

Suggested amendments to improve the operation of the Freedom of Information Acts, 1997 and 2003

A commentary by the Information Commissioner in accordance with the provisions of section
39 of the Freedom of Information Act, 1997

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The Freedom of Information Act, 1997, (FOI Act) has been in operation for nearly nine years. In passing the FOI Act the Oireachtas took a considered and deliberate step which dramatically altered the administrative assumptions and culture of centuries. It replaced the presumption of secrecy with one of openness.

The Act was amended in 2003. Fees for the making of FOI requests and for appeals to my Office were introduced, and further restrictions on the release of information were added. It was notable that my Office, which has responsibility for keeping the Act under review, was not consulted in advance of these amendments. The then Information Commissioner, Mr Kevin Murphy, expressed his considerable disappointment at this development. In March 2003, shortly after the Freedom of Information (Amendment) Bill was published, the Commissioner issued a commentary on the practical operation of those sections of the Act that were to be amended. In Appendix II to that commentary the Commissioner made a number of suggestions as to how the operation of the Act could be improved.

The enclosed document includes many of those suggestions, and further suggestions which have been drawn from my own experience of operating the Act. For example, I recommend:

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

In making these suggestions I have borne in mind the purpose of the Act as expressed in the Long Title:

"An Act to enable members of the public to obtain access, to the greatest extent possible...to information in the possession of public bodies..."

The suggestions I have made are designed to increase the effectiveness of the FOI Act and further benefit the public's right of access to official information.

Emily O'Reilly
Information Commissioner
March 2007

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Section 2

- There appears to be some doubt as to whether the right of access to records can be exercised by a body corporate. We recommend that a definition of "person" be included in section 2 which would define 'person' in line with the Interpretation Act, 2005, i.e. importing a body corporate, an unincorporated body of persons as well as an individual.
- Section 29 deals with instances where an existing exemption is overruled by the relevant public interest test within that exemption; section 28(5) has two separate provisions and only one of them, at (a), has to do with the public interest. Accordingly, we recommend an amendment whereby the definition of a "request to which section 29 applies" should read "section 28(5)(a)" rather than "section 28(5)".

Section 3

If it cannot be achieved through regulation, we recommend that section 3 should be altered with the insertion of the following key requirements;

(a) an obligation on the Minister for Finance to collect, collate and publish (within two months of the end of each calendar year) relevant statistics in relation to FOI usage in the relevant year, and

(b) an obligation on public bodies to provide the Minister with such statistics, and in such manner (including timescale) as the Minister determines, in relation to FOI usage in the relevant year.

Section 6(9)

This provides that records in the possession of a person who is or was providing a service for a public body under a "contract for services" are deemed to be held by the public body. However, there is currently no enforcement provision when a person who is or was providing a service for a public body under a "contract for services" refuses to comply with a request from a public body for records relevant to an FOI request. We recommend that failure by such a person to supply relevant records be made an offence along the same lines as obstructing an investigation of the Commissioner in section 37(7) of the Act.

Section 10

- A provision should be included to allow the head of a public body to refuse to grant a request for records already released to a requester. Such a refusal would be subject to appeal to the Information Commissioner.
- There is a need to protect public bodies from individuals who are abusing the FOI Act by unreasonably targeting a public body. We recommend an amendment whereby a public body could, in limited circumstances, decide to refuse to deal with requests from a particular person for a fixed period. A right of appeal to the Information Commissioner in respect of such a decision should also be included.

Section 15(7)

Section 15(7) is somewhat confusing in that it provides for a section 15 manual being available "for removal free of charge ..." whilst also stating that in certain circumstances it may be available "for purchase". We recommend that the manual should be available free of charge in all circumstances.

Section 16

Where the manual is published electronically, with no full paper version published, public bodies should be required to publish electronically with a print-out, if requested, a document which describes the range of material in the manual and offers to provide paper copies of the contents (or those parts of interest) to any person.

