. John's Hospital, Limerick	221	7	0	228
Temple Street Children's University Hospital	188	22	0	210
Coombe Hospital	182	25	1	208
South Infirmary / Victoria Hospital, Cork	128	5	0	133
Hospitaller Order of St. John of God	123	0	0	123
Mercy Hospital, Cork	82	25	0	107
Dublin Dental University Hospital	89	3	0	92
Cappagh Orthopaedic Hospital	75	7	0	82
Health Information & Quality Authority	8	60	0	68
Medical Council	34	32	1	67
St. Michael's Hospital, Dún Laoghaire	58	3	0	61
National Rehabilitation Hospital, Dún Laoghaire	47	5	0	52
National Paediatric Hospital Development Board	0	50	0	50
Royal Victoria Eye & Ear Hospital	46	4	0	50
Food Safety Authority of Ireland	0	40	0	40
Daughters of Charity Services	35	1	0	36
Mental Health Commission	11	16	0	27
St. Vincent's Hospital, Fairview	22	5	0	27
National Treatment Purchase Fund	0	26	0	26
Central Remedial Clinic	17	3	0	20
Other Hospitals/Services/Agencies	106	41	7	154
Total	**6,224**	**750**	**36**	**7,010**

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

Third Level Education Body	Personal	Non-Personal	Mixed	Total
University College Dublin	63	106	0	169
Trinity College Dublin, the University of Dublin	105	14	0	119
University College Cork	27	76	1	104
National University of Ireland Galway	12	77	0	89
Dublin City University	3	82	1	86
University of Limerick	20	63	1	84
National University of Ireland Maynooth	12	40	0	52
Technological University Dublin	8	43	0	51
Cork Institute of Technology	3	38	0	41
Higher Education Authority	1	38	0	39
Dundalk Institute of Technology	4	29	0	33
Galway-Mayo Institute of Technology	0	27	0	27
Institute of Technology Tralee	3	19	5	27
Athlone Institute of Technology	0	23	0	23
Waterford Institute of Technology	5	15	1	21
Royal College of Surgeons Ireland	4	10	4	18
Letterkenny Institute of Technology	2	15	0	17
Limerick Institute of Technology	2	13	2	17
Dún Laoghaire Institute of Art, Design & Technology	2	14	0	16
Institute of Technology Sligo	1	13	0	14
Total	**277**	**755**	**15**	**1,047**

Table 11: FOI requests received by other bodies

Public body	Personal	Non-Personal	Mixed	Total
Irish Prison Service	409	116	0	525
An Garda Síochána	191	305	1	497
Defence Forces Ireland	278	88	31	397
Houses of the Oireachtas Service	10	261	1	272
Courts Service	122	93	0	215
RTÉ	5	209	0	214
National Transport Authority	6	196	0	202
Health and Safety Authority	23	11	162	196
Social Welfare Appeals Office	149	1	0	150
Irish Water	41	101	0	142
Road Safety Authority	20	110	1	131
Transport Infrastructure Ireland	2	92	1	95
Central Bank of Ireland	17	73	2	92
Public Appointments Service	41	35	6	82
ESB Networks DAC	12	52	2	66
Environmental Protection Agency	0	61	4	65
Inland Fisheries Ireland	5	60	0	65
An Bord Pleanála	44	20	0	64
National Treasury Management Agency	8	50	0	58
Property Registration Authority	28	28	0	56
International Protection Office	46	10	0	56
Sport Ireland	0	56	0	56
State Examinations Commission	34	21	0	55
IDA Ireland	0	54	0	54
Data Protection Commission	13	36	0	49
Office of the Director of Public Prosecutions	20	26	0	46
Fáilte Ireland	1	39	1	41
City of Dublin Education and Training Board	12	24	4	40
Health Products Regulatory Authority	4	35	0	39
Commission for Communications Regulation	3	33	2	38
Garda Síochána Ombudsman Commission	24	14	0	38
Central Statistics Office	17	21	0	38

Enterprise Ireland	0	37	0	37
Office of the Chief Medical Officer	37	0	0	37
Caranua	32	2	0	34
Pobal	18	16	0	34
Residential Tenancies Board	27	5	0	32
Legal Aid Board	22	10	0	32
Competition and Consumer Protection Commission	0	31	0	31
Workplace Relations Commission	6	7	18	31
Eirgrid	0	30	0	30
Other bodies (100 bodies with fewer than 30 requests each)	194	676	28	898
Total	**1,921**	**3,145**	**264**	**5,330**

Section II - Office of the Information Commissioner – 2019

Table 12: Analysis of applications for review received

Applications for review on hand - 01/01/2019	23
Applications for review received in 2019	613
Total applications for review on hand in 2019	**636**
Applications discontinued	13
Invalid applications	106
Applications withdrawn/settled	16
Applications rejected	7
Applications accepted for review in 2019	458
Total applications for review considered in 2019	**600**
Applications for review on hand - 31/12/2019	**36**

Table 13: Analysis of review cases

Reviews on hand - 01/01/2019	113
Reviews accepted in 2019	458
Total reviews on hand in 2019	**571**
Reviews completed in 2019	430
Reviews carried forward to 2020	**141**

Table 14: Applications for review accepted in 2019

Health Service Executive	76
Department of Employment Affairs and Social Protection	27
TUSLA: Child and Family Agency	26
Department of Justice and Equality	17
Defence Forces Ireland	16
Department of Education and Skills	11
Department of Agriculture, Food and the Marine	10
Department of Foreign Affairs and Trade	10
Office of the Revenue Commissioners	9
Department of Public Expenditure and Reform	8
Dublin City Council	8
Irish Prison Service	8
An Garda Síochána	7
Department of Culture, Heritage and the Gaeltacht	6
Kildare County Council	6
An Bord Pleanála	5
Department of Finance	5
Galway County Council	5
IDA Ireland	5
National University of Ireland Maynooth	5
South Dublin County Council	5
St. James's Hospital	5
Others (total number of remaining applications)	178
Total	**458**

Table 15: Outcome of completed reviews - 3-year comparison

	2019		2018		2017	
Decision affirmed	174	40%	168	38%	175	35%
Decision annulled	47	11%	46	10%	45	9%
Decision varied	58	14%	62	14%	68	13%
Discontinued	66	16%	96	21%	56	11%
Settlement reached	23	5%	18	4%	80	16%
Withdrawn	61	14%	52	12%	75	15%
Invalid	1		1		3	1%
Reviews completed	**430**		**443**		**502**	

