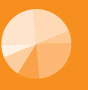
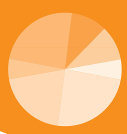
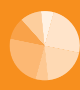
Office of the Information Commissioner
Oifig an Choimisinéara Faisnéise







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Foreword

I hereby submit my fifth 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 tenth Annual Report submitted in relation to the work of the Office of the Information Commissioner since it was established in 1998.

Information Commissioner

May 2008

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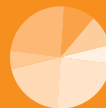
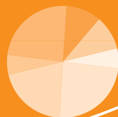
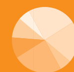
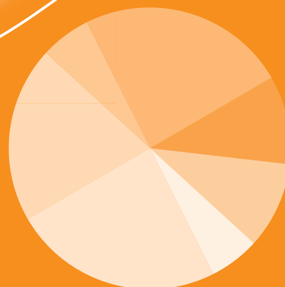
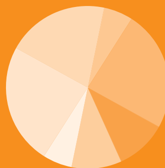










Introduction

It is important not to underestimate the cultural shift that was necessary in the Irish public service with the commencement of the FOI Act.

I am pleased to introduce my fifth Annual Report as Information Commissioner. This Report covers the period from 1st January 2007 to 31st December 2007, my fourth full year in office.

The publication of this Report coincides, more or less, with the 10th anniversary of the commencement of the Freedom of Information (FOI) Act 1997. It also coincides with the date on which records that are more than 10 years old, and which relate to decisions of the Government, or to communications between members of the Government on a matter that was considered by it, are removed from the protection of section 19 of the Act (albeit that they are still subject to the other provisions of the Act). For both reasons, I expect there will be renewed interest in the FOI Act in the coming year.

The FOI Act became law on 21st April 1997, and came into effect twelve months later on 21st April 1998. From that date, three very important rights were conferred on members of the public who sought access to information held by government departments and other designated bodies*. Those rights were:

- the right of access to official records held by public bodies;
- the right to have personal information about them held by such bodies corrected or updated where necessary; and
- the right to be given reasons for decisions taken by public bodies which affect them.

It is important not to underestimate the cultural shift that was necessary in the Irish public service with the commencement of the FOI Act. A move from a culture of secrecy to one of openness was required. Public bodies could no longer do their business behind closed doors. It is almost a cliché to say that the cloak of secrecy was lifted from the Irish public service with the commencement of the Act, and yet, this is actually what happened on 21st April 1998. Where there was no right of access to information before, except at the absolute discretion of the politicians or public servants involved, there was now a right, in law, to information. Furthermore, the information was not mediated in any way, it was not couched in terms chosen by politicians or public servants; instead direct access was given to the documents at issue (subject to the various exemptions of the FOI Act which protect sensitive material). With the commencement of the FOI Act, Ireland had a mechanism to achieve a standard of openness that was becoming the norm for modern democracies world-wide. More particularly, in Ireland, this development was a response to widespread unease regarding failings in transparency and accountability in government.

The Irish FOI Act is a progressive piece of legislation which puts the public interest at its centre. This is clear from the long title of the Act which describes it as:

"AN ACT TO ENABLE MEMBERS OF THE PUBLIC TO OBTAIN ACCESS, TO THE GREATEST EXTENT POSSIBLE CONSISTENT WITH THE PUBLIC INTEREST AND THE RIGHT TO PRIVACY, TO INFORMATION IN THE POSSESSION OF PUBLIC BODIES

** Local authorities and the former Health Boards, now the HSE, became subject to the Act six months later, on 21st October 1998. The Act was extended to include public voluntary hospitals and other similar bodies in October 1999. Regulations made in 1999, 2000, 2001, 2003, and 2006 brought further public bodies within the scope of the FOI Act. There are now over 500 public bodies covered.*

AND TO ENABLE PERSONS TO HAVE PERSONAL INFORMATION RELATING TO THEM IN THE POSSESSION OF SUCH BODIES CORRECTED AND, ACCORDINGLY, TO PROVIDE FOR A RIGHT OF ACCESS TO RECORDS HELD BY SUCH BODIES ...".

The importance of the public interest is also apparent in the parts of the FOI Act that allow for the release of material that would otherwise be protected where, on balance, the public interest in release outweighs other factors. In the first Annual Report of my Office, published by my predecessor, Kevin Murphy, in July 1999, he stated: *"A very important tool is now available to the citizen which can be used to gain access to a wide range of information which, up until recently, would have been withheld on grounds of secrecy. Furthermore, the Act has an important contribution to make to public service reform. If it is used effectively by requesters and operated conscientiously by public servants, it has the potential to bring about significant improvement in the overall standard of public administration".*

During 2008, I will host a conference to mark 10 years of FOI in Ireland which will explore, in detail, what has been achieved by FOI and what remains to be achieved. At the time of writing this Report, my Office is engaged in preparing a comprehensive review of the impact of FOI, and the effect of cases decided by my Office, on overall standards of public administration. I intend to publish this review at the 10th anniversary conference. For this reason, this Annual Report does not contain a detailed review of the past decade. However, in brief, I believe that, notwithstanding the restrictions introduced by the Freedom of Information (Amendment) Act 2003, we are dealing largely with a success story. This is evidenced by the information that is now released as a matter of course by public bodies - information which would previously have been kept secret. Much of this information was first provided as a direct consequence of binding decisions made by my Office. Other information was provided as a result of the general change in culture brought about by the FOI Act.

For example:

- information related to tendering processes by public bodies is routinely made available, including the successful tender price, following key decisions of my Office made in 1998, 1999, and 2001;
- recruitment and selection processes in the public service are more transparent, with candidates receiving interview notes as standard and, in many cases, feedback. These developments followed decisions made by my Office in 1998, 1999, and 2001. Access was also granted to employment references in certain cases in 2006 and 2007 (as detailed in this Report in Chapters 3 and 4);
- details of expenses paid to Oireachtas members are released each year, on foot of FOI requests, since a decision of my Office made in 1999;
- the names of recipients of the highest levels of certain EU agricultural subsidies are released into the public domain since a decision of my Office made in 2001;
- since June 2006, nursing home inspection reports have been published, as a matter of course, by the Health Service Executive (HSE). I first suggested that this be done in my 2004 Annual Report;
- reports on inspections of pre-school services are released by the HSE, on foot of FOI requests, and the HSE has promised to publish these reports on its website shortly.

Whereas the FOI Act excludes records held by a tribunal of inquiry from its scope, there is an exception to this exclusion in respect of records relating to the general administration of a tribunal. Towards the end of 2006, I made two decisions which demonstrated that the FOI Act can be used successfully to access such 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.

In addition, all school inspection reports, compiled on or after 6th February 2006, have been published by the Department of Education and Science. This issue was first raised by my Office in my Annual Report of 2004. Whereas the release of this information is not under the FOI Act, and is not as a direct result of a decision by my Office, it is released as a consequence of the impact of the FOI Act. Also, every day in our print media there are newspaper articles based on information obtained under the FOI Act.

Over the 10 years for which the FOI Act has been in force, 129,723 requests for information were made to public bodies. Of these, an estimated 62,416 (48%) were granted in full, and an estimated 27,875 (21%) were part-granted - a total of 90,291 (70%) access requests granted either in full or in part. In the private domain, some 75,000 people have sought access to personal information held by public bodies about them. As an example, I note in particular, that the FOI Act facilitated former residents of industrial and reformatory schools in accessing information about their time spent in those institutions.

Turning now to the year in question, in 2007, 10,704 requests were made to public bodies under the FOI Act. This is a decrease of 9% from the 2006 figure (11,804) and 27% from 2005 (14,616). It marks a continuation of the downward trend in request numbers, with the exception of 2005, since the introduction of fees in the FOI Amendment Act of 2003. I again call on the Minister for Finance to reconsider the matter of fees with a view to their removal.

This Report highlights a number of significant cases and issues that were dealt with by my Office in the past year. One such issue, dealt with in Chapter 3, is the worrying trend whereby new public bodies are being established without, simultaneously, coming under the FOI Act. This can result in important public functions falling outside the FOI Act for significant periods of time. I again point to the fact that certain public bodies, such as An Garda Síochána, remain outside FOI, and again call for their inclusion. Also, in relation to the Justice sector, I note with some concern that the Immigration, Residence and Protection Bill 2008, excludes from the FOI Act records relating to an application for protection by the State of a foreign national. The exclusion of such records is, in my opinion, unnecessary, and I call for openness and transparency in these matters to engender confidence, both nationally and internationally, that such important processes are dealt with in an equitable way that is in accordance with best practice and fair procedures.

Also in Chapter 3, I examine an area of public administration in which the FOI Act has, as yet, failed to deliver the improvements hoped for - the area of records management practice. Again and again over the past 10 years, my Office, based on our experience of dealing with public bodies and searches for records, has called for improved systems in this area. Unfortunately there are still pockets of the public service where serious shortcomings remain, despite various programmes of public service reform over the period.

I also draw attention, in Chapter 3, to the matter of personal information of deceased persons and the urgent need for legislative action in this area. Based on a reconsideration of all of the issues as discussed in various fora over the past number of years, I have revised my approach to this matter. I explain the basis for my revised approach in Chapter 3, and, in Chapter 4, provide a summary of a decision based on that approach.

As well as the matter of deceased persons records referred to above, Chapter 4 highlights a number of other significant issues that were dealt with by my Office in the past year by providing summaries of relevant cases. It includes summaries of two separate cases where I directed the release of negative employment references in circumstances where candidates placed on panels for public service jobs were not offered employment. I also provide details of decisions involving an adopted person, or the child of an adopted person, who sought the age of their mother, or grandmother, as it appeared in hospital records. The requester in each case was already in possession of a birth certificate. In both, I directed the release of the information. These cases have been appealed to the High Court.

Despite the downward trend in FOI request numbers, in numerical terms, I believe that smart use of the FOI Act, particularly by "power users", such as

NUMBER OF REQUESTS TO PUBLIC BODIES UNDER THE FOI ACT 1998 - 2007

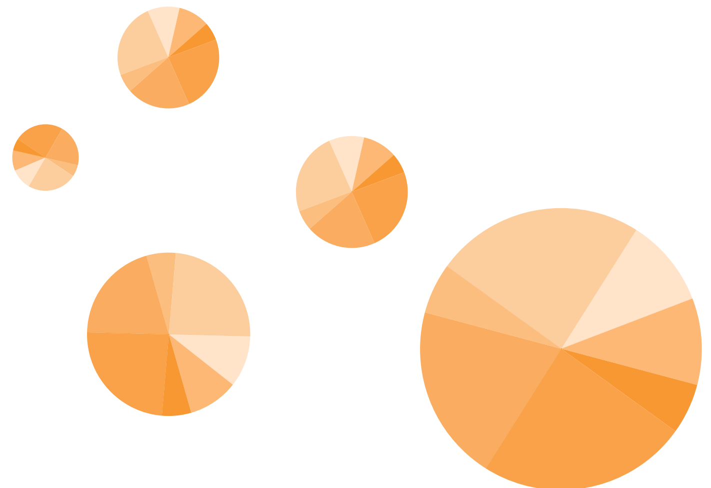
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
3,699	11,531	13,705	15,428	17,196	18,443	12,597	14,616	11,804	10,704

journalists and representative bodies, means that information continues to come into the public domain which would otherwise remain unknown. I believe that the FOI Act has an important role to play in ensuring accountability and transparency in Irish public life, and in facilitating full and informed participation in our democracy. I look forward to the debate this 10th anniversary year is sure to bring.

Finally, in Chapter 6 of this Report, I report on developments since my appointment as Commissioner for Environmental Information, under the Access to Information on the Environment Regulations (S.I. No. 133 of 2007). My role as Commissioner for Environmental Information, which is legally separate to my role as Information Commissioner, is to decide on appeals taken by members of the public who are not satisfied with the outcome of their requests to public authorities for environmental information.

In closing this Introduction to my fifth 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 Ciara Burns, Eoin Keaveney, and Frank Forde for their work in the compilation of this Report.

I believe that, notwithstanding the restrictions introduced by the Freedom of Information (Amendment) Act 2003, we are dealing largely with a success story.



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The Year in Review

The percentage of requests made by journalists has fallen from the 10% level of last year, and compares unfavourably with the 20% of requests submitted by journalists in 2001.

COLLATION OF STATISTICS

I am pleased to report that the collation of statistics from public bodies, in respect of 2007, was completed earlier this year than for any year since the establishment of my Office in April 1998. This followed a considerable improvement last year, compared to previous years, in the furnishing of statistics to my Office. It is important that statistics on usage of the FOI Act are reliable and can be produced in a timely manner. I understand that the improvements are directly attributable to improved systems for recording, along with a network of contact people through whom statistics are furnished to my officials. On my own behalf, and on behalf of my staff, I would like to express my gratitude to all those involved in the production of FOI statistics for this very positive development.

This Report is the first in which statistics are presented that reflect the regional structure of the Health Service Executive (HSE), as opposed to the old Health Board structure. Unfortunately, this means that direct year-on-year comparisons, by region, will not be possible. On 1st January 2007, the HSE was two full years in existence; accordingly, it would not be appropriate to continue to present its statistics under the old structure. It will, of course, be possible to compare FOI statistics for the HSE as a single entity.

LEVEL OF REQUESTS TO PUBLIC BODIES

Some 10,704 requests were made to public bodies under the FOI Act in 2007. This is a decrease of 9% from the 2006 figure (11,804) and 27% from 2005 (14,616), and marks a continuation of the downward trend in request numbers, with the exception of 2005, since the introduction of fees in the FOI Amendment Act of 2003 (see Chapter 5, Table 1 for details). The temporary surge in 2005 is largely accounted for by requests to the Department of Education and Science from former residents of institutional care in preparation of applications to the Residential Institutions Redress Board. The ongoing decrease in request numbers coincides with the imposition of up-front fees for non-personal information, as identified in my Investigation Report published in 2004, and as evidenced by statistics for each full year since that date. I remain convinced, and the statistics support my conviction, that the introduction of fees has acted as a major obstacle to the use of the FOI Act.

The table overleaf shows the ten public bodies subject to the most requests during 2007 (the previous year's position is shown in brackets), along with levels of requests to those bodies in 2005 and 2006. As I have stated above, it is not possible to make year-on-year comparisons between the former Health Boards and the HSE regional divisions. Overall statistics for the HSE, broken down between the new regional structure and national corporate-type functions, are contained in Chapter 5 (see Table 8).

In my Annual Report for 2006, I commented that the increase in the number of FOI requests submitted to three key government departments in 2005 was temporary and that the real trend was the significant drop in requests submitted across the three departments since the FOI Amendment Act 2003 introduced up-front fees, along with restrictions on access to Government

TEN PUBLIC BODIES SUBJECT TO THE HIGHEST LEVEL OF FOI REQUESTS IN 2007				
Rank	Public Body	2007	2006	2005
1	HSE South (-)	1,378	n/a	n/a
2	HSE West (-)	1,257	n/a	n/a
3	HSE Dublin North East (-)	627	n/a	n/a
4	HSE Dublin Mid-Leinster (-)	590	n/a	n/a
5	Department of Education and Science (1)	470	1,108	3,716
6	Department of Justice, Equality and Law Reform (5)	445	477	433
7	Department of Social and Family Affairs (6)	370	464	462
8	Defence Forces (-)	206	185	239
9	Mercy Hospital, Cork (-)	191	132	117
10	St. James's Hospital (-)	184	131	125

records. This is borne out by the figures below, which confirm largely similar numbers for the three Departments in the years 2004 to 2007, but illustrate an average 68% drop in the number of requests received across the three departments since 2003.

