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July 2001

An investigation by the  
Information Commissioner  
into the practices and  
procedures adopted by  
public bodies generally for  
the purpose of compliance  
with the provisions of the  
Freedom of Information  
Act, 1997



# **The Freedom of Information Act - Compliance by Public Bodies**

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An investigation by the Information Commissioner into the practices and procedures adopted by public bodies generally for the purpose of compliance with the provisions of the Freedom of Information Act, 1997

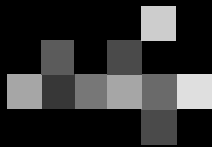
A Report in accordance with section 36(2) of the Freedom of Information Act, 1997

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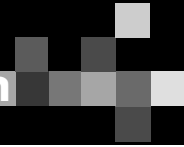
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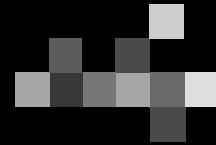


This is a report of an investigation which I carried out in accordance with section 36(2) of the Freedom of Information Act, 1997 (the FOI Act) into the practices and procedures adopted by public bodies for the purposes of compliance with the provisions of that Act.

In the case of most public bodies the Act is now in operation for a little over three years. This investigation, which is required by the Act, presented an opportunity to review the performance of public bodies to date. Its key focus is on what public bodies need to do to ensure that the objectives of the Act are fully met.

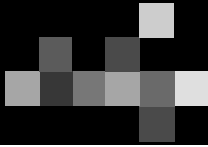
In accordance with section 36(5) of the Act, I am furnishing a copy of this report to the Minister for Finance and to each public body. A copy will also be appended to my next annual report, as required by the Act and, in accordance with normal practice, will be laid before each House of the Oireachtas.

Kevin Murphy  
Information Commissioner  
July 2001



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# Overview and Summary of Recommendations

## Objective

The objective of this investigation was to examine the practices and procedures adopted by public bodies generally for the purposes of the FOI Act. The investigation was carried out in accordance with section 36(2) of the Act.

## Methodology

The investigation was carried out during the period February to May 2001. I did not consider it either practicable or necessary to examine the practices of all public bodies. Instead, I chose 12 public bodies spread across the civil service, local authorities and health boards, concentrating for the most part on those bodies which have received the largest number of requests since the commencement of the Act. A list of the public bodies which were examined in the course of the investigation is set out in Appendix 1. I would like to thank the public bodies concerned for their co-operation during the course of the investigation.

The investigation involved the examination, in the case of each public body concerned, of a random sample of requests where the requester had applied for internal review; it excluded cases that were subsequently appealed to my Office. The sample was chosen by my Office, rather than the public body, and was drawn from requests made in the period January to July 2000. I also looked at a sample of records from each public body designed to check if there was any evidence of a change in record keeping practices following the introduction of the FOI Act. The FOI liaison officer in each public body concerned was interviewed about the organisation's procedures and asked to comment on issues arising out of the examination of the sample. The conclusions in this report are based largely on the sample and on these discussions. However, I have also drawn on my own experience of dealing with public bodies in the course of the reviews which have come before me over the last three years.

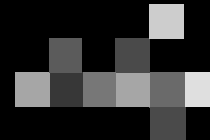
Despite the limited scope of this investigation, I have been able to draw some worthwhile conclusions which are relevant to some degree to all public bodies covered by the FOI Act. Since the investigation looked mainly at the larger public bodies some of my recommendations are drafted with them in mind. Most of the recommendations are also relevant to smaller bodies, although I recognise that they will have another concern - not dealt with in the report - viz how to develop and retain FOI expertise in the absence of a critical minimal level of FOI requests each year. I expect that the recommendations which I make in the report will be implemented by public bodies and that they will help to increase the effectiveness of the Act. I intend in future investigations to monitor the degree to which these recommendations have been implemented by individual public bodies.

## General Conclusions

### *Practices and Procedures*

In Chapters 1 to 4 of this report I examine the practices and procedures adopted by public bodies in dealing with requests made under the Act. In particular I look at the operation of internal review, the quality of response to FOI requests and applications for internal review and practices in relation to charging fees.

Considerable efforts were made prior to the introduction of the Act to ensure that public bodies had in place the systems and procedures necessary to process requests made under the Act and to ensure that staff were properly trained in applying its provisions. I have concluded that, by and large, the procedures adopted for the processing of requests have been satisfactory, based on the fact that most public bodies process most requests within the statutory deadline. There are a few exceptions which are described in detail in this report. The biggest deficiency in



handling requests is a widespread failure, when refusing information, to give reasons which meet the requirements of the Act.

I have also identified a number of other areas where improvements are needed such as quality control and more effective internal reviews. My recommendations on these issues are couched in general terms. It is up to each public body to examine its own performance and decide how best to implement these recommendations in the light of its own circumstances.

### ***Records Management***

In Chapter 5, I examine the records management practices of public bodies. I have concluded that in many cases further work is required to bring records management up to the standard required to meet the business needs of public bodies including the need to search for and retrieve records efficiently for the purpose of dealing with requests made under the FOI Act.

### ***The Use of Exemptions in the FOI Act***

In Chapter 6, I look at the operation of three common exemptions - section 19 (Meetings of the Government), section 20 (Deliberations of public bodies) and section 26 (Information obtained in confidence). It is possible to make a prima facie case for exemption under these or other provisions in relation to many records but whether it is worth doing so, in some cases, is an entirely different matter. In my view the cause of greater openness is not served by trying to rely on an exemption to refuse information simply because the exemption is there or because, while the record sought is innocuous, it is feared that release will, from the public body's point of view, create an unfortunate precedent.

I have concluded that public bodies are resorting unnecessarily to these exemptions in some cases. I have addressed recommendations to public bodies and to the Central Policy Unit of the Department of Finance aimed at reducing the unnecessary use of these exemptions.

### ***Administrative Access***

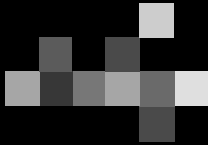
While my investigation was directed mainly at the practices and procedures adopted for the purpose of handling requests, I also tried to gauge whether the needs of requesters were being met and their rights of access fully acknowledged. In Chapter 7, I look at matters such as the degree to which public bodies have encouraged the release of information administratively, i.e. without the need for a formal application under the Act.

I conclude that more information could be released administratively and some of my recommendations are designed to encourage this.

### ***Achieving a more open Public Service***

In Chapter 8, I examine the degree to which the FOI Act has achieved a more open public service. I conclude that the Act has brought about major gains in terms of greater openness and transparency. However, I point to the apparently high rate of refusal of requests and I recommend that public bodies gather further statistics to enable the most common reasons for refusals to be identified and, if possible, further action taken to increase the release of information.

The recommendations which follow are not, for the most part, directed at decision makers or internal review officers. Some require action by FOI officers. Others require action by senior management which, if taken, will reaffirm commitment to the principles underlying the Act. I also make a number of recommendations which require action by the Central Policy Unit of the Department of Finance.



# Recommendations Addressed to Public Bodies

## Organisational Issues

- Each public body should ensure that the role allotted to its FOI unit meets the needs of the organisation and that the unit is sufficiently resourced. (Chapter 1)
- Each public body should ensure that requests under the Act are dealt with at an appropriately senior level in the case of potentially controversial material. (Chapter 1)
- Each public body should review the basis on which decision makers are designated to ensure that decision making is not so thinly spread as to militate against the emergence of expertise in relation to the Act. (Chapter 1)
- Each public body should examine the effectiveness of internal review and consider whether, in the light of performance to date, its present arrangements for internal review achieve their purpose. This examination should also review whether internal review officers are properly equipped in terms of FOI expertise and support . (Chapter 2)
- The Department of Education and Science and the Department of Health and Children should review the procedures adopted for dealing with requests under the Act and should take early action to address the deficiencies identified in this report. (Chapter 3)

## Training

- Each public body should decide on a minimum level of training for all decision makers and put a programme in place to ensure that this is achieved. (Chapter 1)

## Quality Control

- Each public body should review its quality control procedures in relation to the handling of requests, with a particular emphasis on the quality of reasons given for the refusal of access. (Chapter 1)

## Use of Exemptions

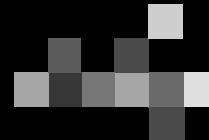
- Each public body should re-examine its use of the exemption in section 20 (deliberations of public bodies) to ensure that information is only withheld on clearly arguable grounds, not merely on the ground that the decision making process has not concluded or that release could cause embarrassment to the body or to the Government. Senior management should provide support to decision makers by clearly indicating the circumstances in which section 20 should not be invoked. (Chapter 6)

## Fees

- Each public body should review its practices in cases where a deposit has not been demanded but the ultimate cost of search and retrieval exceeds £40 (€50.80). (Chapter 4)

## Records Management

- Each public body should devise and publish a records management policy covering the creation, maintenance and destruction of records. The objective of the policy should be to ensure that the activities and decisions of public bodies are adequately recorded. (Chapter 5)



- Each public body should devise detailed guidelines based on these policies and provide staff training in these guidelines. (Chapter 5)
- Where they have not already done so, public bodies should re-evaluate their records management systems to ensure that they are adequate to meet their business needs, including the need to search for and retrieve records efficiently in order to deal with requests made under the FOI Act. (Chapter 5)
- Each public body should allocate responsibility at senior management level for ensuring that development and improvement of records management is accorded the appropriate priority. (Chapter 5)

### **Managing Information / Promoting access to information**

- Each public body should develop and publish guidelines on the collection and use of information obtained from third parties, so as to reduce uncertainty about the status of that information, the use to which it may be put and the circumstances in which it may be disclosed under the FOI Act or otherwise. (Chapter 6)
- Each public body should develop comprehensive guidelines on access to information outside of the FOI Act. (Chapter 7)
- Each public body should identify classes of documents which are likely to be of general interest and adopt procedures to ensure that a proactive approach is taken to releasing them. (Chapter 7)
- Each public body should arrange to gather statistics on the use of the different exemptions and on the granting of requests for personal and official information. The statistics should record the basis of refusals of requests including administrative grounds of refusal (i.e. non-existence of records and records created before the commencement of the Act). (Chapter 8)