Table 16: Subject matter of review applications accepted - 3-year comparison

	2019		2018		2017	
Refusal of access	419	91%	394	92%	466	94%
Objections by third parties to release information about them or supplied by them	12	3%	15	3%	7	1%
Amendment of records under section 9	14	3%	9	2%	6	1%
Statement of reasons under section 10	8	2%	10	2%	10	2%
Decision to charge a fee	5	1%	3	1%	8	2%
Total	**458**		**431**		**497**	

Table 17: Applications accepted by type - 3-year comparison

	2019		2018		2017	
Personal	108	24%	103	24%	129	26%
Non-personal	289	63%	249	58%	278	56%
Mixed	61	13%	79	18%	90	18%
Total	**458**		**431**		**497**	

Table 18: Deemed refusals due to non-reply by public bodies

Refusal of original and internal review decisions			
Public body	**2019**	**2018**	**2017**
Health Service Executive	24	54	27
TUSLA: Child and Family Agency	8	15	29
Irish Prison Service	6	3	9
Department of Justice and Equality	6	5	29
St. James's Hospital	4	1	1
Dublin City Council	3	-	2
Quality and Qualifications Ireland	2	2	1
Mater Misericordiae University Hospital	2	3	7
Department of Public Expenditure and Reform	2	1	-
Department of Health	2	-	1
Department of Employment Affairs and Social Protection	2	3	4
Department of Children and Youth Affairs	2	-	-
Department of the Taoiseach	2	1	-
Defence Forces Ireland	2	4	3
other bodies - 1 each	17	-	-
Total 2019	**84**		

Part II

Commissioner for Environmental Information

Executive Summary

Sixty-four appeals were made to OCEI in 2019, which is more than in any other year of its existence. We closed 54 cases (the same number which we closed in 2018), 37 by formal decision. While 12.5% of the decisions I made in 2018 were appealed to the courts, this increased to 19% of the decisions made in 2019. This is the highest level of court appeals in the history of this Office. This, together with the increased number of appeals received by OCEI and the complexity of the legal issues which those appeals often raised, made 2019 a particularly challenging year for OCEI.

Introduction

Under article 12(2) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018, as holder of the Office of Information Commissioner, I also hold the Office of Commissioner for Environmental Information (OCEI). For this reason, it is my practice to include a report on OCEI in my Annual Report as Information Commissioner.

Unlike FOI law, which is purely national law, Access to Information on the Environment (AIE) law is European and international. This has important implications for how it is interpreted and it means that the work is often difficult.

The AIE scheme is somewhat similar to the FOI regime but it operates in Ireland as a separate system of access. It provides rights of access to environmental information held by 'public authorities'. 'Public authorities' for AIE purposes are not the same as 'public bodies' for FOI purposes. Where a public authority for AIE purposes is also a public body for FOI purposes, an applicant may request environmental information by means of either an FOI request or an AIE request (or, indeed, both, although that could place an unreasonable burden on a public body/ authority).

I remain of the view that greater alignment of the two access regimes (as is the case in some other jurisdictions) would provide easier access to information for those using AIE and simplify the processing of requests by public bodies and reviews by my Office. It would also allow public bodies to process requests using whichever of the two regimes that would provide the most favourable outcome for the applicant.

For more information on the operation of the AIE regime in Ireland, please visit my website at **www.ocei.ie**. It displays all of my Office's decisions, and it includes links to previous Annual Reports and to the relevant legislation.

Chapter 1 - The Year in Review

My role as Commissioner for Environmental Information is to review the decisions of public authorities on AIE requests. Following such reviews last year, I closed 37 cases by formal decision. That number was slightly down on the 40 review decisions I made in 2018 - a year which saw more review decisions than in any other year since the establishment of the Office. However, the number of cases that I close by formal decision in any given year is, on its own, a poor indicator of the achievements of my Office. Our workload in 2019 comprised work on: 36 "on hand" appeal cases carried over from 2018; 64 new appeal cases received in 2019; six court appeal cases carried over from 2018; seven new court appeal cases initiated in 2019; 17 AIE-related enquiries; and two Freedom of Information requests. During the year we also moved to new offices and worked through considerable changes in our information communication technology systems affecting the Office as a whole.

The stand out feature of 2019 for OCEI was the significant increase in the number of my decisions that were appealed to the courts. We first saw a sharp rise in such appeals in 2018, when 12.5% of my decisions were appealed. In 2019 we experienced yet another increase when the rate of new court appeals increased to 19%. This was against a backdrop of the highest number of AIE appeals received in one year by this Office since its establishment (64). Work related to court appeals, together with the complexity of some of the legal issues which arose in the course of the increased AIE appeal case workload, made 2019 a particularly challenging year for OCEI. I also continue to be concerned about the financial resources necessary to respond to the appeals in the Superior Courts.

While we closed 54 cases in 2018 (40 by formal decision), in my Report for that year I said that "the high percentage of [court] appeals is likely to have a negative effect on the ability of my Office to close cases in the coming year". Accordingly, I set our 2019 case-closure target at 50 cases. I am pleased to report that, despite the challenges which we faced in 2019, we once again managed to close 54 cases.

I referred in last year's report to the particular issues of interpreting the definitions of "environmental information" and "public authorities" in the AIE legislative context.

Those issues continued to be challenging in 2019 for my Office (and, no doubt, for others who make AIE requests or decisions). The task of determining whether information is or is not environmental information, in particular, often has the effect of slowing down case work, especially when records are large, numerous or both. I welcome the clarity that court judgments, both domestically and in Europe, can bring, both to questions of interpretation and to the approach that I should take when conducting reviews.

Each year the Department of Communications, Climate Action and Environment compiles a report on the number of AIE requests made to Irish public authorities during the preceding year. While statistical returns for 2019 are currently incomplete, the Department has noted that there was a significant increase in the number of AIE requests received by local authorities in 2019. The data suggests that the number of AIE requests made to local authorities in 2019 was about twice the number made in 2018. At the time of writing, the data on requests received by Departments is too incomplete to allow any trend to be identified.

I regret to report that more AIE requests were met with "deemed refusals" on account of not being answered in time by public authorities in 2019 than in 2018. This is disappointing, as 2018 saw a marked decrease in deemed refusals and I had hoped that trend would continue. This is an issue to which public authorities need to pay special attention. Some already have and I thank them for that. Some need to do much more. When reviewing AIE decisions, I sometimes reach conclusions that differ from those of the public authority involved. That is to be expected. However, every AIE decision should be clear, reasoned and delivered in time. In practice, it often takes considerable time for my Office, during the investigation stage of processing appeal cases, to obtain a clear picture of the public authority's position. Clear decisions are likely to lead to fewer appeals to my Office and to those appeals which are made being processed more quickly.