TYPE OF REQUEST

The figures on type of request continue to show a large decrease (-3,604 or 32%) in the number of personal requests from the temporary high of 2005. There were 7,558 requests for personal information in 2007. This represents a decrease of 8% on the previous year. In my Report for 2006, I commented that, on the basis of the volume of non-personal and "mixed" requests, i.e. requests which include both personal and non-personal information, it was too early to say if usage of the Act for non-personal and mixed information was recovering. The figures for 2007 clearly show that it is not, with a reduction of 12% in the volume of mixed requests between 2006 and 2007, although the proportion of mixed requests as a percentage of the total number of requests has remained static.

TYPE OF REQUESTER

In line with previous years, the majority of FOI requests are made by ordinary members of the public or representative organisations (80%), while journalists (8%), businesses (6%), staff of public bodies (5%), and members of the Oireachtas (1%) make up the other categories of requester. The percentage of requests made by journalists has fallen from the 10% level of last year, and compares unfavourably with the 20% of requests submitted by journalists in 2001. Nevertheless, media usage of FOI continues to result in the regular publication or broadcast of FOI-based reports and investigations.

RELEASE RATES

During 2007, 77% of requests dealt with by all public bodies were either granted in full (57%) or were part-granted (20%), compared to an equivalent figure of 76% for 2006. This means that, allowing for the 2% of requests transferred and the 9% withdrawn or handled outside of FOI, 12% of requests were refused in 2007 as against 13% in 2006 and 15% in 2005. The number of requests granted in full in 2007 (57%) represents an increase of 10% on the previous year. As the number part-granted has decreased by 9%, this may be an indication that public bodies are becoming less likely to exempt sections of information from records which are otherwise appropri-

FOI REQUESTS SUBMITTED TO THREE KEY GOVERNMENT DEPARTMENTS 2003 - 2007						
	2003	2004	2005	2006	2007	2003 - 2007
Department of the Taoiseach	142	45	60	51	71	-50%
Department of Finance	305	78	93	72	64	-79%
Department of Enterprise, Trade and Employment	153	62	86	71	57	-63%

ate for release.

I commented in my 2006 Report that the downward trend in refusal rates could be attributed to the shifting proportions of request types since 2003, as requests for personal information tend to be granted more readily than non-personal requests. However, as the proportion of non-personal and mixed requests is static from 2006 to 2007, it appears that the small, but continuing, downward trend in refusals is independent of the breakdown between personal and other requests and is, therefore, a welcome development.

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 (55%), the HSE (67%), third-level institutions (58%), the voluntary hospitals/mental health agencies/voluntary bodies (67%), and other bodies (48%) all remain more inclined to grant full release than their counterparts in the Civil Service, which granted full release in 35% of cases. I welcome the increase in the Civil Service figure from the 28% recorded for 2006. However, it remains the case that rates of full release are lower for the Civil Service than for other sectors, even where the other sectors have a higher proportion of non-personal requests. An analysis of the figures shows that the proportion of personal requests is lower for the local authorities (22%), other bodies (40%), and third level institutions (55%) than it is for the Civil Service (60%), yet the release rates for those non-Civil Service sectors are higher.

The figures for 2007 indicate that the pattern of lower release rates for the Civil Service is continuing, but that the gap between it and the other sectors has narrowed. I hope to see this gap diminish further in future years.

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 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 2007 was 353, a decrease of 51 cases, or 13%, on 2006. As stated in Chapter 5 (Table 13), 248 of these applications were accepted for review during 2007, which compares to 254 accepted in 2006. While the decrease in numbers of applications accepted from 2006 to 2007 is less than for previous years, nevertheless the fall-off remains in line with the overall reduction in the number of applications to my Office (apart from the temporary 2005 peak related to industrial schools cases) apparent since the introduction, in 2003, of the €150 application fee. One interesting feature of the accepted applications for 2007 is the breakdown between the categories of application, with a much lower proportion of applications relating to personal information (24%) compared to previous years, where it has always exceeded 40%. There is no obvious explanation for this decrease, so I will keep the matter under review to see whether the change turns out to be a once-off occurrence.

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 2.3%, compared to 2.2% in 2006 and 2% in 2005. A breakdown of the public bodies concerned and the subject matter of review applications accepted is contained in Chapter 5 (Tables 15 and 17).

Section 29 of the FOI Act requires public bodies to notify certain third parties if it is proposed to grant access to information, in the public interest, that would otherwise be exempt by virtue of section 26 (information obtained in confidence), section 27 (commercially sensitive information), and/or section 28 (personal information about a third party). The public body must consider any submissions from the third parties before deciding whether to grant or refuse the request. Where third parties object to release, appeal is directly to my Office. In my 2006 Report, I commented that the pattern of reducing numbers of third party objections to the release of information may have been a reflection of a greater acceptance among third parties of the types of records that experience has shown are likely to be released under FOI. I observed that the pattern supported 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 reports of nursing homes and preschool services. However, the figure

for 2007 of 8.1% third party objections is a significant increase over the 2006 figure of 2.8%. As there is no obvious explanation for this fluctuation, I will keep this matter under review.

DEEMED REFUSALS

The FOI Act requires public bodies to issue a decision on an initial request within four weeks, and to issue a decision on an internal review request within three weeks. In both cases, the Act further provides that the failure of a public body to respond within those statutory time limits will be deemed to be a refusal of the request, triggering the requester's right to seek internal review, or to apply to my Office for review, as appropriate. At the end of 2006, I informed public bodies that I intended to name, in my Annual Report, those bodies responsible for applications to my Office resulting solely from their failure to make decisions on FOI requests. Details are set out in Chapter 5 (Table 20). Unfortunately, 19 applications were made to my Office in 2007 on the basis of non-reply by public bodies. That is, in 19 cases the requester received neither an original decision nor an internal review decision. Although this figure may appear low, it represents 8% of the 248 applications accepted by my Office in 2007. It is completely unacceptable that public bodies should simply not respond to requesters attempting to avail of their statutory rights under the FOI Act. It is one matter to seek to deny access to sensitive records and to argue one's case accordingly; it is another to breach statutory provisions simply by not responding to legitimate FOI requests.

One government department (the Department of Transport) was responsible for four deemed refusal applications, two others (the Department of Education and Science, and the Department of Agriculture and Food) and one hospital (Mercy University Hospital, Cork) were responsible for two each, whereas four other departments, three HSE regions, one other hospital, and one local authority were responsible for one each. Overall, the Civil Service was responsible for 12 of the 19 non-reply cases. As there is no acceptable reason for simple non-reply to FOI requests (the Act provides for deferral in certain specific circumstances), I would expect to see public bodies, and government departments in particular, make every effort to ensure that there is no repetition in future years.

FEES RECEIVED

The imposition of an up-front fee for certain requests to public bodies and applications for review to my Office came into effect on 7th July 2003. Where non-personal information is sought, the fees payable to public bodies are €15 for first stage decisions and €75 for internal review, with a fee of €150 for application to my Office. The latter 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 (described above) were applied.

I have commented previously on the way in which the imposition of fees appears to be acting as a brake on accountability of public bodies, through reducing the numbers of their decisions that are appealed. In particular, I have remarked on the significant decrease in the number of requests made by the media, down from 2,103 in 2003 to 1,187 in 2006. Unfortunately, this figure has decreased further to 885 in 2007, which represents a fall from 13% of all FOI requests in 2003, to 8% in 2007.

During 2007, my Office received 150 applications for review where a fee was paid. The total amount received in application fees by my Office in 2007 was €19,250. Of this, €6,250 was refunded for the following reasons:

- €5,800 was refunded in respect of applications which were withdrawn, settled, or rejected as invalid;
- €150 was refunded in cases where the public body had not issued a decision or internal review decision within the time limits (section 41 - deemed refusal); and
- €300 was refunded in respect of overpayments.

In a trend continuing since 2005, many applicants remain unaware that a fee is payable in relation to an application to my Office that involves a request for access to non-personal information. In 73 such cases, my Office wrote to the applicant to say that a fee might be applicable, leading to payment in the majority of these cases. In four cases, the applicant withdrew the non-personal element of the application and advised my Office that they sought personal information only. Therefore, in these cases, the application for review was accepted without a payment. Thirteen cases in which only non-

personal information had been sought were rejected on the basis that the due fee had not been paid.

As well as applications for review, 35 FOI requests were made to my Office during 2007 in relation to information held by it. Of these, 26 were received on-line. Fees were received in 8 cases totalling €105 and all were on-line payments. However, all of the requests were subsequently withdrawn, and the on-line payments voided. Two applications were received for internal review; neither attracted a fee.

REVIEWS OF DECISIONS

During 2007, I reviewed 325 decisions of public bodies, which is an increase of 11% over the 292 cases completed in 2006. This welcome increase has been achieved despite my Office continuing to concentrate on older and generally more time-consuming cases.

At the start of 2007, my Office had a total of 301 reviews on hands and a further 248 were accepted during 2007. Following the completion of the 325 reviews mentioned above, 224 reviews were left on hands at the end of the year. I am pleased that the large backlog of cases on hands continues to decrease and compares favourably to the figure of 796 on hands at the end of 2003. However, this backlog has been, and continues to be, a major source of concern to me, and I hope to reduce it even further in 2008.

TIME TAKEN TO COMPLETE REVIEWS

The 325 reviews completed by my Office in 2007 are broken down in the table below according to the year in which the case was received.

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 248 reviews were received and accepted in 2007, with 105 of these being completed during the year. Sixty-one, or 25%, of these 248 reviews were completed within the time limit provided for in the Act. I am conscious of the importance, for the applicant, of reviews being completed as quickly as possible. The failure to meet the deadline in the remaining cases is regrettable. However, I am satisfied that it is largely due to the concentration by my Office on older cases, in order to reduce the current backlog, on which significant progress was made during 2007. I also think it important to acknowledge that reviews by my Office often involve complex legal issues and/or a large number of records and that some cases take considerably longer to deal with than the four month period 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 2007, I issued 149 formal decisions, which accounts for 46% of all cases dealt with during the year. In 98 (66%) of the formal decisions, I affirmed the decision of the public body, whilst I varied 30 (20%) of the decisions and annulled the remaining 21 (14%). This compares with 76% of decisions affirmed in 2006 and 75% in 2005. The reduction in the percentage of decisions affirmed in 2007 can be explained by the significantly higher number of reviews dealt with concerning non-personal information, which, in general, are less likely to be affirmed than reviews of requests for solely personal information.

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 agreeing to exclude records which will add little or no value to the information they seek. In others, it might be agreed that additional records outside the scope of the original request be released without the need for me to arrive at a formal decision. As always, I would encourage public bodies, in the course of dealing with requests, to engage directly with requesters with a view to

REVIEWS COMPLETED IN 2007

Year	2002	2003	2004	2005	2006	2007	**Total**
Number	5	39	38	28	110	105	**325**

achieving settlements in those cases where a full granting of the request is unlikely.

During 2007, 55 cases were settled. This represents almost 17% of all reviews completed during the year, compared with some 9% in 2006, 10% in 2005, and 5% in 2004. I welcome this increase in the settlement rate, not least because settlements are often the most satisfactory outcome for the applicant.

Withdrawn/Discontinued

In 2007, 35% of all reviews completed were withdrawn by the applicants. This compares to 23% in 2006 and 28% in both 2005 and 2004. In most cases applications are withdrawn following detailed discussions between the applicant and a member of my staff.

Cases that were discontinued during 2007 accounted for 2.2% of reviews completed, compared to 2.7% in 2006 and 1.3% in 2005.

GENERAL QUERIES DEALT WITH BY MY OFFICE

There were 1,315 general queries made to the Office during 2007, of which five were made in person, 288 were in writing (including emails), and 1,022 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 of my remit as Information Commissioner.

STATUTORY NOTICES

The majority of public bodies co-operate 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. Among 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 my Annual Report for 2006, I reported my disappointment at the fact that, whereas it was not necessary for me to issue any notices under section 35, I did have to issue five notices under section 37, three of those to the Department of Justice, Equality and Law Reform. For 2007, I am pleased to report a considerable improvement by that Department, and public bodies generally, in this area. While I did issue one section 37 notice in 2007, this is, nevertheless, a significant improvement on the 2006 position.

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 an 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 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 specifying the number

SECTION 37 AND SECTION 35 NOTICES ISSUED TO PUBLIC BODIES IN 2007

Public body	Section 37 Notices Issued	Section 35 Notices Issued
HSE Dublin North East	1	0
Total: 2007	**1**	**0**
Total: 2006	**5**	**0**
Total: 2005	**0**	**0**

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 2007.

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 no new section 20 certificates were issued during 2007. The first certificate under this section was issued on 11th August 2006 by the Secretary General of the Department of Justice, Equality and Law Reform, and was highlighted in my 2006 Report. As that certificate has not been revoked by the Secretary General in line with the provisions of section 20(1A)(b), it remains in force. No such certificate was issued by any other Minister prior to, or during, 2007.

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 section 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 2007, I have been notified that the Minister for Justice, Equality and Law Reform renewed one certificate, on 11th July 2007, for a further two years and I attach a copy of the notification at Appendix I to this Report. Two further certificates renewed by the former Minister during 2006 remain in force.

On 14th February 2008, I was notified, pursuant to section 25(7) of the Act, that on 30th January 2008 the Taoiseach, the Minister for Finance, and the Minister for Enterprise, Trade and Employment reviewed the three certificates (the two renewed during 2006 and the third on 11th July 2007) that were in operation for the year ended April 2007, and decided that it was not necessary to request their revocation. I attach a copy of the notification at Appendix II to this Report.

APPEALS TO THE HIGH COURT

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

During 2007, the High Court handed down judgments in two cases, both in favour of my Office. One case related to a decision which issued from my Office in 2002 and was heard in the High Court in 2003, with the other case from a 2005 decision which was heard in 2006. A judgment is awaited in respect of a third case which was heard in 2007, relating to a 2005 decision which was appealed in 2006. A summary of the High Court judgments handed down in 2007 is presented in Chapter 3.

Of the decisions which issued from my Office in 2007, ten were appealed to the High Court. Of those, one was withdrawn and two were settled prior to hearing. One case was remitted to my Office for a new review and decision. Dates for hearing are awaited in respect of the remaining six cases.

High Court hearings are also awaited in four further cases, three of which were appealed in 2006, and one in 2007. Three relate to decisions which issued by my Office in 2006, and one appeal is a composite appeal, involving five related decisions, which issued in 2005.

INSPECTION REPORTS FOR NURSING HOMES AND CRÈCHES

In my 2006 Annual Report, I noted that some private nursing homes had not been the subject of a published inspection report. I welcome the HSE's current position whereby inspection

and subsequent publication of the inspection reports are prerequisites for registration of private nursing homes. Accordingly, inspection reports for all registered private nursing homes are now available on the HSE website.

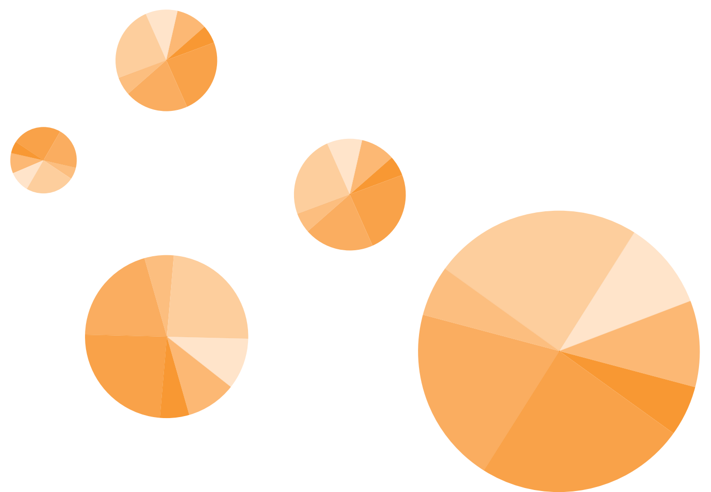
The HSE's position regarding inspection reports on pre-school services is less transparent at present. Under the Child Care (Pre-School) Regulations 2006, the HSE is responsible for the inspection of pre-school services (including pre-schools, play groups, nurseries, crèches, day-care and other similar services). These regulations came into effect on 3rd September 2007. While inspection reports are now generally provided on foot of FOI requests, I would urge the HSE to publish these reports on its website in order to provide interested parties with the same level of open access to pre-school inspection reports as pertains to nursing home inspection reports.