## **Recommendations addressed to the Central Policy Unit of the Department of Finance**

- The Central Policy Unit should consider arranging further training for public bodies in relation to the level of explanation required when access is being refused. (Chapter 3)
- The Central Policy Unit should reconsider the recommended *de minimis* fee with a view to increasing it to a level which would be applied uniformly by decision makers. The effect of this recommendation is to raise the threshold figure at which fees become chargeable. (Chapter 4)
- The Central Policy Unit should provide guidelines to public bodies on the circumstances in which the discretionary exemption in section 19 (meetings of the Government) should be invoked and on how the consultation procedures provided for in section 19(4) should be undertaken. (Chapter 6)
- The CPU should consider developing further guidelines regarding the provision of information from third parties in circumstances which are common to many public bodies e.g. tendering, recruitment/selection references, staff complaints. (Chapter 7)

## Procedures for Handling Requests

The Freedom of Information Act (FOI Act) imposes certain obligations on a public body receiving a request made under the Act. Among these are:

- acknowledgement of receipt of the request within 14 days,
- provision of reasonable assistance to individuals seeking records under the Act,
- the making of a decision on access to all records sought within 28 days,
- provision of a detailed statement of reasons in the case of refusals, and
- review of the initial decision within 21 days by a more senior member of staff, if requested.

Although the Act requires requests to be addressed to the head of the public body it also provides that the head may delegate functions under the Act to a member of staff. As a result the task of deciding whether access to a particular record is granted or not, falls to individual members of staff commonly referred to as 'decision makers', while the more senior members of staff reviewing initial decisions are commonly known as 'internal review officers'. In most cases these staff work in the areas responsible for the particular records requested and they deal with requests received under the FOI Act in addition to their usual day to day duties.

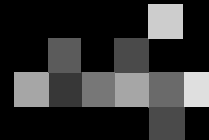
In this chapter I examine the procedures adopted by public bodies in processing requests. I look at the following matters in particular:

- the role of the FOI Officer and the FOI Unit,
- the rank of the decision makers and internal review officers,
- the degree of centralisation of the decision making process,
- the provision of training and support to decision makers and internal review officers, and
- quality control.

### The Role of the FOI Officer and the FOI Unit

All of the public bodies examined in this investigation have broadly similar procedures for handling requests received under the FOI Act. Each body has a nominated FOI liaison officer who heads an FOI unit and is the main point of contact for members of the public wishing to make requests under the FOI Act. The liaison officer/unit ensures that requests are directed to the appropriate decision maker within the body. The liaison officer/unit also ensures that requests for an internal review of the initial decision are directed to the appropriate official for reply.

Notwithstanding this apparently standard approach, the role of the FOI unit differs significantly, in practice, as between public bodies. In some cases the unit is only responsible for logging and monitoring FOI requests. In others it provides advice to decision makers and internal review officers, liaises with my Office, trains staff in FOI related matters, ensures that deadlines specified in the Act are met and provides quality control by checking whether replies issued by decision makers are consistent with the requirements of the Act. In a few public bodies requests may also be dealt with by the FOI unit, although only in the Department of Enterprise, Trade and Employment is this done to any significant degree. Such an expanded role for the FOI Unit,



provided that unit is properly resourced and operates effectively, can enhance compliance with the Act, particularly in larger public bodies. It is clear that some FOI Units are already experiencing significant difficulties in dealing with the requirements of my Office which arise in the course of reviews. I recognise that any enhanced role for FOI units may require additional resources for such units.

It was noted that even in those public bodies where the FOI unit had a relatively wide brief, its main concern in most cases was with the processing of requests under the Act. However, in some public bodies the unit appeared to work closely with other line functions which are concerned with the provision of information such as the Press Office or Information Unit. While recognising that these different units sometimes may have different objectives, links of this kind can be useful in ensuring that use of the formal mechanisms of the Act do not become the first port of call for persons seeking information and that other, less formal, channels are used and developed.

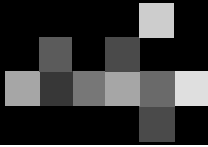
#### **Rank of the Decision Makers and Internal Review Officers**

In the course of the investigation, I looked at the level at which the decision making and internal review function under the Act is carried out. This varies from situations such as that in the Department of Social, Community and Family Affairs and the Department of Education and Science; where some Executive Officers can be decision makers, to the Department of Finance where all Principal Officers<sup>1</sup> are designated as decision makers. The Eastern Regional Health Authority has appointed decision makers at Grade VII level while in the Southern Health Board, Senior Executive Officers perform the decision making duty. In relation to the two local authorities examined the decision making grades are Administrative Officer for Dublin Corporation and County Secretary for Wexford County Council. In the Department of Social, Community and Family Affairs, Executive Officers tend to deal only with requests relating to personal information whereas Higher Executive Officers and higher grades deal with requests for policy-type information. This approach seems to work well for that Department because nearly 90% of its requests are for personal information and release of such information is often straightforward.

There is little evidence that having requests dealt with at a more senior level results in significantly better decision making or the release of more information. The contrasting approaches of the Department of Social, Community and Family Affairs and the Department of Finance, both of which appear to work quite well, suggest that public bodies themselves are best placed to decide the level at which the work of dealing with requests should be carried out. Nevertheless, it is unlikely that relatively junior officials will decide to release, say, policy making records if there is a risk of political embarrassment or a risk of offending a more senior official. Public bodies have a responsibility to ensure that FOI decisions are made at an appropriate level. In the case of potentially controversial material related to policy making, this would normally mean at least Assistant Principal level or equivalent.

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Note: The order of seniority of the civil service grades mentioned in this report is: Assistant Secretary, Principal Officer, Assistant Principal, Higher Executive Officer and Executive Officer.



### **FOI Units and the Decision Making Process**

None of the public bodies examined had centralised its FOI decision making totally within the FOI unit, although the Department of Enterprise, Trade and Employment said that its FOI unit handled an estimated 40% of the Department's total requests. The degree to which decision making is centralised varies considerably among the remaining public bodies examined. In some cases all staff at particular grades are designated as decision makers; in others decision making is confined to a relatively small number of people.

The investigation suggests that it may be more effective to have a small number of 'designated' decision makers rather than designating all of a particular grade as decision makers, as is the case in some public bodies. This approach offers the opportunity for individual officers to gain practical experience and to develop real expertise. Also, it is easier for the FOI unit to concentrate its efforts on informing and developing expertise among a smaller group. Of course, a public body has to ensure that it has a sufficient number of decision makers to handle its requests. Nevertheless, it is suggested that public bodies may need to examine their practices in this area to ensure that expertise is not spread too thinly by designating too many decision makers.

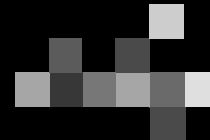
### **Training and Supporting Decision Makers**

If proper decisions are to be made under the Act and the rights of requesters are not to be infringed then it is essential that decision makers and internal review officers have the necessary expertise. The Act is complex and often requires the balancing of competing interests. It contains twelve detailed exemption and exclusion sections which, unfortunately, from the perspective of the poorly trained decision maker, can be seen simply as twelve opportunities to refuse access.

In the course of the investigation I looked at the level of training and support provided to decision makers and internal review officers. A structured one-day decision maker's course is available to all officials in the public service. These courses are provided by the Department of Finance's Centre for Management and Organisation Development (CMOD) and in-house by FOI units in some public bodies. Without wishing to minimise the importance of in-house training, it is best seen as a complement to, and not a substitute for, the training developed by CMOD or under the auspices of the Central Policy Unit. Such training can help to highlight best practice for decision makers and can help to maintain a focus on releasing information as opposed to applying the exemptions in the Act. It can also help to ensure consistency of practice among public bodies.

It was indicated to me that the percentage of decision makers and internal review officers who had received training, either from CMOD or in-house, ranged from 100% in bodies such as the Department of Finance, Department of Social, Community and Family Affairs and Southern Health Board to around 30% in the Department of Justice, Equality and Law Reform and the Department of Health and Children. Needless to say the fact that so many decision makers and internal review officers have not had basic training is a cause for concern and needs to be addressed by the public bodies concerned.

The training provided by CMOD and in-house trainers is supplemented on a regular basis by most public bodies. Copies of my published decisions, copies of legal advice received from the Office of the Attorney General and clarification on the use of certain exemptions arising from meetings of the Inter-Departmental Working Group on FOI, the Civil Service Users Network, the Public Service Users Network and other networks are circulated to relevant officials in public bodies. I note that, in public bodies such as the Department of Enterprise, Trade and Employment



and the Department of Social, Community and Family Affairs, seminars on FOI issues are organised for the Departments' decision makers and internal review officers on a frequent basis. It is important that appropriate provision be made by public bodies to ensure that decision makers and internal review officers are kept fully up to date on FOI developments.

### **Quality Control**

The provision of a quality service to applicants under the Act requires that the administrative procedures in the Act (mainly those relating to acknowledgement and transfers of requests, the provision of reasonable assistance and consultation) be observed ; that decisions are made on a timely basis ; that exemptions are invoked only where it is proper to do so and that where information is refused, the reasons for the refusal are explained in the level of detail required by the Act.