Some appeal cases may be closed in days or weeks, such as where the appeal is found to be invalid. At the other end of the scale, some cases are especially prolonged and complex and can run over a year, such as cases in which multiple third parties have to be consulted, new material issues arise, legal advice is required, or where a decision of the courts which would clarify a relevant legal issue is anticipated.

The average number of days for an appeal to be closed in 2019 was 249 days. Although this is down on the figure of 279 days in 2018, it indicates that in 2019 appellants waited, on average, about 8 months for a decision from my Office. I am not satisfied with that level of service and am determined to do everything I can to improve it.

In relation to trying to reduce the demand for my Office's service, in 2019 my investigators participated in two AIE training events designed for public authority staff and organised by DCCAE. By doing so, I hope to reduce the number of appeals to my Office by helping public authorities to improve the quality and timeliness of their decisions on AIE requests: I believe that applicants are less likely to appeal against decisions which issue on time and are adequately reasoned.

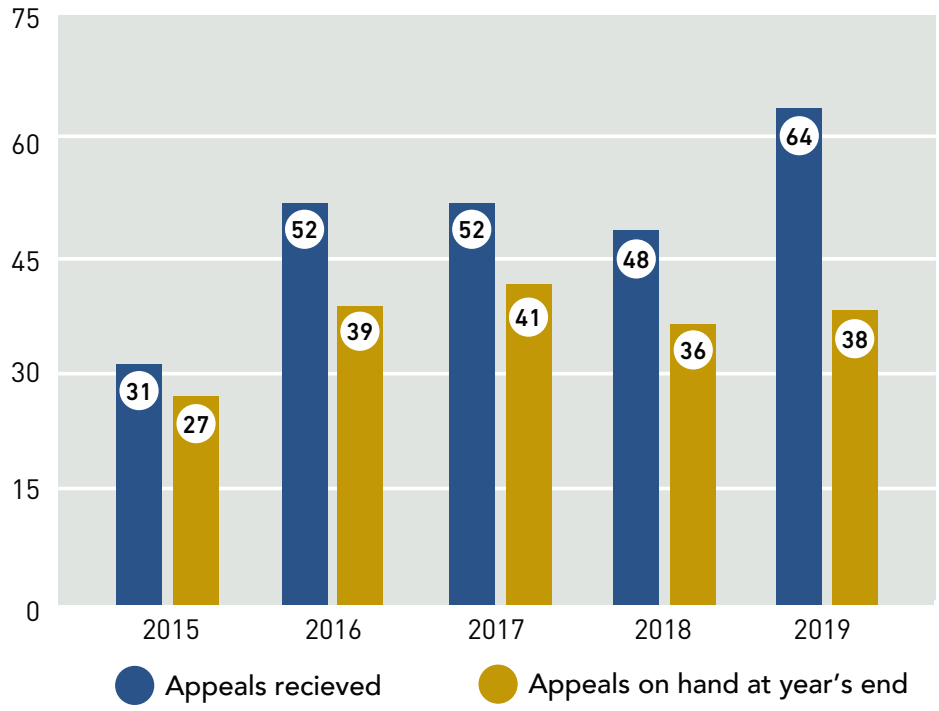
I recognise that the time taken in the processing of an AIE appeal could be reduced if my investigators had better tools available for identifying key decisions and authorities of guidance value. I note as Information Commissioner that staff working on FOI appeal cases have an excellent resource in the form of Guidance Notes prepared in-house and published on OIC's website. I had hoped that we would have been, in OCEI, in a position to start similar work last year but we could not do so, due to the unprecedented pressure of work. Preparation of such guidance has begun in-house at the time of writing.

My Office was consulted by the Department in the course of its plans to revise the guidance that the Minister publishes to assist both public authorities and the public in relation to the practical operation of the AIE scheme.

Key Statistics

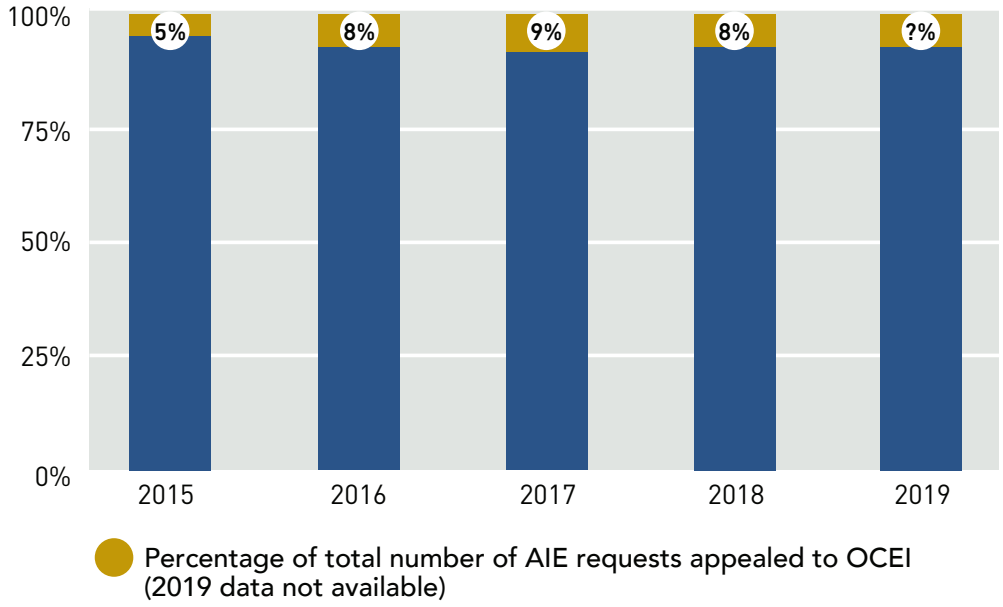
Number of Appeals Recieved and on hand from 2015 to 2019