EXTERNAL REVIEW OF STRUCTURE AND CONTENT OF OIC DECISIONS

The decisions which issue from my Office, following a review, are legally binding on all parties to them. In drafting those decisions, my Office faces the double challenge of ensuring that they are legally sound and, at the same time, clear and understandable to their recipients, many of whom would not be familiar with the complexities of the FOI Act. During 2007, my Office engaged an external expert to carry out a review of our decision letters, including their structure. This exercise included a comparative analysis with similar offices in other jurisdictions. We are currently considering the recommendations of the external expert as to how best to communicate our decisions to interested parties and the wider public.

STAFFING

There were a number of staffing changes in the Office during 2007. David Nutley, Investigator, has moved on to a new challenge in the Office of the Ombudsman. I would like to thank David for his contribution to this Office, and I would also like to welcome Ciarán O'Donohoe and Catherine Rousset, who joined us as Investigator and Clerical Officer, respectively.



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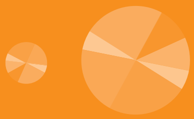


Issues Arising

For some time now it has been a matter of concern to me that certain public bodies remain outside the scope of the FOI Act.

INTRODUCTION

The purpose of this Chapter is to highlight issues relating to the operation of the FOI Act which arose over the past year. It is particularly concerned with issues which impact on the effectiveness of the FOI regime in Ireland. Some of the issues arising are operational and relate to particular public bodies, while others are matters which fall to be resolved either at Government level, or by the Department of Finance. I also include in this Chapter details of two judgments delivered by the High Court during 2007. The issues discussed are:

- Public Bodies Falling Outside of the FOI Act;
- Personal Information;
- Records of Deceased Persons;
- Employment References;
- Records Management;
- Commentary, under Section 39 of the FOI Act, on Section 29: Procedures for Consulting Third Parties;
- High Court Judgments.

PUBLIC BODIES FALLING OUTSIDE OF THE FOI ACT

For some time now it has been a matter of concern to me that certain public bodies remain outside the scope of the FOI Act. I have commented on this frequently in recent years, yet a number of significant public bodies are still outside the FOI regime. In last year's Annual Report, I stated that, despite the fact that the Minister for Finance had made regulations, in June 2006, which brought over 130 additional bodies under the scope of the FOI Act, a number of significant public bodies were not included at that time. No regulations prescribing public sector bodies for the purposes of the FOI Act were made in 2007. Accordingly, the public bodies listed below, among others, remain outside FOI:

- An Garda Síochána, the Garda Ombudsman Commission, the Office of the Refugee Applications Commissioner, the Office of the Refugee Appeals Tribunal, and the Judicial Appointments Advisory Board;
- The Central Bank and Financial Services Authority of Ireland, the National Treasury Management Agency, the National Pension Reserve Fund Commission, and the State Claims Agency; and
- The 33 Vocational Educational Committees, the State Examinations Commission, the Residential Institutions Redress Board, and the Central Applications Office.

During 2007, it came to my attention that some functions of public bodies previously subject to the FOI Act were removed from its scope due to the transfer of those functions to new public bodies. The Road Safety Authority (RSA) is an example of one such body. Records once held by the Department of Transport were transferred, on the establishment of the RSA under the Road Safety Authority Act 2006, to the new body. Similarly, the Property Registration Authority, established under the Registration of Deeds and Title Act 2006, took over the functions of the Land Registry and the Registry of Deeds. As these new bodies are not yet prescribed bodies for the purposes

of the FOI Act, their records are not accessible under the Act. The removal of public bodies for significant periods of time, or of particular functions which were previously covered by the Act, is a particularly worrying development. It could be avoided if the method of prescribing public bodies for the purposes of the Act was revised.

Currently, the Minister for Finance brings new public bodies under the FOI Act by making regulations. Such regulations serve to amend the list of public bodies for the purposes of the Act, as set out in Schedule 1, by adding the new bodies to it. Delays have occurred between the establishment of new public bodies and their prescription for the purposes of the FOI Act. I have suggested previously that each new public body being created under statute, or each body to which significant public functions are being transferred, should be made subject to the FOI Act, either in its own founding legislation, or by way of a regulation from the Minister for Finance, which would coincide with the establishment of the body or the transfer of functions. Given the number of new bodies being established each year, and an emerging trend whereby existing functions are being moved to new bodies, I now consider it urgent that this matter be addressed.

Compliance with freedom of information legislation is now a well-established part of good administration in Ireland, and there is a high level of awareness among public officials about what is required under the legislation. Whereas it might be argued that new bodies need time to become familiar with, and to train their staff in the FOI Act, before becoming subject to its provisions, I do not accept this argument. I do not accept that new public bodies require a lead-in time in respect of their functions under freedom of information legislation any more than they do in respect of any other legislation with which organisations must be compliant from the date of their establishment (such as health and safety legislation). Indeed, I am aware that the RSA, for example, has been operating, since the date of its establishment, "as if" it were subject to the FOI Act. I welcome this approach and acknowledge that it means that requesters may currently be granted access to information on an administrative basis. However, where public bodies are not subject to the FOI Act, requesters are deprived of a right of access in law. In these instances, as was highlighted by a case involving the RSA which came to my Office in 2007, I have no jurisdiction to review a decision where the requester is not satisfied with the organisation's response to their request.

The FOI Act and the Justice Sector

My views on the necessity to include An Garda Síochána under the FOI Act are, by now, well known. I have previously commented that by continuing to exclude An Garda Síochána from its FOI regime, Ireland is out of step with its counterparts across the developed world. Ireland is alone among 26 Council of Europe countries surveyed by a number of NGOs in excluding its police force from FOI legislation. In my 2006 Annual Report, I stated: *"In the context of ongoing reform, such as the 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".* Despite some comment in the media by the Department of Justice, Equality and Law Reform, following publication of my 2006 Annual Report, that it was considering the inclusion of an Garda Síochána as a public body for the purposes of the FOI Act, the Gardaí remain outside its scope.

I have also previously drawn attention to the fact that the Office of the Refugee Applications Commissioner and the Office of the Refugee Appeals Tribunal, as well as the Judicial Appointments Advisory Board, remain outside the FOI Act. The Office of the Refugee Applications Commissioner is independent in its functions. It investigates applications for asylum in this State and makes recommendations to the Minister on such applications. The Commissioner also investigates applications for family reunification. The Office of the Refugee Appeals Tribunal considers appeals against recommendations of the Refugee Applications Commissioner. It is, in my view, particularly important for bodies which deal with issues so closely related to human rights to operate in a way that is open and accountable.

It is in this context that I note with some concern that the Immigration, Residence and Protection Bill 2008, excludes from the FOI Act records relating to an application for protection by the State of a foreign national. The Immigration, Residence and Protection Bill is described in an Explanatory Memorandum by the Government as *"setting out a legislative framework for*

the management of inward migration to Ireland". If enacted, it will repeal and replace various statutory provisions related to immigration policy. Part 7 of the Bill relates to the giving of protection to a foreign national in the State and sets out eligibility criteria and procedures for making determinations. Section 130 excludes from the scope of the FOI Act "records relating to a determination under Part 7 of a protection application" - in effect, any record relating to a determination of a protection application (any application for refugee status or asylum or any such application). The exclusion of such records is, in my opinion, unnecessary. It is my view that the exemptions in the FOI Act provide adequate protection for any sensitive material related to such processes. Openness and transparency in these matters engender confidence among the population, nationally and internationally, that such important processes are dealt with in an equitable way that is in accordance with best practice and fair procedures.

The FOI Act and the Public Finance Sector

In addition to bodies in the area of the Department of Finance which remain outside FOI listed above, I note that the National Development Finance Agency (Amendment) Act 2007 extended the functions of that Agency. Under the Amendment Act, the Agency functions as a centre of expertise for procuring Public Private Partnership projects on behalf of State authorities. The Public Private Partnership website: www.ppp.gov.ie, states: *"This Act extends the functions of the National Development Finance Agency (NDFA) to allow it to provide a Centre of Expertise for procuring Public Private Partnership projects on behalf of State authorities. Through this legislation, the NDFA is allocated a new procurement function giving the Agency the power to enter into PPPs with a view to transferring them to the relevant State authority, or to act as agents for State authorities for PPP procurement".*

In light of these important new functions related to public expenditure, I call for the inclusion of the National Development Finance Agency under the FOI Act without delay.

The FOI Act and the Education Sector

In the area of the Department of Education and Science, the 33 Vocational Educational Committees (VECs) remain outside the FOI Act. The Minister for Education and Science recently published the Student Support Bill 2008. This legislation will place all student support schemes on a statutory footing, with the VECs as the awarding authorities. It will also repeal the Local Authorities (Higher Education Grants) Acts 1968 to 1992. Accordingly, records related to applications for some student support schemes, which were previously held by local authorities, will now be held by the VECs. I have stated previously that VECs should be brought under the FOI Act. These new functions, along with new functions for VECs as patrons of a new State model of community national school, announced by the Department of Education and Science in 2007, make this matter urgent.

New Public Bodies

A review of the Government's legislative programme, announced on 29th January 2008, shows that legislation is planned which will provide, on a statutory basis, a number of new public sector bodies, including the National Employment Rights Authority (currently under the aegis of the Department of Enterprise, Trade and Employment); a Broadcasting Authority of Ireland; an Adoption Authority of Ireland; and a Dublin Transport Authority. While I am aware that it is the stated intention of the Minister for Finance to make regulations bringing certain public bodies under the FOI Act, it remains the case that there have been no such regulations since June 2006. In the absence of a policy and related procedure whereby new bodies are covered by the FOI Act from the date of their establishment, important public functions, often involving the spending of significant amounts of public money, will remain outside the FOI Act. I again call on the Minister to revisit this matter to ensure that all public bodies are subject to the same level of independent oversight as those currently within the scope of the FOI Act.

PERSONAL INFORMATION

Ten years after the commencement of the FOI Act, it is clear that FOI has enabled many people to access personal information about themselves held by public bodies - personal information to which they did not necessarily have a right of access previously. A large percentage of applications to public bodies each year (67% in 2007) relate solely to personal information. It is remarkable that, ten years on, there are still matters related to the FOI Act and its provisions regarding personal information which remain to be settled. In Chapter 4 of this Report,

which presents a sample of significant decisions issued by my Office during 2007, it is noteworthy that out of the eight cases highlighted, five are concerned with personal information of one type or another. Of the fifteen decisions published on my Office's website during 2007, eight related to personal information. In this section of this Chapter, I discuss the personal information of deceased people and the issue of access to employment references. Chapter 4, as well as presenting decisions on these subjects, includes a decision related to the personal information of an adopted person (Case Number 050305), and a case about the personal information of a child (Case Number 050222) in which a hospital refused to provide the child's parents with a copy of a video-taped interview with the child, even though the parents had been allowed to view the videotape.

RECORDS OF DECEASED PERSONS

The issue of access to the personal information of deceased persons, under the FOI Act, is particularly complex. The FOI Act generally protects personal information from release to third parties, but provides people with a right of access to personal information about themselves. In accordance with section 28 of the FOI Act, regulations were made for the granting of access to records where "the individual to whom the record relates is dead" - Statutory Instrument No. 47 of 1999 (the 1999 Regulations). In my 2005 Annual Report, I highlighted the difficulties inherent in the 1999 Regulations as drafted, and called on the Minister to revisit those regulations as a matter of real urgency. In March 2007, my Office published a commentary entitled "Suggested amendments to improve the operation of the Freedom of Information Acts 1997 and 2003" in which I highlighted areas of the legislation which, in my view, and based on the experience of my Office, were causing difficulties. I again drew attention to the problems with the 1999 Regulations and recommended that the Minister amend article 3(1)(b)(iii) of Statutory Instrument No. 47 of 1999. At the time of writing this Report there has been no change to the 1999 Regulations.

Article 3(1)(b)(iii) of the 1999 Regulations describes classes of persons to whom records of deceased persons may be granted, including medical records, as follows:

"the spouse or a next of kin of the individual or such other person or persons as the head considers appropriate having regard to all the circumstances and to any relevant guidelines drawn up and published by the Minister".

The 1999 Regulations define "spouse" as including:

"(a) a party to a marriage that has been dissolved, being a dissolution that is recognised as valid in the State, or

(b) a man or woman who was not married to but cohabited as husband or wife, as the case may be, with the deceased individual".

The 1999 Regulations appear to provide an unqualified right of access to the personal information of a deceased person to anyone who can establish that they are "a next of kin", as opposed to "the next of kin" of the deceased. This means that persons other than immediate next of kin have a right to the deceased person's records, regardless of the nature of the records or the circumstances of the case. Furthermore, given the broad definition of "spouse" in the 1999 Regulations, a former partner who was never married to the deceased would appear to have the same right of access as the deceased's widow or widower with whom the deceased had been living prior to death. Equally, an ex-husband or wife has a right of access to personal information about the deceased person from whom they had been legally divorced.

In my commentary mentioned above, I drew attention to the possibility of joint personal information about the deceased and third parties being released where the requester is not the person to whom the personal information relates. Such third party information would normally be protected by section 28(5B) which provides that joint personal information of the requester and a third party must be refused.

During 2007, I revised my approach to the interpretation of the 1999 Regulations. In earlier decisions dealing with access to the personal records of deceased persons, my Office had applied article 3(1)(b)(iii) of the 1999 Regulations in a somewhat restrictive manner and had regard to the particular circumstances of the case even where the requester was a spouse or a next of kin. In 2007, my decisions on access to the personal records of

deceased persons reflected the view that I have only very limited discretion to depart from what I understand to be the literal interpretation of the provision at article 3(1)(b)(iii) of the 1999 Regulations. I am satisfied that the proper literal and grammatical interpretation of that article is that the qualification or restriction ("having regard to all the circumstances and to any relevant guidelines drawn up and published by the Minister") does not apply to spouses or to "a next of kin".

I am aware of the considerable unease among FOI decision makers relating to the issue of access to the personal records of deceased persons. However, my conclusion is that when records relating to a deceased person are sought, section 28(6) must always be considered; and, if the criteria set out in the 1999 Regulations are met, the granting of the request is mandatory, subject only to there being some other statutory exemption which prohibits access. While I am satisfied that this new approach is the correct one in legal terms, I acknowledge that this approach creates absolute rights of access in scenarios that are complex in human terms. For instance, a requester who would appropriately be subject to the provisions of section 28(3) (which provides that a public body may refuse to grant a request in the case of medical, psychiatric or social work records where, in the opinion of the head of the public body, disclosure of the information "might be prejudicial to his or her physical or mental health, well-being or emotional condition") could, under the 1999 Regulations, be given access to the medical/psychiatric records of deceased relatives, even though these would otherwise be refused.

Case Number 040149, the decision on which issued in May 2007, was the first case in which a decision issued in line with the revised approach outlined above. That decision is summarised in Chapter 4 of this Report. Past decisions of my Office on this issue should be read, for precedent purposes, in the light of this revised approach.