Section 17

- The right under section 17 to amend personal information is limited to records to which the FOI Act applies. The Act does not apply to records which, while disclosing personal information, are available outside of the FOI Act [section 46(2)], for example, planning records or other records in the public domain. We recommend that section 17 be amended to create a right of amendment in the case of personal information, held by a public body, which is "incomplete, incorrect or misleading" whether or not the records are records to which the FOI Act applies.
- The Act should be amended to clarify that the onus is on the applicant to supply evidence/justification for an amendment (in line with the findings of the Commissioner in previous decisions).

Section 17 and 18

While a request for records under section 7 of the FOI Act may be refused on the grounds of being "frivolous or vexatious", there is no equivalent provision in the case of applications made under section 17 (seeking amendment of personal information) or section 18 (seeking reasons for an act of a public body). We recommend that the "frivolous or vexatious" ground of refusal should be extended to section 17 and 18 applications.

Section 18

We recommend that this section be amended to clarify that the right to a statement of reasons for an act of a public body applies only in respect of "acts" taken since the commencement of the FOI Act. Furthermore, we also suggest that applications under this provision must be made within twelve months of the applicant becoming aware of the "act" that affects him/her unless there are particular circumstances that, in the opinion of the head, justify an extension of this period.

Section 19(1)

The FOI (Amendment) Act, 2003 changed this discretionary exemption for the protection of 'Government records' to a mandatory exemption. This sometimes results in trivial and non-sensitive material being exempt from release under the Act. We recommend the exemption return to a discretionary one to enable non-sensitive material be released.

Section 19(3)(c)

We recommend that the 10 year period for protection of certain Government communications revert to the original period of 5 years. It should be noted that any proposed release of such communications is subject to all other exemptions in the Act, including the possibility of a Ministerial Certificate under section 25.

Section 19(6)

The FOI (Amendment) Act, 2003 revised the definition of "Government" for the purposes of section 19. As the then Commissioner commented in his March 2003 Commentary on the proposed changes to the Act, the new definition is a *"constitutionally unrecognisable definition, which is, perhaps, unnecessary to achieve the objective it appears to have been designed to achieve (as explained in the Explanatory Memorandum to the Bill)"*. In light of our experience to date, we agree with this view. The current definition of "Government" as used in section 19 includes a committee of officials, not one of whom is a member of the Government and, indeed, some or none of whom may be civil servants of the Government or the State. We recommend that the definition of Government contained in section 19(6)(b) be deleted.

Section 20(1A)

- This provision, inserted by the FOI (Amendment) Act 2003, creates a mandatory exemption in the case of a record in respect of which a Secretary General of a Department has certified that it relates to the deliberative processes of a Department of State. The number of such certificates issued must be notified to the Information Commissioner. To date, only one certificate has issued. We recommend that this provision be deleted on the basis that the residual exemptions within the FOI Act are a sufficient protection.

- The decision to issue such a certificate is not reviewable by the High Court. This contrasts with the situation in relation to certificates issued by Ministers under section 25 of the Act which are reviewable by the High Court. To ensure consistency, and in the absence of the deletion of this aspect of section 20 as recommended above, we recommend a provision be added to allow the High Court review a decision to issue a 'section 20 certificate'.

Section 24(2)

This provision creates a mandatory, class exemption for certain records which fall within the wider category of records relating to the security or defence of the State, international relations or matters relating to Northern Ireland. As the exemption is mandatory, it applies to all records within the class irrespective of their sensitivity or of any harm which release may cause. Given the protection of section 25 - which allows a Minister to certify that a record is exempt by reference to sections 23 or 24 - we recommend that the exemption be confined to instances in which release can reasonably be expected to result in some harm.