In the course of the investigation I looked for evidence that public bodies had put in place effective quality control procedures. In particular, I examined the part played by the FOI unit in achieving a quality service. I found that only a few public bodies had proper quality control procedures. In some cases the role of the FOI unit appeared to be too narrow, concentrating at most on trying to ensure that the basic administrative procedures referred to above were met. In other cases the FOI unit had a wider quality control brief but was unable to discharge it effectively. In some cases decision letters were not seen by the FOI unit before they issued or were seen so close to the deadline as to make any worthwhile scrutiny impossible. Other FOI units appear to lack the necessary 'clout', resulting in their advice to decision makers being ignored. There were some notable exceptions. In Wexford County Council draft decisions are passed to the FOI unit at latest three weeks after receipt of the request. I found that the unit had the necessary authority to ensure that its recommendations are taken seriously. Quality control was also emphasised in the Department of Enterprise, Trade and Employment. The FOI unit in that Department is able, via the case tracking system, to monitor the progress of requests on an ongoing basis and to see replies to requests as they are drafted. There is active intervention to ensure that deadlines are met and to ensure that, where information is refused, proper reasons are given.

### **Recommendations**

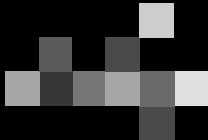
Each public body should ensure that the role allotted to its FOI unit meets the needs of the organisation and that the unit is sufficiently resourced.

Each public body should ensure that requests under the Act are dealt with at an appropriately senior level in the case of potentially controversial material.

Each public body should review the basis on which decision makers are designated to ensure that decision making is not so thinly spread as to militate against the emergence of expertise in relation to the Act.

Each public body should decide on a minimum level of training for all decision makers and put a programme in place to ensure that this is achieved.

Each public body should review its quality control procedures in relation to the handling of requests, with a particular emphasis on the quality of reasons given for the refusal of access.



## The Effectiveness of Internal Review

### The Internal Review Process

A requester who is dissatisfied with a public body's decision on a request made under the Act is normally entitled to seek "internal review" i.e. to have the decision reconsidered by a more senior official of the public body. There are some exceptions to this as, for example, when the initial decision maker is the head of the public body or where the request is for certain information concerning third parties. In such cases the application for review must be made "externally" i.e. to the Information Commissioner rather than to a more senior official of the public body. However, the vast bulk of decisions on access requests are subject to internal review and, in practice, about 7% of initial decisions proceed to internal review (based on figures supplied by all public bodies for 2000).

Internal review is an important feature of the Act. If it operates properly it can provide benefits to both the public body and the requester. It gives the public body the opportunity to:

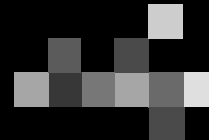
- identify general aspects of initial decision making which may need improvement;
- review and refine the initial decision and thereby avoid or reduce the need to commit extra time and resources to dealing with a review by my Office and;
- avoid the unfavourable publicity which may be generated if information is subsequently released as a result of a review by the Information Commissioner, perhaps creating the impression that the information was "forced out" of an unwilling public body.

The benefit for the requester is a clearer understanding of the basis of refusal or speedier access to the information than is likely to be achieved on external review.

In the course of the investigation I looked at two aspects of the internal review procedures in public bodies. The first was the extent to which the review was independent of the original decision. By its very nature an internal review cannot be fully independent. However, what the Act requires is an objective review by some person not involved with the original decision. I looked for evidence of such reviews during the investigation. The second aspect which I examined was the effectiveness of the internal reviews. This cannot be assessed solely by reference to the question of whether further information was released on foot of the internal review, simply because many initial decisions are fully justified. In assessing the effectiveness of the internal reviews I had regard to whether additional records were released, or whether a more satisfactory explanation was given as to why the material sought was exempt or whether the requester's concerns were met in some other way.

### Extent to which Internal Review was Independent

The public bodies examined during the investigation have adopted a variety of arrangements for the conduct of internal reviews. In the case of the Department of Finance the review is conducted by persons drawn from a board consisting of four Assistant Secretaries and four Principal Officers. When a request for an internal review is received, the FOI Unit selects one Assistant Secretary and one Principal Officer from the board to carry out the review ensuring that the selected officials have not been involved in the initial decision making process. The Principal Officer conducts the preparatory work and drafts a decision with a final decision being made and signed by the Assistant Secretary.



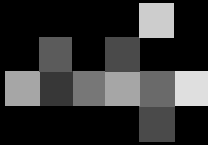
In some public bodies the internal review officer is chosen from a different section of the organisation and the FOI unit ensures that he/she has played no role in the initial decision. Bodies such as Dublin Corporation and the Eastern Regional Health Authority normally appoint internal reviewers from different work areas to that of the decision maker. In a number of other public bodies - such as the Department of Justice, Equality and Law Reform, the Department of Education and Science and the Department of Health and Children, the internal review officer is normally the decision maker's immediate superior. In the Department of Social, Community and Family Affairs reviews are generally carried out by a more senior official in the same division as the decision maker. The review may be carried out by the decision maker's immediate superior but the Department says that this only occurs where that person has not been involved in the initial decision.

It might seem tempting to conclude that more independent and better quality decision making will result from assigning reviews to persons outside the section of the public body which made the initial decision. However, the experience of the Office of the Revenue Commissioners would suggest otherwise. From the commencement of FOI the Revenue had tried to achieve cross division review. In the course of a review of its FOI procedures during 2000, it was noted that most decisions on requests for access to records of the Office of the Chief Inspector of Taxes were confirmed on internal review. The procedures review concluded that the reason for this was that internal reviewers from outside that Office were not familiar with the material (some of a technical nature) contained in the records and, therefore, they tended to err on the side of caution by affirming the initial decision. As a result of the review the Revenue appointed a panel of nine internal review officers in the Office of the Chief Inspector of Taxes. It maintains that this has resulted in better decision making and the release of further records.

The degree to which internal review can be said to be independent varies across public bodies. The review board model used by the Department of Finance meets the spirit as well as the letter of the Act. At the other end of the scale, review by the initial decision maker's immediate superior - as in the Department of Justice, Equality and Law Reform, the Department of Health and Children and the Department of Education and Science - is a practice which should be avoided because it is less likely to result in a fresh look at the initial decision. This is particularly so where the request was allocated originally to the initial decision maker on the basis that he or she was familiar with the records or with the issues involved. If, as is likely, the internal reviewer has a similar degree of familiarity or involvement then there is less prospect that he or she will be able to stand back and take an objective view.

### **Effectiveness of Internal Review**

Based on the results of the sample of cases which I examined in the course of the investigation, I have concluded that internal review is not fully effective in many public bodies. There were a number of exceptions. In the cases of the Department of Finance, Department of Enterprise, Trade and Employment and Wexford County Council I was satisfied that the result of most internal reviews was that either further records were released or the explanations given were more satisfactory than those given by the initial decision maker. In the case of the Department of Finance it was noteworthy that the resources which that Department was willing to devote to internal review were greater than the norm. For example, considerable support was given to the internal review board by the FOI officer who analysed the initial decision and sometimes highlighted particular issues involved in the request to the board. The FOI unit ensures that all relevant records are on the FOI file prior to it being seen by the internal review board and is



available to advise the board on technical aspects of the Act. Also, as indicated earlier, internal review is conducted at a more senior level than in the other public bodies examined.

Another exception was the Department of Social, Community and Family Affairs where it was clear that, for example, in search cases the internal reviewer had made additional efforts to locate records. It was also clear that further efforts were made to explain refusals of information. For example, in relation to requests for non-personal records the FOI Unit is involved in "vetting" the internal review letter before it is issued.

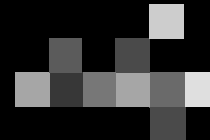
Some of the internal review decisions which I examined in the course of the investigation bore all the hall marks of rubber stamping - there was no evidence of independent consideration of the issues and little or no attempt to improve the explanations given to the requester. It would be all too easy to lay the blame for this at the door of the officials concerned. However, it seems to me that the root cause of this type of behaviour may be traced to lack of expertise among some internal reviewers and a lack of expert support. In these circumstances, the easiest option for an internal review officer is simply to affirm the initial decision in full.

Rubber stamping is by no means so widespread as to undermine the effectiveness of internal review completely. At the same time enough instances were identified in the course of the investigation to suggest a need for all public bodies to monitor their own performances in relation to internal review, as the Revenue has done, and to take appropriate action to remedy deficiencies.

Even in public bodies where there was no evidence of rubber stamping, a significant number of the internal review decisions examined in the course of the investigation (almost 40%) did not meet the full requirements of the Act in terms of quality of response, a matter which I discuss in detail in Chapter 3. While not wishing to overstate the problems in this area, I am concerned that, on a second attempt and even with the input of a more senior official, some public bodies are failing to accord requesters their full statutory rights by either releasing the information requested or providing clear and comprehensive explanations for not doing so.

### **Recommendations**

Each public body should examine the effectiveness of internal review and consider whether, in the light of performance to date, its present arrangements for internal review achieve their purpose. This examination should also review whether internal review officers are properly equipped in terms of FOI expertise and support.



## Quality of Response

The Act sets out in some detail the public body's obligations when dealing with an FOI request. These include the requirement to make a decision within the statutory time limit, the requirement to advise the requester of any further appeal rights and the requirement to give a detailed statement of reasons where access is refused or deferred. Although the investigation highlighted some instances - described below - in which the first two requirements were not met this does not seem to be a widespread problem. On the other hand I found that failures to give an adequate statement of reasons are common. In view of this I would like to summarise what the requirement is and explain why I think that public bodies need to undertake a detailed review of their practices in this area.

The Act obliges a public body which is refusing a request, whether wholly or partly, to give the requester a statement of the reasons for the refusal and, other than in cases where those provisions of the Act which permit a refusal to confirm or deny the existence of a record are being invoked, to specify:

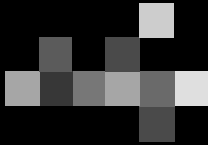
- any provision of the Act pursuant to which the request is refused,
- the findings on any material issues relevant to the decision, and
- particulars of any matter relating to the public interest taken into consideration for the purposes of the decision.