I remain of the view, first expressed in my 2005 Annual Report, that there is an urgent need for legislative action in this area. I welcome the announcement made by the Department of Finance at a recent FOI Conference ("Freedom of Information: A 2008 Update", TCD, 8th March 2008) that the 1999 Regulations are under review and that new regulations will issue by the end of 2008. I look forward to reporting on developments in my 2008 Annual Report.

EMPLOYMENT REFERENCES

Since the commencement of the FOI Act in April 1998, candidates for positions at public bodies have received information about the recruitment processes in which they were involved. I think it is fair to say that the FOI Act was responsible for the streamlining of material related to recruitment processes and for an improvement in the quality of information recorded about candidates. The fact that interview notes are now routinely made available to candidates and that structured feedback is provided is, in my view, attributable to the cultural change facilitated by the FOI Act and to a number of early decisions of my Office on the subject.

Some areas remain contentious. During 2007, in a number of decisions involving access to references, where the requester was the subject of the reference, I drew attention to the fact that public bodies are governed by the requirements of fair procedure in such situations. I observed that fair procedure may well require that a candidate be made aware of the content of a reference considered by the public body as part of the selection process. Furthermore, the requirements of fair procedures would appear to be weightier in those situations in which the candidate would have been appointed to a post but for the taking into account of a negative reference.

In a case decided in 2006, which was summarised in my Annual Report for that year, I found that it was inherently unfair that a candidate who was placed on a panel for a position did not progress to employment based on a reference that remained secret. I decided that the public interest would be served by the granting of access to the reference, even in circumstances where the record might otherwise be considered exempt (as release might prejudice the effectiveness of the recruitment process: section 21(1)(a) of the FOI Act). In addition, in an earlier case, I decided that, in the context of a public body considering the termination of a person's employment, any reference-type material requested by the employer from other bodies could not, given the requirements of constitutional justice, be withheld from the person whose employment was in question.

Two decisions of interest, out of a number of decisions on this matter

which issued during 2007, are described in Chapter 4 (they are available on my Office's website at www.oic.gov.ie). Once again, negative references which resulted in candidates not being offered employment were at issue. In each case the reference was refused on the basis that a duty of confidence was owed to the referee, and, in each case, I found that the record did not qualify for exemption under section 26(1)(b) of the FOI Act.

In broad terms, I accept that, in contacts between public bodies and referees, there would be a general understanding of confidentiality; that is, there would be an understanding that the content of a reference would remain confidential *vis-à-vis* third parties. However, I do not accept that this general understanding of confidentiality means that the content of a reference would never be made available to the subject of the reference. As I stressed in Case Number 060030 (summarised in Chapter 4), in deciding on such cases, I am generally required to look behind the facts and circumstances relevant to the decision under review, and to test whether these facts and circumstances support the decision made by the public body.

I should point out that the cases highlighted in this Report related to FOI decision-making by the HSE which dated back to 2004 in one case, and 2005 in the other. While the HSE previously sought to rely on a system whereby references were sought in confidence, and on the understanding that they would not be disclosed to the subject of the reference, I understand that the HSE has changed its practice and now takes the view that all references are subject to the FOI Act and are likely to be releasable, under FOI, to the reference subject. Furthermore, I understand that potential referees are now advised by the HSE that they should assume that any reference provided will be released, if requested, to the subject. I welcome this open approach to the matter.

RECORDS MANAGEMENT

The problem of poor records management has been an issue commented on in each Annual Report since the establishment of my Office. Unfortunately, this year is no exception. While I must acknowledge that there have been considerable improvements, it is disappointing that, ten years after the commencement of the FOI Act, there are still serious shortcomings in the records management practices of some public bodies. This is particularly disappointing in the context of so many initiatives in public service reform over that time.

In a 2001 special investigation into the general practices and procedures adopted by public bodies for the purpose of compliance with the provisions of the FOI Act, my predecessor drew attention to the importance of good records management. It is clear that as the public service develops, and in the context of the decentralisation programme, the following factors have renewed significance for managers:

"Apart from meeting the requirements of the FOI Act, the maintenance of proper records is important so as to ensure that:

- *"corporate memory" is preserved thus ensuring informed decision making and continuity following staff transfers;*
- *information can be shared easily, thus enabling the business of the public body to be conducted efficiently;*
- *appropriate information is available to management;*
- *evidence of the public body's activities including transactions with clients is available; and*
- *legal requirements, including those of the National Archives Act, are met".*

The FOI Act provides (at section 15(5)) for the making of regulations, by the Minister for Finance, to provide for the management and maintenance of records held by public bodies. In my Annual Report for 2003, I restated my predecessor's concern that no such regulations had been published. The lack of regulations setting out clear requirements and guidelines for records management is contributing to problems and inconsistencies in this area. As stated above, good records management practice is essential for good and efficient administration. It is also essential for the effectiveness and efficiency of the FOI Act. It is my view that regulations in this area would support and facilitate best practice. However, I must stress that the absence of such regulations should not deter public bodies from developing policies in respect of their own organisations.

Investigation into Use of Search Exemption

In February 2007, I reported on an investigation carried out by my Office during 2006, under section 36 of the FOI Act, into the practices and procedures adopted by a sample of public bodies which relied on section 10(1)(a) of the Act to refuse access to records. Section 10(1)(a) provides that a public body may refuse to grant a request for access to records if the record concerned "does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken". My investigation focused solely on requests dealt with by the public bodies concerned which had not come to my Office on appeal, and which would not otherwise have been seen by my officials. Practices and procedures related to searches for records of former residents of industrial schools were excluded from the investigation as they had been examined by my Office previously. The decisions in question were made in 2005.

I 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" - available on my website at www.oic.gov.ie. Although I presented a summary of my main recommendations in my 2006 Annual Report, I think it is worth repeating them here.

- 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.

Contrasting Approaches to Records Management Practice

During 2007, my Office dealt with a number of cases which highlighted on-going problems in the area of records management. Poor records management practices within public bodies have an impact upon their searches for records; this in turn has a very real impact on the access rights of the requester(s) involved. I highlight two cases below which illustrate contrasting approaches both to records management, and to search cases.

Local Authorities

Three local authorities were included in my search exemption investigation mentioned above. At the time of the investigation, none of the three had comprehensive records management policies in place. One local authority had no records management policy, while two authorities referred to policies which related mainly to the retention of non-current records. All three authorities spoke to my officials about a national records management policy for local authorities which was being developed by the Local Government Management Services Board (LGMSB), and appeared to have decided to await that policy rather than develop a records management policy for their own authority.

I note from the 2006 Annual Report of the LGMSB that its Records/Files Management Working Group considered the matter of records management policies during 2006. It stated: *"The absence of such policies across the sector was identified as an urgent issue and a pilot study was proposed".*

I have recently been advised by the LGMSB that its National Records Retention Policy was produced by it in 2002, and that a working group is currently in place to develop that policy to incorporate a National Record Management Policy. Whereas the LGMSB has advised my Office that they anticipate that a draft policy will be prepared by the end of 2008, it is disappointing to note that, despite the identification of this matter as urgent during 2006, the policy will not be completed until 2009 at the earliest.

Fingal County Council - Case Number 060233

In Case Number 060233, I reviewed a decision taken by Fingal County Council (the Council) to refuse access to records on the replacement of Mountjoy Prison with a new prison on a green-field site at Thornton Hall in north County Dublin.

My review highlighted many shortcomings in the Council's processing of the FOI request, including failure to carry out adequate searches for records coming within the scope of the request, and failure to provide the requester

with a schedule of records, or any information about the number of records in the scope of the request. The Council's decision was that five records fell within the scope of the request, all of which were withheld. During my review, the Council decided to grant access to one record in full and to a small extract from a second record.

In circumstances where so few records were deemed by the Council to be relevant to the request, and in light of the fact that the prison project was such a substantial project within its area of responsibility, my Office wrote to the Council and requested evidence of the steps taken to locate relevant records. A copy of any relevant records management manuals or guidelines was also requested. In its subsequent submission, the Council stated that following a previous similar FOI request, the County Manager had decided that one official would deal with all matters concerning the proposed new prison and would act as a liaison officer for all related correspondence. When the FOI request was received, all available information was sought from the liaison officer and five records were subsequently provided to the decision maker. As regards records management, the Council's submission stated that it did not have any guidelines or manual setting out arrangements for record creation, retention or destruction. During the course of my review, it emerged that a far greater volume of records existed which were properly in the scope of the original request but which the Council had not considered relevant. The existence of these records was made known only following detailed questioning by my officials. I was advised of the existence of one set of records only at the very end of my review, despite having requested information on all relevant records at an early stage. It also emerged that a letter to the Council, relevant to the request, had been lost shortly after being recorded as having been received. Furthermore, files on the matter were not entered on a register of files and allocated file numbers, but instead were merely labelled "Thornton Hall". Even in such circumstances it is difficult to comprehend how initial searches for records relating to the site at Thornton Hall did not uncover files by that title.

The Council's handling of this case was most unsatisfactory - both from the point of view of the requester, and of my Office. I found it necessary to point out to the Council, following the conclusion of my review, that the requester's lawful right of access to information, as provided by the FOI Act, had not been treated in the proper manner. Indeed I stated that it almost seemed as if the Council simply chose not to carry out obvious routine checks in relation to the existence of relevant records before issuing decisions, in respect of which the requester had paid substantial fees, and before making declarations to my Office. I pointed to the urgent necessity for the development of a records management policy by the Council.

My decision in this case was to vary the Council's decision. I directed that nine of the records eventually identified as being within the scope of the request be released.

Records Management in Hospitals

In my role as Ombudsman I published, in March 2006, a special report entitled "Complaints Against the Public Health Service". One of the reasons for that report was to present, for the attention of the HSE, issues which had arisen at my Office in the course of examining complaints about the health service. At Chapter 4 of that report I focused on the importance of good record-keeping, in a hospital context, given the sensitivity of medical records, as well as their practical importance in terms of patient care. I emphasised that great care should be taken to ensure the safe holding and efficient management of such records. Equally, when it comes to the efficient processing of FOI requests, the same considerations apply, as is demonstrated by the following case.

Our Lady's Hospital for Sick Children - Case Number 050133

In Case Number 050133, a requester sought access to her medical records. The requester's medical condition was a relatively rare one and her medical file quite substantial because of the extent of her treatment by the Hospital which spanned almost twenty years. In the normal course, medical records were stored in the medical records library. However, the Hospital had a practice whereby older records were stored off-site by a records management company. Records relating to the request were removed to off-site storage in 2003, in accordance with the Hospital's record management policy. At the time of my review, the Hospital said that that its off-site storage company had searched for the records but that the records were not listed on

its database. It appeared as though the records had not been received by the company. Despite extensive searches at the Hospital, the records were not found. Having reviewed the steps taken by the Hospital to locate the records, I found that the Hospital's decision to refuse the request under section 10(1)(a) of the FOI Act was justified in the circumstances. My decision issued on 9th September 2005. However, the hospital agreed with my view that it was surprising and disturbing that medical records spanning such a lengthy period, and which had been in use at the Hospital until relatively recently, could not be found. The Hospital undertook to continue to search for the records.

The Hospital recently advised me that it had entered into consultations with its off-site storage company in order to improve the quality of service provided to the Hospital. A senior staff member with responsibility for medical records had engaged with the company to ascertain exactly how records were stored and retrieved. The Hospital met directly with the company on several occasions and outlined its concerns in relation to records which had not been located, in particular the medical records in the above case. As a result of this intervention, I have been advised that the systems in the off-site storage facility have been improved. Furthermore, the requester's medical records were located, in March 2007, by the company and forwarded directly by the Hospital to the requester.

The Hospital is to be commended for its perseverance and openness in this case. The case highlights the importance of public bodies satisfying themselves that systems of off-site storage operate to the highest standard of records management practice. These standards should be agreed between the company and the public body as an integral part of its overall records management policy, and, as in this case, kept under review.

COMMENTARY UNDER SECTION 39 OF THE FOI ACT: SECTION 29, PROCEDURE FOR CONSULTING THIRD PARTIES

Under section 39 of the FOI Act, I may prepare and publish commentaries on the practical application and operation of the FOI Act, including commentaries based on my experience, as Commissioner, of carrying out reviews. In May of 2007, I published a commentary on the operation of section 29 of the FOI Act. Section 29 of the FOI Act sets out procedures to be followed where a decision to release certain information in a record, in the public interest, could potentially affect the interests of third parties. It is a complex provision which can cause difficulties and confusion for public bodies, requesters, and third parties.

My commentary emphasises the point that section 29 applies only in exceptional cases where specific conditions are met and will have no application in the majority of cases involving third party information. It stresses that section 29 does not provide for a third party to have any kind of veto over the release of records, stating rather that section 29 is a notification requirement and not a mechanism through which consent to the release of records is sought. The commentary is available in the Publications area of my Office's website (www.oic.gov.ie), and will be of interest to FOI practitioners.

HIGH COURT JUDGMENTS

The National Maternity Hospital (Appellant) v The Information Commissioner (Respondent) and Parents for Justice (Notice Party) [2007] IEHC 113

In my Annual Reports for 2005 and 2006, I discussed the decision that gave rise to this appeal by the National Maternity Hospital. Parents for Justice sought records held by the Hospital relating to the Post Mortem Inquiry (known as the Dunne Inquiry) set up by the Minister for Health and Children to review post-mortem examination policy, practice, and procedure since 1970. Apart from a small number of records, I found that the records did not qualify for the exemptions claimed by the Hospital and should be released. The Hospital appealed this decision to the High Court.

In March 2007, the High Court upheld my decision. In his judgment, Mr Justice Quirke rejected arguments put forward by the Hospital that I had made mistakes of law in my interpretation of sections of the FOI Act including those relating to:

- the business or proceedings of a tribunal or inquiry (section 22(1A));
- legal professional privilege (section 22(1)(a));
- information given in confidence (section 26);

- the deliberative process (section 20);
- investigations and negotiations (section 21); and
- the fairness of civil proceedings in a court or other tribunal (section 23(1)(a)(iv)).

The Court found that I was entitled to consider all of the material before me on the date of my decision and to have regard to the circumstances which existed on that date. It held that there was sufficient material before me to enable me to reach the conclusions which I did. The Court said that it would not interfere with the exercise by me of the discretion conferred by the FOI Act provided this had been exercised lawfully.

The Court also rejected the contention that my Office had failed to accord the Hospital fair procedures. Mr Justice Quirke said that the procedures to be adopted in respect of reviews are entirely within my discretion, provided that they do not offend recognised principles of natural and constitutional justice. He said that he knew of no principle of natural or constitutional law which conferred upon parties who make submissions to a decision-making body, the right to respond to the submissions made by every other party who participates in the process. He found that the Hospital had been provided with extensive opportunities to be heard. Costs were awarded to my Office.

The text of the judgment is available on www.oic.gov.ie.

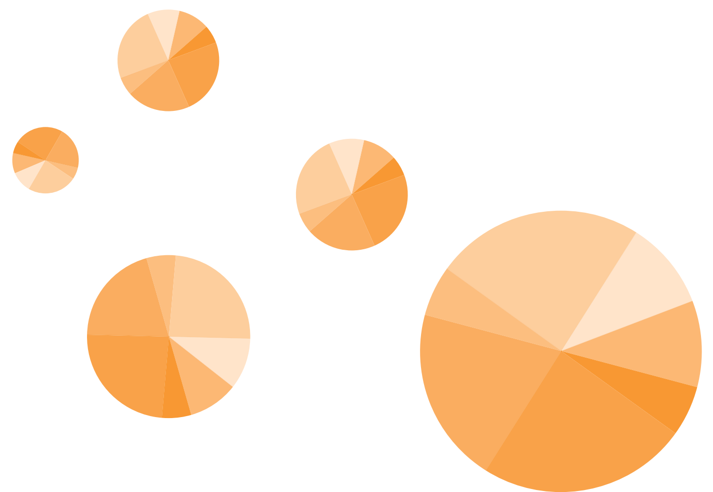
John O'Grady (Appellant) v The Information Commissioner (Respondent) and the Department of Education and Science (Notice Party) [2007] IEHC 152

In March 2007, the High Court delivered its judgment on this appeal which had been heard in 2003.

