



Oifig an Choimisinéara Faisnéise
Office of the Information Commissioner



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Foreword

I hereby submit my fourth Annual Report to the Dáil and Seanad pursuant to the provisions of section 40(1)(c) of the Freedom of Information Acts, 1997 and 2003. This is the ninth Annual Report submitted in relation to the work of the Office of the Information Commissioner since it was established in 1998.



Information Commissioner

May 2007



01

Introduction

I am pleased to introduce my fourth Annual Report as Information Commissioner. This Report covers the period of 1 January 2006 to 31 December 2006, my third full year in office.

In my previous Reports, I commented on the impact of the amendment of the Freedom of Information (FOI) Act in 2003, particularly the negative effect of the up-front fees on overall usage of the Act. I acknowledged in last year's Report that, on one level, the picture was not very positive. Some commentators have suggested recently that the situation is worse than I had previously outlined.

I agree that certain recent developments have been discouraging. For instance, the manner in which the Joint Committee on Finance and the Public Service conducted its review, in 2006, of the non-disclosure provisions under section 32 of the FOI Act was ultimately disappointing. From a position of engaged debate, which I felt was largely supportive of many of my recommendations for the removal of certain secrecy provisions, the Joint Committee then went to a vote and split along party lines. Its report to the

I consider that a number of the decisions that I made last year also reflect that FOI is still being used effectively to achieve openness and accountability in public service.

Oireachtas in September 2006 rejected all of my recommendations in favour of those of the relevant Minister without providing any reasons for its decision.

I also remain concerned that changes continue to be made to the FOI Act without consultation with or even notification to my Office. In this Report, I refer, in particular, to one such change that was effected by a clause in the Safety, Health and Welfare at Work Act, 2005. On the other hand, I outline a number of recommendations that I made recently as to how the operation of the FOI Act could be improved.

Although 136 additional public bodies were brought within the scope of the FOI Act last year, the continued exclusion of certain other bodies likewise remains a matter of concern to me. I list the significant omissions in this Report, and I also reiterate my particular concern regarding An Garda Síochána. I emphasise that Ireland is alone among 26 Council of Europe countries recently surveyed by a number of Non-Governmental Organisations (NGOs) in excluding its police force from FOI-type legislation.

It is also true that overall usage of the FOI Act fell in 2006 despite the increased number of public bodies prescribed. Nevertheless, I find grounds for cautious optimism.

The decline in overall usage is entirely accounted for by the drop in the level of requests for personal information, mostly by former residents of industrial schools to the Department of Education and Science, which was an expected occurrence. The level of requests for non-personal and mixed information actually rose in 2006, with half of the increase being attributable to requests made to Civil Service Departments and Offices. I am also encouraged by the fact that the rate of requests granted in full by public bodies rose in 2006 by four percent. In addition, there was also an increase in the percentage of requests from journalists, reversing what had been a downward trend. I conclude that FOI is still working, albeit not as well as it could be.

As I observed in a speech I made at a Public Affairs Ireland conference on 30 November 2006, examples of FOI-based stories that appeared in published media reports in 2006 include:

- in February 2006, *The Irish Times* reported, in relation to the Leas Cross nursing home saga, that in 1998 the Health Board's own inspectors recommended against the registration of the nursing home (the FOI request was made by Fergus O'Dowd, TD);
- in June 2006, *The Irish Times* reported that the Government went ahead with plans to reinstate much of the Western Rail Corridor despite advice from an expert group that the restored line would not be economically viable;
- in July 2006, *Foinse* reported that 89 civil servants were employed on constituency work on behalf of Ministers and Ministers of State;
- in August 2006, the *Irish Independent* reported that the Minister for the Environment, Heritage and Local Government and the Minister for State responsible for the Office of Public Works (OPW) were at odds on proposals (from the OPW) to specify the use of "green" or environmentally-friendly cement in public contracts;
- in October 2006, the *Irish Examiner* reported on a very uneven availability of relevant patient data from Ireland's public maternity hospitals;
- throughout the year, many newspapers carried stories on rates of MRSA infection in hospitals throughout Ireland.

I consider that a number of the decisions that I made last year also reflect that FOI is still being used effectively to achieve openness and accountability in public service. Among the decisions highlighted in Chapter 4 of this Report

is one in which I directed the release of an adverse employment reference that had been supplied to a public body by a previous employer of a candidate for a public sector job. In reaching my decision, I stressed the public interest in fair procedure in relation to a selection process for a public sector job and found that this public interest would be served by the granting of the request concerned. In two other decisions highlighted in this Report, I directed the release of records relating to the general administration of the Tribunal of Inquiry into Certain Planning Matters and Payments (more commonly known as "the Mahon Tribunal"), thus demonstrating that FOI can be used to make a Tribunal of Inquiry more open and transparent in the way it conducts its business on behalf of the public.

Moreover, in response to my previous Annual Reports, nursing home inspection reports have now begun to be published on the website of the Health Service Executive. Although progress has been slower than I would have desired, this development is nevertheless very welcome. As noted in last year's Annual Report, the decision of the Minister for Education and Science to publish school inspection reports is another consequence of the FOI Act.

This Report highlights a number of other significant cases and issues that were dealt with by my Office in the past year. One such issue is that of parental access rights under the FOI Act. In this Report, I describe the full case history of *McK v. The Information Commissioner*. I acknowledge, in accordance with the Supreme Court's judgment in the *McK* case, that a presumption of parental primacy applies in relation to access to records containing personal

information about a child. I explain how the presumption was overcome in the *McK* case and other cases involving the same requester. However, I also include an example of a straightforward decision applying the parental primacy presumption by granting the request for access to the records concerned.

In addition, I summarise my report on the investigation that I carried out in the past year under section 36 of the FOI Act. My investigation focused on the manner in which public bodies have used section 10(1)(a) of the Act to refuse FOI requests that involve searches for records. While, in overall terms, I found that the examined public bodies were carrying out searches for records in a proper manner, I presented my recommendations in the form of a "Guide to Standards of Best Practice for Public Bodies when dealing with FOI requests that involve searches for records". As a related topic, I draw attention to some of the cases dealt with by my Office on review in which poor records management practices within public bodies had an impact upon their searches for records and, in turn, upon the right of access of the requesters concerned.

In closing this Introduction to my fourth Annual Report as Information Commissioner, I wish to express my sincere appreciation for the continued dedication and support of all of my colleagues in the Office. I would like to thank in particular my Director General, Pat Whelan, Senior Investigators, Seán Garvey and Fintan Butler, as well as Melanie Campbell, John Doyle, and Frank Forde for their work in the compilation of this Report.



02

The Year in Review

I remain concerned that we in Ireland are out of kilter with our counterparts across the developed world who have included their police forces under FOI-type legislation.

COLLATION OF STATISTICS

In a number of previous Annual Reports, my predecessor and I have raised the ongoing difficulties encountered by my Office in ensuring that statistics produced by public bodies on usage of the FOI Act are both timely and reliable. This year, the production of statistics has proven to be a less cumbersome and time-consuming exercise than in previous years, and I would like to express my gratitude to all those involved in bringing about this most welcome improvement. While some problems remain, in particular the timeliness of production of statistics by a small number of public bodies and issues around carryover of figures of requests on hands from one year to the next, the overall process has proven to be much more streamlined this year than previously, and I hope that the improvement continues into the future.

LEVEL OF REQUESTS TO PUBLIC BODIES

Some 11,804 requests were made to public bodies under the FOI Act in 2006. This is a decrease of 19% from the 2005 figure (14,616) and 6% from 2004 (12,597), and marks continua-

tion of the downward trend in request numbers, with the exception of 2005, since the introduction of fees in 2003. The temporary surge in 2005 is largely accounted for by requests to the Department of Education and Science by former residents of institutional care in preparation of their applications to the Residential Institutions Redress Board. I said in last year's Report that the 2005 volume of requests would not be maintained and the figures for 2006 support that conclusion.

The overall fall in the number of FOI requests made to public bodies since 2003 coincides with the imposition of up-front fees for non-personal information, as identified in my Investigation Report published in 2004. This is something I will keep under review in future Annual Reports.

The table overleaf shows the ten public bodies subject to the most requests during 2006 (the previous year's ranking is shown in brackets). For the purposes of making comparisons with recent years, I have broken down the Health Service Executive (HSE) statistics into the areas that were covered by the former regional Health Boards.

Overall statistics for the HSE, which came into existence at the start of 2005, are contained in Chapter 5 (see Table 8).

In my Annual Report for 2005, I welcomed the fact that there was an increase in the number of FOI requests submitted to three key Departments of State, but cautioned that I could not envisage a return to pre-2003 levels of usage without the issue of up-front fees being reviewed and changes made. The figures overleaf illustrate that the increase recorded for 2005 was indeed temporary, with an average 68% drop in requests submitted across the three Departments since up-front fees were introduced in 2003.

TYPE OF REQUEST

The figures on type of request confirm the trend for overall request numbers, with a large decrease (-2,941) in the number of personal requests from the temporary high of 2005. Despite the overall 19% decrease in requests since 2005, the volume of non-personal and "mixed" requests, i.e. requests which include both personal and non-personal information, actually increased from 3,454 to 3,583, or 4% over the 2005

Rank	Public Body	2004	2005	2006
1	Dept. of Education and Science (1)	1,840	3,716	1,108
2	HSE Southern Area (2)	732	731	756
3	HSE Western Area (3)	456	521	627
4	HSE South Eastern Area (4)	401	495	529
5	Dept. of Justice, Equality and Law Reform (7)	444	433	477
6	Dept. of Social and Family Affairs (5)	559	462	464
7	HSE North Western Area (6)	541	440	360
8	HSE North Eastern Area (10)	343	349	356
9	HSE Northern Area (9)	233	366	354
10	HSE Mid Western Area (-)	326	334	325

figure. As fees are payable for both non-personal and mixed requests, there has been an increase of 129 in the number of requests for which fees are payable. With such a small increase, it is too early at this stage to say if usage of the FOI Act for non-personal and mixed information is recovering.

TYPE OF REQUESTER

The majority of FOI requests continue to be made by ordinary members of the public or representative organisations (77%), while journalists (10%), businesses (7%), staff of public bodies (5%), and members of the Oireachtas (1%), make up the other categories of requester. These annual figures are broadly similar to previous years. An exception is the percentage level of requests made by journalists, which

has risen from 6.5% in 2005. While I welcome this increase, it still compares unfavourably with the 20% of requests submitted by journalists in 2001. Nevertheless, media usage of FOI results in the regular publication or broadcast of FOI-based stories, as highlighted elsewhere in this Report.

RELEASE RATES

During 2006, 47% of requests dealt with by all public bodies were granted in full and a further 29% were part-granted. This means that, allowing for the 2% of requests transferred and the 9% withdrawn or handled outside of FOI, 13% of requests were refused in 2006 as against 15% in 2005 and 16% in 2004. While I welcome this downward trend in refusal rates, it can be attributed to the shifting propor-

tions of request types since 2003, as requests for personal records tend to be released more readily than non-personal requests. However, as the proportion of non-personal and mixed requests is higher for 2006 than 2005, it will be interesting to see if the welcome downward trend in refusal rates continues should it transpire that numbers of non-personal and mixed requests continue to recover.

As was the experience in previous years, there are differences between sectors in their rates of release. Chapter 5 (Table 5) shows that the local authorities (57%), the HSE (64%), third level institutions (64%), the voluntary hospitals/mental health agencies/voluntary bodies (58%), and other bodies (48%) are all more inclined to grant full

	2003	2004	2005	2006	(03 - 06)
Department of the Taoiseach	142	45	60	51	- 64%
Department of Finance	305	78	93	72	- 76%
Department of Enterprise, Trade and Employment	153	62	86	71	- 54%

release than their counterparts in the Civil Service, which only granted full release in 28% of cases. An analysis of the figures shows that the lower release rate in the Civil Service is not related to a higher level of requests for non-personal policy type records in that sector, as the proportion of personal requests is lower for the local authorities (23%), other bodies (40%), and third level institutions (54%) than it is for the Civil Service (64%), yet the release rates for those non-Civil Service sectors are higher.

In last year's Report, I commented that, due to the temporary peak in 2005 of personal requests to the Department of Education and Science, I expected the full release rate in the Civil Service to increase in 2006. While this has happened, with the rate increasing from 23% in 2005 to 28% in 2006, it remains the case that the full release rate is considerably lower for the Civil Service than for the other sectors. The statistics on release rates lead me to the conclusion that the lower release rate in the Civil Service appears to result from a more restrictive approach to providing access to information generally than in the other FOI sectors. This is a matter I will return to in future Reports.

APPLICATIONS TO MY OFFICE FOR REVIEW

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

The number of applications for review made to my Office during 2006 was 404, an increase of 24 cases, or 6%, on 2005. As indicated in Chapter 5 (Table 13), 254 of these applications were accepted for review during 2006, which compares to 285 accepted in 2005. This fall-off is in line with the overall reduction in the number of requests, apparent since 2003, apart from the temporary 2005 peak.

The proportion of cases appealed to my Office, and accepted for review, as a percentage of the total number of requests received by public bodies was 2.2% compared to 2% in 2005 and 2.5% in 2004. A breakdown of the public bodies concerned and the subject matter of review applications accepted are contained in Chapter 5 (Tables 15 and 17). The number of third party objections to the release of information, at 2.8%, is a slight reduction from the 3% figure for 2003 and is a reversal of the steady increase to 8.7% in 2004 and to 13.7% in 2005. This pattern supports my conclusion in the 2005 Report that the increases for 2004 and 2005 were largely accounted for by decisions taken by public bodies to release, in the public interest, requests for inspection records of nursing homes and child care services. Apart from those two years, the level of third party objection has declined steadily from 7% in 2001 to the 2.8% recorded for 2006. This may reflect a greater acceptance among third parties of the types of records that experience has shown are likely to be released under FOI, leading to reduced levels of objection to such release. The processes for dealing with the issue of third party consultations by public bodies are set out in section 29 of the FOI Act.

FEES RECEIVED

The imposition of an up-front fee for certain applications for review to my Office came into effect on 7 July 2003. Where non-personal information is sought, the fee payable to my Office is €150, although this is reduced to €50 if the applicant is a medical card holder or if the appeal arises from a decision taken by a public body in which the provisions of section 29 were applied.