In order to comply with the terms of the Act it is not sufficient for a public body to simply paraphrase the words of the particular exemption. I note that the Central Policy Unit of the Department of Finance has advised public bodies that a statement of reasons should show a connection, supported by a chain of reasoning, between the decision and the decision maker's findings on material issues. It has also strongly recommended that, other than in cases involving no more than a few records, decision makers should prepare a schedule listing the records sequentially by number and containing the following information :

- the date of the record,
- the title of the document or the name of its author or addressee,
- a brief but sufficient description of the record or its contents to show a prima facie claim for exemption,
- the exemption claimed, and
- where the claim relates to parts of a record, a clear indication of the parts involved.

It also recommends that a version of the schedule from which sensitive information has been removed should be attached to the statement of reasons issued to the requester.

I have endorsed the advice of the Central Policy Unit on a number of occasions. Even in the absence of specific statutory requirements, good administrative practice requires that users of public services should have the right to be given reasons for actions or decisions which affect them. In my view it would be very difficult to give meaningful reasons for a decision to refuse access to information without giving the level of detail prescribed by the Act.



As regards the scheduling of records, a common objection made by some public bodies is that it is time consuming and a waste of resources. Based on what I have observed in the course of this investigation and when dealing with reviews, I have little sympathy with these objections. Where a large number of records is involved it is practically impossible to meet the requirements of the Act without providing a schedule to the requester. Failure to produce a schedule also results in additional work at the internal and/or external review stages.

Failure to provide a proper schedule also suggests that the decision maker may not be taking the rights of the requester seriously. After all, the Act is intended to provide access to information held by public bodies to the greatest extent possible consistent with the public interest and the right to privacy. Release should be the norm; refusal the exception. In this context, it is hardly too much to expect a public body which is refusing access to go to the trouble of properly documenting that refusal.

### **Breach of Time Limits and Failure to Reply**

The Act prescribes strict time limits for dealing with requests and applications for internal review. It safeguards the rights of requesters by providing that if a public body fails to make an initial decision on a request within four weeks, the request is deemed to have been refused, and the requester is entitled to apply for an internal review. Similarly, if an internal review decision is not made within three weeks, the requester is entitled to seek a review of the initial decision (or deemed decision) from the Information Commissioner.

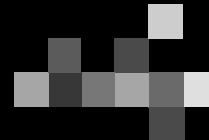
All public bodies have procedures in place which are designed to meet the requirement to provide decisions within the statutory time limit. In the case of most of the public bodies examined no breaches of the statutory deadlines were found. In these cases the FOI unit appeared to take an active role in following up the processing of requests and ensuring that replies issued on time. In the remaining public bodies occasional breaches occurred. Occasional breaches may be unavoidable in larger public bodies which deal with a large volume of requests or where an unexpected peak occurs in the number of requests received. However, I would be concerned if this failure to meet time limits becomes more common because it could erode the commitment to timely decision making which, on the evidence of this investigation, is present in most public bodies.

Failures which went beyond the occasional breach were noted in the case of three public bodies - the Department of Education and Science, the Department of Health and Children and, to a lesser extent, the Department of Justice, Equality and Law Reform. Of these, the most serious problem is in the Department of Education and Science.

### **The Department of Education and Science**

The Department said that its problems in meeting the statutory deadlines derive from the fact that it is facing a large demand for personal records from former residents of industrial and reformatory schools relating to their time in these schools. It said that, to date, it has received about 1400 requests for access to records held in relation to industrial and reformatory schools. It has answered over 900 of these requests but over 400 are still outstanding.

The Department has informed requesters that it is wholly committed to the full release of these records in accordance with the FOI Act. However, it has indicated that there are practical difficulties with these cases which make it impossible to meet the timescales set out in the Act. All



the records are stored by the Department in paper form. Given the passage of time, many of them are in a poor condition, which makes their retrieval and examination for FOI purposes extremely difficult.

The Department said that, in all, it holds over 230,000 separate documents relating to the 59 institutions under the Industrial and Reformatory School System. Of these 230,000 documents, over 130,000 are contained in the Department's administration files relating to the institutions concerned. Some of these records contain occasional references to former residents e.g. in medical inspections.

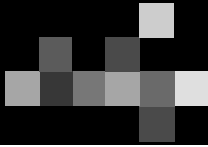
The Department has records of over 41,000 former residents of such institutions, of which the Department holds specific personal files for about 13,000. Of the 230,000 documents held by the Department, 100,000 documents relate to these individual personal files. Search and retrieval of these records on a manual basis has proven to be very time consuming.

In response to the search and retrieval issue, and to a number of High Court actions against the Department which would involve the release of these records, the Department moved in August 1999 to scan all the records on to a computer database. Each scanned record was individually processed using relevant index data which facilitates retrieval using specific search criteria e.g. name, institution, period of residence, etc. This project is expected to be completed in September 2001 from which time requests should be capable of being processed more easily. In the interim, the Department is continuing to process all FOI requests received on a manual search and retrieval basis.

The Department said that the FOI Act was not suited to the provision of what proves to be very limited personal information in these cases. It indicated its preference that such information be released in a caring, supportive and compassionate way. It said that it is exploring with Barnardos the possibility that it would provide a wider service involving a family tracing service, mediation and support for persons who were raised in industrial and reformatory schools. It envisages that personal records would be made available to such people through Barnardos.

It will be clear from what I have said elsewhere in this report that I do not believe that it is either necessary or desirable that people should always be forced to use the formal request mechanisms of the Act to obtain information. This is all the more so where the public body concerned has no real objection to release. Therefore, I broadly welcome the Department's general proposal for making this information available to the requesters concerned. I would add one caveat. No matter how well intentioned the Department's proposals involving Barnardos may be they must not involve any diminution of a requester's statutory rights. Until the proposal is implemented the Department has a responsibility to continue to deal with requests made under the Act. Indeed, even when the Barnardos proposal is implemented the Department must still permit any requester who so wishes to exercise his/her right under the FOI Act.

It would be wrong to give the impression that the Department is experiencing problems only in relation to industrial schools cases. In relation to other requests, not connected with industrial schools, I noted that long delays occurred in the FOI unit forwarding requests to the appropriate decision maker or internal review officer. In some cases 2 - 3 weeks passed before the request was assigned. This led to inevitable delays in replies issuing and deadlines were not met by significant margins in about half the cases examined. In two cases no initial decision issued.



These both involved requests to sections that were heavily involved in High Court actions and this certainly contributed to the lack of response. However, other public bodies have faced similar problems of competing demands on a section's resources but have managed to cope either by reassigning the request or agreeing a deferral or a narrowing of the scope of the request with the requester. The Department accepts that it has had difficulties in this area in the past but has stated that it is committed to eliminating these problems so as to ensure the maximum overall efficiency in responding to FOI requests made to it. I note that the Department has attempted to address some of these problems by assigning extra staff to the FOI unit.

The Department's problems are also evident in its dealings with my own Office. The general level of response, even to simple requests for information is very poor and compares unfavourably with the response of other public bodies.

### **The Department of Health and Children**

Of the ten cases randomly selected from the Department I found three where no decision letter issued at all. Under the Act this is deemed to be a refusal by the Department and in each case a request for an internal review was made by the requester. In one of these cases the subsequent internal review decision took four months to issue instead of the twenty one days required by the Act. In another case an appeal received by the Department on 6 March 2000 had yet to have a decision issued on it a year later. My own Office has also experienced difficulties in obtaining responses from the Department although the scale of the problem is less than in the case of the Department of Education and Science.

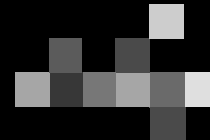
Among the public bodies examined, with the exception of the Department of Health and Children and the Department of Education and Science, the investigation found no evidence of systematic failure to deal with requests resulting in the triggering of these automatic appeal provisions. In the case of the Department of Health and Children, failure to take the initial decision within the deadline appears to happen often enough to give rise to serious cause for concern. When taken together with the other failures identified in relation to that Department, it underlines the need for an immediate review of its FOI procedures.

I raised these problems with the Department. In response it said that the results of the sample were not indicative of the Department's performance in relation to FOI generally. I should point out that the sample for the Department was chosen in exactly the same way as for other public bodies - most of whom did not exhibit the deficiencies identified in the case of the Department.

The Department acknowledged that it has problems in meeting the statutory deadlines but it said that the failure to do so is neither deliberate nor systematic. It said that a review of its procedures is already underway and that it is considering particular initiatives to support the Act on an ongoing basis.

### **The Department of Justice, Equality and Law Reform**

Failure to meet deadlines in this Department was less serious than in the Department of Education and Science and the Department of Health and Children. The investigation discovered a small but fairly consistent delay in dealing with applications for internal review with most taking four weeks or more as opposed to the 21 days permitted by the Act.



### **Failure to advise Requesters of Appeal Rights**

The obligation to advise requesters of their appeal rights appears to be generally observed. The one possible exception is the Department of Health and Children whose practice in this area makes it impossible to be certain that requesters are advised of their rights of appeal.

When a request is acknowledged by the Department a one-page leaflet is attached which describes the requester's rights of appeal under the Act. Unlike other public bodies examined, the Department does not include this information in its decision letters although sections 8 and 14 require that the decision letters include details of the rights of review. Instead, the Department's practice is that decision makers and internal reviewers enclose a copy of the same leaflet when issuing their respective decision letters. In a number of cases it was not clear whether this leaflet was enclosed with the internal review decision. The letters concerned made no reference to it and no copy of the leaflet was on the file. I consider that there is a real possibility that an official issuing a decision letter may accidentally omit to include the leaflet resulting in the requester not being reminded of his/her right to appeal both to the Department after the initial decision and to my Office following the internal review decision. I recommend that the Department adopt the practice of the other public bodies examined and outline the requester's appeal rights in its decision letters.

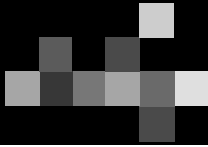
### **Statements of Reasons**

My general conclusion is that, where information is refused, statements of reasons which fail to meet the requirements of the Act are reasonably common. The sample would suggest that such failures occur in about 50% of cases. Without a proper statement of reasons a requester cannot make an informed decision as to whether to seek a further review. here is clear evidence from the reviews which come before me that unnecessary reviews are being generated as a result of the failure to give proper statements of reasons.