Section 26

There is an anomaly whereby confidential information sent in a letter to a public body from a third party can qualify for exemption if it meets the criteria in section 26(1)(a) while the same information received via a phone call and noted by a member of staff of a public body cannot attract such protection (because of section 26(2)) unless it meets the 'duty of confidence' test in section 26(1)(b) / s 26(2). We recommend that such information should attract the same protection and a distinction should be drawn between information received from a third party in such circumstances and information created or generated by a member of staff of a public body.

Section 28(5B)

This provides for a refusal to grant a request where the record concerned discloses the joint personal information of the requester and of a third party. Under section 28(6), a requester may be granted access to the personal information of a minor or of a deceased person. However, it appears section 28(5B) does not apply where the personal information of the minor or of the deceased person is joined with the personal information of a third party, and where the record does not disclose the personal information of the requester. {For example, a parent seeks information about his or her child but the record in question discloses the personal information of another person in addition to disclosing the information of the child.}

We recommend that the section 28(5B) provision be extended to include situations in which personal information, sought under section 28(6), is joined to the personal information of a party other than the requester.

Section 28(6) - Access to records of deceased persons

- In her Annual Report for 2005 and in the book "*Freedom of Information: Law and Practice*" , (edited by Ms Estelle Feldman), the Commissioner referred to a need for a comprehensive review of the whole issue of access to deceased persons' records (and medical records in particular). In summary, the current legislation governing access to personal records of deceased persons is capable of being read as providing an unqualified right of access to any party capable of being included as a next of kin and not necessarily the most immediate next of kin. Problems arise also because of the very broad definition of "spouse" used in this context. The Commissioner believes that it is unlikely, for example, that the Oireachtas intended that the Minister for Finance would make regulations whose effect would be that a former (unmarried) partner would have the same right of access to the deceased's personal records as would the deceased's widow or widower with whom the deceased had been living prior to death. It is hard to envisage that such an outcome would be constitutionally sound given the protection afforded to the institution of marriage. In these circumstances, we recommend that the Minister for Finance review the legislation as a matter of urgency. In the short term, we recommend that the Minister should amend article 3(1)(b)(iii) of Statutory Instrument No. 47 of 1999, in order to overcome the present difficulty whereby access to the records of a deceased person appears to be possible, in an unqualified way, to a spouse, partner or a next of kin of the deceased.

Section 29

Section 29 is a notification requirement which public bodies are required to observe in relation to the proposed release, in the public interest, of information relating to third parties. The manner in which the section is constructed has resulted in difficulties for public bodies and this Office in applying its provisions in a consistent manner. For example:

- the situation is unclear where only some of the records coming within the scope of the request are subject to the notification process;
- it is unclear as to whether a section 29 notification can take place at the 'internal review' stage of the process.

We recommend that the Department of Finance engage in discussions with this Office with a view to clarifying the issues involved in section 29. In the meantime, the Commissioner intends to publish a commentary on the application of section 29 for the guidance of FOI practitioners.

Section 34(1)(f)

Section 34(1) sets out the types of decision the Information Commissioner may review. Section 34(1)(f) provides that the Commissioner may review "*a decision on a request to which section 29 applies*". A "*request to which section 29 applies*" is defined in section 2 of the Act. This definition presents practical difficulties. We have taken the approach that the Commissioner is entitled to review a public body's decision in respect of the public interest element only of sections 26, 27 and 28. However, this approach prevents the Commissioner taking into account the possibility that information may have lost its confidentiality, commercial sensitivity, etc. in the time between the public body's decision and the Commissioner concluding her review. This would seem to undermine the view of the High Court that the Commissioner's review is *de novo*. We recommend an amendment which will establish that the Commissioner is not confined to considering the public interest only in relation to a "*decision on a request to which section 29 applies*".

Section 34(5)

This provision currently requires that withdrawal of a review application must be done in writing. However, many applicants are slow to write to this Office confirming a withdrawal of their application. We therefore recommend that this provision be amended to allow a withdrawal to be done orally with the Commissioner confirming this in writing to the applicant and also informing the public body that this has happened.