This appeal was brought by a former industrial school resident who sought records concerning himself and his late sister held by religious orders who had run industrial schools in which they had been detained. The appeal was against a decision of 9th January 2002 (Case Number 99036), in which my predecessor, Kevin Murphy, decided that the FOI Act did not entitle the applicant to have access to the records held by the religious orders who operated the industrial schools. He reached this conclusion on the basis that the religious orders did not have a contract for services with the Department of Education and Science. Section 6(9) of the FOI Act provides that a record in the possession of a person who was or is providing a service for a public body under a contract for services is deemed to be held by the public body. The applicant challenged the decision and asked the Court to find that the relationship between the Department and industrial schools was based on a contract for services so that the relevant records would be deemed to be held by the Department.

The High Court rejected the appeal and found that no error of law had been made. In his judgment, Mr Justice Barry White said that the previous Commissioner was entitled to interpret as he did the requirements for a "contract for services" in considering that elements such as an offer, unqualified acceptance, and an intention to create legal relations were not present in the relationship between the industrial schools and the Department. Mr Justice White took into account the statutory regulatory role of the Department in respect of the industrial schools which arose as a direct consequence of legislation providing for the committal of children to these schools. He also referred to the fact that the level of remuneration to the industrial schools was determined solely by the Department and that the school management had no rights of negotiation in relation to funding.

The text of the judgment is available on www.oic.gov.ie.



04

Decisions

I explained that I am generally required to look behind the facts and circumstances relevant to the FOI decision, and to test whether these facts and circumstances support the decision already made.

INDEX OF TOPICS COVERED

Personal Information of Deceased Persons
Case Number 040149

Employment References
Case Number 060030
Case Number 040152

Birth Records and Public Records
Case Number 050305

Personal Information of a Minor
Case Number 050222

Voluminous Request
Case Number 060260

FOI and Discovery in Legal Proceedings
Case Number 020179

This Chapter, drawing on material contained in a small number of significant decisions which issued during 2007, 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 identities of the parties removed where necessary, is available on my Office's website at www.oic.gov.ie.

PERSONAL INFORMATION OF DECEASED PERSONS

The issues arising in relation to access to records of deceased persons have been discussed in Chapter 3. The regulations made by the Minister for Finance under section 28(6) of the FOI Act, Statutory Instrument No. 47 of 1999 (the 1999 Regulations), provide for the grant of access to records of the deceased, including medical records, to certain specified classes of persons. During 2007, I revised my Office's approach to the interpretation of the 1999 Regulations and adopted an approach based on a literal interpretation. My decision in Case Number 040149, which issued in May 2007, was the first of several in which I applied my revised approach.

Mr X and the HSE - Case Number 040149

The requester sought access to the medical records of his late mother, who had been a patient in a hospital under the control of a Health Board (now the Health Service Executive (HSE)). He and his siblings were the deceased's next of kin. The records comprised medical and nursing notes including medication records and test results. They included some details of contacts the hospital had had with members of the requester's family, including himself. The HSE refused access to the records on the basis that the information in them was personal to the deceased and protected from release under section 28 of the FOI Act. In its submission to my Office, the HSE also implicitly raised a claim for exemption under section 26(1) of the FOI Act, which protects confidential information.

The HSE argued that patients expect and deserve confidentiality and privacy during their lives and that, following their death, it is incumbent on hospitals to maintain this privacy unless "clear and valid reasons exist" to release a deceased persons records. It argued that no such reasons existed in this case. The HSE did not consider the question of section 28(6)(b) of the FOI Act, and the 1999 Regulations, and how they might have applied in the case. Instead, while accepting that

the requester was "a next of kin" of the deceased, it suggested that any concerns he might have about his late mother's admission to hospital might be best resolved through discussion.

My review was concerned solely with the issue of whether the requester had a right of access, under the FOI Act, to his late mother's records. In deciding this issue, I adopted a new approach to the interpretation of article 3(1)(b)(iii) of the 1999 Regulations. Classes of persons to whom records of deceased persons can be given are set out in that article of the 1999 Regulations as follows:

"(iii) the spouse or a next of kin of the individual or such other person or persons as the head considers appropriate having regard to all the circumstances and to any relevant guidelines drawn up and published by the Minister".

As discussed in Chapter 3, I now take the view that, I have only very limited discretion to depart from the literal interpretation of the provision. I am satisfied that the proper literal and grammatical interpretation of article 3(1)(b)(iii) of the Regulations is that the qualification or restriction ("having regard to all the circumstances and to any relevant guidelines drawn up and published by the Minister") does not apply to spouses or to "a next of kin". A requester has a statutory right of access to records of deceased persons where it can be established that he or she belongs to one or other of the specified classes. If the criteria in the regulations are met, the granting of the request is mandatory, subject only to there being some other statutory exemption which prohibits release.

Accordingly, in this case, I found that as the requester was a next of kin of the deceased person concerned, he had a right of access to the records containing her personal information. I also found that as the FOI Act provides (at section 28(6)(b)) for a process under which the personal and confidential information of a deceased person will be released to certain specified classes of persons, the records in this case were not protected by section 26(1) of the FOI Act. It was not established that the release of the records in this case to a next of kin would constitute a breach of a duty of confidence.

I did accept that the requester did not have a right of access to parts of the records which contained the personal information of third parties (in this case, personal information of other family members), as they were exempt from release under section 28(1) of the FOI Act, and could be extracted from the other information.

An appeal to the High Court initiated by the HSE against my decision was withdrawn prior to hearing.

EMPLOYMENT REFERENCES

Two cases involving employment references, decided during 2007, are presented here. The general issue of employment references is discussed in Chapter 3. In the first case presented, Case Number 060030, I considered whether disclosure of the information concerned would constitute a breach of an equitable duty of confidence (section 26(1)(b)), and whether public interest considerations were relevant in deciding this. In making this determination, I considered the matter of constitutional justice in my assessment of public interest factors for and against the release of a reference. In Case Number 040152, I directed the release of a negative reference in circumstances where a person placed on a panel was not offered employment and where the company which provided the negative reference to the potential employer had provided the person involved with a positive reference when she left the company.

Ms Y and the HSE - Case Number 060030

The requester, Ms Y, was a former candidate for a position in the health service who had been notified in writing by the HSE that she had been placed second on a panel of eighteen. Ms Y had been found to be satisfactory from the medical point of view and she also had provided a satisfactory Garda clearance report. The HSE had sought personal references in respect of Ms Y from four previous employers; in the case of three of these (released on foot of her FOI request), the references were positive. The HSE relied on section 26(1)(b) of the FOI Act to withhold the reference material from the fourth employer (the Organisation).

The HSE and the Organisation both argued that to release the records at issue would constitute a breach of an equitable duty of confidence, owed by the HSE to the Organisation, and that the refusal of the records was justified by reference to section 26(1)(b) of the FOI Act. It was clear from the submissions of the Organisation that it envis-

aged reviews by my Office as being conducted within quite limited boundaries. The Organisation appeared to believe that, in conducting a review, my Office should take the situation at face value and not look behind events or circumstances.

In my decision, I accepted that in conducting a review I should not purport to make findings on matters which would properly be matters for the courts; neither should I purport to "make" new law as a court might do. However, I clarified that in conducting a review it is not sufficient that I accept facts and circumstances at face value. I explained that I am generally required to look behind the facts and circumstances relevant to the FOI decision, and to test whether these facts and circumstances support the decision already made. I stated that the extent to which this testing is necessary will vary from one case to another.

I observed, in accordance with the Supreme Court's judgment in the case of *McK v. the Information Commissioner,* [2006] 1 IRLM 504, that the FOI Act falls to be interpreted in accordance with the Constitution. I therefore considered that, in making my decisions, I am required to have regard to the parties' constitutional rights. Ms Y, in her submission to me, included a claim that her right to fair procedures was relevant in this case. In the Irish context, to invoke fair procedures is to invoke the principle of constitutional justice arising under Article 34 of the Constitution.

As I stated in my decision, my understanding of the law on confidentiality, as it currently stands in this jurisdiction, is that it is founded in a recognition of the public interest served by the preservation of confidences but that, in turn, it may be outweighed by some other countervailing public interest which favours disclosure. Accordingly, establishing whether disclosure would amount to a breach of an equitable duty of confidence involves some form of balancing between the public interest in preserving confidences and whatever countervailing public interests there may be.

As I was satisfied that public interest considerations could be taken into account in determining whether disclosure to the requester would constitute a breach of a duty of confidence, the next question to decide was whether the public interest considerations favouring disclosure to Ms Y were sufficiently strong to outweight the public interest in preserving confidences. I took the view, in the circumstances of this case, that the key test of whether disclosure would constitute a breach of an equitable duty of confidence was the test of whether such disclosure was unauthorised. I considered that there was an equitable obligation on the HSE to ensure its dealings with Ms Y complied with fair procedure. I took the view that the equitable duty of confidence in this instance could not be understood as requiring the HSE to adopt a position which was itself at odds with the requirements of equity. I noted that the purpose for which the HSE had acquired the information from the Organisation was to assist it in its employment selection process. In my view, a requirement of that process (at least once the panel had been established) was that there be fair procedure. In the circumstances of this case, this meant that Ms Y was entitled to be made aware of any negative or adverse comment regarding her. Therefore, I concluded that it would have been entirely legitimate for the HSE to divulge to Ms Y the substance of whatever comments were made about her by the Organisation.

On the basis of the very particular facts and circumstances attaching to this case, I found that the disclosure to Ms Y, by the HSE, of the substance of the information provided by the Organisation was not "unauthorised". Accordingly, I found that section 26(1)(b) of the FOI Act did not apply. I annulled the decision of the HSE and directed that the record in question be released, subject to certain deletions.

Ms X and the HSE - Case Number 040152

The requester in this case was placed on a panel for a position with a former Health Board (now the HSE). In response to an inquiry form sent by the Board to her former employer, a negative reference was provided. Following receipt of the reference the Board told Ms X that it was not proceeding with her job application. Persons placed lower on the panel were subsequently appointed. Ms X sought access to the reference, which the Board refused on the grounds that it contained information provided to it in confidence and that its release would result in a breach of a duty of confidence.

In my decision I found that the record did not qualify for exemption under section 26(1)(b) of the FOI Act. I did

not accept that the understanding of confidence in this case extended to an understanding that the content of the reference would never be made known to the requester. In coming to my decision I took account of the fact that, when the requester left the employment of the company involved, it had provided her with a positive reference which differed significantly from that given to the Board. I found that, in the circumstances, the job applicant had a right to, and legitimate expectation of, fair procedure on the part of the public body. Taking the view that any understanding of confidentiality between the Board and the former employer must be assumed to accord with the principles of constitutional justice, I directed that the reference be released.

BIRTH RECORDS AND PUBLIC RECORDS

During 2007, I made four formal decisions in a number of "origins" type cases which have come to my Office in recent years. These cases involved people who had themselves been adopted, or who were the children of an adopted person, and who were seeking the age of their mother, or grandmother, as it appeared in records held by the hospital at which the woman gave birth. The requester in each case was already in possession of a birth certificate of a child born to the woman which showed the name of the mother and, in some cases, an address or other information. All cases involved persons born prior to the enactment of the Adoption Act 1952. In each case the information related to requesters who already possessed information of the kind necessary to check records at the General Register Office (GRO), the central civil repository for records relating to births, deaths, and marriages in the Republic of Ireland. The case summarised below is Case Number 050305 which is published on my Office's website at www.oic.gov.ie.

Ms X and the Rotunda Hospital - Case Number 050305

The requester, Ms X, sought records held by the Rotunda Hospital (the Hospital) relating to her grandmother who gave birth to Ms X's father in 1907. Ms X's father died in 1990. Having satisfied myself that the information held by the Hospital related to Ms X's father and grandmother, my review was concerned solely with the question of whether the Hospital was justified in its decision to refuse access to two records which contained an entry for the age of the requester's grandmother (but not her date of birth) as recorded by the hospital in 1907. In its refusal of access, the Hospital argued that the information was personal information which had been given to it in confidence.

In my decision I commented on the fact that my Office had had to undertake a detailed and lengthy review, involving complex legal arguments, when it might have been expected that common sense would prevail and that the Hospital would have provided Ms X with the record, if necessary outside of the FOI Act, when she first made her request in 2005. When efforts by my Office to settle this case and other similar cases failed, I had no option but to issue a formal, binding decision.

In my decision on the case I found that, while the age of the person may constitute "personal information" within the meaning of the FOI Act, the exemption at section 28(1) does not apply where "information of the same kind as that contained in the record in respect of individuals generally, or a class of individuals that is, having regard to all the circumstances, of significant size, is available to the general public" (section 28(2)(c)).

From enquiries made by my Office to the GRO, I found that, once a researcher has a name, information on the age of any individual is available through the individual's birth certificate (as well as through any marriage or death certificate which may also be held at the GRO). Such information is held at the GRO as a public record which may be accessed by anyone. While recognising that the level of effort required to trace any individual's birth details will vary depending on the level of information in possession of the researcher, I stated that, in principle, it would be possible to trace an individual's date of birth through one or other of the GRO's registration certificates. I found that section 28(2)(c) operated to dis-apply section 28(1) in this case. Having so found, it was not necessary for me to address the public interest arguments put forward by the Hospital.

Although I did not consider it necessary to make a finding on the matter, I commented in my decision that it was likely that the records would have fallen to be released under section 28(6)(b) of the FOI Act as the requester was "a next of kin" of the deceased person (see Case Number 040149 above).
In relation to section 26 of the FOI Act, I concluded that, in the circumstanc-

es of this case, the information could not be treated as having the necessary quality of confidence. I found that neither section 26(1)(a) nor section 26(1)(b) applied. I commented that, if it had been necessary to make a finding in relation to the public interest, I would have found that, on balance, the public interest favoured disclosure of the information to the requester.

I annulled the decision of the Hospital and directed it to release the parts of the records at issue. I made similar decisions in the three further "origins" cases involving requests made to the same hospital.

At the time of writing this Report the Hospital had appealed my decisions in all four cases to the High Court and a date for hearing was awaited.

PERSONAL INFORMATION OF A MINOR - FORM OF ACCESS

Ms X and Mr Y and a Hospital - Case Number 050222

In this case the parents of a young child had requested copies of records about their child held by a hospital. The Hospital had released the relevant paper records. While it had offered access, by viewing, to a videotape of interviews with the child made following an allegation of abuse, the Hospital had refused to provide the parents with a copy of the videotape.

In refusing access to the videotape in the form sought, the Hospital had relied on sections 12(2)(b)(iii) and (iv) of the FOI Act. These provisions allow a decision maker to give access to a record in a form other than the form requested where he or she is satisfied that to give access in the form sought would conflict with a legal duty or obligation of a public body (section 12(2)(b)(iii)); or prejudice, impair, or damage interests protected by the exemption provisions of the Act, or interests protected by the exclusion of certain records from the Act (section 12(2)(b)(iv)). During the course of the review, efforts by my Office to effect a settlement between the requesters and the Hospital failed so that it became necessary for me to issue a formal, binding decision.

In my decision I found that the Hospital had already decided that the requesters had a right of access to the videotape. What was at issue was whether the provision of a copy of the videotape to the requesters would conflict with the Hospital's legal duties or obligations or prejudice, impair, or damage any interests protected by the FOI Act.