During 2006, my Office received 129 appeals where a fee was paid. The total amount received in application fees by my Office in 2006 was €14,575. Of this, €4,225 was refunded for the following reasons:

- €3,150 was refunded in respect of applications that were withdrawn or rejected as invalid;
- €150 was refunded in respect of cases where the application was for the personal information of a minor or a deceased person [section 28(6)];
- €800 was refunded in cases where the public body had not issued a decision within the time allowed; and
- €125 was refunded in respect of overpayments.

In a trend continuing from 2005, many applicants were unaware that a fee was payable in relation to an application that involved a request for access to non-personal information. In 62 cases, my Office wrote to the applicant to say that a fee was applicable. In 11 cases, the applicant withdrew the non-personal element of the application and indicated that they were seeking access to record(s) which "contain only

personal information relating” to them. Therefore, in these cases, the application for review was accepted without a payment.

As well as applications for review, my Office also received 56 requests under the FOI Act during 2006 in relation to information held by it. Some 39 of the 56 FOI requests were received on-line. Fees were received in 13 cases (12 on-line payments) and totalled €180. Eleven of the 12 on-line payments were voided on administrative grounds and the other on-line payment was refunded.

REVIEWS OF DECISIONS

During the year, I reviewed 292 decisions of public bodies. In terms of reviews processed by my Office, this represents a decrease of some 35% from the 447 cases completed in 2005. This decrease is accounted for by a number of reasons, including the complexity of a small number of parental access cases (highlighted in Chapter 3), and greater concentration by my Office on older and generally more time-consuming cases. The continued fall-off in the numbers of reviews from former residents of industrial schools, which were very similar in nature and accordingly required less time to complete, also contributed to the reduced clearance rate for 2006.

At the start of the year, my Office had a total of 339 reviews on hand and a further 254 were accepted during 2006. A total of 292 reviews were completed during 2006, leaving 301

reviews on hand at the end of the year. I remain pleased that the large backlog of cases on hand continues to decrease and is now significantly less than the figure of 796 at the end of 2003. Despite the welcome trend of a reducing backlog, this issue has been and continues to be a major source of concern to me, and I hope to reduce the backlog even further in 2007.

TIME TAKEN TO COMPLETE REVIEWS

My Office completed 292 reviews in 2006 which are broken down in the table below according to the year in which the case was received by my Office.

The FOI Act provides that reviews by my Office should be completed as soon as may be and, in so far as practicable, not later than four months after receipt of the application. A total of 245 reviews were received and accepted in 2006, with 81 of these being completed during the year. Forty-five, or 56%, of these 81 reviews were completed within the time limit provided for in the Act. This is a decrease from the 68% achieved in 2005, but is broadly in line with the rates achieved in 2004 and 2003. Naturally, I am concerned at this decrease, as I am conscious of the importance of achieving a high closure rate within four months from the point of view of requesters, public bodies, and my Office. While the failure to meet the deadline in the remaining cases is regrettable, I am satisfied that it is largely due to the effect on closure rates of the concentration by my Office

on older cases in order to reduce the current backlog of reviews. I also think it important to acknowledge that such reviews often involve complex issues and/or a large number of records. In my view, these are factors which take these cases outside the scope of the four month time-frame envisaged by the Act.

OUTCOME OF REVIEWS

Not all of the reviews completed resulted in the issuing of formal decisions: some were discontinued, some were withdrawn, and a settlement was effected in others.

Formal Decisions

During 2006, I issued 191 formal decisions, which accounts for 65% of all cases dealt with during the year. In 146 (76%) of the formal decisions, I affirmed the decision of the public body, while I varied 32 (16.8%), and annulled the remaining 13 (6.8%) decisions. This compares with 75% of decisions affirmed in 2005 and 87% in 2004. The 2006 figure for decisions affirmed is virtually identical to the 2005 figure, but is 11% less than the equivalent figure from 2004. This is despite the fact that, although the number of FOI requests to the Department of Education and Science in particular increased from 2004 to 2005, the number of applications for review to my Office decreased over the same period. One possible explanation for this may be that requesters, in many cases former residents of industrial schools, came to accept the reality, as reflected in the high affirmation rate of

Reviews Completed in 2006									
Year received	1999	2000	2001	2002	2003	2004	2005	2006	Total
Number	1	1	7	27	23	47	105	81	292

decisions of public bodies in 2004, that frequently the records that they sought did not exist and therefore there was nothing to be gained by appealing to my Office. The fact that the increased level of requests for personal information in 2005 did not lead to a corresponding increase in the level of applications for review to my Office tends to support this explanation.

Of the 45 cases in 2006 in which the public body's decision was varied or annulled, the new decision resulted in more records being released in almost every case.

Settlements

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

During 2006, 26 cases were settled. This represents almost 9% of all reviews completed during the year compared with some 10% in 2005, 5% in 2004, and 21% in 2003. I welcome the fact that the settlement rate has held steady since 2005 and appears to confirm recovery from the low of 5% in 2004.

Withdrawn/Discontinued

In 2006, 23% of all reviews completed were withdrawn by the applicant. This compares to 28% in both 2005 and 2004. In most cases in which the application is withdrawn, this comes about following detailed discussions between the applicant and a member of my staff.

Cases that were discontinued during 2006 accounted for 2.7% of reviews completed, compared to 1.3% in 2005 and 2% in 2004.

GENERAL QUERIES DEALT WITH BY MY OFFICE

There were 1,551 general queries made to the Office during 2006, of which 21 were made in person, 309 were written, and 1,221 were made by telephone. These general queries do not relate to any particular review and typically involve requests for information about my Office or about the operation of the Act, as well as matters outside my remit as Information Commissioner.

STATUTORY NOTICES

The majority of public bodies cooperate fully with my Office in relation to the provision of records and statements of reasons. I very much appreciate this high level of co-operation. There are specific provisions in the FOI Act in relation to the furnishing of records and information to the Information Commissioner. Amongst other things, section 37 of the Act enables me to require the production of information and/or records and to enter premises occupied by a public body. Similarly, section 35 of the Act enables me to obtain a comprehensive statement of reasons for decisions taken under the Act by public bodies.

In 2005, I reported with pleasure that it was not necessary for me to issue any notices under either section 35 or 37 and that this was a good indication of the generally high levels of co-operation my Office receives from public bodies and the good working relationship which we have developed with them. The year 2005 was the first in which no such notices had been issued since details were first published by my predecessor in his Annual Report for 2002.

However, it gives me no pleasure to report that this welcome occurrence has not been repeated for 2006. While I remain pleased that no section 35 notices were issued, it can be seen on the table overleaf that I found it necessary to issue five section 37 notices in 2006. This reverses a trend of declining requirement to issue such notices since 2002, and I hope it does not mark a reduction in the due diligence that has marked the relations between my Office and public bodies generally. It is a matter of some concern to me that three of the five section 37 notices issued in 2006 were to the same public body, the Department of Justice, Equality and Law Reform. One of those three notices was in relation to three separate FOI requests for which records had not been provided to this Office for consideration. It is of further concern to me that my Office did not receive any substantive reply following the issue of one of these notices to that Department, a situation which required intervention at the highest official level between my Office and the Department before an appropriate response was forthcoming. Both of these issues, i.e. the level of recourse to section 37 and the issue of inadequate response, are matters that I will come back to in my Report for 2007.

CERTIFICATES ISSUED BY PUBLIC BODIES UNDER THE FOI ACT

Following the amendment of the FOI Act in 2003, the possibility now exists for certain public bodies to issue certificates under three different sections of the Act. Generally speaking, the issuing of such certificates in relation to a record allows public bodies to refuse access to that record following a FOI request without such refusal being subject to review by my Office.

The provisions of sections 19, 20 and 25 of the Act provide that a report specifying the number of such certificates issued, if any, shall be forwarded to the Information Commissioner.

Section 19

Section 19 is a mandatory exemption which provides protection for records relating to the Government or the Cabinet. Following the amendment of the Act in 2003, the definition of Government includes, in certain circumstances, a committee of officials certified by the Secretary General to the Government. Section 19(4) of the Act provides that the Secretary General to the Government shall furnish to the Commissioner a report in writing spec-

ifying the number of certificates issued by him or her. I have been informed by the Secretary General to the Government that no such certificates were issued by him in 2006.

Section 20

Section 20 of the Act is a discretionary exemption which may be relied on to protect certain records relating to the deliberative processes of a public body. Section 20 allows a Secretary General of a Department of State to issue a certificate in writing stating that a particular record contains "matter relating to the deliberative processes of a Department of State". Where such a certificate is issued, the record specified cannot be released under the FOI Act. In effect, the exemption becomes mandatory. I consulted with each Secretary General and have been informed that, for the first time, a section 20 certificate has been issued, in this instance by the Secretary General of the Department of Justice, Equality and Law Reform. I attach a copy of the notification of issue of the certificate at Appendix I to this Report. No such certificate has been issued by any other Secretary General prior to or during 2006.

Section 25

A Minister of the Government, where he or she is satisfied that a record is exempt either by virtue of section 23 (relating to law enforcement or public safety) or section 24 (relating to security, defence and international relations) and, where the Minister is satisfied that the record is of sufficient sensitivity or seriousness to justify doing so, may, by issuing a certificate under section 25(1), declare such a record to be exempt from the application of the FOI Act. Any Minister who issues such a certificate must furnish me with an annual report detailing the number of certificates issued by him or her in the year and the provisions of section 23 or 24 of the Act which applied to the exempt record(s). In turn, I am obliged under section 40(1)(b) of the Act to append a copy of any such report to my Annual Report of the year in which the certificate(s) issued.

While no new certificates were issued by any Minister in 2006, I have been notified that the Minister for Justice, Equality and Law Reform renewed two certificates, on 20 February 2006 and 15 March 2006, respectively, for a further two years. I attach a copy of the notification at Appendix I to this Report.

Section 37 and Section 35 Notices Issued to Public Bodies in 2006

Public Body	Section 37 Notices Issued	Section 35 Notices Issued
Department of Justice, Equality and Law Reform	3	0
Department of Communications, Marine and Natural Resources	1	0
Department of Transport	1	0
Total: 2006	5	0
Total: 2005	0	0
Total: 2004	6	1

On 9 March 2007 I was notified, pursuant to section 25(7) of the Act, that on 6 March 2007 the Taoiseach, the Minister for Finance, and the Minister for Enterprise, Trade and Employment reviewed the three certificates (the two renewed during 2006 and a third issued on 5 August 2005) that were in operation for the year ended April 2006 and decided that it was not necessary to request their revocation. The Tánaiste was not involved in the review as he, in his capacity as Minister for Justice, Equality and Law Reform, had issued the certificates in question and therefore, pursuant to section 25(7)(b), was precluded from involvement in the review of such issue. I attach a copy of the notification at Appendix II to this Report.

APPEALS TO THE HIGH COURT AND SUPREME COURT

A party to a review, or any other person who is affected by my decision, may appeal to the High Court on a point of law. Following the amendment of the FOI Act in 2003, the decision of the High Court is no longer final and can be appealed to the Supreme Court.

During 2006, the High Court issued judgments in two cases, and one appeal was struck out by order. The Supreme Court issued a judgment in 2006 in an appeal that it had heard in 2005.

I comment on the judgments issued by the High Court and the Supreme Court during 2006 in Chapter 3.

NEW BODIES WITHIN THE REMIT OF THE FOI ACT

In June 2006, the Minister for Finance announced that he had made regulations bringing over 130 additional public bodies under the scope of the

FOI Act. With the inclusion of these bodies, the public will have access to the records of over 600 public bodies. The list includes a substantial number of bodies in the education sector, including the Education Support Centres; in the enterprise sector, including the City and County Enterprise Boards; and other bodies in whose activities the public will have a very keen interest, for example, the National Treatment Purchase Fund and the Commission for Taxi Regulation.

While I obviously welcome the extension of the Act to these bodies, I am disappointed at the fact that a number of public sector bodies of some considerable significance remain outside its scope. I commented on this in my 2005 Report, and am further disappointed that none of the bodies I specified in that Report has been included in the June 2006 extension. Those bodies are:

- in the area of the Department of Justice, Equality and Law Reform: An Garda Síochána, the Garda Ombudsman Commission, the Office of the Refugee Applications Commissioner, the Office of the Refugee Tribunal, and the Judicial Appointments Advisory Board;
- in the area of the Department of Finance: the Central Bank and Financial Services Authority of Ireland, the Irish Financial Services Regulatory Authority, the National Treasury Management Agency, the National Pension Reserve Fund Commission, and the State Claims Agency;
- in the area of the Department of Education and Science: the 33 Vocational Educational Committees, the State Examinations Commission, the Residential Institutions

Redress Board, and the Central Applications Office;

- other bodies include: the Adoption Board, the Irish Red Cross, the Personal Injuries Assessment Board, and the Law Society of Ireland (which might be included to the extent that it performs statutory functions under the Solicitors Acts).

In my 2005 Report, I suggested that, in future, each new body being created under statute, or each body to which significant public functions are being entrusted, should be made subject to the FOI Act either in its own founding statute or by way of a regulation from the Minister for Finance, made to coincide with the establishment of that body. This would ensure that all new public bodies are subject to the same level of independent oversight as those currently under the scope of the FOI Act.

THE FOI ACT AND AN GARDA SÍOCHÁNA

In a speech I made on 30 November 2006, delivered at a Public Affairs Ireland conference (available on my Office's website at www.oic.gov.ie), I referred to the continued exclusion of An Garda Síochána from the FOI Act. I remain concerned that we in Ireland are out of kilter with our counterparts across the developed world who have included their police forces under FOI-type legislation. We are alone among 26 Council of Europe countries recently surveyed in excluding our police force from the ambit of the FOI Act. In the context of ongoing reform, such as establishment of the Garda Inspectorate and the Garda Ombudsman Commission, I feel that now is the correct time to make An Garda Síochána amenable to the FOI Act.

REVIEW OF NON-DISCLOSURE PROVISIONS BY THE JOINT COMMITTEE ON FINANCE AND THE PUBLIC SERVICE

In last year's Annual Report, I outlined the process whereby the Joint Committee on Finance and the Public Service (the Joint Committee) is authorised to conduct a review of the operation of legislative enactments which authorise, or require, the non-disclosure of a record which would otherwise be subject to the FOI Act (for details on how the process works, please see last year's Annual Report, available on my Office's website at www.oic.gov.ie). As part of that process, each Government Minister is required, for their respective areas of responsibility, to specify whether such enactments should be amended, repealed, or allowed to remain in force, and also whether they should be included in the Third Schedule to the FOI Act. The Ministers are required to lay a report on their conclusions on these matters before each House of the Oireachtas and to provide copies to me as Information Commissioner.