Section 34(6)

Section 34(6) provides that when accepting an application for review the Commissioner must forward a copy of the application to the public body concerned. In some cases the application from a person contains personal or confidential information which was not intended for circulation to the public body. The provision should be amended to allow the Commissioner, at her discretion, remove any information from the application which the Commissioner believes was not intended by the applicant to be forwarded to the public body.

Section 34(9)(a)

- Section 34(9)(a) provides that, in certain circumstances, the Commissioner may discontinue "a review" or refuse to grant "an application". In many cases the review or application involves a number of different aspects. We recommend that the Act clarify that the Commissioner's powers include the power to discontinue a review or refuse an application in respect of some or all aspects of the overall case.
- The grounds on which the Commissioner may refuse to grant an application or discontinue a review should be widened. (In this regard it is noted that section 138(1)(b) of the Planning Act, 2000 allows An Bord Pleanála dismiss an appeal on a number of wide-ranging grounds.)

We recommend the following additional grounds:

- (a) where the applicant fails to provide the Commissioner with sufficient information or otherwise fails to co-operate with the Commissioner in the conduct of a review;

(b) where, in the course of the review, access to the records in question has been granted by the public body and where the Commissioner is satisfied that there is no longer any issue requiring adjudication by her Office;

(c) where the application to the Commissioner does not contain sufficient particulars to enable the Commissioner to proceed with a review.

- The grounds for a public body refusing a request as frivolous or vexatious (as set out in section 10(1)(e) of the FOI Act, 1997) were expanded by the Freedom of Information (Amendment) Act, 2003. However, no equivalent provision was carried into section 34(9) in the case of the grounds on which the Commissioner may refuse to grant an application or decide to discontinue a review. We recommend the terms of the amended section 10(1)(e) should apply also to the Commissioner under section 34(9).

Section 34(9)(b)

The Act provides that the Commissioner may suspend a review only when endeavouring to effect a settlement between the parties concerned. We believe that it is also appropriate to suspend reviews in other circumstances, for example, where a court judgment which would clarify the point of law at issue is awaited or where clarification of the nature of the application to the Commissioner is needed. We recommend an amendment that would permit the Commissioner to act in accordance with her own discretion when deciding to suspend a review.

Section 37

We recommend that a provision to allow for the enforcement of decisions made by the Commissioner be included. While the Commissioner has various powers to compel public bodies to provide copies of records and co-operate with her review, there is no explicit provision requiring a public body to comply with a binding decision of the Commissioner. It is unclear what the legal situation is in a case where the Commissioner directs that a public body grant an applicant access to records and, in the absence of an appeal to the High Court, the public body refuses to do so. In the UK, the Information Commissioner may apply to the courts for an enforcement order and failure to comply with such an order is a contempt of court. We recommend a similar provision.

Section 37(7)

We recommend that the maximum fine for failing or refusing to comply with a requirement or for hindering or obstructing the Commissioner should be increased to € 10,000 and/or six months imprisonment.

Section 42(4)

- This provides that the time limit for appealing a decision of the Commissioner to the High Court is eight weeks. There is however an anomaly whereby, in certain circumstances, a requester who is being granted partial access to records will not receive those records until after the time for a High Court appeal has expired; in such circumstances, the requester will not know whether he or she is satisfied with the Commissioner's decision until after the time for the making of an appeal has expired. This situation may arise where a third party, other than the requester, has an interest in the release of the records and, because of the operation of section 44, there is a stay on the implementation of the Commissioner's decision. This stay is to protect the rights of the third party. However, an unintended consequence is that the requester cannot be given the records until after the appeal period has expired. This Office has had one instance of a High Court appeal made "on the blind" in such circumstances. Accordingly, we recommend an amendment to section 42(4) whereby the time for an appeal by the requester in such cases might be extended by two weeks following the actual release of the records.
- Apart from the situation set out immediately above, we recommend that the time limit for an appeal of the Commissioner's decision to the High Court should be returned to 4 weeks. We believe that the current period of 8 weeks is excessive and can further delay a right of access to records after a requester has already been through internal review and review by the Commissioner.