In *N.McK v the Information Commissioner* [2006] 1 IRLM 504, the Supreme Court found that parents have a fundamental (but rebuttable) presumption that their actions are in the best interests of their child. In coming to my decision in this case I took the view that this presumption does not depend on whether access to the record in the form sought is actually necessary to enable parents to act in the best interests of their child.

The Hospital argued for the application of section 12(2) of the FOI Act "in a reasonably flexible manner" stating that it had to protect to the greatest extent possible, the confidentiality of video interviews. Dealing with the perception that the content of a videotape is seen as being inherently more sensitive than that of a paper record, I commented that very sensitive personal information about children is regularly released by hospitals and others to parents - normally in paper form. Indeed, the requesters in this case had already had access to written reports and notes of interviews with their child.

Taking account of the McK case, where the High Court found that a complaint of abuse remained unsubstantiated and that the appellant came before the Court enjoying the presumption of innocence, I proceeded in this case on the basis that the alleged perpetrator of the abuse enjoyed a similar position. It appeared not to be in dispute that the allegations in this case were unsubstantiated. I did not accept that the Hospital was entitled to envisage a "worst case scenario" in all instances or to adopt a position whereby parents can never, under any circumstances, be given a copy of a videotape of interviews with their child. I acknowledged the concerns of the Hospital for its patients but considered that it was not justified, in its decision making, in taking as a starting point the fear that the content of the recording will inevitably, whether inadvertently or not, be put into circulation.

I accepted that there may be cases where evidence is produced that the release of records to parents or to a parent is contrary to the best interests of a minor. However, I found that the Hospital had failed to show how the giving of access in the form sought would, of itself, cause the prejudice feared. I stated that while I appreciated the importance of the Hospital

being able to give as much re-assurance as possible to children regarding future use of their taped interviews, I was not satisfied that the Hospital could ever give a categorical assurance to a child that his or her interview tape will never be released to another party, e.g. to legal advisers, parents, or guardians.

Having regard to the particular circumstances of the case, I found that the provisions of sections 12(2)(b)(iii) and (iv) did not apply. I directed that access to the record be given in the form requested by the parents, i.e. by giving them a copy of the videotape.

An appeal to the High Court initiated by the Hospital against my decision was withdrawn by the Hospital prior to hearing.

VOLUMINOUS REQUEST

Section 10(1)(c) of the FOI Act allows for the refusal of a request if granting the request would, by reason of the volume or nature of the information, require the retrieval and examination of records which would cause "a substantial and unreasonable interference with or disruption of work of the public body concerned". Whereas a request seeking access to a voluminous amount of records may be valid and must be processed in accordance with the requirements of the FOI Act, the processing of FOI requests is not intended to be unreasonably burdensome for public bodies. In the decision summarised below I found that the Health Insurance Authority was justified under section 10(1)(c) in refusing an excessively broad and voluminous request made by a law firm. I also found that the Authority had complied with the requirement at section 10(2) of the FOI Act to offer assistance to the requester.

Ms X and the Health Insurance Authority - Case Number 060260

Ms X was a solicitor in a law firm that was involved in litigation with the Health Insurance Authority (the Authority) over risk equalisation. Her request to the Authority was for access under FOI to all records relating to 16 categories of information involving the issue of risk equalisation in the health insurance market. The request included, among other categories of information, "all records relating to . . . the operation of the Health Insurance Acts 1994 - 2003", that is, the Acts under which the Authority was established and in which its functions are set out. The Authority took the view that granting the request would have required the retrieval and examination of such number of records as to cause a substantial and unreasonable interference with its work. While the Authority did not issue a formal decision, it was deemed, in accordance with section 41, to have refused the request.

In its submission, the Authority explained that it is a small statutory body with sanction for nine employees. The Authority also explained how the request as formulated effectively covered all of the records held by the Authority that had been created since 1st January 2004. Thus, according to the Authority, the contents of over 150 lever arch files would have had to have been examined individually in order to consider each of the items as requested. I considered that the request was of an excessively broad and voluminous nature. I accepted the Authority's contention that the processing of the request would have caused a substantial and unreasonable interference with or disruption of its other work. I also accepted that it would not be appropriate for the Authority to process the request at the expense of its statutory duties under the Health Insurance Acts. I noted that, while the FOI Act imposes statutory obligations on public bodies, compliance with these obligations is not intended to be unreasonably burdensome.

I rejected Ms X's argument that the Authority failed to provide assistance to her in amending the request. I noted that the Chief Executive of the Authority had written to Ms X, setting out in detail the difficulties presented by the broadly-worded nature of the request as originally formulated and asking her to be more specific. The Chief Executive had also raised the possibility of granting a revised request on a phased basis. In relation to Ms X's assertion that a "simple call" would have clarified matters, I noted that Ms X was a solicitor in a law firm that was involved in litigation with the Authority over risk equalisation. In these circumstances, and in light of the sheer length and breadth of the request, I did not consider it reasonable for Ms X to have expected the Authority to have sought clarification other than in writing.

FOI AND DISCOVERY IN LEGAL PROCEEDINGS

It has been established that there is no restriction on the use of the FOI Act as a means of obtaining documents held

by a public body which might otherwise be available through the process of discovery. Indeed, in his High Court judgment of 4th April 2001 in the case of *E.H. v. the Information Commissioner,* Mr Justice O'Neill commented that as people became aware of the opportunities for disclosure in the FOI Act, it would increasingly be used in place of the traditional method of discovery. In the decision summarised below which issued in 2007, I rejected a claim that, in advance of an order for discovery, a request for records under FOI could prejudice or impair the fairness of legal proceedings which had commenced.

Dublin International Sports Council and the Department of Arts, Sport and Tourism - Case Number 020179

In this case a request had been made to the Department of Arts, Sport and Tourism for records relating to the award of the tender for the construction and operation of the National Aquatic Centre at Abbotstown. The tender competition was run by Campus Stadium Ireland Development Ltd. (CSID - now the National Sports Campus Development Authority). The records requested consisted mainly of correspondence between the Department and CSID regarding the manner in which the tender process was carried out.

The Department had refused access to a number of the records under a number of exemptions in the FOI Act, including section 22(1)(a) which protects records which attract legal professional privilege. Following an examination of the records I found that some of them, which contained legal advice from the Office of the Attorney General or CSID's legal advisors, or which repeated or paraphrased legal advice received, attracted legal professional privilege and were exempt from release. With regard to the remainder, I found that sections 20(1) (deliberations of public bodies) and 21(1)(c) (disclose negotiating positions) did not apply. The Department had also claimed that the records were confidential and commercially sensitive. However, having regard to the fact that the records were by then over six years old, combined with the strong public interest in showing how two public bodies, the CSID and the Department, fulfilled their functions in relation to a tender process involving an exchequer investment of over €62m, I found that the public interest favoured release of the records.

At the time of the application to my Office, Dublin International Arena Ltd., on whose behalf the request had been made, had taken judicial review proceedings against the State, CSID, and the Minister for Arts, Sport and Tourism in relation to the award of the contract. The Department claimed that the records were exempt from disclosure as their release could, as provided for at section 23(1)(a)(iv), "reasonably be expected to (a) prejudice or impair ... (iv) the fairness of criminal proceedings in a court or of civil proceedings in a court or other tribunal". The Department argued that the records were relevant to the judicial review proceedings and that their release, in advance of an order for discovery, would prejudice the fairness of those proceedings. I did not accept that argument. In my decision I stated that I was aware of no restriction on the use of the FOI Act as a means of obtaining documents held by a public body which might otherwise be available through the process of discovery. On this point I noted that in his judgment of 4th April 2001 in the case of *E.H. v. the Information Commissioner,* Mr Justice O'Neill commented: *"I think it will undoubtedly be the case that as the public grow accustomed to the opportunities of disclosure contained in the Act, as time goes by and where litigation may be contemplated or indeed where it has even occurred they may opt to seek disclosure of documents via the Act rather than via the traditional method of discovery".*

I stated my view that the principal purpose of section 23(1)(a)(iv) is to prevent the disclosure of information which could result in unfairness in the conduct of particular court proceedings; for example, if the disclosure of information were to result in the manufacture or destruction of evidence, or interference with a potential witness. I found that section 23(1)(a)(iv) did not apply in this case.

Whereas this case was appealed to the High Court by CSID, the appeal was subsequently withdrawn and a settlement reached whereby the requester was granted access to the majority of the records in respect of which I had directed that access be given.

05

Statistics

The figures for 2007 indicate that the pattern of lower release rates for the Civil Service is continuing, but that the gap between it and other sectors has narrowed.

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

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STATISTICS 2007

SECTION I - PUBLIC BODIES

TABLE 1: OVERVIEW OF FOI REQUESTS DEALT WITH BY PUBLIC BODIES - 2007			
Requests on hand - 01/01/2007			**3,022***
Requests received in 2007			
	Personal	7,558	
	Non-personal	3,044	
	Mixed	102	
Total :			**10,704**
Total requests on hand during year			13,726
Requests dealt with			11,149
Requests on hand - 31/12/2007			**2,577**

* A small number of bodies adjusted their figures for live cases on hand at the end of 2006. In particular, the Department of Education and Science adjusted their figure for live cases downwards from 2,026 to 704 following a Departmental audit of FOI files.

TABLE 2: FOI REQUESTS DEALT WITH BY PUBLIC BODIES AND SUBSEQUENTLY APPEALED - 2007

	Number	Percentage
FOI requests dealt with by public bodies	11,149	100%
Internal reviews received by public bodies	592	5%
Applications accepted by the Commissioner	248	2%

TABLE 3: FOI REQUESTS RECEIVED - ANALYSED BY REQUESTER TYPE - 2007

Requester Type	Number	Percentage
Journalists	885	8%
Business	653	6%
Oireachtas Members	73	1%
Staff of Public Bodies	550	5%
Clients	6,446	60%
Others	2,097	20%
Total received - 2007	**10,704**	**100%**

TABLE 4: OVERVIEW OF REQUESTS DEALT WITH BY PUBLIC BODIES - 2007

	Number	Percentage
Requests granted	6,323	57%
Requests part-granted	2,211	20%
Requests refused	1,407	12%
Requests transferred to appropriate body	210	2%
Requests withdrawn or handled outside FOI	998	9%
Total dealt with - 2007	**11,149**	**100%**

TABLE 5: ANALYSIS OF REQUESTS DEALT WITH BY PUBLIC SERVICE SECTOR - 2007

	Percentage granted	Percentage part-granted	Percentage refused	Percentage transferred	Percentage withdrawn or handled outside of FOI	Total
Civil Service Departments	35	29	19	4	13	100
Local Authorities	55	23	18	0	4	100
HSE	67	17	10	2	4	100
Voluntary Hospitals, Mental Health Services and related agencies	67	7	7	1	18	100
Third Level Institutions	58	24	8	1	9	100
Other Bodies	48	28	14	0	10	100

TABLE 6: FOI REQUESTS RECEIVED BY CIVIL SERVICE DEPARTMENTS AND OFFICES - 2007

Civil Service Department/Office	Personal	Non-personal	Mixed	Total
Department of Education and Science	371	93	6	470
Department of Justice, Equality and Law Reform	331	111	3	445
Department of Social and Family Affairs	342	26	2	370
Defence Forces	196	10	0	206
Department of Health and Children	41	106	0	147
Department of Agriculture and Food to 20/10/07[1]	82	49	0	131
Office of the Revenue Commissioners	67	50	0	117
Department of the Environment, Heritage and Local Government	11	88	0	99
Department of Transport	5	86	0	91
Department of the Taoiseach	1	70	0	71
Department of Communications, Marine and Natural Resources to 20/10/07[1]	4	63	0	67
Department of Finance	8	56	0	64
Department of Enterprise, Trade and Employment	11	46	0	57
Department of Foreign Affairs	11	31	1	43
Public Appointments Service	25	10	7	42
Department of Arts, Sport and Tourism	0	38	0	38
Office of the Information Commissioner	17	15	3	35
Department of Defence	9	19	0	28
Department of Community, Rural and Gaeltacht Affairs	1	25	1	27
Office of Public Works	1	22	3	26
Department of Agriculture, Fisheries and Food from 20/10/07[1]	15	10	0	25
Office of the Director of Public Prosecutions	14	2	0	16
Office of the Houses of the Oireachtas	1	11	0	12
Central Statistics Office	7	0	0	7
Ordnance Survey Ireland	1	2	0	3
Valuation Office	0	2	0	2
Office of the Ombudsman	2	0	0	2
Office of the Appeals Commissioner for the Tax Acts	0	2	0	2
Office of the Comptroller and Auditor General	0	1	0	1
Office of the Attorney General	1	0	0	1
Department of Communications, Energy and Natural Resources from 20/10/07[1]	0	0	0	0
Office of the Director of Corporate Enforcement	0	0	0	0
Office of the Registrar of Friendly Societies	0	0	0	0
Office of the Chief State Solicitor	0	0	0	0
National Consumer Agency	0	0	0	0
Total Received - 2007	**1,575**	**1,044**	**26**	**2,645**

[1] With effect from 20 October 2007, certain fisheries and marine functions were reallocated among a number of government departments. Where this occurred, separate figures are shown for those departments, reflecting requests received up to 20/10/07 and requests received since 20/10/07.

TABLE 7: FOI REQUESTS RECEIVED BY LOCAL AUTHORITIES* - 2007

Local Authority	Personal	Non-personal	Mixed	Total
Cork County Council	10	121	0	131
Dublin City Council	46	74	0	120
Galway County Council	5	67	0	72
Fingal County Council	18	51	0	69
Dún Laoghaire-Rathdown County Council	21	48	0	69
Kerry County Council	12	35	18	65
Mayo County Council	9	45	0	54
Galway City Council	15	37	0	52
Cork City Council	14	37	0	51
Donegal County Council	2	39	0	41
Clare County Council	4	36	0	40
South Dublin County Council	13	26	0	39
South Tipperary County Council	6	30	0	36
Meath County Council	9	25	0	34
Kildare County Council	7	27	0	34
Wexford County Council	9	20	2	31
North Tipperary County Council	3	26	0	29
Wicklow County Council	6	21	1	28
Limerick County Council	2	25	0	27
Waterford City Council	15	12	0	27
Kilkenny County Council	7	19	0	26
Roscommon County Council	8	17	0	25
Cavan County Council	1	24	0	25
Louth County Council	7	17	0	24
Limerick City Council	10	12	0	22
Sligo County Council	6	16	0	22
Monaghan County Council	3	17	0	20
Laois County Council	5	12	0	17
Offaly County Council	5	12	0	17
Longford County Council	5	10	0	15
Waterford County Council	4	10	1	15
Westmeath County Council	4	9	0	13
Carlow County Council	1	5	0	6
Leitrim County Council	0	4	0	4
Total	**292**	**986**	**22**	**1,300**
Regional Authorities	0	0	0	0
Regional Assemblies	0	0	0	0

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

TABLE 8: FOI REQUESTS RECEIVED BY THE HSE - 2007

Health Service Executive Area*	Personal	Non-personal	Mixed	Total
HSE South	1,303	71	4	1,378
HSE West	1,194	63	0	1,257
HSE Dublin North East	550	73	4	627
HSE Dublin Mid-Leinster	545	43	2	590
HSE National Requests - Corporate	0	77	0	77
HSE National Requests (to Areas)	0	24	0	24
ERHA & EHSS	1	1	0	2
Total Received - 2007	**3,593**	**352**	**10**	**3,955**

*Figures in this table are presented to reflect the regional structure of the HSE, as opposed to the old Health Board structure used in previous reports.