In accordance with section 32(5) of the FOI Act, I presented my opinions and conclusions on the Ministers' reports to the Joint Committee in December 2005 in the form of a special report (available on my Office's website at www.oic.gov.ie). At the time of writing of last year's Annual Report, my understanding was that the Joint Committee would deal with the matter in the months following.

In my Public Affairs Ireland conference speech, I also commented on the Joint Committee's consideration of my special report. My views on this matter are already on the public record. However, as my Annual Reports are the

mechanism by which I fulfill my statutory reporting obligations on the activities of my Office to the Oireachtas, I think that my comments are worth repeating here:

"In September 2006 the Joint Committee on Finance and the Public Service completed its report to the Oireachtas following a lengthy series of deliberations which included appearances before the Committee both by myself and by senior officials of the Departments of Finance and of Health and Children. In net terms, the Committee was faced with a situation in which, out of a total of 150 secrecy provisions identified, in 36 instances there was disagreement between myself and the relevant Minister as to whether the secrecy provision should be made subservient to the FOI Act or should continue to override the FOI Act. The Committee, therefore, had to choose between my recommendation - that the 36 secrecy clauses should each be made subservient to the FOI Act - and that of the relevant Minister - that the secrecy clauses should continue to override the FOI Act.

. . .

In appearing before the Committee, I felt that my argument was understood and, broadly speaking, accepted by it. However, when the Committee presented its Report to the Oireachtas in September last its recommendation, in the case of those secrecy provisions on which I disagreed with the relevant Minister, was to support the Minister in each case.

I should add, for the sake of clarity, that possibly for the first time in its

history, the Committee went to a vote on this issue. It then split, regrettably, along party political lines. I say regrettably for the following reasons. I believe and still believe in the bona fides of that Committee and I believe that each Committee member, regardless of party affiliation, genuinely engaged with the issues at hand, many of which were complex. I also believe that the majority agreed with my views on the recommendations at issue. But, in the end, apparently, an unstated political imperative overrode everything else.

I am not so sensitive that I cannot live with the rejection of a recommendation or decision. My appeal decisions are subject to appeal to the High Court and subsequently to the Supreme Court and I am accustomed to having my decisions scrutinised, and occasionally rejected, by the Courts. What concerns me, and indeed disappoints me greatly, about this particular episode is that the Committee has given no analysis of any kind, or any explanation in its report, as to why it opted for one set of recommendations over another. Indeed, the substantive Committee Report consists of little more than one page; and the recommendation itself is conveyed in the single sentence: 'The Joint Committee supports the Ministers' recommendations.'

. . .

Commentators have suggested that a 'whip' was imposed on certain Committee members after, as one such member explained, they had made 'an error of judgement' in their initial assessment. Whatever the reality, the experience has been

a very disheartening one both for my Office and for myself. But wider forces were at play apparently.

I appreciate that it is not very usual for office holders such as myself to comment in this fashion in relation to an Oireachtas Committee. However, there is nothing to be gained from adopting the pretence that the Committee's handling of the Section 32 issue does not warrant comment. There are important issues at stake here and I believe, as an independent office holder, that I should make these comments in the interests of promoting an honest and thorough debate on what is an important aspect of our democracy."

I provided the Joint Committee with a copy of the speech quoted above in advance of the November conference. The Joint Committee acknowledged receipt of the speech and commentary, and, in the course of its proceedings on 13 December 2006, made a brief reference to having received my correspondence and noted it accordingly. At the time of writing, this remains the last contact I have had with the Joint Committee on this issue.

ACCESS TO RECORDS OF DECEASED PERSONS

In last year's Annual Report, I dealt at length with the issue of access to records of deceased persons. I focused on what had been brought to my attention as drafting flaws in the relevant Regulations under section 28(6) of the FOI Act, which provides for a potential right of access to records of deceased persons. I also outlined my concern that flaws in the mechanism by which guidelines on the Regulations prepared by the Minister for Finance had been brought into force meant

that the guidelines in question were not those envisaged in the FOI Act, and that, even if they were, the language used in them causes confusion as to their actual effect. The net effect of these flaws is that the wording of the 1999 Regulations as they stand, in my view, provides for access to records of deceased persons by any requester who is defined in the Regulations as a next of kin of the deceased person. A next of kin as provided for in the 1999 Regulations includes partners and former partners, and has no regard to the status or currency of the relationship between the next of kin requester (as set out in the Regulations), and the deceased person to whose records access has been sought.

I suggested that the Minister might consider revisiting the 1999 Regulations as a matter of urgency. While it has been indicated to my Office by the Department of Finance that a review of the Regulations is underway, at the time of writing my Office has not been informed of any tangible progress on the matter. This remains a real issue, as I am required to make my decisions based on the law as it stands, not as it ought to be or how it has been promised to be. I fully accept that this position is highly unsatisfactory and, accordingly, I would like to take this opportunity to restate my view that it is appropriate for the Minister for Finance to revisit the 1999 Regulations as a matter of urgency.

PUBLICATION OF SCHOOL INSPECTION REPORTS

Also in last year's Annual Report, I dealt in detail with the Supreme Court's decision to overturn the High Court's upholding of my decision to release a particular school inspection report, and to direct that the report should be

withheld. I welcomed the subsequent decision by the Minister for Education and Science to voluntarily publish a restricted version of school inspection reports. Voluntary publication was in contrast with the approach taken by the Department of Education and Science in the years preceding that decision where it consistently argued that such publication would have a seriously detrimental effect on the proper operation of the Department's Inspectorate function. While welcoming the Minister's approach, I remain concerned that section 53 of the Education Act of 1998 continues to exclude school inspection reports from the scope of the FOI Act. This means that the continued publication of the reports, and the content of them, is entirely at the discretion of the Minister with no independent oversight of the exercise of that discretion other than judicial review. This contrasts with the position of other public bodies whose activities are subject to such independent oversight through being included under the remit of the FOI Act. Therefore, there is no legislative mechanism providing for access to the reports should the Minister, or her successor, decide at some future point to discontinue publication.

I also remain of the view that the published reports should contain a more comprehensive assessment of school performance than is currently the case. In particular, I continue to see no reason why the reports should not contain an element on the academic performance of schools, duly anonymised to protect the privacy of students and teachers. Information on academic performance, duly balanced and contextualised by other critical information, e.g., special needs provision, would give those who find such reports useful, parents in

particular, a better basis on which to make informed decisions about their childrens' education.

NURSING HOME INSPECTION REPORTS

In my Annual Reports for both 2004 and 2005, I drew attention to the desirability of the HSE publishing, as a matter of course, its reports of inspections of private nursing homes. Section 38 of the FOI Act requires that, as Commissioner, I should "foster and encourage the publication by public bodies ... of information of relevance to the general public in relation to their activities and functions generally". In June 2005, in response to my Annual Report for 2004, the HSE committed itself to publishing nursing home inspection reports on its website as a matter of course. In October 2005, the HSE told my Office that work was well advanced on national, standardised nursing home inspection and reporting arrangements. However, almost another full year went by before inspection reports actually began to appear on the HSE website. The reports being published by the HSE are reports of inspections which have taken place since 26 June 2006.

Clearly, the publication of these reports is very welcome. The availability of published reports has contributed both to public debate about standards in private nursing homes as well as being of help to families choosing a home for a family member. However, I must confess to some disappointment at the slow progress being made on this

matter. As of the time of compiling this Report, some private nursing homes have not yet been the subject of any published inspection report.

FEES FOR SUBMITTING FOI REQUESTS

I have previously outlined the negative impact that the introduction of fees continues to have on the use of the FOI Act, with significantly fewer requests being submitted by media sources in particular (down from 2,103 in 2002 to 1,187 in 2006). While the up-front fee of €15 has this effect, I am also concerned that the fee of €150 for applications for review to my Office acts as a further disincentive for people to appeal decisions of public bodies that they are unhappy with. This is borne out by the statistics - in 2002, my Office accepted 272 applications for review of decisions relating to non-personal or mixed personal/non-personal records (requests for one's own exclusively personal records are not subject to fees). In 2006, this figure dropped to 121 applications. As the €150 fee appears to be acting as a brake on accountability of public bodies through reducing the number of their decisions that are appealed, I remain strongly of the view that the fee should be reviewed and brought into line with other jurisdictions which either do not charge or have a nominal fee. I refer further to this point in my commentary on amendments to the FOI Act which I published in March 2007 and the main points of which are set out below.

COMMENTARY ON AMENDMENTS TO THE FOI ACTS, 1997 AND 2003

In March 2007, I published, in accordance with section 39 of the FOI Act, a list of "Suggested amendments to improve the operation of the Freedom of Information Acts, 1997 and 2003". In the commentary, which is available on my Office's website at www.oic.gov.ie, I recommend:

- that fees for internal review of FOI decisions and appeals to my Office be brought into line with other jurisdictions which either do not charge or have a nominal fee;
- that such fees be refunded in the event of a successful appeal of a public body's decision;
- that some of the amendments made to the FOI Act in 2003 be removed, particularly those relating to Government records and the definition of "Government";
- that the Minister for Finance review the existing legislation where it appears that there is an unqualified right of access to records of the deceased by the spouse, partner or a next of kin of the deceased; and
- that the FOI Act apply to all records of the Health and Safety Authority (whose "enforcement" records were removed from the scope of the Act in 2005).

STAFFING

During 2002, a number of changes occurred arising from the implementation of a staff mobility policy. As a result, this Office lost the services of Mary Byrne and Chris Cogan, both of whom departed for new challenges in the Office of the Ombudsman. I would like to thank each of them for their contribution to this Office and I would also like to welcome Alison McCulloch and Phyllis Flynn, who joined us as Investigator and Higher Executive Officer, respectively.



03

Issues Arising

A key element in good records management is that there should be clarity about the period for which records will be retained and that records will be destroyed only in accordance with the agreed retention periods.

INTRODUCTION

In this Chapter, I highlight certain important issues that arose in 2006 in relation to the operation of the FOI Act. There were also further developments in relation to issues considered in depth in my Annual Reports for 2005 and previous years. My purpose here is to provide guidance to FOI users and public bodies, to address recurring problems relating to the processing of requests by public bodies, and also to give some insight into the decision-making process of my Office. The issues discussed in this Chapter are as follows:

- Parental Access Rights
- Records Management, including:
 - Summary of Investigation into Use of Search Exemption
 - Other Search Cases
- Discovery and Legal Professional Privilege
- Tribunal Cases
- The Safety, Health and Welfare at Work Act, 2005, and the FOI Act
- High Court and Supreme Court Judgments

PARENTAL ACCESS RIGHTS

Important questions have to be addressed where cases involve the rights of parents and children. Some of these rights were central to a Supreme Court judgment in the case (highlighted below) of *McK v. The Information Commissioner*, which resulted from a request by a father for access to his daughter's medical records. The issues involved relate to sensitive family law matters. Judge Susan Denham acknowledged this point when she commented in the Supreme Court judgment: "As it is so quintessentially a matter arising in family law it may be that it is a matter more appropriately considered in a Family Law Court. However, this matter proceeded under the Act of 1997 procedures." I have highlighted the *McK* case, and a number of related decisions made in line with that judgment, below.

Background - Mr. N.McK and the Adelaide and Meath Hospital (Case Number 000128)

Mr. McK sought records held by the Adelaide and Meath Hospital (the Hospital) relating to the hospitalisation, in 2000, of his daughter, who was then 12 years old. The Hospital was

deemed to have refused access to the records, and the requester made an application to my Office for review. On 12 August 2002, my Office issued a decision finding that Mr. McK was not entitled to have access to the records concerned.

Mr. McK appealed to the High Court, which delivered its judgment in favour of the requester on 14 January 2004. In sum, the Court found that my Office had erred in law in regard to the construction of the relevant regulations [the Freedom of Information Act, 1997 (section 28(6)) Regulations (S.I. No. 47 of 1999) - the "1999 Regulations"] and in the application of a test requiring the requester to furnish "tangible evidence" that his having access to his daughter's medical records would be in her best interests. The Court directed that the matter be remitted to my Office and that the requester be granted access to the records. (A more detailed synopsis of the High Court's judgment was included in my Annual Report for 2004.)

Supreme Court Judgment - *McK v. The Information Commissioner*

I appealed the High Court's decision

to the Supreme Court. I explained my reasons for taking this step in my article published by *The Irish Times*, "Strengthening the Rights of Children" (28 September 2006), which is available on my Office's website at www.oic.gov.ie. The Supreme Court delivered its judgment on 24 January 2006, affirming the decision of the High Court.

The Supreme Court held that a parent is entitled to a rebuttable presumption that access to his or her child's medical information is in the best interests of the child. In reaching its judgment, the Supreme Court stated that the FOI Act, and the Regulations, must be interpreted in accordance with the Constitution. Referring to Article 41 of the Constitution, the Court observed that the "relationship between parent and child has special status in Ireland". The Court noted that the family unit has rights, but so does each member of the family unit. The Court stated:

"A parent's rights and duties include the care of a child who is ill. As a consequence a parent is entitled to information about the medical care a child is receiving so that he or she may make appropriate decisions for the child, as his or her guardian. The presumption is that a parent is entitled to access such information. That position is not absolute. The circumstances may be such that the presumption may be rebutted. But the primary position is that the presumption exists."

The Court further explained: "The presumption is that the release of such medical information would best serve the interests of the minor. However, evidence may be produced that it would not serve her interests, and, in considering the circumstances, her

welfare is paramount." The Court noted that it was "regrettable" that a considerable amount of time had elapsed since the requester had first sought his daughter's medical records in 2000. The Court found that, as the minor in question was by then nearing the age of 18, her views were very relevant. Accordingly, the Court remitted the case to me "for review in accordance with the correct test and in light of all of the circumstances".

I fully accept and have apologised to Mr. McK for the error of law contained in the original review decision. I recognise also, as the Supreme Court pointed out, that the considerable lapse of time since Mr. McK sought access to the records gave rise to serious consequences.