Section 42(6)

We recommend that the provision at section 42(6)(c) in relation to the Supreme Court should also apply to the High Court, i.e. in a successful High Court appeal by a requester, or third party, and where the point of law involved is of exceptional public importance, some or all of the requester's, or third party's costs may be borne by the public body involved.

Section 46(1)(db)

This provides that the Act does not apply, among other records, to briefing material for responses to Dáil questions. This provision is not necessary as the numerous exemptions in the FOI Act already provide strong protection for material where release could cause harm. We recommend deletion of this provision.

Section 46(1)(dc)

This excludes from the scope of the FOI Act records held or created by the Health and Safety Authority (HSA) and which relate to or arise from the HSA's enforcement functions. These records had been subject to the FOI Act prior to the commencement of the Safety, Health and Welfare at Work Act, 2005. We recommend deletion of this provision on the basis that the existing exemptions in the FOI Act are sufficient to protect the interests involved.

Section 47

- In July 2003, the Minister for Finance introduced Regulations setting out the amount of the fee to be paid when making FOI requests or applications to the Information Commissioner for non-personal information. The amounts were set at €15 for an initial request, € 75 for an 'internal review' and €150 for application to the Information Commissioner. In her June 2004 report, the Commissioner examined the effects of the Amendment Act and the introduction of fees on requests by members of the public. The Commissioner observed that of the seven jurisdictions with similar FOI legislation to Ireland, none charged a fee for 'internal review' while only one, Ontario, charged a fee for appeal to the Information Commissioner. In the case of Ontario this fee was set at €15.60 for non-personal information. Since the introduction of fees the number of non-personal requests made to public bodies and appeals accepted by the Information Commissioner has fallen by 59% and 44% respectively. We recommend that the amount of the fees for 'internal review' and appeal to the Information Commissioner, be reviewed to bring them into line with other similar jurisdictions.
- The Act should provide for a refund of the 'internal review' fee or application fee paid to the Information Commissioner, as appropriate, where the original decision of the public body is successfully appealed at 'internal review' or appeal to the Information Commissioner.

It should be noted that in 2005, the Joint Committee on Finance and the Public Service agreed unanimously that *"the cost of instigating a Freedom of Information denial appeal to the Information Commissioner was excessive"* and *"in particular, where such an appeal was successful, the fee should be refunded"* .

Regulations made under section 47

The wording of section 47 and the Regulations which set the amount of the fee for the making of certain FOI requests, applications for 'internal review' and applications to the Information Commissioner present practical difficulties. In order for a request/application to be valid, a fee must be paid at the time of the making of the request/application. Where a fee which is required to be paid is not paid, the public body/Commissioner must refuse to accept the request/application and it is deemed for the purposes of the Act not to have been made. In addition, a request/application does not attract a fee if the request is for records which *"contain only personal information relating to the requester or ... applicant"* .

This means that a public body or the Information Commissioner must determine, based on the wording of the request alone, whether the records sought are likely to contain only personal information relating to the requester and therefore, whether a fee should have been paid. This presents practical difficulties in dealing with the request and can lead to the requester being disadvantaged either by having to pay a fee for records which turn out to contain only personal information relating to him/her, or not receiving records which were sought as no fee was paid and the records do not contain only the requester's personal information.

Requests for personal information which is inextricably linked to another individual's personal information (joint personal information), requests for records of deceased persons and requests for records of minors, cause particular difficulties. We recommend that the wording of section 47 and the relevant regulations be revised in order to provide clarity as to which requests attract a fee.

New provision

A penalty should be introduced for the deliberate tampering with, or destruction of, a record in order to adversely affect a right of access under the FOI Act. This provision is even more important given the increase in the storage of information electronically which can facilitate such actions.