Failures of one kind or another occurred in all the public bodies examined. However, the seriousness of these failures varied considerably as between public bodies. For example, in the case of the Department of Social, Community and Family Affairs, some refusals were badly explained but were probably justified. In Dublin Corporation there were a number of refusals where no explanation of the exemption used was given or how it applied to the records being refused. In the case of the Department of Finance any deficiencies found related only to initial decisions with internal review letters giving clear reasons and a proper explanation of the public interest considerations in releasing or withholding the information in question.

Some public bodies had specific problems. In the case of the Department of Justice, Equality and Law Reform, where adequate explanations had not been given in a number of the cases examined, two particular problems were noted. The first was a tendency to rely on an exemption but to give no indication as to why it was appropriate in the particular case. The second was failure to provide a schedule of the records at issue. The failure to provide a schedule meant that in some cases the requester had no indication of how many records were being refused and often was given little real information about the nature of the records held by the Department.

Prior to this investigation and as a consequence of inadequate decision letters issuing from the Department, staff from my Office had met the Department, at the latter's request, with a view to addressing these issues. The Department maintains that since then there has been a significant improvement in the decision letters now issuing due to greater input by the FOI Officer and it has



provided examples of improved decision making letters to support this contention. I will continue to monitor the progress being made by the Department in this matter.

Similar problems were noted in the case of the Revenue - inadequate reasons and no schedules in some cases. A further problem arose from the fact that some requests cover records held in more than one branch of the Revenue. The Revenue's approach in these cases used to be to appoint a separate decision maker in each branch to decide on access to the records held in that branch. These separate decisions were then sent to the requester by the FOI unit. Originally, the FOI unit forwarded these separate decisions to the requester with a covering letter - a practice which some requesters clearly found confusing. It should be noted that these comments are based on the sample examined in the course of the investigation which was drawn from the period January - July 2000.

Following a review of its procedures in May 2000, the Revenue has adapted significantly its approach to explaining decisions. Schedules are provided and requesters are told what records are not being released. Explanations which go beyond a simple paraphrase of an exemption are provided. Its current approach to decision making favours one division taking responsibility, where practicable. In such cases only one decision is made which covers all records. Where this is not practicable a single decision letter issues from the FOI unit which incorporates the decisions of the separate decision makers. The Revenue has given me recent examples of its revised style of decision letter and I am satisfied that these meet the requirements of the Act. Time did not allow me to establish whether the Revenue's changes of practice have been carried through in all cases. However, I think that it is worth recording that there has been a significant fall in the number of applications for review to my Office against Revenue decisions (1999 : 56, 2000 : 31 and 2001(5 months) : 5) and this may be attributable in part to its new approach to explaining its decisions. The Revenue has said that its arrangements are subject to ongoing review to determine best practice.

### **Recommendations**

The Department of Education and Science and the Department of Health and Children should review the procedures adopted for dealing with requests under the Act and should take early action to address the deficiencies identified in this report.

The Central Policy Unit should consider arranging further training for public bodies in relation to the level of explanation required when access is being refused.

## Fees

### Fees and the FOI Act

The FOI Act provides a detailed regime for charging fees in respect of information sought under the Act.

The Act permits the charging of a fee only in connection with:

- the gathering together of the relevant records (search and retrieval time); and
- any copying of the record which is required (section 47(2)).

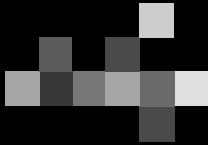
The number of hours of search and retrieval time which can be charged are limited to those which an efficient and well-organised body would need to find the records. The hourly amount of the search and retrieval fee is set by regulation at £16.50 (€20.95). The charge for the copying of records is set at 3p (4 cent) per page.

There are a number of situations in which the Act envisages that a fee may be either reduced or waived :

- Where the requester is seeking records which contain only personal information about her/him, a fee for search and retrieval time is not to be imposed (unless a significant number of records is involved).
- The public body must consider not imposing a fee for the costs of copying personal records if it is not reasonable to do so, having regard to the limited means of the requester and the nature of the personal information being sought.
- A fee (or deposit) may be reduced or waived if the body considers that the records (if disclosed) would be of particular assistance to the understanding of an issue of national importance.
- A public body should not impose a fee if it considers that the amount of the proposed fee would be less than the administrative (including accounting and collection) costs involved.

It is clear that the fees charged in respect of the provision of records under the Act do not cover the full cost of dealing with a request, since by far the greatest cost to public bodies in most cases is the time spent in considering whether records should be released. It is also apparent from comments made during the passage of the legislation through the Oireachtas that this was deliberate, that the charging regime is not intended to discourage the average user of the Act from making requests and that they are intended, in part, as a safeguard against abuse of the right of access by persons making voluminous or deliberately disruptive requests.

Despite this, some concern was expressed during the passage of the legislation and subsequently that the charging of fees might be used by some public bodies as an unreasonable deterrent to requesters. In the course of the investigation I looked at how the fee regime operated in practice. In particular, I examined whether it was applied uniformly by public bodies and whether there was any evidence that fees were being imposed in such a way as to defeat the purposes of the Act.



## The Charging Regime in Public Bodies

In the case of the public bodies examined during the investigation, fees were charged in only a very small percentage of cases, ranging from 1% to 4% depending on the public body concerned. However, I noted that the number of FOI requests where fees have been paid has increased in 2000 (from 82 in 1999 to 130 in 2000 for civil service Departments/Offices), signalling an increased willingness on the part of some public bodies to charge fees. The public bodies examined during the investigation indicated that very few requests are withdrawn or not proceeded with because a fee or deposit is charged. However, the imposition of a fee may result in the request being narrowed - something which is not objectionable in itself - provided it does not result in a requester being unreasonably denied access to records.

Requesters have the right to apply to me for review of a decision to charge a fee or deposit in excess of £10 (€12.70). Only 18 such applications have been made since the commencement of the Act. Accordingly, my general conclusion is that fees are not being used by public bodies as an unreasonable deterrent and a means of avoiding unwelcome requests.

It appears that in many cases public bodies are reluctant to charge fees simply because of the inconvenience involved for the decision maker in doing so and that more fees might be imposed if the process was streamlined. At this stage, I do not favour any easing of this administrative burden. I do not believe that the experience of the last three years suggests that the rights of requesters should be curtailed or that it should be made any easier for public bodies to deflect requests through the imposition of fees.

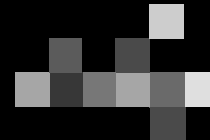
The Act provides, in section 47(6), that fees are not to be charged where collection, accounting and other costs would exceed the amount of the fee. CPU Notice 11 suggested that effect should be given to this provision by not charging any fee less than £5 (€6.35). In practice this guideline appears to be widely disregarded, with some public bodies and individual decision makers deciding when fees should be waived on *de minimis* grounds, often at a level considerably in excess of £5 (€6.35). This is not altogether desirable because it can lead to inconsistent and arbitrary charging practices.

There also appeared to be a view among some decision makers that if a deposit was not sought when the request was being dealt with initially then the maximum fee which could be charged was £40 (€50.80). In my view this is not correct. If for one reason or another - for example, failure to estimate the cost of search and retrieval accurately in advance - a deposit is not demanded, it is still open to a public body to charge a fee in excess of £40 (€50.80) either on foot of the initial decision or on internal review.

## Recommendations

The Central Policy Unit should reconsider the recommended *de minimis* fee with a view to increasing it to a level which would be applied uniformly by decision makers. The effect of this recommendation is to raise the threshold figure at which fees become chargeable.

Each public body should review its practices in cases where a deposit has not been demanded but the ultimate cost of search and retrieval exceeds £40 (€50.80).



## Records Management

### The Importance of Proper Records Management

The FOI Act does not impose specific requirements on public bodies in relation to records management, although provision has been made in section 15(5) for the making of regulations by the Minister for Finance in relation to this matter. Despite the absence of specific requirements it is clear that proper records management is vital to the success of the Act. As the joint Australian Law Reform Commission/Administrative Council put it in its review of the operation of the Australian Federal FOI Act:

*"Good record keeping and records management are...important to the success of the FOI Act. Without them, the right of access provided by the Act is unenforceable in practice. Agencies will be unable to locate records efficiently (if at all) and records that ought to be retained may be destroyed."*

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

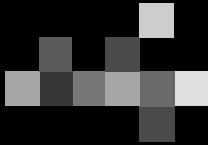
- "corporate memory" is preserved thus ensuring informed decision making and continuity following staff transfers,
- information can be shared easily, thus enabling the business of the public body to be conducted efficiently
- appropriate information is available to management,
- evidence of the public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

Proper records management goes beyond the ability to locate records efficiently. It is also concerned with which records should be created, how long they should be retained for and how they should ultimately be disposed of. To a large degree records management is a matter for individual public bodies and is governed by the requirements of the body's business. Therefore, rather than undertake a detailed survey of the records management practices of each of the public bodies examined, I looked for evidence that the objective of the Act was being circumscribed through deliberate failure to create records. I also looked for evidence that public bodies had upgraded their records management systems to enable them to meet effectively the additional requirements of search and retrieval of records which the Act imposes.