Case Number 000128A

I conducted a fresh review in light of the Supreme Court's ruling that parents have a fundamental (but rebuttable) presumption that their actions are in the best interests of their child. My starting point in this review was an acknowledgement of Mr. McK's constitutional rights as a parent and of the enjoyment by him of parental primacy in relation to access to records containing medical information about his daughter, Miss McK. It was the first case of its kind in which my staff met with the young person affected to ascertain her views. I also invited and considered submissions from Mr. McK, Miss McK's joint guardian, and the hospital.

The Statutory Position

Section 28(1) of the FOI Act prohibits the release of records which contain personal information about individuals other than the requester. However, section 28(6) of the FOI Act provides for exceptions to the general prohibition

on the release of personal information. For instance, it states that the Minister for Finance may provide by regulation for the grant of access where "the individual to whom the record concerned relates belongs to a class specified in the regulations and the requester concerned is the parent or guardian of the individual". The 1999 Regulations, in turn, require that a request for records relating to personal information about a minor be granted where the requester is the minor's parent or guardian and where, having regard to all the circumstances, to release the records to the parent/guardian would be in the minor's best interests.

Findings

Having considered all the circumstances, including the direct evidence of Miss McK, who was 17-years-old at the time, and having regard to the fact that the welfare of the child is paramount, I found that the evidence to the effect that, in this particular case, disclosure of the girl's records to her father would not serve her best interests, was sufficient in order to rebut the presumption of parental primacy. I had regard to the age and maturity of the girl involved and the cogent reasons she advanced in relation to her views. I found that section 28(6)(a) did not apply in this case to set aside the prohibition on release of the records as provided for in section 28(1) of the Act. I also concluded that neither section 28(5)(a) - the public interest override - nor any of the other exceptions to section 28(1) applied in the circumstances of this case. The detailed submissions of the parties together with the various stages of the review process are set out in my decision, which is published on my Office's website at www.oic.gov.ie.

Other McK Cases - Case Numbers 99491, 020593, and 030587; Case Number 000137

Four other reviews from the same requester were suspended pending the outcome of the Court appeals. Following the Supreme Court judgment, I resumed the other reviews, which involved records relating to Mr. McK and his family that were held by a former Health Board (now the Health Service Executive (HSE)) and another Dublin hospital. Unlike Case Number 000128A, the records at issue in the other reviews were not confined to medical records. Again, I considered submissions from Mr. McK, his daughter, her joint guardian, the HSE, and the hospital involved. Mr. McK was unwilling to consent to his son being contacted by my Office for the purposes of establishing his son's views on the release of his personal records.

In the case of the former Health Board records, Case Numbers 99491, 020593, and 030587, I was satisfied that all of the records at issue disclosed, to a greater or lesser extent, the personal information of Mr. McK's daughter and/or of his son. In relation to the records containing the personal information of Miss McK, I again found that the evidence to the effect that disclosure of the girl's records to her father would not serve her best interests was sufficient in order to rebut the presumption of parental primacy. Since I found that all of the records were exempt on the basis of section 28(1), I did not find it necessary to consider the other exemptions also relied upon by the Health Service Executive. As regards the application of section 28(6) to the personal records of Mr. McK's son, I took the view that,

as I had not been able to establish the views of the son, I was not in a position to reach any conclusion on the matter. In the circumstances, I affirmed the decisions of the HSE to refuse access to the records concerned on the basis of section 28(1) of the FOI Act.

In Case Number 000137, many of the records at issue related to Mr. McK's late wife and to legal proceedings involving the family. I found that some of the records qualified for legal professional privilege under section 22(1)(a) of the FOI Act in that they comprised communications between the hospital and the late Mrs. McK's solicitors, the dominant purpose of which was preparation for contemplated or pending litigation. I noted in my decision that the courts have proceeded on the basis that legal professional privilege normally endures after the client who is entitled to the privilege is deceased. Furthermore, several of the records had been introduced before the courts in family law proceedings and proceedings involving minors. As the *in camera* rule (i.e. that proceedings be held otherwise than in public) applies to such proceedings, I found that the records concerned were exempt under section 22(1)(b) of the FOI Act, which requires that access to a record be refused if its disclosure would be in contempt of court.

My finding was that all of the remaining records contained the personal information of Miss McK and that most of those records also contained the personal information of the late Mrs. McK so that they could be classed as "joint personal" information. Nonetheless, I proceeded on the basis that the Supreme Court judgment in *McK and the Information Commissioner*

applied to all of the records, since they had been created in the context of the hospital's involvement with the family. Having found that all of the records disclosed the personal information of Miss McK, and that none of the exceptions to section 28(1) applied to set aside the prohibition on release of the records, I made a new decision to refuse the request for access to the records concerned on this basis.

Case Number 050129

Following the *McK* cases, I dealt with another case in which I applied the parental primacy presumption in accordance with the Supreme Court's judgment. It involved a request to the HSE for access by a father to records relating to his son's admission to a hospital as a result of an allergic reaction. Referring to the Supreme Court's judgment in *McK v. The Information Commissioner*, I followed the rebuttable parental primacy line of reasoning as set out in that judgment and summarised above. I stressed that, in considering whether sufficient evidence has been presented to overcome the presumption, the welfare of the child is paramount.

I noted that the requester, along with the child's mother, had both guardianship and custodial rights and obligations in respect of the child. Considering the circumstances of the case, I found that the HSE had presented insufficient evidence to upset the parental primacy presumption. In relation to the Supreme Court finding that the views of Miss McK were very relevant, I noted that, in this case, the child was not yet 10 years old. I therefore did not consider it appropriate to have sought his views on whether his hospital records should be released to

his father. I annulled the decision of the HSE and made a new decision to grant the request for access to the child's hospital records.

RECORDS MANAGEMENT AND THE SEARCH FOR RECORDS

Section 36 of the FOI Act requires that I keep the operation of the Act under review. I may accomplish this purpose by carrying out an investigation at any time into the practices and procedures adopted by public bodies generally, or any particular public body or public bodies, for the purposes of compliance with the provisions of the Act generally, or with any particular provision of the Act. In 2006, I carried out such an investigation with particular focus on the manner in which public bodies have used section 10(1)(a) of the Act to refuse FOI requests that involve searches for records. The report on my investigation is summarised below.

Section 10(1)(a) provides that a head of a public body may refuse to grant a request for a record if "the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken". In reviews involving section 10(1)(a), it is not normally my function to search for records. My role is to decide whether the decision maker has had regard to all the relevant evidence and to assess the adequacy of the searches conducted by the public body in looking for relevant records. The evidence in "search" cases generally consists of the steps actually taken to search for the records along with miscellaneous other information about the records management practices of the public body insofar as those practices relate to the records in question. On the basis of the information

provided, I decide whether the steps taken by the public body to locate the records requested have been reasonable. My approach in search cases was upheld by the High Court in the case of *Matthew Ryan and Kathleen Ryan and The Information Commissioner* (2002 No. 18 MCA), which is available on my Office's website at www.oic.gov.ie.

Summary of Investigation into Use of Search Exemption

In February 2007, I published a report of an investigation into the practices and procedures employed by a representative sample of public bodies who had relied on section 10(1)(a) in decisions made in 2005. In overall terms, I am pleased to note that some public bodies have developed and implemented detailed search protocols, and that a number of bodies have already modified their practices, on foot of comments made by my Investigators during their visits to them.

In drawing conclusions and making recommendations based on the findings in the report, I want to encourage all public bodies to apply best practice, not only in respect of section 10(1)(a), but in respect of all provisions contained within the FOI Act. On that basis, I have presented my recommendations in the form of "the Information Commissioner's Guide to Standards of Best Practice for Public Bodies when dealing with FOI requests that involve searches for records".

My recommendations can be summarised as follows:

- Every public body should draw up and implement a comprehensive records management policy as a priority, and should ensure that

their records management policies incorporate archiving of records.

- There should be consistency in searches for records by public bodies, and a checklist should be used for this purpose.
- Decision letters should always set out the requester's rights of review/appeal, and should always include detailed information relating to the nature of the searches carried out and of the locations searched.

The report, "Review of the Operation of Section 10(1)(a) of the Freedom of Information Acts, 1997 and 2003", is available on my Office's web site at www.oic.gov.ie.

Other Search Cases

My investigation did not include cases in which the decision to apply section 10(1)(a) had been or was the subject of a review by my Office, because such cases are examined in the course of my review of the decision to refuse access to the records requested. However, as in previous years, many of the other cases dealt with by my Office in 2006 involved poor records management practices within public bodies that had an impact upon their searches for records and, in turn, upon the right of access of the requesters concerned. I highlight four such cases below. I also comment upon other shortcomings in the processing of the requests by the public bodies concerned, particularly the failure to issue decisions on requests and internal review applications within the statutory time limits.

The Department of Education and Science - Cases Numbered 050288 and 060170

In my Annual Report for 2003, I commented favourably upon the signifi-

cant improvements made by the Department of Education and Science (the Department) with respect to its search and retrieval practices relating to records of former residents of industrial schools. However, in 2006, I found reason to be disappointed with the Department's processing of requests involving other types of records.

In **Case Number 050288**, the requester sought access to various records concerning a proposed new primary school. The Department's processing of the request proved faulty on numerous grounds.

In the first instance, the Department did not issue a decision on the request within the statutory four-week time limit. (Failure to meet this deadline, or the three-week deadline applying to internal review applications, results in a "deemed refusal".) Relevant records were only released by the Department following an application for internal review.

Then, in the course of my Office's review of the Department's decision, it transpired that the Department did not keep a separate copy of the records released. When my Office asked for a copy of the released records for the purposes of the review, the Department re-copied the records concerned, but did not ensure that the copies sent to my Office were in the same numerical sequence as those that it had sent out to the requester. This, in turn, led to difficulties in conducting the review, given that the copies of records upon which the requester made various comments to my Investigator did not necessarily bear the same reference number as the copies sent to this Office, or indeed as the records held in the Department.

In dealing with the request concerned, as indeed with any request, I would expect that the Department would have copied the relevant records, numbered them, and drawn up a schedule that listed the records and stated which were being released or withheld (should that have been the case). This would have avoided confusion for all parties involved and would have saved a large amount of time and work for both this Office and the Department in the course of my Office's review. I note that the Department subsequently re-copied all records of relevance to the request and re-issued them to the requester, and also expressed its regret at the way in which her request had been dealt with. Nevertheless, I am disappointed that such action was not taken at a much earlier stage, particularly by a body that has been subject to the FOI Act since 1998.

A number of additional records were located and released during my Office's review in this case. However, it became apparent, both from comments made by the requester and from my Investigator's examination of the released records, that the Department had been unable to find other, relatively recent records relevant to the request that it should have held. The Department admitted that it apparently had misplaced an entire file of relevant records.

In **Case Number 060170**, an application was made to my Office for a review in respect of a request for access to records concerning a particular school. The Department did not issue a decision on the original request, nor did it issue a decision following an application for internal review of that deemed refusal. Only following

the application for review to my Office did the Department release a number of records.

After receiving the released records, the requester told my Office that he was aware of the existence of seven other relevant documents, some of which dated from as recently as 2004. With the exception of one such record that was subsequently located, the Department was unable to find either the particular records that the requester claimed it should hold or, indeed, any further records of relevance to the request.

I am disappointed that weaknesses in the Department's records management practices have led to a situation, in both Cases Numbered 050288 and 060170, where relatively recent records could not be found. I can accept that, on occasion, records are misplaced or misfiled even when a public body has excellent filing and retrieval systems in place, and that records can be located later than one might have expected when dealing with an FOI request. However, the number and relatively recent nature of the missing records in both of these cases are matters of great concern to me. They should also be matters of equal concern to the Department, particularly in respect of the ensuing impact on the perception of the Department's management processes in general amongst the people and organisations with whom it deals.

The Department has stated (as referred to in my recent section 36 investigation report) that the process of acquiring an electronic file registry system has commenced. I hope that implementation by the Department of such a system will go a long way towards resolving the

records management problems that arose in these cases. In the meantime, however, it is incumbent upon all staff within the Department to take the necessary steps to ensure that records are placed on the correct file, and that the files themselves are stored in accordance with the relevant Departmental records management policies and practices.

Finally, I am also disappointed to note the Department's failure to issue decisions on requests and internal review applications. I would expect that such failures by a body, especially one that has been subject to the FOI Act for so long, to be the exception rather than the norm. I urge the Department to examine its decision-making practices, and to put the necessary procedures in place to ensure that all FOI requests are dealt with in accordance with the time limits set out in the FOI Act.

I should add, however, that the Department of Education and Science is not alone among public bodies in failing to issue decisions on requests and internal review applications within the statutory time limits. Consequently, with effect from 1 January 2007, my Office now records each instance where time limits are not adhered to, both at decision stage and at internal review, on applications for review that come to my Office. I intend, as is currently the case with notifications issued under section 37(1) of the FOI Act (see Chapter 2), to publish a table specifying the numbers of "deemed refusal" cases reaching my Office each year in future Annual Reports.

Hospital Records - Case Number 050320

In Case Number 050320, the requester applied to the HSE for access

to her medical records from the early 1990s held by St. Brendan's Psychiatric Hospital, Dublin (the Hospital). An issue arose regarding the non-availability of records of her participation in a particular group therapy programme. This group therapy, described as a form of "regression therapy", was facilitated by the Hospital's then Clinical Director and involved the administration of a particular drug, Ketamine. It transpired that the records of these therapy sessions, including the records of the drugs administered in the course of the sessions, had all been destroyed by, or on behalf of, the Clinical Director upon his retirement.

In the course of my Office's review, the HSE explained the situation in the following terms: the programme of regression therapy was "introduced and managed" by the then Clinical Director; the "therapy was innovative and did not form part of the routine procedures of the hospital at that time"; the files relating to the sessions were held by the Clinical Director and did not form part of the patient's ordinary hospital record; similarly, "the records of drugs administered were kept separately from drugs administered in the wards"; any notes taken during the sessions, as well as the records of drugs administered, were "destroyed when the programme ended".

The requester, who had been a public patient in the Hospital, expressed serious concern at these practices. In particular, she suggested that the failure to record the administration of Ketamine on her hospital file constituted bad practice, not least to the extent that side effects of that drug might not be recognised, and also because its interaction with other medication might not be anticipated. Furthermore,

she was concerned at the possibility of some adverse situation developing in the future, linked to that drug, whereby the absence of her records might be detrimental.