TABLE 9: FOI REQUESTS RECEIVED BY VOLUNTARY HOSPITALS, MENTAL HEALTH SERVICES AND OTHER RELATED AGENCIES - 2007

Hospital/Service/Agency	Personal	Non-personal	Mixed	Total
Mercy University Hospital, Cork	184	7	0	191
St James's Hospital	164	19	1	184
Mater Misericordiae Hospital	167	14	0	181
Beaumont Hospital	128	23	1	152
St Vincent's University Hospital	112	13	0	125
South Infirmary - Victoria Hospital, Cork	107	6	0	113
Tallaght Hospital (Adelaide and Meath Hospital, Incorporating the National Children's Hospital)	99	8	0	107
Rotunda Hospital	101	3	0	104
Our Lady's Hospital for Sick Children, Crumlin	67	6	0	73
National Maternity Hospital, Holles Street	64	4	0	68
Coombe Women's Hospital	60	4	0	64
The Children's Hospital, Temple Street	57	2	0	59
St John's Hospital, Limerick	45	2	0	47
Cappagh National Orthopaedic Hospital, Dublin	41	1	0	42
Hospitaller Order of St John of God	32	0	0	32
Royal Victoria Eye and Ear Hospital	30	1	0	31
St Michael's Hospital, Dún Laoghaire	15	0	1	16
Daughters of Charity Services	15	0	0	15
Brothers of Charity, Cork	14	0	0	14
Brothers of Charity, Waterford	13	0	0	13
St Luke's Hospital, Rathgar	11	1	0	12
St Mary's Hospital, Baldoyle	11	0	0	11

TABLE 9: Contd.

Hospital/Service/Agency	Personal	Non-personal	Mixed	Total
Sunbeam House Services	11	0	0	11
Brothers of Charity, Galway	10	0	0	10
National Rehabilitation Hospital, Dún Laoghaire	4	3	2	9
Mental Health Commission	7	2	0	9
COPE Foundation	7	0	0	7
Medical Council	0	6	0	6
Central Remedial Clinic	5	1	0	6
Our Lady's Hospice, Harold's Cross	3	3	0	6
St Vincent's Hospital, Fairview	5	0	0	5
Cheeverstown House	5	0	0	5
St Michael's House	4	0	0	4
Western Care	4	0	0	4
Dublin Dental School and Hospital	2	1	0	3
St Patrick's Hospital, Cork	3	0	0	3
Irish Wheelchair Association	1	1	1	3
National Cancer Registry	1	2	0	3
Crisis Pregnancy Agency	0	3	0	3
National Breast Screening Board	0	3	0	3
Brothers of Charity, Limerick	3	0	0	3
Sisters of Charity of Jesus and Mary	3	0	0	3
St John of God Hospitaller Services	3	0	0	3
Others (38 bodies with less than 3 requests each)	8	9	0	17
Total Received - 2007	**1,626**	**148**	**6**	**1,780**

TABLE 10: FOI REQUESTS RECEIVED BY THIRD LEVEL EDUCATION BODIES - 2007

Third Level Education Body	Personal	Non-personal	Mixed	Total
Waterford Institute of Technology	11	56	2	69
University College Dublin	43	22	0	65
Sligo Institute of Technology	38	5	0	43
University College Cork	32	9	2	43
Dublin Institute of Technology	30	2	0	32
The University of Dublin (Trinity College)	15	6	2	23
National University of Ireland Galway	13	6	0	19
University of Limerick	13	3	0	16
Dublin City University	4	9	0	13
St Patrick's College, Drumcondra	2	7	4	13
National University of Ireland, Maynooth	9	2	0	11
Athlone Institute of Technology	3	6	1	10
Limerick Institute of Technology	6	3	0	9
Institute of Technology, Tallaght	3	4	0	7
Royal College of Surgeons in Ireland	3	4	0	7
Dún Laoghaire Institute of Art, Design and Technology	2	4	0	6
Mary Immaculate College, Limerick	1	4	0	5
Institute of Technology, Blanchardstown	3	2	0	5
Galway-Mayo Institute of Technology	3	2	0	5
Institute of Technology, Tralee	2	3	0	5
Letterkenny Institute of Technology	0	4	0	4
Dundalk Institute of Technology	0	4	0	4
Institute of Technology, Carlow	1	3	0	4
Higher Education Authority	1	2	0	3
Mater Dei Institute of Education	0	3	0	3
National College of Art and Design (NCAD)	1	2	0	3
Others (7 bodies with less than 3 requests each)	3	9	0	12
Total	**242**	**186**	**11**	**439**

TABLE 11: FOI REQUESTS RECEIVED BY OTHER BODIES - ANALYSED BY PUBLIC BODY - 2007

Public Body	Personal	Non-personal	Mixed	Total
Chief Medical Officer for the Civil Service	65	0	0	65
Social Welfare Appeals Office	50	1	0	51
Health and Safety Authority	1	14	20	35
RTÉ	5	27	1	33
National Roads Authority	0	26	0	26
Broadcasting Commission of Ireland	0	24	0	24
FÁS	12	9	2	23

TABLE 11: Contd.

Public Body	Personal	Non-personal	Mixed	Total
Irish Medicines Board	4	15	0	19
The Courts Service	0	19	0	19
Railway Procurement Agency	0	15	0	15
Environmental Protection Agency	1	13	0	14
The Arts Council	4	9	0	13
Teagasc	11	2	0	13
Probation and Welfare Service	12	1	0	13
Údarás na Gaeltachta	0	12	0	12
Irish Blood Transfusion Service	10	2	0	12
An Bord Pleanála	1	10	0	11
IDA Ireland	0	11	0	11
Fáilte Ireland	1	9	0	10
Commission for Communications Regulation	5	4	0	9
Legal Aid Board	8	1	0	9
Pobal	0	8	0	8
Dublin Docklands Development Authority	0	8	0	8
The National Library of Ireland	0	7	0	7
Education Support Centres	5	2	0	7
National Educational Welfare Board	6	1	0	7
National Museum of Ireland	1	5	0	6
Eastern Regional Fisheries Board	5	1	0	6
Central Fisheries Board	0	4	1	5
Shannon Regional Fisheries Board	0	5	0	5
Competition Authority	5	0	0	5
Bord na gCon	1	3	0	4
National Council for Special Education	4	0	0	4
Commission for Taxi Regulation	2	2	0	4
Irish Sports Council	0	3	0	3
The Marine Institute	0	3	0	3
North Western Regional Fisheries Board	0	3	0	3
Western Regional Fisheries Board	0	3	0	3
Companies Registration Office	0	3	0	3
Food Safety Authority of Ireland	0	2	1	3
Shannon Development	0	3	0	3
Local Government Computer Services Board	0	3	0	3
Others (145 bodies with less than 3 requests each)	11	35	2	48
Total	**230**	**328**	**27**	**585**

TABLE 12: FEES CHARGED BY PUBLIC BODIES - 2007

	Original Request €	Internal Review €	Search & Retrieval €	Refunds €	Net Fees €
Civil Service Departments	13,905	5,450	6,988.89	738.43	25,605.46
Local Authorities	14,945	4,525	3,900	735	22,635.00
HSE	3,755	825	4,518	30	9,068.00
Voluntary Hospitals, Mental Health Services and related agencies	1,375	0	2,645.97	15	4,005.97
Third Level Institutions	2,600	300	592.16	210	3,282.16
Other Bodies	5,160	1,525	2,962.72	725	8,922.72
Total	**41,740**	**12,625**	**21,607.74**	**2,453.43**	**73,519.31**

STATISTICS 2007

SECTION II - OFFICE OF THE INFORMATION COMMISSIONER

TABLE 13: ANALYSIS OF REVIEW APPLICATIONS RECEIVED - 2007		
Applications for Review on hand - 1/1/2007	42	
Applications for Review received in 2007	353	
Total applications for review on hands in 2007		**395**
Discontinued	2	
Invalid applications	88	
Applications withdrawn	14	
Applications rejected	9	
Applications accepted for review in 2007	248	
Total applications for review considered in 2007		**361**
Applications for Review on hand - 31/12/2007		34

TABLE 14: ANALYSIS OF REVIEW CASES - 2007	
Reviews on hand 1/1/2007	301
Reviews accepted in 2007	248
Total reviews on hand in 2007	**549**
Reviews completed	325
Reviews carried forward to 2008	224

TABLE 15: APPLICATIONS FOR REVIEW ACCEPTED BY THE INFORMATION COMMISSIONER - ANALYSED BY PUBLIC BODY - 2007			
Health Service Executive*			75
	HSE South	23	
	HSE West	17	
	HSE Dublin North East	19	
	HSE Dublin Mid-Leinster	15	
	HSE National Requests - Corporate	1	
	HSE National Requests (to Areas)	0	
	ERHA & EHSS	0	
Department of Justice, Equality and Law Reform			22
Department of Education and Science			10
Department of Transport			10
Department of Communications, Marine and Natural Resources up to 20/10/07[(1)]			8
Department of Agriculture and Food up to 20/10/07[(1)]			7
The University of Dublin (Trinity College)			6
Department of Social and Family Affairs			6
Dublin City Council			5
Cork County Council			4
Defence Forces			4
Department of Agriculture, Fisheries and Food from 20/10/07[(1)]			4
Irish Medicines Board			4
Department of Enterprise, Trade and Employment			3
Department of Health and Children			3
Department of the Taoiseach			3
Mercy University Hospital, Cork			3
Office of Public Works			3
South Tipperary County Council			3
University College Dublin			3
Others (50 bodies with less than 3 applications each)			62
Total			**248**

[(1)] With effect from 20 October 2007, certain fisheries and marine functions were reallocated among a number of government departments. Where this occurred, separate figures have been given for those departments to show requests received up to 20/10/07 and requests received since 20/10/07.

*Figures in this table are presented to reflect the regional structure of the HSE, as opposed to the old Health Board structure used in previous reports.

TABLE 16: OUTCOME OF COMPLETED REVIEWS - THREE YEAR COMPARISON						
	2007	%	2006	%	2005	%
Decision Affirmed	98	30.15%	146	50.00%	204	45.64%
Decision Annulled	21	6.46%	13	4.45%	18	4.03%
Decision Varied	30	9.23%	32	10.96%	50	11.19%
Discontinued	7	2.15%	8	2.74%	6	1.34%
Settlement Reached	55	16.92%	26	8.90%	44	9.84%
Withdrawn	114	35.08%	67	22.95%	125	27.96%
Reviews completed	**325**	**100%**	**292**	**100%**	**447**	**100%**

TABLE 17: SUBJECT MATTER OF REVIEW APPLICATIONS ACCEPTED - THREE YEAR COMPARISON						
	2007	%	2006	%	2005	%
Refusal of access	201	81.05%	200	78.74%	211	74.04%
Objections by third parties to release of information about them or supplied by them	20	8.06%	7	2.76%	39	13.68%
Amendment of records under section 17	5	2.02%	16	6.30%	13	4.56%
Statement of reasons under section 18	14	5.65%	25	9.84%	17	5.96%
Decision to charge a fee	8	3.23%	6	2.36%	5	1.75%
Applications Accepted	**248**	**100%**	**254**	**100%**	**285**	**100%**

TABLE 18: APPLICATIONS ACCEPTED BY TYPE - THREE YEAR COMPARISON						
	2007	%	2006	%	2005	%
Personal	61	24.60%	133	52.36%	118	41.40%
Non Personal	149	60.08%	96	37.80%	124	43.51%
Mixed	38	15.32%	25	9.84%	43	15.09%
Total	**248**	**100%**	**254**	**100%**	**285**	**100%**

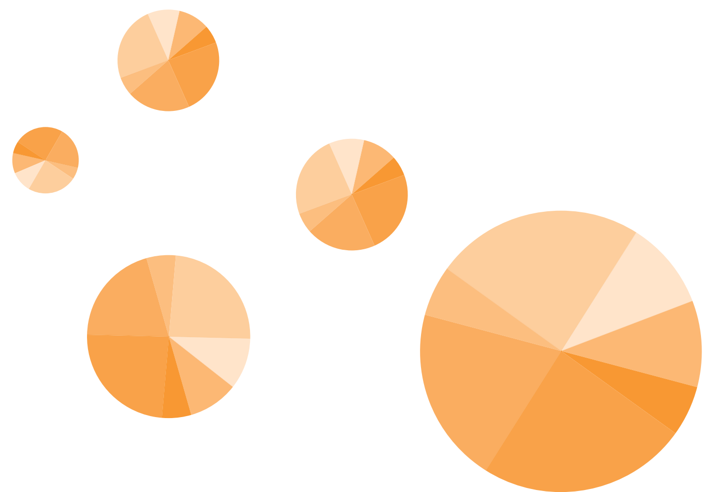
TABLE 19: PHONE/GENERAL ENQUIRIES

Year	Number
1999	130
2000	799
2001	1,136
2002	1,047
2003	1,090
2004	1,306
2005	1,396
2006	1,551
2007	1,315
Total	**9,770**

TABLE 20: DEEMED REFUSALS DUE TO NON-REPLY BY PUBLIC BODIES - 2007

Public Body	No Original or Internal Review Decision
Department of Transport	4
Department of Agriculture and Food up to 20/10/07[(1)]	2
Department of Education and Science	2
Mercy University Hospital, Cork	2
Department of Communications, Marine and Natural Resources up to 20/10/07[(1)]	1
Department of Health and Children	1
Department of Justice, Equality and Law Reform	1
Department of Social and Family Affairs	1
Dublin City Council	1
Health Service Executive Mid-Leinster	1
Health Service Executive North East	1
Health Service Executive West	1
Mater Misericordiae Hospital	1
Total	**19**

[(1)] With effect from 20 October 2007, certain fisheries and marine functions were reallocated among a number of government departments. Where this occurred, separate figures have been given for those departments to show requests received up to 20/10/07 and requests received since 20/10/07.



Commissioner for Environmental Information 06

Access to Information on the Environment

My role is to decide on appeals taken by members of the public who are not satisfied with the outcome of their requests to public authorities for environmental information.

Access to Information on the Environment Regulations 2007

Under the Access to Information on the Environment Regulations (S.I. No. 133 of 2007) (the Regulations), I, as holder of the Office of Information Commissioner, was assigned the legally separate role of Commissioner for Environmental Information. My role is to decide on appeals taken by members of the public who are not satisfied with the outcome of their requests to public authorities for environmental information.

The Directive and the Regulations

The regime of access to environmental information is based on Directive 2003/4/EC (the Directive) which was intended to be implemented in EU Member States by 14th February 2005. The Directive has, as its key provision, the establishment of a right of access to environmental information held by public authorities. In fact, implementation in Ireland of the Directive did not happen until 1st May 2007 when the Regulations, made by the Minister for the Environment, Heritage and Local Government, came into effect.

What is Environmental Information?

The definition of "environmental information" in the Directive and in the Regulations is broad and wide ranging. The definition covers information "in written, visual, aural, electronic or any other material form". It identifies six separate categories of information dealing with:

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

Promoting Access to Information

There are some exceptions to the right of access but the Directive makes clear that these exceptions are to be interpreted in a restrictive way and are subject to a public interest test. Interestingly, there is also a requirement that public authorities should organise information on the environment which they hold "with a view to its active and systematic dissemination to the public". Clearly, this reflects a strong view that public authorities should actively seek to create public interest in, and knowledge of, environmental matters. It sets the tone for the approach public authorities should take when members of the public, or corporate bodies, make specific access requests. The expectation, very clearly, is that access requests will be granted.

As regards a remedy where information is not made available, the Directive requires Member States to put in place both internal and external review or appeal mechanisms. The outcome of the independent, external review - which under the 2007 Regulations will be carried out by my Office - is binding on the public authority.

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

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

It is worth mentioning that some commercial state bodies not already subject to either the FOI Act or to the Ombudsman Act are covered by these Regulations. Where there is a dispute as to whether a body is a public authority, within the meaning of the Regulations, the person seeking the information has a right of appeal to my Office.