### Failure to Create Records

A concern which is sometimes expressed about the FOI Act is that its enactment has led to less information being recorded because some public servants would prefer not to record certain information rather than, as they would see it, run the risk of disclosure under the Act. Similar concerns have been expressed in other jurisdictions. For example, the Canadian Information Commissioner remarked in his 1998/99 report that :

*"Too many public officials cling to the old proprietorial notion that they, and not the Access to Information Act, should determine what and when information should be dispensed to the unwashed public. If bold boasts are to be believed, some have taken to adopting the motto attributed to the old New York Democratic boss : "Never write if you can speak ; never speak if you can nod ; never nod if you can wink."*



It would be surprising if some public servants used to working in a culture influenced by the Official Secrets Act, did not react in this way. In a survey of four public bodies carried out in 2000\*, FOI officers in the public bodies concerned stated they believed that less information was being recorded. It noted that over half of the decision makers that responded thought that less information was now being recorded with a view to avoiding disclosure. Over 80% said that they themselves exercise caution when recording information, particularly where the material may be sensitive or embarrassing. Caution in recording sensitive or embarrassing material is not objectionable in itself particularly if it results in a more objective and considered record being created rather than one where unnecessary, irrelevant and even hurtful comments about individuals are included. However, I would be extremely concerned if information, which ought to be recorded in the interests of enabling the business of the public body to be properly and efficiently conducted, was not now being recorded in an effort to avoid release under FOI.

During the course of the investigation I examined copies of certain types of records created before and since the commencement of the Act from the twelve public bodies examined. These included minutes of management advisory committee meetings, notes prepared for Ministers' own information in the context of replying to parliamentary questions and copies of records of tender competitions.

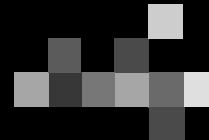
In analysing these records I found no evidence that less detailed information was being recorded or that certain information was being deliberately omitted. Indeed, in some instances I found that minutes of management advisory meetings were being recorded in greater detail than previously. In one particular case minutes were now being recorded where before the introduction of the FOI Act no formal minutes were kept. The analysis of the tender competition files supplied suggested that more public bodies are freely offering feedback to unsuccessful tenderers than was previously the case. There was no evidence that relevant information was not being recorded.

While the number of records analysed was small it does provide some evidence that the culture of official secrecy has not been replaced by a culture of non recording of information simply to avoid disclosure under the FOI Act. That is not to say, on the basis of the current sample, that record keeping in public bodies is of a particularly high standard. I would not be prepared to conclude from this investigation that the standard of record keeping is sufficiently high to meet the criteria mentioned at the start of the Chapter.

One example of unsatisfactory record keeping was discovered in examining the sample of FOI requests from the Department of Agriculture, Food and Rural Development. The request was for records relating to an investigation into a suspected serious fraud by a farmer. The records indicated that while an investigation had been carried out by a regional office, the matter had also been investigated by the Department's special investigation unit (SIU) in Dublin.

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\*The survey was carried out by students of an Institute of Public Administration course and covered the Department of Environment and Local Government, the Department of Finance, the Department of the Marine and Natural Resources and the Department of Public Enterprise



The decision maker in this case was based in the regional office and appeared to have difficulties in establishing whether the SIU had any records on the matter. Following further enquiries the decision maker was informed that the SIU did not have any records in respect of the investigation. The decision maker then issued his decision and in a note on the FOI file indicated that he remained convinced that papers existed in the SIU which had not been given to him in order to respond to the FOI request. It appeared that the FOI unit in the Department also believed that the SIU may have held records relating to the FOI request.

I took up the matter with the Department which informed me that the SIU held no records relating to the investigation up to the date the FOI request was received. I put it to the Department that, if an investigation into such a serious matter was being carried out by the SIU, it would be reasonable to assume that the Unit would have had some record of it. The Department informed me that:

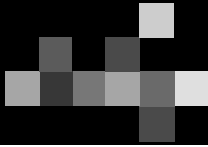
*"The Special Investigation (SIU) got involved in this case following an informal request from the Department's local District Veterinary Office (DVO). The request was for advice and assistance in reviewing the DVO files with a view to bringing about a prosecution in this particular case. SIU members have considerable experience in investigating and preparing cases for prosecution. At the time there was regular contact (face to face and by telephone) between the SIU and the DVO because the SIU were carrying out a number of other investigations in this area. The review of the files and the provision of advice and assistance did not necessitate the creation of any records in the SIU. When the level of SIU involvement in this case was stepped up, adequate records were created and kept in the SIU. These records were created after the date of the FOI request and were therefore outside the scope of the request."*

It went on to say:

*"All members of the SIU are acutely aware of the need to keep full and accurate records. The very nature of their work means that they are constantly involved in preparing cases for prosecution, underlining the need for proper records. The Department is satisfied that the record keeping practices of the SIU are adequate."*

I am prepared to accept the Department's assurance that the SIU did not hold any records relating to the request. Notwithstanding this, the fact that the SIU could be involved in such a serious matter for a period of almost one year without the creation, by the Department, of a single record, which accurately records the SIU's involvement in the case, raises questions in my mind about the Department's record keeping practices.

In former times, detailed and contemporaneous recording of events was one of the defining characteristics of the public service. However, I am aware of many factors at play in the modern public service environment which militate against the recording of information. First, developments in technology have decreased the level of reliance on paper-based files and have led to a dispersion of information across multiple databases, e-mail files etc. which, paradoxically, can be time-consuming and difficult to collate when an FOI request is received. Second, the pace of activity has increased significantly and many public servants find it increasingly difficult to set time aside to write up notes of meetings etc. Third, drawing on the experiences of those public servants who have appeared before tribunals, enquiries etc. some of their colleagues are, in my view, misguidedly and erroneously, adopting, at best, a minimalist approach to the recording of information.



As will be clear from my opening remarks in this Chapter, continued deterioration in the standard of record keeping does not augur well for the future effectiveness of the FOI Act. It also raises concerns about the ability of public bodies to conduct their business efficiently. It also has implications for accountability. As I have pointed out on an earlier occasion, less comprehensive records may be a double edged sword and may lead later on to a distorted view of what the various contributions may have been. I intend to continue to monitor the record keeping practices of public bodies through the reviews which come before me.

### **Efficient Search and Retrieval**

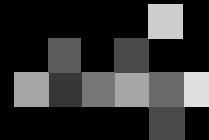
It was generally accepted that with the enactment of the FOI Act, the records management practices of some public bodies would need to be improved. It was expected that Government Departments/Offices and other designated public bodies would use the twelve month lead-in period to review and upgrade their existing file management systems in order to facilitate easy search and retrieval of records under the forthcoming FOI regime. Guidelines on records management were produced by an interdepartmental group on record management in July 1997 primarily for use by civil service bodies preparing for the introduction of the FOI Act. In the light of this, it is disappointing to note that only two of the twelve bodies examined in the course of the investigation - the Department of Enterprise, Trade and Employment and the Department of Social, Community and Family Affairs - have introduced new records management systems to facilitate efficient search and retrieval of records sought under the Act. A few of those public bodies examined accepted that their systems were not entirely adequate to meet the requirements of the Act particularly in relation to records created before the commencement of the Act. Most public bodies examined said that a review is either being, or shortly will be, conducted of their records management systems. This ranges from a 'root and branch' review in some bodies to a review of certain specific aspects of a public body's records management system.

Generally speaking, the FOI files examined in the course of the investigation disclosed no difficulties in relation to accessing records that were created since the commencement of the Act. This is hardly surprising given the relatively short timespan involved. However, some requests for personal records which were created some years before the commencement of the Act did pose difficulties for the bodies concerned. This supports what I have found in reviews which have come before me viz that considerable resources often have to be spent searching for old records, sometimes to no avail. Generally these problems can be traced to inadequacies of one kind or another in records management.

The level of training and guidance provided to staff in relation to record creation, maintenance and disposal varied considerably. Few public bodies provided structured training in records management procedures for all staff. Most relied on local management to ensure that their own staff were adequately informed of the records management requirements.

There appears to be a lack of uniformity in record-keeping practices particularly with regard to responsibility for the records management function. Responsibility for records management appears to lie in different areas in different public bodies, e.g. in Information Technology or Corporate Services areas in some, or at a local level in others.

The failure by some public bodies to accord a higher priority to improving records management runs the risk of storing up serious problems for the future. The difficulties and costs now being experienced in regard to the retrieval of records created prior to 1998 may also feature in future



in relation to requests for records relating to current events. New systems are needed which make appropriate use of modern technology to enable the tracking and retrieval of records and which are robust enough to withstand staff changes and reorganisations.

### **Department of Social, Community and Family Affairs**

As a result of the introduction of the FOI Act a new File Registration System (FRS) was introduced by the Department to register files dealing with non-personal information. Files relating to individuals are accessed by means of the individual's RSI number. The Management Services Unit has responsibility for maintaining the FRS which is an electronic register of all non-personal files in the Department. The FRS is updated by individuals in each area of the Department. However due to the geographical spread of the Department's offices, local management is responsible for the filing, retrieval and disposal of records held by them.

Staff are regularly reminded, through memos and at training seminars, of the need for proper records management in order to meet the business needs of the Department and the requirements of the National Archives Act.

### **Southern Health Board**

In light of the FOI Act all Health Boards adopted a policy on records retention in October 1999. This policy sets out the minimum periods for which records should be retained having regard to the nature of the records. While it did not introduce a new records management system in anticipation of the FOI Act, the Southern Health Board has produced its own guidelines on best practice in records management aimed at ensuring that records are easily identifiable, maintained in a comprehensive system and easily accessible. While there is no central control or responsibility for records management, each manager is responsible for his/her own area.

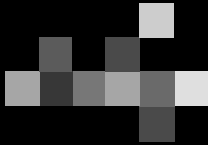
From my analysis of the cases involved I found that there does not appear to be any difficulty in retrieving recent records. However, many of the requests received by the Board and other health boards are for records created many years prior to the commencement of FOI. In these cases retrieval of records depends on the filing systems that were in operation at the time. Very often these were inadequate by today's standards and regrettably sometimes it is not possible to locate these records or even to say whether or not they still exist.

### **Office of the Revenue Commissioners**

The Revenue did not introduce a new records management system in anticipation of the FOI Act. On the other hand, in examining the cases supplied I did not find evidence of any particular difficulties in accessing the records requested. It would appear that different divisions have developed different records management systems to deal with their particular requirements. Because of the huge volume of individual cases which the Revenue has to deal with, there is a constant need to minimise the creation of routine manual records and to arrange for the regular destruction of such records. In such an environment it is important that destruction is properly authorised and recorded and complies with the requirements of the National Archives Act. A recent development is that a group of 'certifying officers' has been set up to ensure that Divisions meet these responsibilities.