My interest in this case relates solely to the records management aspect. If the purpose of hospital record-keeping is to inform current and future treatment, then it is counter-productive to hold certain records separately from the main file. All hospital staff should be required to abide by agreed records management practices and exceptions should not be allowed - not even for the most senior staff. A key element in good records management is that there should be clarity about the period for which records will be retained and that records will be destroyed only in accordance with the agreed retention periods. In particular, individual staff members (no matter how senior) should not be allowed to destroy records on their own initiative. Above all, this case illustrates the need for hospitals to have clear records management policies and practices which are enforced in relation to all staff, including the most senior medical staff.

Laois County Council - Case Number 040402

In this case, the requester sought access to "details of the property transaction that took place" between his late parents and Laois County Council (the Council). In its decision on the FOI request, the Council provided a copy of a tenancy agreement from the late 1970s that related to a property which had been occupied by the requester's late parents following the transaction for which details were requested. The Council's decision also verified the address provided by the requester for the previous residence of his late

parents and advised that, "having searched for information in relation to the property . . . the Housing Department did not acquire this property at any stage".

The requester sought internal review of the Council's decision. The Council's decision on internal review affirmed the original decision and re-stated that there were no records to indicate that the Council had bought a property from the requester's late parents. The Council advised the requester to contact the Land Registry to establish details of any sale of the property concerned.

When the requester applied to me for a review of the Council's decision, he provided me with folio records which he had obtained from the Land Registry. I requested the Council to provide a submission on its decision and to include consideration of the Land Registry documentation. As a result, the Council procured a copy of transaction records from the Land Registry showing that the Council had, with effect from a date in the late 1970s, by means of a Deed of Transfer, become the full owner of the property previously owned by the requester's late parents.

In other words, the Land Registry evidence led directly to the discovery of records showing that the Council had in fact assumed full ownership of the property in question, a fact which the Council had denied both at the initial request and internal review stage. The Deed of Transfer between the Council and the requester's late parents was released to the requester.

Overall, I consider that the Council did not adequately deal with the FOI

request in this case. The Council apparently had not retained a record of its acquisition of the property in question, which reflects inadequate records management in my view. The Council then made a misleading statement regarding the property transaction; that statement was contrary to the evidence ultimately uncovered through contacts with the Land Registry. As a point of interest, I also note that the outcome of this FOI case led to the re-opening of a complaint made by the requester to the Office of the Ombudsman, which previously had not been accepted for examination because no administrative action on the part of the Council could be identified.

DISCOVERY AND LEGAL PROFESSIONAL PRIVILEGE

Some FOI cases involve complex legal issues that can cause confusion for FOI users and public bodies alike. Last year, my Office dealt with four such cases. I hope that the following discussion will help to clarify the position and alleviate any confusion that may ensue when similar such issues arise in future.

Discovery

Discovery is the disclosure of relevant documents by one or both parties to a civil action. A party obtaining documents through discovery usually gives what is referred to as an "implied undertaking", at the risk of contempt of court, not to use the discovered documents for any purpose other than the litigation concerned.

Section 22(1)(b) of the FOI Act is a mandatory exemption for records whose disclosure would constitute a contempt of court. It states:

"A head shall refuse to grant a request under section 7 if the record concerned -

... (b) is such that the head knows or ought reasonably to have known that its disclosure would constitute contempt of court".

The contempt of court exemption does not, however, necessarily apply to a record simply because it has been subject to the discovery process. In the cases referred to below, I addressed several important aspects of the exemption insofar as it relates to the discovery process, namely: (1) the point at which an implied undertaking is given or received by a party to litigation; (2) the documents covered by a discovery order; (3) the parties bound by an implied undertaking given on discovery; and (4) whether the exemption applies to records refused through discovery on the grounds of relevance. The first three issues arose in **Case Number 050166**, whereas I dealt with the fourth issue in **Case Number 040334**.

Mr. Eamonn Murphy and the Industrial Development Agency - Case Number 050166

The name of the requester has not been removed in this case, as he chose to waive his right to anonymity. Mr. Murphy sought the release of records held by the Industrial Development Agency (IDA) relating to a proposed exchange of lands and construction of a replacement house for his late relatives and records concerning an investigation that had been referred to in a letter he received from the IDA in 2002. The IDA refused access to the vast majority of such records.

An Order of Discovery had been issued by the High Court in respect of litiga-

tion between the IDA and a third party. However, at the time of my review, no documents or list of documents had actually been discovered by either party to the litigation. Nevertheless, in a submission to my Office, the IDA argued that access to records which came within the scope of the discovery order must be refused on the basis of section 22(1)(b) of the FOI Act. According to the IDA, it would be in breach of an implied undertaking, and therefore could be cited for contempt of court, if it released records that would, in due course, be discovered. I rejected the IDA's argument and found that section 22(1)(b) did not apply for the reasons stated below.

In the absence of any reference in the IDA's submissions on this matter to any legal authority in support of its stance, and having regard to my own research, I found that an implied undertaking is not given or received by a party to litigation at the time that an Order of Discovery is made by a Court. As it did not arise in the circumstances of this case, I did not make any findings in relation to the wider question of whether such an undertaking is given when a list of documents to be discovered is served or when such documents are in fact produced on discovery. No doubt this specific issue will arise in a future review.

In addition, I found that only the actual documents received under discovery are covered by the undertaking given and therefore cannot be released under FOI to any requester. Accordingly, documents identical to those received under discovery (or additional copies of them) which are also held by the body can be released under FOI to any requester (subject of course to other exemptions that may be applicable).

I also clarified that the implied undertaking is given only by the party receiving documents (or possibly a list of documents) under discovery and not by the party making discovery. Therefore, documents discovered to the other side in litigation can be released under FOI to a third party, as the public body has not given any undertaking in relation to its own documents and cannot therefore be cited for contempt. However, the public body cannot release such documents under FOI to the other party to the litigation, as that person would have given an undertaking and, in the circumstances, release under FOI would amount to a contempt of court.

A and the Broadcasting Commission of Ireland - Case Number 040334

In this case, the requester sought access to confidential records held by the Broadcasting Commission of Ireland (BCI) relating to a third party. The records had been subject to a High Court ruling refusing to release the records to the requester through discovery. This decision was upheld by the Supreme Court. Significantly, however, the decision to refuse discovery was on the grounds that the records were not relevant to the judicial review then under consideration. Therefore, the Supreme Court decision had no bearing on the request for the same records under FOI. In the circumstances, I found that the risk of contempt of court did not arise and that section 22(1)(b) therefore did not apply.

Exceptions to the Legal Professional Privilege Rule

Section 22(1)(a) of the FOI Act is a mandatory exemption that applies to records which would be exempt from production in court proceedings on

the grounds of legal professional privilege. Legal professional privilege (LPP) enables the client to maintain the confidentiality of two types of communication:

- confidential communications made between the client and his/her professional legal adviser for the purpose of obtaining and/or giving legal advice, and
- confidential communications made between the client and a professional legal adviser or the legal adviser and a third party or between the client and a third party, the dominant purpose of which is the preparation for contemplated/pending litigation.

In considering whether a record would be exempt from production in a court on the grounds of legal professional privilege, I have to ignore the likelihood or otherwise of court proceedings taking place and bear in mind that legal professional privilege resides with the client. The question comes down simply to whether the public body, in the event of court proceedings, would succeed in withholding the records on the grounds of legal professional privilege.

However, although the FOI Act does not provide for a public interest override to the LPP exemption, in exceptional circumstances, the courts may refuse a claim of privilege on public policy grounds. For instance, it is a well established legal principle that privilege may not attach to communications in furtherance of a criminal offence. In a case involving an alleged violation of doctor-patient confidentiality, the requester argued that a similar such exception to the LPP rule should apply to the records concerned.

Mr. X and the Defence Forces - Case Number 040333

The requester in this case was a plaintiff in litigation against the Defence Forces in relation to an alleged work-related accident. He sought access to all records relating to him, including his Central Medical File LA30. The Defence Forces granted the request in part, but refused access on the basis of legal professional privilege to certain records, including medical reports consisting of or relating to the preparation of a Medical Legal Report that was created in response to the legal action. The requester argued that legal professional privilege cannot cover a report relating to his own medical situation, because the report and any related medical documents should not have been furnished by his doctors without his consent.

However, there was no evidence of any unethical, dishonest, or fraudulent conduct on the part of the Medical Officer who prepared the Medical Legal Report. Moreover, in *McGrory v. Electricity Supply Board* [2003] IESC 45, the Supreme Court (Keane, C.J.) found that a defendant in an action where the plaintiff claims damages for personal injuries has the right to have the plaintiff medically examined, to have access to his medical records, and to interview his treating doctors. Keane, C.J. stated: "The plaintiff who sues for damages for personal injuries by implication necessarily waives the right of privacy which he would otherwise enjoy in relation to his medical records." In light of this judgment, it seems unlikely that an alleged violation of doctor-patient confidentiality would give rise to an exception to the legal professional privilege rule.

In the circumstances, my Office accepted that the records at issue would be exempt from production in a court on the grounds of legal professional privilege. Accordingly, the decision of the Defence Forces to refuse access to the records on the basis of section 22(1)(a) of the FOI Act was affirmed.

LPP v. the "Without Prejudice" Rule

Mr. X and the South Eastern Health Board - Case Number 010314

Mr. X was a social worker who sought access to various records relating to his employment with the former South Eastern Health Board (the Board). Four of the records at issue consisted of contacts between Mr. X's solicitor and the Board's solicitors for the purpose of settlement of an action taken against the Board by Mr. X.

Three of the records were letters between the solicitors concerned that were marked "Without Prejudice". The fourth record was a note by the Board's solicitors of a telephone conversation with Mr. X's solicitor. Although the note was not marked as "Without Prejudice", the Board argued that a note of discussions conducted on a "without prejudice" basis should be treated, for FOI purposes, in the same manner as a record of a written communication marked as "Without Prejudice".

The Board initially claimed that these records were exempt on the basis of section 22(1)(a) of the FOI Act. While the Board subsequently appeared to accept that LPP did not apply to the records concerned, I took the opportunity to examine the distinction between the "without prejudice" rule and LPP.

I noted that statements made "without prejudice" as part of an attempt to settle a dispute may be privileged in the sense that they may not be introduced into evidence in a court of law. I accepted that the records of correspondence between the solicitors which were marked "Without Prejudice" had been created in the context of efforts to reach a settlement of Mr. X's action against the Board. My research indicated that documents relating to oral attempts to reach a settlement, though not marked "Without Prejudice", may nevertheless be withheld from introduction into evidence. Thus, I also accepted that the note by the Board's solicitors of a telephone conversation with Mr. X's solicitor may also be treated in the same manner as the letters which were marked "Without Prejudice". However, I was satisfied that the privilege applying to such records was of a separate category from that of legal professional privilege and that, accordingly, section 22(1)(a) did not apply.

TRIBUNAL CASES

Section 46 of the FOI Act excludes records held by a Tribunal of Inquiry from the scope of the Act. However, section 46(1)(a)(II) provides for an exception to this exclusion for records relating to the general administration of a tribunal. Towards the end of 2006, I made two decisions in which this provision was relevant (for more detail, please see the summaries of Cases Numbered 010221 and 010264 in Chapter 4). I found, against the wishes of the Department of Environment, Heritage and Local Government (the Department) and the Tribunal of Inquiry into Certain Planning Matters and Payments (the Tribunal), that application of section 46(1)(a)(II) meant

that the majority of the records sought were appropriate for release while the Tribunal was still sitting. I acknowledge that, due to a variety of factors, including the large number of records involved and the Department's reluctance to forward the relevant records to me, it took some considerable time to complete the reviews in question, to the extent that, by the time they were released, the records had lost much of their value to the two journalists who had requested them. Nevertheless, I regard these cases as highly significant, as they demonstrate that the FOI Act can be used successfully to access records of a Tribunal of Inquiry, thereby helping to make it more open and transparent in the way it conducts its business on behalf of the public.

THE SAFETY, HEALTH AND WELFARE AT WORK ACT, 2005, AND THE FOI ACT

In previous Annual Reports, and through other public fora, I have called on the Minister for Finance to make particular amendments to the FOI Act in order to improve its operation as a mechanism for ensuring better openness and accountability in service delivery by our public bodies. I have also commented on changes made to the Act, in some cases without consultation with or even notification to my Office. One such change resulted from a clause in the Safety, Health and Welfare at Work Act, 2005, which inserted a new exclusion [section 46(1)(dc)] into the FOI Act. The new restriction has the effect of removing records "relating to or arising from" the enforcement functions of the Health and Safety Authority (HSA) from the scope of the FOI Act. My Office was not informed of the change and only became aware of it when a requester

sought confirmation of the change, having been appraised of it by the HSA in the context of the request he had submitted to the public body.

I reiterate the previous comments I made on this method of amendment of the FOI Act, or indeed any other piece of legislation (please see my December 2005 special report to the Joint Committee on Finance and the Public Service, available on my Office's website at www.oic.gov.ie). While I can see how tagging on an amendment to the FOI Act to an unrelated piece of legislation may result in some savings of Oireachtas time, I do not see why this process should not involve consultation with, or, at the very least, notification to my Office, charged as it is with a key role in operating FOI legislation. It remains a concern to me that, apart from the merits or otherwise of this particular amendment to the FOI Act, my Office was not informed of the change, despite my having expressed similar concern at the absence of consultation with my Office prior to the introduction of the FOI Amendment Act in 2003.

HIGH COURT AND SUPREME COURT JUDGMENTS

A party to a review, or any other person who is affected by my decision, may appeal to the High Court on a point of law. The FOI Act, as amended, now allows for the decision of the High Court to be appealed, in turn, to the Supreme Court. In 2006, the High Court delivered judgments in two appeals of my decisions, whereas the Supreme Court delivered a judgment in one case arising under the FOI Act. The full text of these judgments is available on my Office's website at www.oic.gov.ie.

Supreme Court - McK v. The Information Commissioner [2006] IESC 2

A synopsis of the Supreme Court's judgment in this case is included under "Parental Access Rights" above.