Chart 1



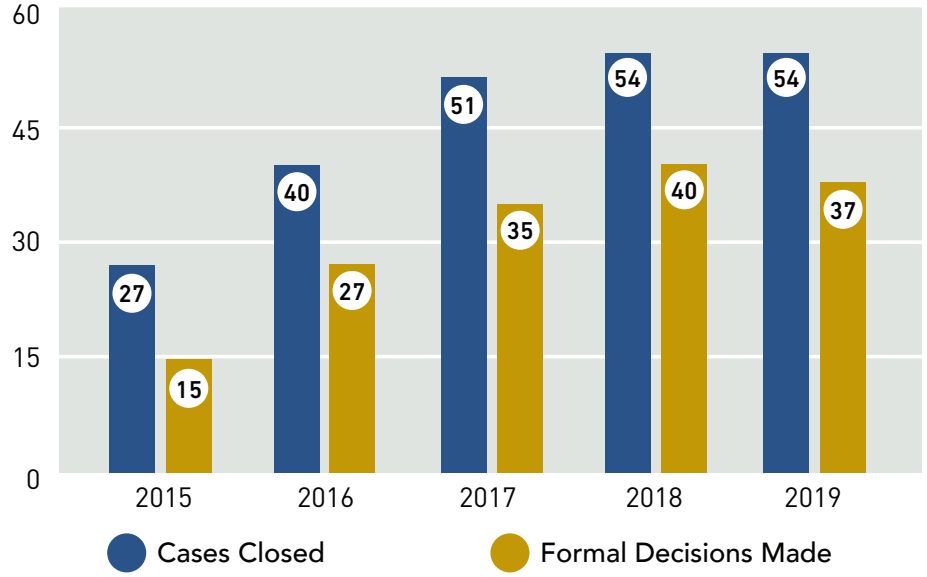
Percentage of AIE requests appealed to the OCEI from 2015 to 2019

Chart 2



Number of cases closed and formal decisions made from 2015 to 2019

Chart 3

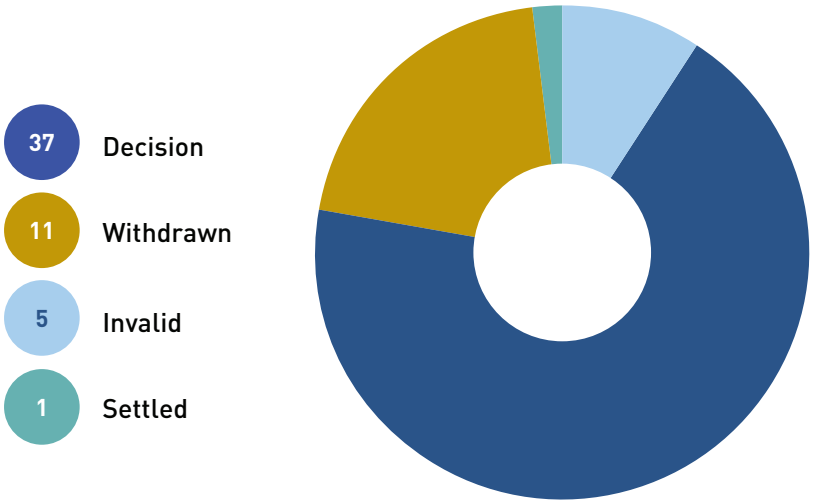


The outcome of the 54 cases closed in 2019 was:

- 5 cases were invalid.
- Of the 49 valid cases, 37 were closed by decision, 11 were withdrawn and 1 was settled.

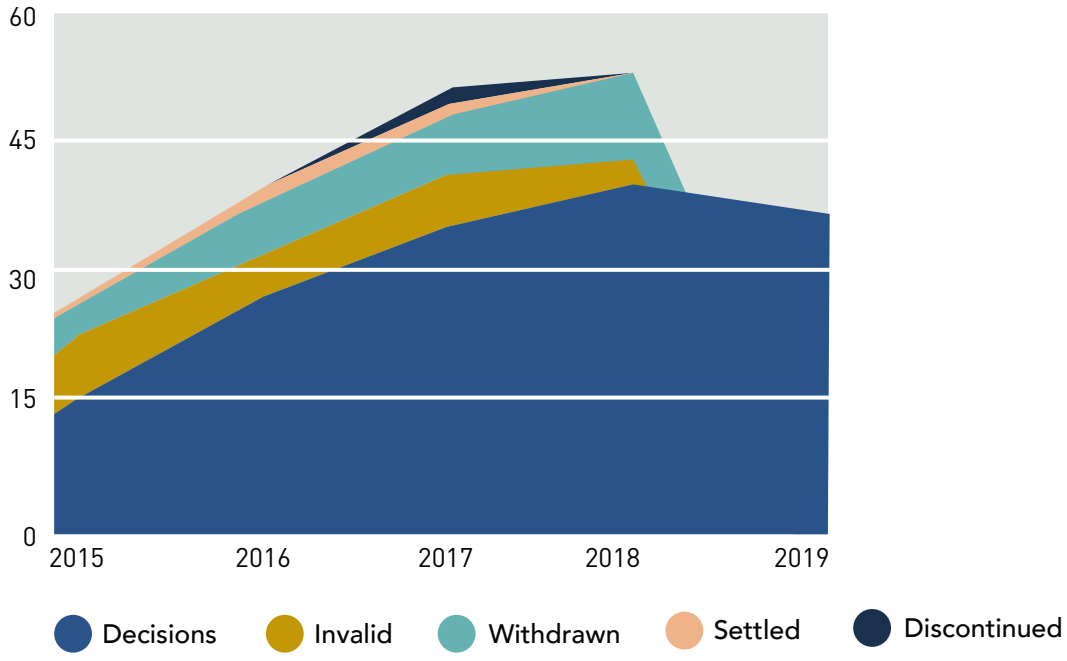
Outcome in cases closed in 2019

Chart 4



Outcome of cases from 2015 to 2019

Chart 5



In 2019, 37 cases were closed by decision, 11 were withdrawn, 1 was settled and five were found to be invalid. Of those withdrawn, 9 were withdrawn voluntarily and I deemed two others to have been withdrawn.

Third party appeals against decisions made by public authorities

I reported last year that, in late 2018, my Office received its first ever third party appeals (two) against AIE decisions made by public authorities. These were appeals taken under article 12(3)(b) of the AIE Regulations, where:

> "a person other than the applicant or third party, would be incriminated by the disclosure of the environmental information concerned".

This Office accepts that article 12(3)(b) applies where a third party believes that their interests would be affected by the disclosure concerned. Both of the appeals were withdrawn in 2019, so I did not review the respective decisions of the public authorities.

Late in 2019 my Office received two new third party appeals against decisions made by public authorities on AIE requests.