Charges
Unlike access under the FOI Act, there is no upfront fee when making a request. Neither is there any charge for the making of an internal review application. However, there is an upfront fee for appeal to my Office which is set at €150 with a reduced fee of €50 for medical card holders and their dependants.

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

Refusal Grounds
The Regulations provide various grounds on which a request may be refused. These grounds include the protection of:

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

While some of these grounds are described as "mandatory", this is misleading in that all of the exemption grounds are subject to certain restrictions, as set out in article 10 of the Regulations. For instance, requests for environmental information relating to emissions into the environment cannot, in general, be refused. In all cases, a potential exemption must be subjected to a public interest test.

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

Guidance
The Department of the Environment, Heritage and Local Government has published a set of Guidance Notes, which includes the text of the Regulations. The Guidance Notes are available on the Department's website at www.environ.ie. While these provide useful detail to which public authorities are obliged to have regard, they do not purport to be a legal interpretation of the Regulations.

Appeals Received
As regards appeals made to my Office under the new regime, I received six cases in the period from 1st May 2007 to the end of the year. Of these, two were invalid, and in two cases, the

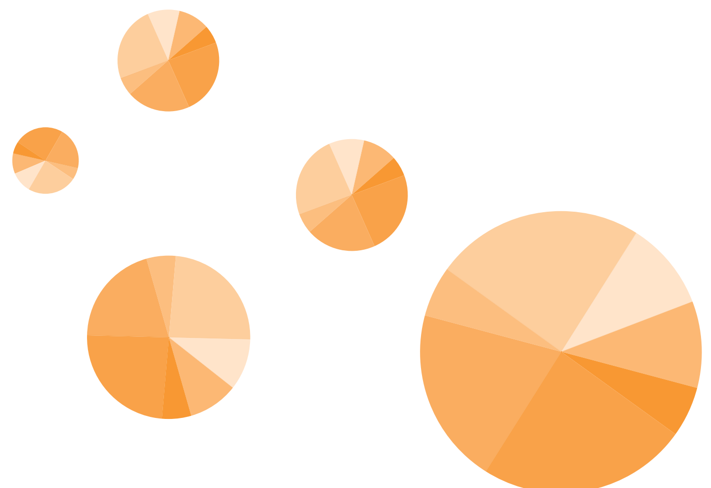
records were released as a result of the involvement of my Office and it was not necessary to proceed to a formal decision. The remaining two cases are being dealt with at the time of writing and I expect that I will give formal decisions on them.

Comment

As of now, I think it is fair to say that public awareness in Ireland of the AIE regime is very low. I believe that there is a particular importance in ensuring that public authorities take on the proactive role, as envisaged in the Directive, of making environmental information available as a matter of course and of encouraging the public to take an interest in environmental matters. For this to happen, it is essential that there be some external body which actually promotes this activity within public authorities and which can report on how well or badly this function is being fulfilled.

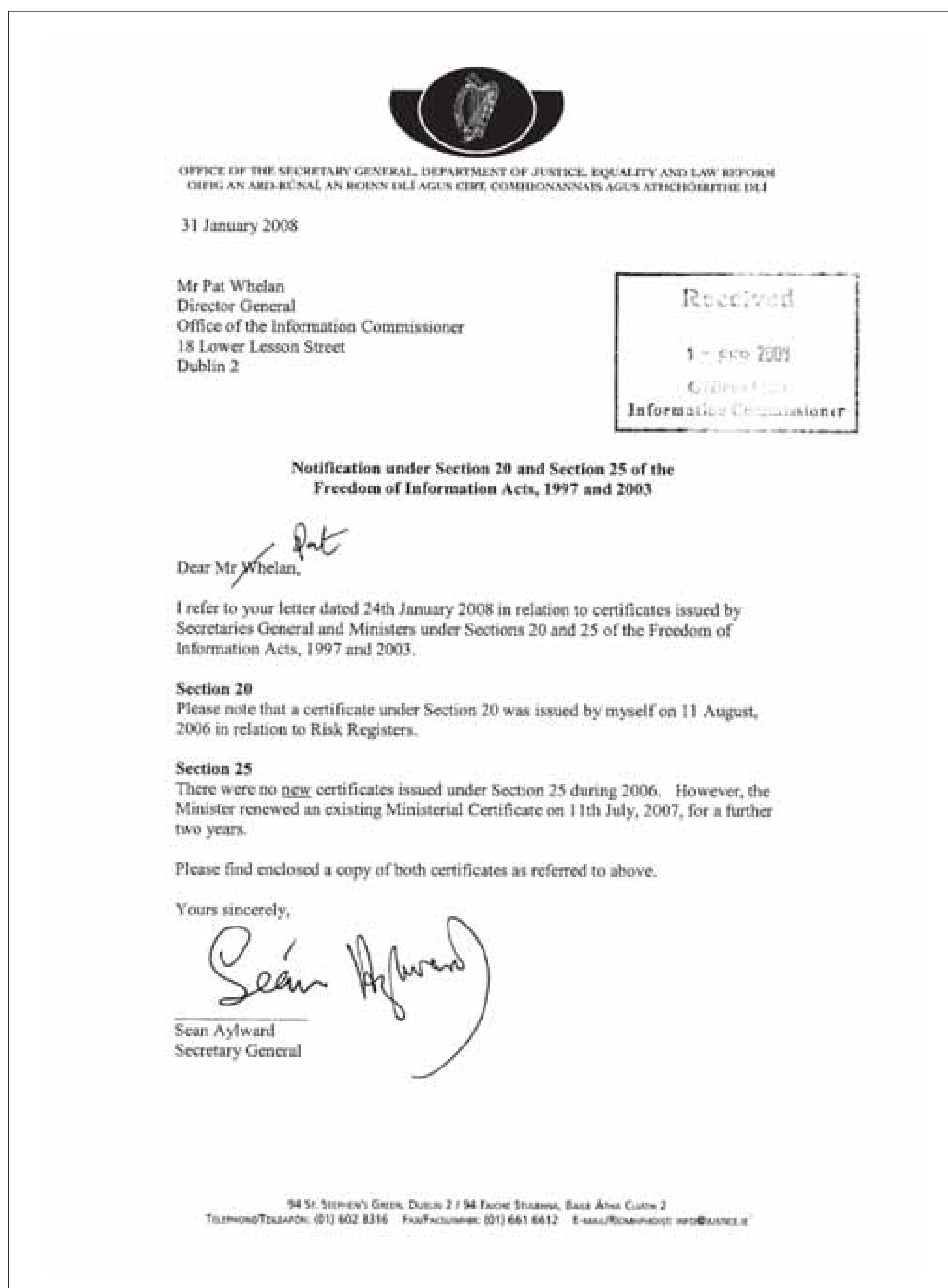
On the question of good AIE practice, good decision making, and public authorities' own efforts to make environmental information available as a matter of course; as matters stand there is no mechanism available for investigating what is actually happening. One key concern would be whether all public authorities, where a request is refused, actually inform the requester of the grounds for the refusal. Another, and perhaps deeper concern, is whether all public authorities, where a request is refused, inform the requester of his or her rights of appeal, both internally and externally. Both of these are required practices under the Regulations. As regards the level of usage of AIE, it remains to be seen whether reliable data on AIE usage and outcomes will become available.

A dedicated website for the Office of the Commissioner for Environmental Information will be launched shortly, and I will publish any of my decisions that have precedent value on that site. To the extent that it is possible, I hope to undertake some promotion of the AIE regime with a view to raising its profile.



Appendix I

Certificates Issued under Section 20 and Section 25



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

31 January 2008

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

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

Dear Mr Whelan, Pat

I refer to your letter dated 24th January 2008 in relation to certificates issued by Secretaries General and Ministers under Sections 20 and 25 of the Freedom of Information Acts, 1997 and 2003.

Section 20
Please note that a certificate under Section 20 was issued by myself on 11 August, 2006 in relation to Risk Registers.

Section 25
There were no new certificates issued under Section 25 during 2006. However, the Minister renewed an existing Ministerial Certificate on 11th July, 2007, for a further two years.

Please find enclosed a copy of both certificates as referred to above.

Yours sincerely,

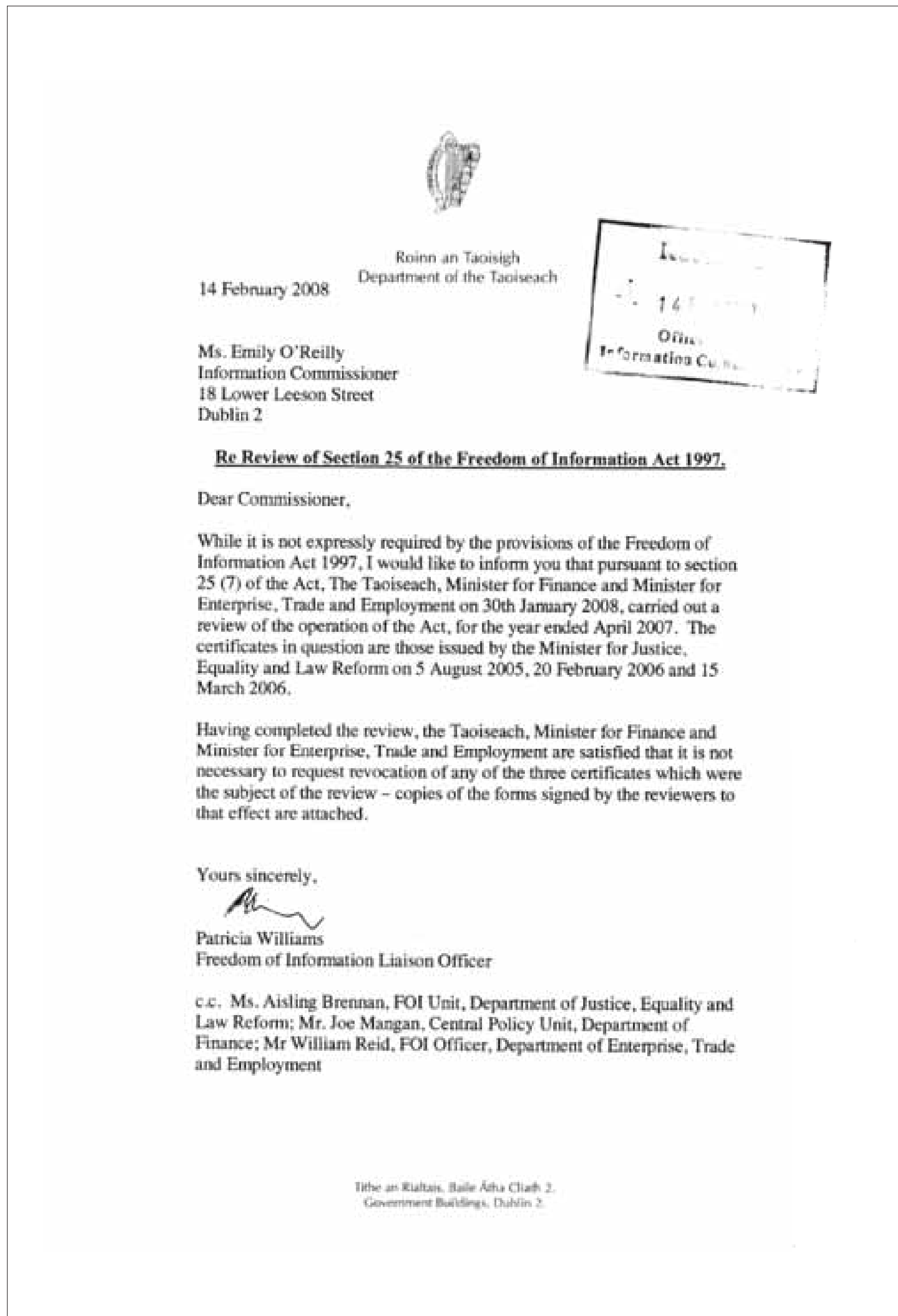
Seán Aylward

Sean Aylward
Secretary General

94 St. Stephen's Green, Dublin 2 / 94 Faiche Stiabhna, Baile Átha Cliath 2
Telephone/Teileafón: (01) 602 8316 Fax/Facsuimhir: (01) 661 6612 E-mail/Ríomhphost: info@justice.ie

Appendix II

Review under Section 25(7) of Ministerial Certificates Issued



Roinn an Taoisigh
Department of the Taoiseach

14 February 2008

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 30th January 2008, carried out a review of the operation of the Act, for the year ended April 2007. 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. Aisling Brennan, FOI Unit, Department of Justice, Equality and Law Reform; Mr. Joe Mangan, Central Policy Unit, Department of Finance; Mr William Reid, FOI Officer, Department of Enterprise, Trade and Employment

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

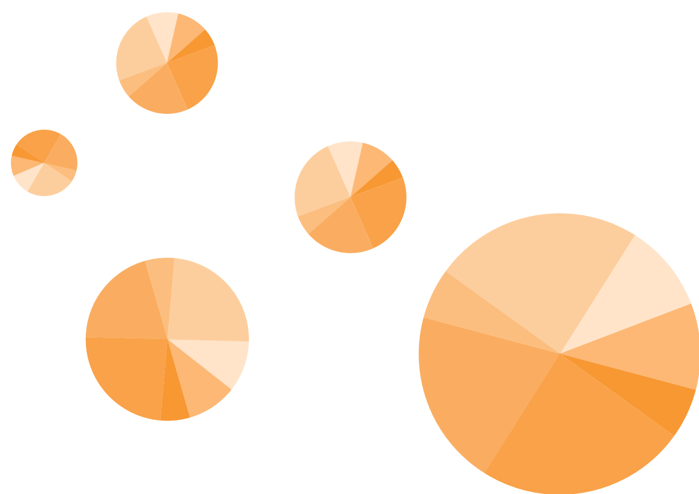
Staff List

DIRECTOR GENERAL
Pat Whelan

SENIOR INVESTIGATORS
Fintan Butler
Seán Garvey

INVESTIGATORS
Ciara Burns
Melanie Campbell
Liz Dolan
Cathal Duffy
Alison McCulloch
Anne Moran
David Nutley (to 31/10/07)
Marie O'Brien
Ciarán O'Donohoe (from 30/10/07)
Des O'Neill
Colin Stokes

SUPPORT UNIT
Roseanne Brown
Phyllis Flynn
Frank Forde
Liz Martin
Catherine Rousset (from 20/08/07)
David Stone



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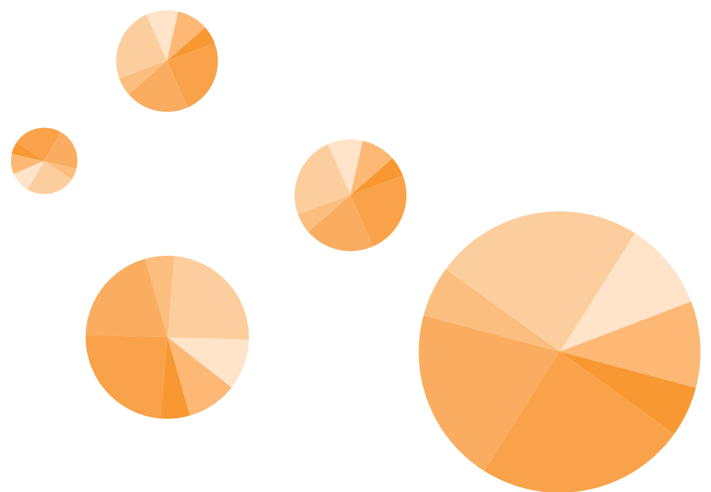

The Ombudsman

State agencies must be open to scrutiny

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Containers bought to store e-voting machines 'too small'

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