High Court - The Minister for Enterprise, Trade and Employment v. The Information Commissioner [2006] IEHC 39

The issue in this case was whether the Department of Enterprise, Trade and Employment (the Department) had control over records relating to the requester's application for grant assistance from his local County Enterprise Board (the Board). The Department had refused the request on the basis that it did not hold the records, as they related to the day-to-day operational matters of the Board. I annulled the decision on the grounds that the Department's Ministerial oversight role over the Board gave the Department control of the records and directed release of them. The Department appealed my decision to the High Court.

The High Court upheld the Department's appeal. The Court held that access to records relating to the individual grant application at issue was not an information need of the Minister and, thus, such records were not under the control of the Department. In reaching this conclusion, the Court found that "from the provisions of the Industrial Development Act, 1997 and from the articles of association of the Board, together with the operating agreements between the Department and the Board that the Minister's role appears to be that of financing and supervising such financing which emanates from

both national and European sources". It also found that directions that may be given by the Minister to the Board "would appear to be prudent banking conditions rather than reservations on the powers of the Board or, indeed, control of the business and administration of the Board by the Minister". On this basis, the Court found that "the Department does not appear, from the operating agreement, to have any role in relation to the evaluation of individual grant applications". In reaching its judgment, the Court relied on the test of control as delivered by Blaney J. in *Ó Coindealbhain (Inspector of Taxes) v. Mooney* [1990] 1 I.R. 422.

High Court - Gannon v. The Information Commissioner [2006] IEHC 17

In this case, the requester sought access to records held by the Legal Aid Board relating to an application for legal aid by a third party. The issue was whether the records concerned were exempt from release under section 26(1)(a) of the FOI Act, which protects information given to a public body in confidence, provided that certain requirements are met. Section 26(1)(a) of the FOI Act is subject to a public interest balancing test [section 26(3)]. Significantly, the case represents the first time that the higher courts have examined section 26(1)(a) and my jurisdiction and approach regarding that exemption.

In my decision, I found that the records met the requirements of the exemption. I found no public interest in the case which would justify the loss of privacy of the individual in question and the consequent erosion of the expectation that recipients of legal aid would be treated in the same way as

those who are in a position to pay for legal services. The requester appealed my decision to the High Court.

The requester argued that my decision was unreasonable or irrational. The Court rejected this contention, finding that there was "adequate material" to support my determination that section 26(1)(a) applied.

In relation to the public interest test, the Court identified the relevant factors as "ensuring the proper distribution of public funds" and also the "right vested in the Third Party to have his privacy and the confidential character of his private personal information respected and protected". The Court found that my jurisdiction under sections 26(1)(a) and (3) of the FOI Act "required a balancing exercise between competing interests". In the Court's view, that exercise "was entirely within the jurisdiction of the respondent". The Court also found that I had adequate material before me to enable me to decide as I did. The requester's appeal was dismissed.

04

Decisions

As the High Court acknowledged..., my role in conducting reviews under the FOI Act can involve “a balancing exercise between competing interests”.

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This Chapter, drawing on material contained in a small number of decisions during 2006, is intended to highlight points of interest to public bodies and FOI users alike. The full text of these and other decisions of interest, with the parties' identifying details removed where necessary, is available on my Office's website at www.oic.gov.ie.

EMPLOYMENT REFERENCES

As the High Court acknowledged in the *Gannon* judgment, referenced in Chapter 3, my role in conducting reviews under the FOI Act can involve “a balancing exercise between competing interests”. Competing interests can certainly come into play in cases where a requester wishes to access information relating to his or her employment history, such as that contained in an employment reference, but where the public body wishes to withhold it on the basis of confidentiality or prejudice to the recruitment process. In 2006, I dealt with two such cases. The pertinent exemptions were sections 26(1)(a) and (b), which prohibit the release of confidential information in certain circumstances, and also section 21(1)(a), of the FOI Act. Section 21(1)(a) provides for the refusal of a record where its release could reasonably be expected to prejudice the effectiveness of, among other things, inquiries conducted by or on behalf of a public body, or the procedures or methods employed for the conduct of such inquiries. Both sections 21(1)(a) and 26(1)(a) are subject to a public interest balancing test.

Ms. X and the Southern Health Board - Case Number 020021

Ms. X had been a candidate for a particular post within the former Southern Health Board (the Board). She had been placed on the panel, but the Board told Ms. X that, following receipt of a negative reference, it was not proceeding with her job application.

She sought access under FOI to the references supplied to the Board by her previous employers. The Board refused access to one particular reference on the basis of confidentiality. The Board also argued that release of references under the FOI Act could cause the quality and frankness of the information provided to “diminish, perhaps to the point of being worthless”.

The reference was contained in a standard inquiry form that had been sent by the Board to Ms. X's former employer. The inquiry form bore the words “Private and Confidential” at the top, but also stated that “all personnel records, including references, are subject to the terms laid down in the Freedom of Information Act and may be available to the candidate at their request”. It stated that the referee “will

be contacted prior to disclosure or release" of such records.

The referee stated to my Office that she did not consent to the release of the reference and that it would not have been provided if it had not been covered by confidentiality. The Board said that its practice was not to release such references without the consent of the referee. The question for me, however, was whether this practice was compatible with the requirements of the FOI Act. I emphasised that the mere existence of such a practice is not a determining consideration for the purposes of the FOI Act; rather, it is the provisions of the FOI Act which determine whether release of the record concerned is, or is not, required.

I found no evidence to suggest that the Board had explicitly assured the referee of confidentiality, or that the referee had sought such assurances. In considering whether an implicit understanding of confidence might have existed, I noted that the words "Private and Confidential" on the inquiry form, taken along with the form's mention of the FOI Act, merely indicated that the reference would not be disclosed to other job applicants or third parties, but that the reference may well be made available to the candidate under the FOI Act. I said that, while the mention of the FOI Act did not mean that the reference would definitely be released under the FOI Act, it did mean that the referee was not being given any assurance of confidentiality insofar as disclosure of the reference to the candidate was concerned. Furthermore, I considered that the statement in the inquiry form regarding contacting the referee prior to disclosure or release of the reference was intended to mean that the referee would be informed

of the proposed release as a matter of courtesy. I did not accept that the statement could be taken as giving the referee any right of veto over the potential release of the record.

I also noted that, while the referee had insisted to the Board that the release of the reference would constitute a breach of confidence between them, the Board's decision on internal review stated that "[t]his argument cannot be fully supported as the wording of the confidential query does state that it is subject to the terms of the FOI Act". In my view, it was reasonable to infer that the Board did not consider itself to have given the referee any express assurances of confidentiality, nor did it consider itself to have done so implicitly by its conduct. In the circumstances, I found that neither section 26(1)(a) nor section 26(1)(b) applied to the reference.

I was, however, satisfied that the record qualified for exemption under section 21(1)(a) of the FOI Act. I accepted that references add value to the overall recruitment process. I observed that, if a reference contains less information than it ordinarily would have because of its potential release under FOI, it is possible that the further inquiries a prospective employer makes might not be as informed as they might have otherwise been. I therefore accepted that release of references could reasonably be expected to prejudice the effectiveness of the recruitment process and of the procedures employed by the Board in that process.

However, I considered that, once listed on a panel following a selection process, a person would have a right to, and a legitimate expectation of, fair procedure in the public body's as-

essment as to how he or she might progress from that panel. In my view, this would be the position regardless of the candidate's place on the panel and whether a vacancy would arise during the lifetime of that panel.

I stated that it is inherently unfair that a candidate, who has been successful in being placed on a panel following a selection process, should lose out on possible employment on the basis of a reference which is secret and which the candidate cannot attempt to rebut. In the circumstances, I was satisfied that there was a substantial public interest in the Board abiding by fair procedure in relation to the selection process in question and that this public interest would be served by the granting of Ms. X's request. Accordingly, I annulled the decision of the Board and directed that the adverse reference be released to Ms. X.

Mr. X and the South Eastern Health Board - Case Number 010314

Mr. X was a social worker who sought access to records of his employment with the former South Eastern Health Board (the Board). In Chapter 3, I explained why I did not accept the Board's initial claim of legal professional privilege with respect to some of the records at issue in this case (namely, records of contacts between Mr. X's solicitor and the Board's solicitors for the purpose of settlement of an action taken against the Board by Mr. X). However, another issue of interest concerned the Board's refusal of records containing information relating to Mr. X's performance while undertaking training at the University of Wales in Swansea. The Board's refusal was based on the University's position that its communications with the Board were "in effect professional

references" and "should continue to be treated as confidential and should not be disclosed". Thus, once again, I had to address the question of whether records which were in the nature of employment references were exempt on the basis of confidentiality.

I accepted that, in the contacts between the Board and the University, a general understanding of confidentiality would have existed in relation to third parties. However, I did not accept that the understanding of confidentiality would have existed to the extent that the information concerned would not be made available to the requester, Mr. X. In taking this view, I was influenced by the fact that the Board had solicited the information from the University in the context of considering whether to terminate Mr. X's employment. I considered that, in the absence of exceptional circumstances, any understanding between the Board and the University that the information concerned would be withheld from Mr. X in this context would have been in breach of the requirements of constitutional justice. I assumed that whatever understanding there was between the two bodies accorded with the principles of constitutional justice. I therefore found that neither section 26(1)(a) nor section 26(1)(b) applied, and I directed the release of the relevant records to Mr. X accordingly.

EXCLUSION OF CERTAIN RECORDS FROM FOI

Section 46 of the FOI Act excludes certain categories of information from the scope of FOI. Section 46(1)(db) was inserted into the FOI Act, 1997 by section 29 of the FOI Amendment Act, 2003. Section 46(1)(db) restricts the application of the Act by providing

that it does not apply to "a record given by a public body to a member of the Government or a Minister of State for use by him or her for the purposes of any proceedings in either House of the Oireachtas or any committee of either or both such Houses or any subcommittee of such a committee (including such proceedings in relation to questions put by members of either such House to members of the Government or Ministers of State (whether answered orally or in writing)". In 2006, I had occasion to address the applicability of section 46(1)(db) for the first time.

Mr. John McCarthy and the Department of Agriculture and Food - Case Number 040025

The name of the requester has not been removed in this case, as he chose to waive his right to anonymity. Mr. McCarthy, who is the principal shareholder in Emerald Meats Limited, had sought the release of certain records held by the Department of Agriculture and Food (the Department) concerning the company. The Department's decision resulted in a number of records being withheld, primarily on the basis that they were either exempt on the grounds of legal professional privilege [section 22(1)(a)] or were outside of the remit of the Act, as they were created or held by the Office of the Attorney General [section 46(1)(b)].

However, for the purposes of this Annual Report, the significant aspect of my decision concerned one particular record, being a "Note for Minister", that had been withheld by the Department on the basis of both section 22(1)(a) and section 46(1)(db) of the FOI Act. As noted above, section 46(1)(db) provides that the Act does not apply to a record given by a public

body to a member of the Government, or a Minister of State, for use by him or her for the purposes of any proceedings in either House of the Oireachtas. In its internal review decision, the Department had informed the requester that the "Note for Minister" had been given to the Minister as a brief in the context of his answer to a Parliamentary Question (PQ). However, when my Office queried this and requested details from the Department as to the specific PQ that this brief was provided for, it emerged that the brief had not in fact been given in respect of any particular PQ, but had been created in the event that the Minister might be required, some time in the future, to answer questions about Emerald Meats. In my decision, I stated that I do not believe that a brief given to a Minister in such general terms can reasonably be construed as meeting the exclusion provisions of section 46(1)(db). However, I accepted that the Department's claim for exemption under section 22(1)(a) of the FOI Act was relevant. Accordingly, I found that the record should be released in part, but that the remainder had been properly withheld in accordance with section 22(1)(a).

Mr. McCarthy has appealed my decision to the High Court, on a point of law, but his appeal concerns the applicability of the legal professional privilege exemption and has no bearing on my finding in relation to section 46(1)(db), as outlined above.

REPORT RELATING TO A NORTH/SOUTH BODY

Two exemptions which are frequently at issue in FOI reviews are section 26, relating to confidential information, and section 28, relating to personal

information. Last year, I dealt with a case involving Waterways Ireland, an all-island Implementation Body established under the British-Irish Agreement Act, 1999. The FOI Act does not apply to these bodies. However, the public body concerned in this case was the Department of Community, Rural and Gaeltacht Affairs, which held a copy of the record at issue. The Department's claim for exemption under section 26 required me to examine the status of Waterways Ireland for FOI purposes. I also had to examine the definition of personal information in the context of a press statement disclosing certain information which may otherwise have been exempt under section 28. In addition, the Department relied on section 24 of the FOI Act, which provides, in pertinent part, that a public body may refuse access to a record if it considers that access could reasonably be expected to affect adversely matters relating to Northern Ireland.

Mr. X and the Department of Community, Rural and Gaeltacht Affairs - Case Number 050338

The record at issue in this case was a copy of a report of an investigation into allegations made by the requester against the Chief Executive Officer (CEO) of Waterways Ireland. The report had been prepared by two retired civil servants who had been appointed to investigate the allegations by the sponsor Departments of Waterways Ireland: the Northern Ireland Department of Culture, Arts and Leisure (DCAL) and the Department of Community, Rural and Gaeltacht Affairs (the Department). Following completion of the report in November 2004, the DCAL and the Department had issued a press statement outlining the allega-

tions and the findings made. Some of the report had also been released to the requester by the DCAL under UK Data Protection legislation. However, the requester also sought access under the FOI Act to the report held by the Department. The Department refused access on various grounds, including sections 24, 26, and 28 of the FOI Act.

In my decision, I rejected the Department's claim for exemption under section 24 of the FOI Act. I did not accept that all records held by the Department pertaining to Waterways Ireland warranted protection merely because of its status as an all-island Implementation Body. I noted that the report was focused on matters internal to Waterways Ireland and did not touch on any activities with which Waterways Ireland might be charged under the British-Irish Agreement. I also noted that it was a matter of public record that the report had been jointly commissioned by the DCAL and the Department, which had issued a joint press statement summarising the investigators' main conclusions on the allegations made. Accordingly, I did not see how release of the report under FOI could further reveal the nature, or level, of interactions between the DCAL and the Department in relation to Waterways Ireland. I also did not accept that proper working relationships between two civil service bodies such as the DCAL and the Department were dependant on confidentiality applying to whatever information they must share in order to perform their statutory functions.