### **Department of Education and Science**

The Department did not introduce a new records management system in anticipation of the FOI Act. The Department said that it might look at ways to improve its records management system,



possibly in the context of the "Review of Department's operations, systems and staffing needs" (Cromien report). The main responsibility for records management lies in the Central Management Services and IT areas. The Department has acknowledged that there is a need to improve the system for the future.

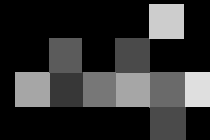
### **Recommendations**

Each public body should devise and publish a records management policy covering the creation, maintenance and destruction of records. The objective of the policy should be to ensure that the activities and decisions of public bodies are adequately recorded.

Each public body should devise detailed guidelines based on these policies and provide staff training in these guidelines.

Where they have not already done so, public bodies should re-evaluate their records management systems to ensure that they are adequate to meet their business needs, including the need to search for and retrieve records efficiently in order to deal with requests made under the FOI Act.

Each public body should allocate responsibility at senior management level for ensuring that development and improvement of records management is accorded the appropriate priority.



## The Use of the Exemptions contained in the FOI Act

### The Exemptions

One of the keys to the successful operation of the Act is the ability of public bodies to interpret and apply the exemptions in the Act properly and consistently. In this chapter I identify difficulties and deficiencies in the application of some of the exemptions - in particular, those provided for in sections 19, 20 and 26 of the Act. Since the primary purpose of this investigation is to examine the practices and procedures adopted by public bodies for the purposes of compliance with the Act, I do not consider it appropriate to attempt to review in detail how each public body has applied these exemptions. Instead, I have tried to identify instances in which decision makers generally appear to have taken a narrow view of an exemption or appear to be uncertain how to deal with it or where I believe there is an underlying problem contributing to overuse of the exemption.

My comments are based partly on my own experience of reviews which have come before me and partly on the results of the sample which I examined during this investigation. My conclusions are necessarily tentative because time did not allow for an in-depth analysis of how the exemptions are being applied by each of the public bodies concerned. Nevertheless, I am satisfied that the problems identified are sufficiently widespread to warrant consideration by public bodies.

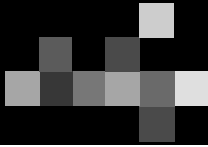
### Section 19

The effect of this section was explained at Committee Stage in the Seanad by the sponsoring Minister of State, at that time, Eithne Fitzgerald T.D. in the following terms: (see Seanad Debates Vol. 149, Col. 1572).

*"It provides limited and time bound protection for matters prepared for Government, related briefing material and Government records. This material can become available and the protection will no longer be applicable when five or more years elapse from the relevant decision being made or, in respect of factual information, where the associated decision has been published, unless another exemption protects the information. Basically, after a Government decision has been made and published, the factual material relating to that decision is released. Secondly, within five years the whole memorandum is released, unless there is some degree of protection because it concerns security or the personal affairs of an individual. In other words, the material is intrinsically covered by another exemption."*

The section contains both mandatory and discretionary exemptions. The mandatory exemption is contained in section 19(2) and requires access to be refused to records (other than memoranda to Government and briefing material) which contain the whole or part of a statement made at a meeting of the Government or information that reveals, or from which may be inferred, the substance of the whole or part of such a statement. This provision is intended to be sufficiently narrow to be consistent with the decision in the case of Attorney General v. Hamilton on Cabinet confidentiality (see comments of sponsoring Minister in the Dáil : Dáil Debates Vol. 477, Col. 765).

The discretionary exemption is contained in section 19(1) and applies to other records such as memoranda to Government and associated briefing material but with two exceptions. Access cannot be refused under section 19(1) to records which relate to a decision of the Government made more than five years earlier nor to records to the extent that they contain factual information about a published decision of the Government. Where discretion to refuse access does exist e.g. where the records relate to a decision of the Government and contain something other than factual information then, before exercising the discretion in favour of release, the decision maker is required to consult with the leader of each political party which participated in the Government which made the decision to which the record relates.



In practice, it appears that decision makers rarely, if ever, consider exercising their discretion to release. Nor have decision makers been provided with any guidance as to when it might be appropriate to exercise their discretion to release or how to go about the consultation process envisaged by the section where release is contemplated. This has led to a perception among some decision makers that the section 19 exemption is mandatory in its entirety. It has also resulted in situations in which decision makers appeared to feel obliged to refuse access to Government memoranda even though their contents had already been released in their entirety by way of press release.

I am concerned that an exemption which is clearly intended to be applied with discretion, is regarded, in practice, as mandatory. Further, the refusal of access to records whose contents are already largely in the public domain is not an encouragement to the creation of a more open public service. It appears to place the emphasis on finding the correct "technical" basis for refusal rather than making information available "to the greatest extent possible consistent with the public interest and the right to privacy". Such a minimalist approach can easily spill over into the use of other exemptions resulting in an overly cautious approach to the release of other information.

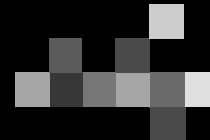
## **Section 20**

Section 20 is concerned with ensuring that the right of access to official records does not prejudice the deliberations of public bodies. The application is discretionary, which means that records which fall within its scope may be released at the discretion of the decision maker/internal review officer in the public body concerned. It is an important exemption and one which is used frequently by public bodies, particularly Government Departments.

For the exemption to apply, two requirements must be met. The first is that the record must contain matter relating to the deliberative process; the second is that **disclosure must be contrary to the public interest**. These are the two independent requirements. The fact that the first is met carries no presumption that the second is also met.

### *The Public interest Test*

Evidence gathered from the reviews which came before me and during the investigation suggests that some decision makers are experiencing problems in applying this exemption. Some displayed a basic misunderstanding of the nature of the public interest test which section 20 requires, confusing it with the public interest balancing test contained in sections such as 21, 26 and 27. This latter test applies when a decision maker, having decided that access may be refused on the ground that some harm will be caused by release or may reasonably be expected to be caused by release, must then consider whether, notwithstanding any such harm, the public interest would, on balance, be better served by release. The point of this "balancing" test is that it involves a presumption that a harm of some kind has already been identified and is weighing against release. When a decision maker uses a balancing test in section 20, or the language of a balancing test, then the message conveyed to the requester is that the decision maker considers that the release of material relating to the deliberative process is, of itself, harmful and is only permitted where some public interest can be identified which will outweigh the harm previously identified. Not surprisingly, a decision maker starting from this premise is most unlikely to release records.



The correct application of the public interest test in section 20 requires the decision maker to identify some particular reason why release would be contrary to the public interest. In essence this public interest test is a harm test although, in contrast to the harm tests in provisions such as sections 21 and 23, the specific harms are not identified in the section. The harm to the public interest must be considered having regard to the contents of the record or records at issue in each particular case.

### ***Release during Deliberative Process***

A second problem with the application of section 20 is the view among some decision makers that material relating to the deliberative process should not be released until that process has concluded. I can discern no such principle in the terms of section 20 and if, indeed, the purpose of the section is to protect matter relating to the deliberative process until that process had been completed, it would have been a simple matter for the Oireachtas to have enacted a specific provision along these lines. It is true that section 20 provides that a decision maker must consider whether release would be contrary to the public interest by reason of the fact that the requester concerned would thereby become aware of a significant decision that the body proposes to make. This falls well short of any justification for the view that material must always be protected until the deliberative process has concluded.

The view that nothing should be released until the deliberative process has concluded seems to have led some decision makers to refuse access simply because an issue, which was once the subject of deliberations, has yet to result in a final outcome. For example, in one case a matter which had been decided by the Government some time earlier was the subject of subsequent representations to the Department. Access to the records dealing with these representations was refused, apparently because at the date of the request the Government decision had not yet been implemented. It seemed that very little consideration, if any, was given to what harm might be caused by release.

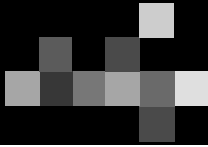
The evidence gathered in the course of the investigation tends to reflect my experience in dealing with reviews of decisions where section 20 has been involved. A number of such reviews have been settled on the basis that by the time the review came to be dealt with the information had been released because the deliberative process had concluded. This is not a satisfactory outcome from the requester's point of view and it gives rise to suspicion among some users of the Act that refusals under section 20 are tactical, designed to defer access until it suits the public body.

While section 20 does not require, as a matter of principle, that material should be withheld until the conclusion of a deliberative process, it is open to a public body to argue, in any particular case, that the public interest requires no disclosure until the process has been completed. However, any arguments on this ground must be supported by the facts of the case and a specific harm to the public interest flowing from the release must be identified.

### **Section 26**

Section 26 is a mandatory exemption concerned with protection of information held by public bodies which is received in confidence from third parties where:

- disclosure would be likely to prejudice the giving of similar information to the public body in the future and it is of importance to it that it receives such information (section 26(1)(a)), or



the information is subject to a legal duty of confidence owed to the supplier of the information (section 26(1)(b)).

This is a complex exemption and it would appear that many decision makers experience difficulty in applying it correctly. In some cases the exemption is invoked in circumstances where it is inappropriate to do so.

### ***Protecting the Identity of a Supplier of Information***

In some cases what the public body seeks to protect is the identity of the person who has provided information to it in confidence, as opposed to the contents of the information. In such cases, access may more appropriately be refused under section 23(1)(b) or section 46(1)(f) - which provide that access may be refused if it could reasonably be expected to reveal or lead to the revelation of the identity of a person who has given information in confidence to a public body in relation to the enforcement or administration of the civil law or in relation to the enforcement of the criminal law.