Powers under article 15(5) of the AIE Regulations

A case closed by withdrawal can be withdrawn either:

- by the appellant or
- by me pursuant to article 15(5) of the AIE Regulations which recognises that a case may be resolvable otherwise than by way of a binding decision. Article 15(5) provides that:

  "The Commissioner may deem an appeal to be withdrawn if the public authority makes the requested information available, in whole or in part, prior to a formal decision of the Commissioner under article 12(5)."

In 2019 I deemed two cases to be withdrawn pursuant to article 15(5). The appellant in each case expressed the wish that I would make a decision on issues that had arisen prior to the release of the information concerned. However, in circumstances where, following the intervention of my Office, the requested information had been released to the appellant in full, I did not consider that my Office had a further role in the matter. In my view, it would not have been an appropriate use of my Office's limited resources to carry out a comprehensive first instance review, and make a decision, where the environmental information requested had been released in full. In the circumstances, I considered it appropriate to deem the appeals to be withdrawn under article 15(5) of the AIE Regulations, and, as is my Office's practice in such cases, to refund the appeal fee.

Powers under article 12(6) of the AIE Regulations

Article 12(6) of the AIE Regulations provides that in the course of carrying out a review of an appeal I may:

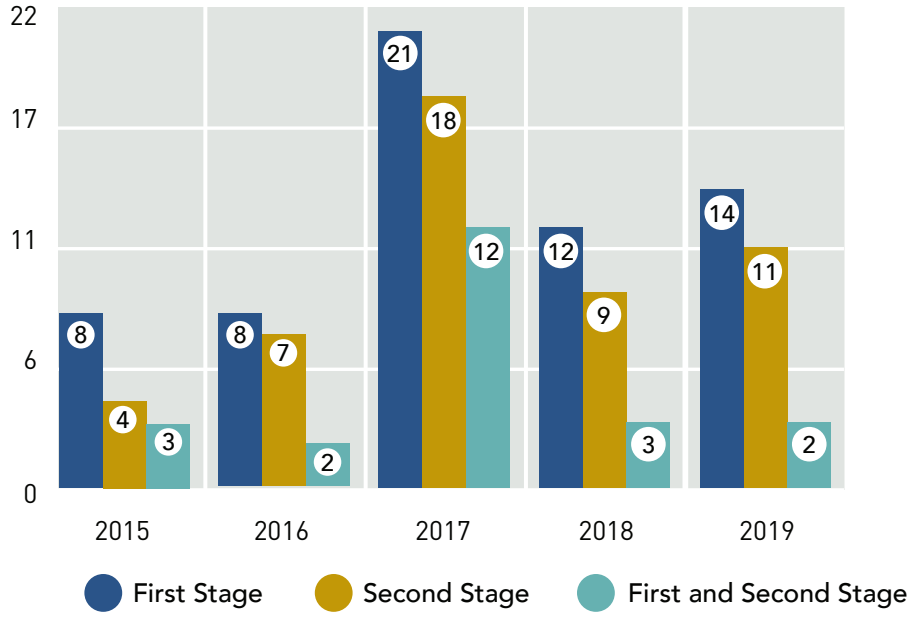
- require a public authority to make environmental information available to me.
- examine and take copies of environmental information held by a public authority.
- enter any premises occupied by a public authority so as to obtain environmental information.

I am pleased to report that I had no need to apply these powers in 2019.

Increased number of deemed refusals

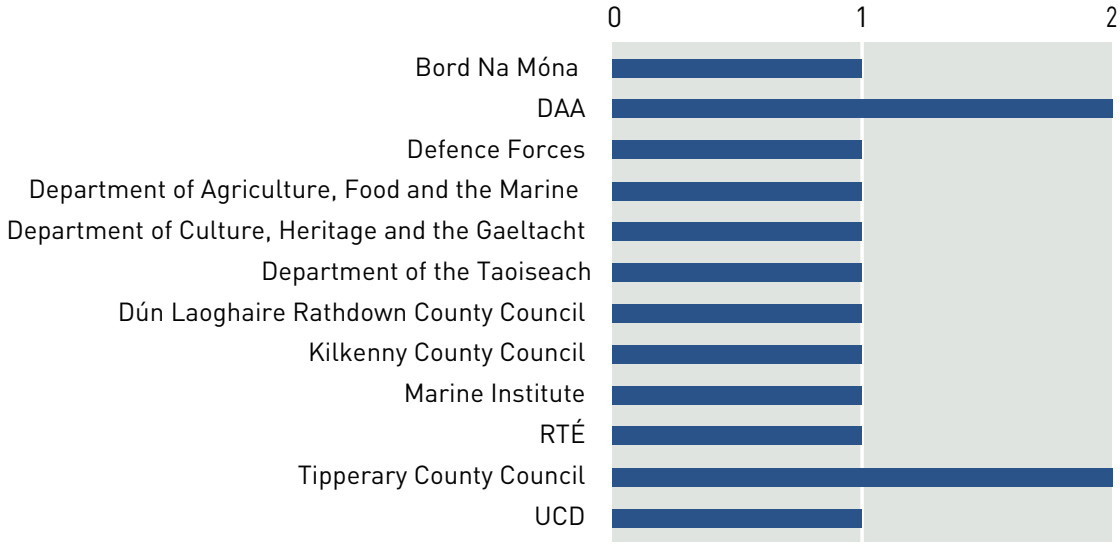
Cases in which public authorities failed to deliver a decision in time, 2015 – 2019

Chart 6



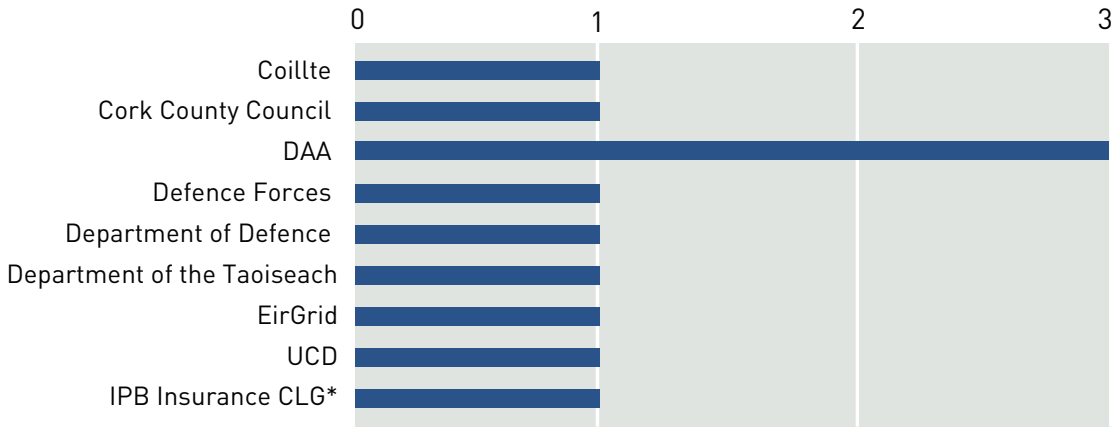
Deemed refusals at first stage

Chart 7



Deemed refusals at second stage

Chart 8



*The issue in this case was whether the entity which received the AIE request is a public authority within the meaning of the AIE Regulations.