In relation to section 26, the Department appeared to claim that section 26(1)(b), in particular, applied to infor-

mation provided by staff members of Waterways Ireland to the investigators. Section 26(1)(b) generally applies where disclosure of information would constitute a breach of a duty of confidence. Section 26(2), however, provides that a duty of confidence cannot be owed to a member of staff of a public body.

I noted that the FOI Act requires that the phrase "public body" shall be construed in accordance with the First Schedule, which lists the bodies subject to the Act. Although Waterways Ireland is a public sector organisation, it is not listed in the First Schedule, and is therefore not covered by the FOI Act. In the circumstances, I accepted that Waterways Ireland is not a public body for the purposes of the FOI Act. Thus, I considered it possible for the investigators to owe a duty of confidence to the staff members of Waterways Ireland. Moreover, applying the relevant tests, I found that section 26(1)(b) applied to the parts of the report at issue pertaining to information provided by the staff members of Waterways Ireland.

In considering section 28, I had regard to section 2 of the FOI Act, which defines "personal information" as information about an identifiable individual that would, in the ordinary course of events, be known only to the individual or his/her family or friends, or information about the individual that is held by a public body on the understanding that it would be treated as confidential. I noted some of the information concerning particular individuals in the report would, under normal circumstances, be classified as personal information. However, I found that any information about individuals, as released into the public domain through the press statement issued

by the Department and the DCAL, no longer met the definition of personal information for the purposes of the FOI Act and was therefore not exempt under section 28(1).

I noted, however, that certain references in the report went beyond what was contained in the press statement. A number of published media reports also contained references to particular staff members of Waterways Ireland. I distinguished between personal information about individuals that is in the public domain through, for example, media reports on court cases on the one hand, and such information that has been authorised by a public body to be released into the public domain by, for example, an authorised press statement, on the other hand.

I considered that information held by a public body on the understanding of confidence remains confidential until such time as the body might authorise the release of that information into the public domain (e.g., via a press release). I therefore considered that information about individuals that was contained in the report at issue, but that was also referred to in the published media reports, still met the definition of personal information for the purposes of the FOI Act, unless its release had been authorised by virtue of a press statement issued by the sponsor bodies. Accordingly, I found the references to individuals in the report that went beyond the level of detail that was contained in the press statement qualified for exemption under section 28. Having considered the relevant public interest test in light of the information made available through the press statement, I was satisfied that section 28(1) applied to the references in question. I ultimately

varied the decision of the Department and directed that access to the report be granted in part and refused in part.

CONTROL OF RECORDS OF AN GARDA SÍOCHÁNA

While the FOI Act confers a right of access to records held by a public body, section 2(5)(a) provides that a reference to records “held” by a public body includes a reference to records “under the control” of the body. The meaning of the term “control” was addressed by the High Court in *Minister for Enterprise, Trade and Employment and the Information Commissioner* [2006] IEHC 39, which is summarised in Chapter 3 of this Report. In a case that I dealt with in 2006, I had to decide whether records physically held by An Garda Síochána could be considered, for the purposes of the FOI Act, to be under the control of the Department of Justice, Equality and Law Reform.

AV Niche Ltd and the Department of Justice, Equality and Law Reform - Case Number 010355

In this case, the requester sought access to records relating to the analysis, by the Garda Síochána, of a successful tenderer’s bid for the supply of interview and surveillance equipment to the Garda Síochána. The Department of Justice, Equality and Law Reform (the Department) argued that the records were held by the Garda Síochána (which is not subject to the FOI Act) and not held, or under the control of, the Department. The requester argued that the records were under the control of the Department for a number of reasons, including the fact that the Department was the “contracting authority” for the tender and, under the Garda Síochána Act 2005, there was a duty on the Garda Commissioner to provide documents to the

Secretary General of the Department.

I found that the records were not under the control of the Department. In considering whether a public body can be said to have control over records, not in its physical possession, I had regard to relevant case law, including the High Court judgment in *Minister for Enterprise, Trade and Employment and the Information Commissioner*. I concluded that a range of factors needed to be considered, including, but not only, whether the public body had a legal entitlement to access the records.

I did not accept that access was the same as control. I also did not accept that the Department had the power to decide how the technical evaluation of bids was carried out by the Garda Síochána. I agreed that there was a duty on the Garda Commissioner to supply records to the Secretary General of the Department, but only if so requested by the Secretary General. I noted that the Secretary General had not requested the records from the Garda Commissioner and that the Garda Commissioner was now the accounting officer for the Garda Síochána (rather than the Secretary General of the Department). Having regard to the other factors, including ownership, physical possession, and the Department’s reliance on the records, I concluded that the records were not under the control of the Department. Accordingly, I affirmed the decision of the Department to refuse to grant the request.

TRIBUNAL RECORDS

In Chapter 3, I referred to two cases involving requests for access to administrative records of the Tribunal of Inquiry into certain Planning Matters and Payments (more commonly known

as “the Mahon Tribunal”). A relevant provision of the FOI Act was section 46, which excludes records held by a Tribunal of Inquiry from the scope of the Act. Section 46(1)(a)(II), however, provides for an exception to this exclusion for records relating to the general administration of a tribunal.

The Irish Examiner and the Department of Environment, Heritage and Local Government - Case Number 010264

The Irish Times and the Department of Environment, Heritage and Local Government - Case Number 010221

Applications for review were made to my Office in mid-2001 by two newspapers in respect of decisions made by the Department of Environment, Heritage and Local Government (the Department) to refuse access to certain administrative records of the Mahon Tribunal. The records at issue consisted of: (i) estimates of the costs associated with running the Tribunal; (ii) salary and pension arrangements for Mr. Justice Flood (retired member of the Tribunal); (iii) fee notes and invoices submitted to the Department by barristers and others supplying services to the Tribunal; and (iv) correspondence between the Department and the Office of the Attorney General.

The Tribunal and the Department objected to the release of the records on a number of grounds, including the need to keep confidential (i) the identity of witnesses to the Tribunal, (ii) the names of recruitment agencies used by the Tribunal, and (iii) any commercially sensitive or personal information in the records.

Following careful examination of the large number of records involved in this case, I found, as a matter of fact, that access to the records concerned would not disclose the identity of witnesses to the Tribunal. Given the age of the records, I was also satisfied that disclosure of the identity of the recruitment agencies would not lead to unscrupulous individuals “infiltrating” the Tribunal, as feared by the Tribunal. I directed that access be granted to all the records sought with the exception of records created by the Office of the Attorney General [section 46(1)(b)], records seeking or providing legal advice [section 22(1)(a)], and the personal information contained in some of the records [section 28].

Having examined the fee notes and invoices held by the Department, I was satisfied that their release would not result in any commercial damage to those mentioned. In coming to this conclusion, I took into account the age of the invoices and fee notes in question, and the fact that overall fees paid to barristers had already been made public. I also commented that, even if I were to accept that the notes and invoices were commercially sensitive, the strong public interest in the accountability of public funds would warrant their release. In the circumstances, I found that the relevant exemption, section 27(1)(b) of the FOI Act, did not apply.

In my decision, I expressed my regret that these cases took a considerable length of time to resolve. I have already commented in previous Annual Reports on such delays. While these cases involved a large number of records and required my Office to consult with a number of third parties,

the delay was further exacerbated by the position adopted by the Department and its reluctance to supply my Office with the relevant records. I commented in more detail on this aspect of the case in my decision, and I have written to the Department drawing its attention to the need to ensure that such a situation does not recur.



05

Statistics

The statistics on release rates lead me to the conclusion that the lower release rate in the Civil Service appears to result from a more restrictive approach to providing access to information generally than in the other FOI sectors.

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

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ANNUAL REPORT STATISTICS 2006

SECTION I - PUBLIC BODIES

TABLE 1: OVERVIEW OF FOI REQUESTS DEALT WITH BY PUBLIC BODIES - 2006

Requests on hand - 01/01/2006		6,526*
Requests received in 2006:		
	Personal	8,221
	Non-personal	3,499
	Mixed	84
Total:		11,804**
Total requests on hand during year		18,330
Requests dealt with		13,981
Requests on hand - 31/12/2006		4,349

*A few bodies adjusted their figures for live cases on hand at the end of 2005.

**These figures include requests received by new bodies who became subject to the FOI Act with effect from 31 May 2006.

TABLE 2: FOI REQUESTS DEALT WITH BY PUBLIC BODIES AND SUBSEQUENTLY APPEALED - 2006

	Number	Percentage
FOI requests dealt with by public bodies	13,981	100%
Internal reviews received by public bodies	706	5%
Applications accepted by the Commissioner	254	2%

TABLE 3: FOI REQUESTS RECEIVED - ANALYSED BY REQUESTER TYPE - 2006

Requesters	Number	Percentage
Journalists	1,187	10%
Business	848	7%
Oireachtas Members	115	1%
Staff of Public Body	546	5%
Clients	6,268	53%
Others	2,840	24%
Totals	11,804	100%

TABLE 4: OVERVIEW OF REQUESTS DEALT WITH BY PUBLIC BODIES - 2006

	Number	Percentage
Requests granted	6,591	47%
Requests part-granted	4,028	29%
Requests refused	1,835	13%
Requests transferred to appropriate body	257	2%
Requests withdrawn or handled outside FOI	1,270	9%
Totals	13,981	100%

TABLE 5: ANALYSIS OF REQUESTS DEALT WITH BY PUBLIC SERVICE SECTOR - 2006

	Percentage granted	Percentage part granted	Percentage refused	Percentage transferred	Percentage withdrawn or handled outside of FOI	Total
Civil Service Departments	28	44	16	2	10	100
Local Authorities	57	18	19	1	5	100
HSE	64	19	10	3	4	100
Voluntary Hospitals, Mental Health Services and related agencies	58	14	6	1	21	100
Third Level Institutions	64	20	10	0	6	100
Other Bodies	48	27	15	0	10	100

TABLE 6: FOI REQUESTS RECEIVED BY CIVIL SERVICE DEPARTMENTS - 2006

Public Body	Personal	Non-personal	Mixed	Total
Department of Education and Science	977	125	6	1,108
Department of Justice, Equality and Law Reform	328	149	0	477
Department of Social and Family Affairs	438	25	1	464
Department of Health and Children	75	142	0	217
Department of Agriculture and Food	139	78	0	217
Defence Forces	172	13	0	185
Office of the Revenue Commissioners	59	71	0	130
Department of the Environment, Heritage and Local Government	9	119	0	128
Department of Communications, Marine and Natural Resources	7	87	0	94
Department of Transport	4	88	0	92
Department of Finance	8	64	0	72
Department of Enterprise, Trade and Employment	19	52	0	71
Office of the Information Commissioner	27	25	4	56
Department of Defence	19	32	1	52
Department of the Taoiseach	1	50	0	51
Department of Arts, Sport and Tourism	0	50	0	50
Department of Foreign Affairs	12	36	0	48
Office of Public Works	2	40	0	42
Department of Community, Rural and Gaeltacht Affairs	4	33	0	37
Public Appointments Service	23	3	1	27
Office of the Houses of the Oireachtas	1	14	0	15
Central Statistics Office	9	2	0	11
Office of the Commissioner of Valuation and Boundary Survey of Ireland	5	3	1	9
Office of the Director of Public Prosecutions	7	2	0	9
Office of the Attorney General	0	6	0	6
Office of the Ombudsman	3	0	1	4
Office of the Director of Corporate Enforcement	0	2	0	2
Office of the Director of Consumer Affairs	0	2	0	2
Ordnance Survey Ireland	1	1	0	2
Office of the Comptroller and Auditor General	0	1	0	1
Office of the Registrar of Friendly Societies	0	1	0	1
Office of the Chief State Solicitor	0	0	0	0
Office of the Appeals Commissioner for the Tax Acts	0	0	0	0
Totals	2,349	1,316	15	3,680

TABLE 7: FOI REQUESTS RECEIVED BY LOCAL AUTHORITIES * - 2006

Local Authority	Personal	Non-personal	Mixed	Total
Dublin City Council	51	87	0	138
Cork County Council	11	123	0	134
Mayo County Council	9	61	1	71
Fingal County Council	16	54	0	70
South Dublin County Council	23	40	0	63
Dún Laoghaire - Rathdown	16	44	0	60
Cork City Council	19	40	0	59
Kerry	31	20	3	54
Galway County Council	13	39	0	52
Donegal	3	45	0	48
Galway City Council	15	32	0	47
Kildare	2	39	1	42
Clare	1	37	3	41
Meath	10	31	0	41
Wexford	4	32	3	39
Wicklow	6	29	3	38
Limerick County Council	1	26	3	30
South Tipperary County Council	4	24	1	29
Limerick City Council	12	16	0	28
Laois	8	19	0	27
Louth	13	14	0	27
Waterford County Council	3	23	0	26
Westmeath	4	20	0	24
North Tipperary County Council	7	13	4	24
Kilkenny	5	15	0	20
Sligo	6	14	0	20
Waterford City Council	6	13	0	19
Monaghan	3	14	0	17
Offaly	3	13	0	16
Roscommon	0	15	1	16
Carlow	3	12	0	15
Leitrim	3	12	0	15
Cavan	2	9	0	11
Longford	3	7	0	10
Totals	316	1,032	23	1,371
Regional Authorities	1	6	1	8
Regional Assemblies	0	2	0	2

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

TABLE 8: FOI REQUESTS RECEIVED BY THE HEALTH SERVICE EXECUTIVE (HSE) - 2006

HSE Area	Personal	Non-personal	Mixed	Total
Southern	732	24	0	756
Western	577	50	0	627
South Eastern	489	40	0	529
North Western	337	20	3	360
North Eastern	336	20	0	356
Northern Area	315	38	1	354
Mid Western	304	21	0	325
Midland	245	35	1	281
Eastern Coast Area	88	49	2	139
South Western Area	125	7	0	132
HSE National*	14	132	2	148
Totals	3,562	436	9	4,007

*Comprises requests that are not attributable to any one of the former regional Health Boards and requests made to the former Eastern Regional Health Authority Corporate and Shared Services.