Attendance at conferences

It is important that my investigative staff endeavour to keep up to date on matters both legal and environmental. With that in mind, investigators from my Office attended a number of conferences during the year, including the annual Environment Ireland conference held at Croke Park and the Law and Environment Conference held at University College Cork.

There is also an international aspect to AIE, since the AIE Directive was introduced to give effect to the Aarhus Convention. (The full title of this international convention is the "**Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters"**.) This Convention was drawn up by the United Nations Economic Commission for Europe (UNECE), based in Geneva. In December 2018, a representative from my Office was invited to give a presentation at an international symposium held in Berlin on "Best Practices on Access of Environmental Information". Following on from this successful event, my Office gave a presentation in Geneva in Spring 2019 at the UNECE's 12th meeting of the Task Force on Access to Justice under the Aarhus Convention. In our presentation we spoke about the benefits and challenges that we face in carrying out administrative reviews of AIE decisions in Ireland. We were also able to build on the contacts that had been made with European colleagues in Berlin and share information about our respective experiences in operating under the Convention and the Directive, including how we deal with the interplay between AIE and domestic freedom of information legislation, as well as the pressures arising from resource constraints and the complexity of the casework. We learned, however, that the OCEI is apparently unique in Europe, leading the Chair of the Task Force to describe Ireland as providing a particularly good and innovative example of access to justice in environmental information cases. Accordingly, we considered it appropriate to make another contribution based on our experience at the 6th meeting of the Task Force on Access to Information under the Aarhus Convention in October 2019, where we spoke about the challenges we face in interpreting the environmental information definition in the context of the dual regime for access to information through AIE and FOI legislation.

Chapter 2 - Some Decisions of Interest

***Indicates that this decision has been appealed to the High Court and that further details can be found in Chapter 3.**

CEI/16/0041 Right to Know CLG and the Department of Defence

This case concerned a request for information on journeys made by the President on Air Corps aircraft. The Department refused the request on the basis that "the President is not a public authority". It later maintained that the requested information is not environmental information and that, even if it were, articles 8(a)(i), 8(a)(ii) and 9(1)(a) would justify refusal.

I concluded that the information was held by the Department within the meaning of the Regulations, notwithstanding that it related to the President, who is excluded from the scope of the Regulations. I found that information on dates of travel, departure points and destinations, flying time and the number of passengers on flights is environmental information. I was not satisfied that articles 8(a)(i), 8(a)(ii) or 9(1)(a) applied to the information. Accordingly, I annulled the Department's decision and required it to make the withheld information available to the appellant.

*CEI/17/0017 Right to Know CLG and the Office of the Secretary General to the President (OSGP)

The appellant was refused access to a copy of records relating to two speeches given by the President on the basis that the OSGP was not a public authority for the purposes of the Regulations. The issue at the centre of this case was whether the President's immunity in the exercise of his or her powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of those powers and functions under Article 13.8.1° of the Constitution extended to include the OSGP in the circumstances of the case. I found that, insofar as the information requested related to the exercise and performance of the powers and functions of the President, Article 13.8.1° of the Constitution precluded the OSGP from being subject to the review procedure under Article 6 of the AIE Directive. I therefore found that the OSGP was not a public authority within the meaning of the Regulations for the purposes of the review. Accordingly, I found that I had no jurisdiction to review the OSGP's decision on the AIE request.

*CEI/17/0033 Right to Know CLG and the Office of the Secretary General to the President (OSGP)

The appellant was refused access to a copy of records relating to two Bills considered by the Council of State, including any communications between the Council of State and the President, minutes of the meetings of the Council of State and any submissions, memoranda and briefing notes, on the basis that the OSGP was not a public authority for the purposes of the AIE Regulations. The issue at the centre of this case was whether the President's immunity in the exercise of his or her powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of those powers and functions under Article 13.8.1° of the Constitution extended to include the OSGP and the Council of State in the circumstances of the case. I found that, insofar as the information related to the exercise and performance of the powers and functions of the President, Article 13.8.1° of the Constitution precluded the Council of State and the OSGP from being subject to the review procedure under Article 6 of the AIE Directive. I found that neither the OSGP nor the Council of State was a public authority within the meaning of the Regulations for the purposes of this review. Accordingly, I found that I had no jurisdiction to review the OSGP's decision on the AIE request.

*CEI/18/0039 Right to Know CLG and Raheenleagh Power DAC

Raheenleagh Power DAC is a wind energy company which arose from a joint venture between the ESB and Coillte Teo. The company refused an AIE request on the basis that it was a not a public authority within the meaning of the Regulations. The Regulations provide three categories of public authority, and I considered the company in relation to each of those categories. Amongst the matters I took into consideration were the following: the company was not vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law; it did not have public responsibilities or functions; and it did not provide a public service. On completion of my review, I found that the company was not a public authority within the meaning of the Regulations.

*CEI/18/0032 and CEI/19/0033 (Right to Know CLG and IPB Insurance CLG (Joined Cases)

IPB Insurance is a mutual insurance company with a commercial mandate in selling insurance products to its clients, including local authorities. It is a private company, limited by guarantee, established under the Companies Act 2014, with registration pursuant to the Companies Acts 1908 – 1917.

It refused two AIE requests on the basis that it is not a public authority for the purposes of the Regulations. The Regulations provide three categories of public authority, and I considered the company in relation to each of those categories.

I was satisfied that it did not perform services of public interest and it is not for such a purpose vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law. I was also satisfied that it did not have public responsibilities or functions relating to the environment . Accordingly, I found, in a single decision on both cases, that IPB Insurance CLG was not a public authority within the meaning of the Regulations.