TABLE 9: FOI REQUESTS RECEIVED BY VOLUNTARY HOSPITALS, MENTAL HEALTH SERVICES AND OTHER RELATED AGENCIES - 2006

Public Body	Personal	Non-personal	Mixed	Total
Mater Misericordiae Hospital	153	17	0	170
Beaumont Hospital	114	17	1	132
Mercy Hospital, Cork	126	6	0	132
St James' Hospital	103	26	2	131
St Vincent's University Hospital	117	9	1	127
Our Lady's Hospital for Sick Children, Crumlin	101	5	0	106
Rotunda	98	6	0	104
Tallaght Hospital (Adelaide and Meath Hospital, Incorporating the National Children's Hospital)	86	10	0	96
The Children's Hospital, Temple Street	71	2	0	73
South Infirmary - Victoria Hospital, Cork	66	2	0	68
National Maternity Hospital, Holles Street	62	4	0	66
Hospitaller Order of St John of God	64	2	0	66
Coombe Women's Hospital	56	4	0	60
St John's Hospital, Limerick	37	4	0	41
Cappagh National Orthopaedic Hospital, Dublin	37	1	0	38

TABLE 9: Contd.

Public Body	Personal	Non-personal	Mixed	Total
Brothers of Charity, Galway	34	0	0	34
Brothers of Charity, Cork	24	2	0	26
Daughters of Charity Services	19	0	0	19
National Rehabilitation Hospital, Dún Laoghaire	11	0	0	11
St Vincent's Hospital, Fairview	10	0	0	10
Brothers of Charity, Limerick	10	0	0	10
St Luke's Hospital, Rathgar	8	1	0	9
Medical Council	2	6	0	8
Sisters of Charity of Jesus and Mary	8	0	0	8
St Michael's Hospital, Dún Laoghaire	7	1	0	8
Food Safety Authority of Ireland	1	6	0	7
Dublin Dental School and Hospital	7	0	0	7
Incorporated Orthopaedic Hospital, Clontarf	5	1	0	6
St Mary's Hospital, Baldoyle	6	0	0	6
Health Insurance Authority	0	5	0	5
Brothers of Charity, Roscommon	5	0	0	5
Stewarts Hospital	5	0	0	5
Mental Health Commission	3	1	1	5
National Treatment Purchase Fund	0	4	0	4
An Bord Altranais	2	2	0	4
Brothers of Charity, Waterford	4	0	0	4
COPE Foundation	4	0	0	4
Sunbeam House Services	4	0	0	4
Central Remedial Clinic	4	0	0	4
Cheshire Ireland, Dún Laoghaire	3	0	0	3
Irish Wheelchair Association	1	1	1	3
Our Lady's Hospice, Harold's Cross	2	0	1	3
St Michael's House	1	2	0	3
Galway County Association	3	0	0	3
Pre-Hospital Emergency Care Council	0	3	0	3
Crisis Pregnancy Agency	0	3	0	3
Drug Treatment Centre Board	2	1	0	3
Pharmaceutical Society of Ireland	0	3	0	3
Others (34 bodies with less than 3 requests each)	13	10	0	23
Totals	1,499	167	7	1,673

TABLE 10: FOI REQUESTS RECEIVED BY THIRD LEVEL EDUCATION BODIES - 2006

Third Level Education Body	Personal	Non-personal	Mixed	Total
Dublin University, Trinity College	67	8	1	76
University College Dublin	53	11	1	65
Waterford Institute of Technology	3	55	0	58
University College Cork	19	20	6	45
Sligo Institute of Technology	40	4	0	44
National University of Ireland, Galway	18	16	0	34
Dublin City University	11	4	0	15
Limerick Institute of Technology	6	7	0	13
University of Limerick	6	6	1	13
Galway-Mayo Institute of Technology	8	4	0	12
National University of Ireland, Maynooth	10	2	0	12
Institute of Technology, Carlow	2	8	0	10
Athlone Institute of Technology	3	6	0	9
St Patricks College, Drumcondra	3	3	2	8
Dublin Institute of Technology	2	6	0	8
Higher Education Authority	0	7	0	7
Dundalk Institute of Technology	0	7	0	7
Cork Institute of Technology	1	4	1	6
Institute of Technology, Tralee	0	4	0	4
NCAD Dublin	1	2	1	4
Letterkenny Institute of Technology	0	4	0	4
Tipperary Institute	2	2	0	4
Dún Laoghaire Institute of Art, Design and Technology	2	2	0	4
Institute of Technology, Tallaght	0	4	0	4
Institute of Technology, Blanchardstown	0	3	0	3
Mary Immaculate College, Limerick	0	3	0	3
Froebel College of Education	1	2	0	3
Others (6 bodies with less than 3 requests each)	1	4	0	5
Totals	259	208	13	480

TABLE 11: FOI REQUESTS RECEIVED BY OTHER BODIES - ANALYSED BY PUBLIC BODY - 2006

Public Body	Personal	Non-personal	Mixed	Total
Chief Medical Officer for the Civil Service	49	0	0	49
Social Welfare Appeals Office	48	1	0	49
RTÉ	4	32	0	36
FÁS	22	13	0	35
Land Registry and Registry of Deeds	22	9	1	32
Broadcasting Commission of Ireland	0	28	0	28
National Roads Authority	1	21	0	22
Health and Safety Authority	0	13	8	21
Probation and Welfare Service	20	0	0	20
An Bord Pleanála	0	19	0	19
Commission for Communications Regulation	8	10	0	18
Environmental Protection Agency	2	16	0	18
The Courts Service	3	13	0	16
Teagasc	6	8	0	14
Blood Transfusion Service Board	3	8	0	11
Arts Council	0	11	0	11
Board of National Library of Ireland	1	10	0	11
The Railway Procurement Agency	1	8	0	9
Údarás na Gaeltachta	3	5	1	9
Irish Sports Council	0	7	1	8
National Council for Special Education	7	0	0	7
Fáilte Ireland	0	6	0	6
Education Support Centres	6	0	0	6
IDA Ireland	1	5	0	6
Irish Medicines Board	0	6	0	6
Board of National Museum of Ireland	0	5	0	5
The Marine Institute	0	5	0	5
Shannon Regional Fisheries Board	2	2	1	5
Companies Registration Office	0	5	0	5
Dublin Docklands Development Authority	0	5	0	5
National Gallery of Ireland	2	2	0	4
Enterprise Ireland	0	3	1	4
Central Fisheries Board	1	2	0	3
TG4	0	3	0	3
Royal College of Surgeons in Ireland	1	2	0	3
Legal Aid Board	2	1	0	3
Others (152 bodies with less than 3 requests each)	20	48	3	71
Totals	235	332	16	583

TABLE 12: FEES DEALT WITH BY PUBLIC BODIES - 2006

	Original Request	Internal Review	Search and Retrieval	Refunds	Net Fees
Civil Service Departments/Offices	€16,620	€4,765	€12,321.73	€1,737.41	€31,969.32
Local Authorities	€15,600	€5,300	€4,143.42	€1,044.78	€23,998.64
HSE	€6,320	€410	€375	€125	€6,980
Voluntary Hospitals, Mental Health Services and related agencies	€1,935	€285	€3,458.94	€45.80	€5,633.14
Third Level Institutions	€3,000	€295	€378.52	€394.33	€3,279.19
Other Bodies	€5,305	€2,325	€2,073.78	€577.13	€9,126.65
Totals	€48,780	€13,380	€22,751.39	€3,924.45	€80,986.94

ANNUAL REPORT STATISTICS 2006**SECTION II - OFFICE OF THE INFORMATION COMMISSIONER****TABLE 13: ANALYSIS OF REVIEW APPLICATIONS RECEIVED - 2006**

Applications for review on hand - 1/1/2006	13	
Applications for review received in 2006	404	
Total applications for review on hands in 2006		417
Invalid applications	79	
Applications withdrawn	7	
Applications rejected	35	
Applications accepted for review in 2006	254	
Total applications for review considered in 2006		375
Applications for review on hand - 31/12/2006		42

TABLE 14: ANALYSIS OF REVIEW CASES - 2006

Reviews on hand - 1/1/2006	339
Reviews accepted in 2006	254
Total reviews on hand in 2006	593
Reviews completed	292
Reviews carried forward to 2007	301

TABLE 15: APPLICATIONS FOR REVIEW ACCEPTED BY THE INFORMATION COMMISSIONER - ANALYSED BY PUBLIC BODY - 2006

Health Service Executive		71
	Southern	15
	North Western	10
	South Eastern	9
	Mid-Western	8
	Midland	8
	North Eastern	7
	Western	5
	East Coast Area	4
	Northern Area	3
	South Western Area	2
Trinity College Dublin		31
Department of Justice, Equality and Law Reform		23
Department of Education and Science		14
Office of the Revenue Commissioners		10
Fingal County Council		6
Dublin City Council		6
Department of Transport		5
Department of Social and Family Affairs		4
Department of Agriculture and Food		4
South Dublin County Council		3
Wexford County Council		3
Department of Finance		3
Department of Communications, Marine and Natural Resources		3
Department of Health and Children		3
Department of the Environment, Heritage and Local Government		3
St James's Hospital		3
Cork City Council		3
Others (41 bodies with less than 3 applications each)		56
Total		254

TABLE 16: OUTCOME OF COMPLETED REVIEWS - THREE YEAR COMPARISON

	2004	%	2005	%	2006	%
Decision affirmed	353	56.21%	204	45.64%	146	50.00%
Decision annulled	23	3.66%	18	4.03%	13	4.45%
Decision varied	30	4.78%	50	11.19%	32	10.96%
Discontinued	13	2.07%	6	1.34%	8	2.74%
Settlement reached	32	5.10%	44	9.84%	26	8.90%
Withdrawn	177	28.18%	125	27.96%	67	22.95%
Total reviews completed	628	100.00%	447	100.00%	292	100.00%

TABLE 17: SUBJECT MATTER OF REVIEW APPLICATIONS ACCEPTED - THREE YEAR COMPARISON

	2004	%	2005	%	2006	%
Refusal of access	258	77.48%	211	74.04%	200	78.74%
Objections by third parties to release of information about them or supplied by them	29	8.71%	39	13.68%	7	2.76%
Amendment of records under section 17	20	6.01%	13	4.56%	16	6.30%
Statement of reasons under section 18	25	7.51%	17	5.96%	25	9.84%
Decision to charge a fee	1	0.30%	5	1.75%	6	2.36%
Total applications accepted	333	100%	285	100.00%	254	100.00%

TABLE 18: APPLICATIONS ACCEPTED BY TYPE - THREE YEAR COMPARISON

	2004	%	2005	%	2006	%
Personal	160	48.05%	118	41.40%	133	52.36%
Non Personal	123	36.94%	124	43.51%	96	37.80%
Mixed	50	15.01%	43	15.09%	25	9.84%
Totals	333	100.00%	285	100.00%	254	100.00%

TABLE 19: PHONE/GENERAL ENQUIRIES

Year	Number
1999	130
2000	799
2001	1,136
2002	1,047
2003	1,090
2004	1,306
2005	1,396
2006	1,551
Total	8,455


Appendix I

Certificates Issued under Section 20 and Section 25



Appendix II

Review under Section 25(7)
of Ministerial Certificates
Issued



Roinn an Taoisigh
Department of the Taoiseach

9 March 2007

Received

12 MAR 2007

Office of the
Information Commissioner

Ms. Emily O'Reilly
Information Commissioner
18 Lower Leeson Street
Dublin 2


Re Review of Section 25 of the Freedom of Information Act 1997.

Dear Commissioner,

While it is not expressly required by the provisions of the Freedom of Information Act 1997, I would like to inform you that pursuant to section 25 (7) of the Act, The Taoiseach, Minister for Finance and Minister for Enterprise, Trade and Employment on 6th March 2007, carried out a review of the operation of the Act, for the year ended April 2006. The certificates in question are those issued by the Minister for Justice, Equality and Law Reform on 5 August 2005, 20 February 2006 and 15 March 2006.

Having completed the review, the Taoiseach, Minister for Finance and Minister for Enterprise, Trade and Employment are satisfied that it is not necessary to request revocation of any of the three certificates which were the subject of the review – copies of the forms signed by the reviewers to that effect are attached.

Yours sincerely,



Patricia Williams
Freedom of Information Liaison Officer

c.c. Ms. Anne Roche, FOI Unit, Department of Justice, Equality and Law Reform; Ms. Catriona O'Brien, Central Policy Unit, Department of Finance; Mr Pat McCourt, FOI Officer, Department of Enterprise, Trade and Employment

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

Staff List

DIRECTOR GENERAL

Pat Whelan

SENIOR INVESTIGATORS

Fintan Butler

Seán Garvey

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Melanie Campbell

Liz Dolan

Cathal Duffy

Alison McCulloch

Anne Moran

David Nutley

Marie O'Brien

Des O'Neill

Colin Stokes

SUPPORT UNIT

Roseanne Brown

Phyllis Flynn

Frank Forde

Elizabeth Martin

David Stone



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Sensitive GM crop data may remain restricted

Department seeking to keep details secret

Department rejects plans for 'green' cement

amended to allow for a defence

Decentralisation dispute set to intensify

Council paid €5m to consultants last year

out €5.275m to consultants last year. The biggest recipient was... date for its work on the 14-year-old project. the project budget, while ten firms received payments. Some of the region's other...
to consultants...
Clare County...
Justice, which had sought opinions as part of a review of law. It received 11 submissions which dealt with the issue of reasonable mistake, two of which have not been released for confidentiality reasons.
A department spokesman has defended the decision to reject the advice at the time and said the submissions were...
sent." However, it said the should be on the accused to duce "sustainable evidence St Clare's unit at Tei Street, which specialise treating child abuse vict said the law "does not ope as a prohibitor but inst increases the level of coer required to ensure the offe is not reported".
The Rape Crisis Centre said it would...

27% of disadvantaged schools in three r

its population, Dublin has inc " to more rigorous ques- the 100... 214 or 26% of uc

Call for tougher laws after childcare safety breach

by Ma GRO

Limerick City Council pays legal fees of €600,000

by Jimmy Woulfe Mid-West Correspondent

Dismissal of

Most TDs' parliamentary assistants not based in Dáil

In a report to Oireachtas Commission and the also

Impact of prison cutbacks highlighted

The remaining T

Council's bo

Gordon Deegan

IE body charged with suring 30,000 residents in : greater Ennis area have : clean drinking water : increased its spend on bot- d water by 50% last : figures rel

(HSE) imposing three separate boil notices on the Ennis water supply last year in response to the contamination of the supply. A partial boil notice remains in

Garda salary boosted by €77m over

GORDON DEEGAN

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included € security of airport du

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