*CEI/19/0007 Right to Know CLG and RTÉ

RTÉ received an AIE request for copies of records relating to how RTÉ should report on climate change issues. It refused to release the information sought, which comprised emails sent by members of the public to RTÉ commenting on the quality and quantity of its reporting, on the basis that it was not environmental information. I considered the emails in light of the six categories of environmental information set out in the Regulations. I took account of the following: while the concept of 'environmental information' is broad, it is not unlimited; a mere connection or link to an environmental factor or element is not sufficient to bring it within the scope of the AIE regime; the withheld information did not contain or provide information on or about the state of the elements of the environment or the interaction between those elements nor did it provide or contain information on or about factors or other release into the environment affecting or likely to affect the state of the elements of the environment and the connection between RTÉ's reporting on climate change issues and any effect on factors of the environment were, to my mind, too indirect and too uncertain for the reporting to qualify as a measure or activity within the meaning of the definition of environmental information; and the connection between the emails themselves and any environmental impact was even more tenuous. I concluded that the withheld information did not fall under any of the categories of environmental information provided in the Regulations and therefore found that the information is not environmental information.

*CEI/18/0027 Mr XY and Fingal County Council

Conditions attached to waste collection permits require permit holders to submit an Annual Environmental Report (AER) containing information on their waste collection activity to the National Waste Collection Permit Office. The Council part-granted a request for the information in one AER, but refused to provide access to information showing the onward destination of processed waste, on the ground that that information was commercially or industrially sensitive and fell under the exception in article 9(1)(c) of the Regulations. I found that article 9(1)(c) applied to the withheld information but I also found that the public interest in disclosure outweighed the interest served by refusal on that ground. I therefore required the Council to provide the requester with access to the withheld data.

*CEI/17/0025 Right to Know CLG and Celtic Roads Group DAC

Celtic Roads Group DAC (CRGDAC) operates a section of the M1 motorway under a Public Private Partnership (PPP) Programme agreement made with Transport Infrastructure Ireland (TII) and a local authority. The appellant sent an AIE request to CRGDAC seeking data from traffic counters on that section of road. CRGDAC refused the request on the ground that it is not a public authority within the meaning of the Regulations. The requester appealed to my Office, arguing that all PPP companies are public authorities for AIE purposes. The Regulations provide for three types of public authority: (a), (b) and (c). I was satisfied that CRGDAC was not a type (a) authority. The appellant argued that it is a public authority of type (b). I found that CRGDAC has not been vested with special powers under Irish law and that it is not a public authority of type (b). I found that CRGDAC is not under the control of TII and was satisfied that it is not a public authority of type (c). I therefore found that CRGDAC is not a public authority within the meaning of the Regulations.

CEI/18/0029 Right to Know CLG and the Department of Culture, Heritage and the Gaeltacht

The issue in this case was whether the Department was justified in refusing access to certain records concerning the impact on wildlife of the Heritage Bill providing for the reduction of the closed period for the cutting and burning of vegetation. I found that article 8(a)(iv), which provides that requests shall be refused where disclosure would adversely affect the confidentiality of the proceedings of public authorities, applied to a note of legal advice (on the basis of legal professional privilege) but not to a record of an actual Government meeting. While I accepted that the process undertaken by a Department of State in preparing Memoranda may qualify as "the proceedings of public authorities", I did not accept that article 8(a)(iv) applied to factual information within such Memoranda. Moreover, while I found that the relevant records, including the Government Decision, qualified as internal communications that were subject to refusal under article 9(2)(d) of the Regulations, taking into account the public interest served by disclosure, and also applying article 10 of the Regulations, I found it appropriate to require the Department to make parts of the internal communications available to the appellant.

*CEI/18/0046 Right to Know CLG and Transport Infrastructure Ireland

The question in this case was whether article 9(2)(a) of the AIE Regulations applied to the appellant's request for access to the Public Private Partnership (PPP) contract concerning the design, build and operation of part of the M8 motorway. That article allows a request to be refused where it is manifestly unreasonable. While the appellant did not dispute that the contract at issue was voluminous, it did not accept that volume was a basis for finding that a request was manifestly unreasonable. The appellant also disputed that it was necessary to examine the contract in order to separate the environmental information from the non-environmental information, since it considered that the contract as a whole was environmental information. I found no reason to depart from the approach that my Office had taken in relation to article 9(2)(a) in the past. I accepted that volume is not itself a determinative factor, but found that it is relevant in determining whether the processing of a request would result in an unreasonable interference with the work of the public authority concerned. Moreover, while I accepted that the construction of a motorway is an activity that affects or is likely to affect the environment, I did not agree that it was possible to find that all of the information contained in the extensive PPP contract was environmental information for the purposes of the AIE Regulations without an examination of its contents. I also noted that, given the range of information involved, fully processing the request would likely require detailed analysis in light of other refusal grounds provided for under the Regulations. Having regard to the circumstances, including the amount of information about the M8 PPP Scheme already in the public domain, I found that the public interest served by disclosure in the case did not outweigh the interests served by refusal. Accordingly, I found that article 9(2)(a) applied.

Chapter 3 - Court Appeals

In last year's report I listed six live court appeals. Five of those challenged my decisions and one challenged, in the Court of Appeal, a decision of the High Court to uphold one of my decisions.

Judgment has been delivered in two of those cases:

- **Redmond & Anor v Commissioner for Environmental Information 2016/27** concerned an appeal to the Court of Appeal against the decision of the High Court, following a judicial review, to uphold my decision in case CEI/14/0011. The Court delivered its judgment on 3 April 2020 and a copy is available **here**. It set aside the High Court judgment and held that, unless the appellant makes a new request for information to Coillte, the case should be remitted to me to reconsider, amongst other things, whether the sale of particular Coillte Land was a measure "likely to affect" the environment in the sense indicated in the judgment.
- **Electricity Supply Board v Commissioner for Environmental Information and Anor [2020] IEHC 190.** This related to my decision on case CEI/18/0003. The High Court delivered its judgment on 3 April 2020, setting aside my decision on some of the grounds put forward. A copy of the judgment is published on www.betacourts.ie **here**.

At the time of writing, we are carefully examining both of these judgments and I very much welcome the guidance that they have provided in relation to the definition of environmental information and my review role.

In May 2019 the High Court requested a preliminary ruling from the Court of Justice of the European Union in relation to Friends of the Irish Environment v Commissioner for Environmental Information 2017/298 MCA, which challenges my decision on case CEI/16/003.

The remaining cases are at various stages prior to hearing. They are:

- Right to Know CLG v Commissioner for Environmental Information 2018/119 MCA. The applicant challenges my decision on case CEI/17/0021. This case was listed for hearing over two days commencing 18 March 2020. However, in response to the Covid-19 crisis, the High Court indefinitely adjourned all non-jury cases with effect from 18 March 2020.
- Coillte Teoranta v Commissioner for Environmental Information 2018/453 MCA. The applicant challenges my decision on case CEI/17/0022. This case was adjourned pending a decision on Redmond.
- Right to Know CLG v Commissioner for Environmental Information 2019/87 MCA. The applicant challenges my decision on case CEI/18/0039. This case was listed for hearing over 4 days commencing 31 March 2020 and is now adjourned due to the Covid - 19 crisis.

Of the 36 decisions I made in 2019, seven (19%) were appealed to the courts. That represents a significant increase over 2018, which itself saw the number of court appeals rise sharply to 12.5% of my decisions.

Of the seven decisions made in 2019 which were appealed to the Courts, I agreed to the remittal of one (CEI/18/0031) to my Office for fresh consideration. The other six - the decisions themselves are described in more detail above in Chapter 2 - are still before the courts and, at the time of writing, are indefinitely adjourned due to the Covid-19 crisis. They are:

- High Court case 168/2019 MCA. The applicant, Right to Know CLG, challenges my decision on CEI/17/0025. The case was listed for hearing in May 2020.
- High Court case 249/2019 MCA. The applicant, Right to Know CLG, challenges my decision on CEI/17/0017. No date was set for hearing at the time of writing.
- High Court case 287/2019 MCA. A third party, M50 Skip Hire and Recycling Ltd, challenges my decision on CEI/18/0027. The case was listed for hearing in July 2020.
- High Court case 48/202 MCA. The applicant, Right to Know CLG, challenges my joint decision on cases CEI/18/0032 and CEI/19/0033. No date was set for hearing at the time of writing.
- High Court case 2020/33 MCA. The applicant, Right to Know CLG, challenges my decision on CEI/18/0046 . No date was set for hearing at the time of writing.
- High Court case 2020/34 MCA. The applicant, Right to Know CLG, challenges my decision on CEI/19/0007. No date was set for hearing at the time of writing.

Looking Ahead to 2020

When we began work in January 2020, my hopes for the year were:

- That forthcoming court decisions and Aarhus Convention Compliance Committee findings would assist my work by providing greater legal clarity.
- That the rate of incoming AIE appeals and court appeals might decline, so as to create a breathing space which we could use to consolidate our corporate knowledge. This could lead to greater efficiency and faster decisions.

Despite the unexpected difficulties posed by the Covid-19 crisis, those remain my hopes for 2020. The two court judgments delivered in 3 April 2020 have already provided welcome clarity on some aspects of the law and procedures which affect our work. I know that it was the intention of the Minister for Communications, Climate Action and Environment to carry out a review of the Regulations with a view to making amendments to them. My Office remains available to discuss this and to provide any input required based on our experience of applying the Convention, the Directive and the Regulations since 2007.

Appendices

Appendix I
Statutory Certificates issued by Ministers in 2019

An Roinn Dlí agus Cirt
agus Comhionannais
Department of Justice
and Equality

Oifig an Ard-Rúnaí | Office of the Secretary General

Mr. Stephen Rafferty,
Senior Investigator
Office of the Information Commissioner
6 Earlsfort Terrace
Dublin 2
D02 W773

Office of the Information Commissioner
RECEIVED
12 FEB 2020

10 February 2020

Secretary General Reference: DJE-SG-00009-2020

Re: Notification under section 34 of the Freedom of Information Act, 2014

Dear Mr. Rafferty

I refer to your correspondence dated 8 January 2020 in relation to Section 34 of the Freedom of Information Act 2014.The Minister renewed three Certificates and issued a further two in 2019; please see below table for details.

Reference Number	Renewed/New Certificate
156/343/2009	Renewed
156/390/2009	Renewed
156/443/2001	Renewed
DOJ FOI 2019 0274	New certificate
DOJ FOI 2019 0291	New certificate

Copies of the Certificates are also attached for ease of reference.

Your sincerely,

Aidan O'Driscoll
Secretary General

51 Faiche Stiabhna, Baile Átha Cliath 2, D02 HK52
51 St Stephen's Green, Dublin 2, D02 HK52
Telephone / Teileafón: +353 1 602 8316 | Lo-call: 1890 221 227
Email / Riomhpost: secretarygeneral@justice.ie | www.justice.ie

Appendix I
Statutory Certificates issued by Ministers in 2019

An Roinn Gnóthaí Eachtracha agus Trádála
Department of Foreign Affairs and Trade

Office of the Information Commissioner
RECEIVED
23 JAN 2020

21 January 2020

Mr Stephen Rafferty
Senior Investigator
Office of the Information Commissioner
6 Earlsfort Terrace,
Dublin 2,
D02 W773

Notification under Section 34 of the Freedom of Information Act, 2014

Dear Mr Rafferty,

I refer to your recent letter on the above.

On 8 January 2019 the Tánaiste, Minister for Foreign Affairs and Trade issued three certificates in accordance with Section 34 of the Freedom of Information Act 2014 by reference to which the records are exempted under Section 32 and Section 33. The certificates related to three requests for the same set of records.

Please find enclosed copies of the certificates issued in 2019.

Yours sincerely

Fiona Flood
Director
Security and Corporate Compliance

Appendix II
Review under section 34(7) of Ministerial Certificates issued

Roinn an Taoisigh
Department of the Taoiseach

5 March 2020.

Mr. Peter Tyndall,
Information Commissioner,
Office of the Information Commissioner,
18 Lower Leeson Street,
Dublin 2,
D02 HE97.

Review of Certificates issued under Section 34 of the Freedom of Information Act, 2014

Dear Commissioner,

I wish to confirm that the Taoiseach, the Minister for Finance and Public Expenditure and Reform and the Minister for Business, Enterprise and Innovation carried out a review for the period ended 31 December 2019, on 3 March 2020.

Sixteen Certificates were reviewed, ten of which were issued by the Minister for Justice and Equality and six by the Minister for Foreign Affairs and Trade.

The Taoiseach, the Minister for Finance and Public Expenditure and Reform and the Minister for Business, Enterprise and Innovation are satisfied that it is not necessary to request revocation of any of the sixteen certificates which were the subject of this review - copies of the forms signed by the reviewers to that effect are enclosed.

Yours sincerely,

N. Martin
Niall Martin

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