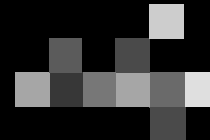
### ***Information used to influence Policy Making or Legislation***

A second set of circumstances in which it may not be appropriate to invoke section 26 is where the information at issue is intended to influence policy making or legislation. In such circumstances, it is most unlikely that a legal duty of confidence is owed to the provider of the information. However, public bodies may feel that refusing to treat such information in confidence will reduce the flow of information to them. In my view this is a consequence which must be suffered in the interests of democracy. The alternative is to permit policy to be formulated and legislation to be enacted on the basis of secret representations - something which is wholly at odds with the concepts of openness and transparency which the FOI Act was intended to foster. As I pointed out in my decision in Case Number 98058 - *Mr Phelim McAleer and the Department of Justice, Equality and Law Reform*, there may be unusual circumstances in which persons providing information or opinions which are intended to influence policy or legislation also provide information of an essentially private nature about themselves or their business. Section 26 or other exemptions may properly be invoked to protect such confidences. This apart, public bodies should be slow to invoke the section to protect inputs to the policy making and legislative processes.

### ***Information provided by other Public Bodies***

A third set of circumstances in which the application of section 26 may be inappropriate is where the information was provided by another public body. This is only an issue where the provider of the information is a public body which has not yet been brought within the scope of the Act - such as the Garda Síochána. Where the provider of the information is another public body which is within the scope of the Act then the information cannot be protected under section 26 unless it is the subject of a duty of confidence owed to someone other than the public body, a member of its staff or a person providing services to it under a contract of services (see section 26(2)).

Where the provider of the information is a public body not yet within the scope of the Act (but whose future inclusion is provided for by the First Schedule of the Act), then a claim for exemption under section 26 requires a decision maker in the recipient public body to conclude either that release would be likely to prejudice the flow to the recipient public body of future similar and important information or that it would involve a breach of a duty of confidence owed to the



provider of the information. One possible situation in which the flow of information to the recipient public body could be prejudiced is where the provider of the information has obtained that information in confidence from a third party. In my decision in Case Number 98100 - *Ms Fiona McHugh and the Department of Enterprise, Trade and Employment* I accepted that in such circumstances disclosure would be likely to prejudice the giving of similar information to the first public body which, in turn, would prejudice the provision of the information to the recipient public body. Apart from this exceptional situation it is difficult to accept that one public body would simply refuse to provide information to another public body where the information concerned is of importance to the latter public body (and presumably intended to be used to discharge its functions). This means that recourse to the exemption in section 26(1)(a) will not normally be justifiable.

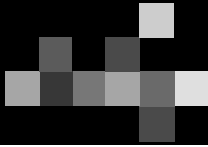
As regards section 26(1)(b), in the absence of a duty of confidence imposed by statute or by an agreement, the only other basis on which refusal might be considered is if an equitable duty of confidence was owed either to the public body providing the information or to someone who, in turn, had provided the information to it. This latter duty arises where disclosure of the information would involve "unconscionable" behaviour on the part of the recipient - something which seems rather unlikely, at least in the case of information which was not received originally from some third party.

The fact that section 26 may not apply in the circumstances outlined above does not mean that the information sought to be protected should always be released. The Act has a number of exemptions which protect the functions of both the provider of the information and the recipient public body as well as protecting the privacy interests of third parties. The concentration on section 26, sometimes to the exclusion of other more appropriate exemptions, tends to distract decision makers from identifying real harms which could be caused by release. In other cases it results in the refusal of access to information whose disclosure could not conceivably cause any harm.

### ***Determining whether Information was given in Confidence***

Even where section 26 is correctly invoked decision makers appear to have problems in determining whether information was given in confidence or is subject to a legal duty of confidence. Given the volume of business transacted by public bodies, it is not surprising that express assurances of confidentiality are relatively rare. This means that decision makers often have to decide whether an assurance of confidence was implied. This is not an easy task particularly since the decision maker may not be able to establish with certainty the precise circumstances in which the information was given to the public body and the use to which the provider of the information intended it to be put. Even where express assurances of confidentiality are given problems can arise. Some such assurances may be inappropriate, or their scope may be misleading, as where, for example, information is given to a public body and it is intended that active use will be made of it to the detriment of another person. In such cases, if active use is made of the information then fair procedures may require disclosure of the substance of the information to the person affected regardless of any prior assurances given to the provider of the information.

The problems in applying section 26 could be eased if public bodies were to develop and publish clear guidelines on the collection and use of information obtained from third parties and a clear policy on when confidentiality would be assured to such parties. Such guidelines, provided they



observed the principles underlying the FOI Act in this area, would create greater certainty for suppliers of information as well as ensuring that information was not withheld unnecessarily from requesters. Based on the evidence of the investigation it seems that some public bodies have attempted to put suppliers of information on notice of the possibility of release of information under the FOI Act. In many cases this guidance is framed as advice that the public body will treat the information as confidential unless required to release it by virtue of the FOI Act or otherwise by law. While this is clearly better than ignoring the issue altogether, it can create considerable uncertainty for the supplier of the information. The approach taken by the health boards in developing guidelines for administrative access (see chapter 7) is a good example of the value of developing general guidelines on the collection, use and disclosure of information.

### **Recommendations**

The Central Policy Unit should provide guidelines to public bodies on the circumstances in which the discretionary exemption in section 19 (meetings of the Government) should be invoked and on how the consultation procedures provided for in section 19(4) should be undertaken.

Each public body should re-examine its use of the exemption in section 20 (deliberations of public bodies) to ensure that information is only withheld on clearly arguable grounds, not merely on the ground that the decision making process has not concluded or that release could cause embarrassment to the body or to the Government. Senior management should provide support to decision makers by clearly indicating the circumstances in which section 20 should not be invoked.

Each public body should develop and publish guidelines on the collection and use of information obtained from third parties, so as to reduce uncertainty about the status of that information, the use to which it may be put and the circumstances in which it may be disclosed under the FOI Act or otherwise.

# Reducing the Burden of Complying with FOI Requests

## **The Role of FOI in the Provision of Information**

The processing of FOI requests can impose a formidable administrative burden on public bodies. Requests must be acknowledged within a statutory deadline, third parties notified in certain cases where release is proposed, detailed reasons for any refusal must be given, and a right of appeal offered. It is clear that the FOI Act was never envisaged as the sole or main avenue by which information is made available to the clients of a public body, the media or the general public. Indeed, section 6(8) of the Act declares that nothing in the Act is to be construed as prohibiting or restricting a public body from publishing or giving access to a record (including an exempt record) otherwise than under the Act unless this is prohibited by law.

Information about the rules, procedures, practices, guidelines and interpretations used by public bodies must be published in accordance with section 16 of the Act. However, this still leaves an enormous amount of information which is potentially accessible under the FOI Act. Common sense as well as administrative convenience suggests that the public service should strive towards providing as much of this information as possible outside of the FOI Act ( i.e. without the need for a formal FOI request) and that the practices of public bodies may have to change to accommodate this. As the then Minister of State Eithne Fitzgerald put it during the passage of the legislation through the Oireachtas ( see Seanad Debates Vol. 50, Col. 114 ):

*" Freedom of information must go with the grain of how public bodies do their day-to-day job and giving information must be built into the way public officials work. If there is a tension between doing the day-to-day job and providing information, it will be difficult to practice freedom of information. It is important to devise systems that ensure that the provision of information goes with the grain of how public business is done. "*

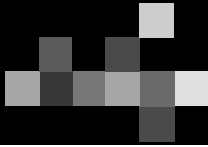
## **Developing a Policy on releasing Information outside FOI**

Release outside of the FOI Act can benefit requesters through faster provision of the information; the public body gains through avoiding the need for formal processing. Prior to the implementation of the Act the FOI Central Policy Unit advocated an active approach to the release of information outside of the FOI Act. It recommended that public bodies develop instructions for staff clearly specifying the arrangements governing access to broad classes of non-contentious information outside of the Act (see CPU Notice Number 5, reproduced in Appendix 2).

During the course of the investigation I examined what steps public bodies had taken to reduce the need for formal FOI requests. In doing so I largely disregarded the fact that some public bodies had provided very significant amounts of information in their section 16 manuals since there is a legal obligation to publish this information. Instead, I looked for evidence that the public bodies concerned had developed coherent policies on the release of information outside of the Act or had adjusted their procedures to achieve a greater openness.

## **Administrative Access**

Most public bodies were able to point to some area in which access was now granted to records outside of FOI as a matter of course. The Department of Finance publishes the papers of the Tax Strategy Group on its website as soon as possible after the Minister's budget day speech. The papers are edited but it is clear from a perusal of some of the documents that worthwhile, topical information which gives an insight into the Department's thinking is being released. The Department of Justice, Equality and Law Reform said that reasons for visa refusals are now given administratively and that this has reduced the volume of FOI requests in this area. The



Department of Health and Children has undertaken to provide routine access to the minutes and reports of the Forum on Fluoridation. Most public bodies referred to the release of personnel files ( including records created before 21 April 1995, where there may not always be a legal right of access under the FOI Act). Others referred to the release of the results of internal promotion competitions and the release of information to unsuccessful tenderers.

Both the Southern and the former Eastern Health Board had developed detailed administrative access policies in relation to client records - with the latter's policy now adopted by its successor area health boards. The arrangements set out clear guidance as to when and to whom client information may be disclosed administratively and when requesters should be required to make a formal request under the FOI Act.

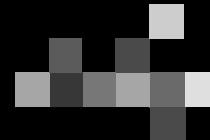
Other public bodies have not developed similar guidelines although such an approach is advocated in CPU Notice Number 5. In my view such guidelines could be very helpful to the emergence of a culture of openness. They would remove uncertainty about what records the public body releases routinely. They would also serve to reassure more junior officials that the public body was committed to a more open policy and that specified categories of releases made outside of the Act were authorised.

There are other steps which could be taken to increase access outside of the FOI Act. The first is to adopt a proactive policy on releasing deliberative process material or other documents which are likely to be of general interest. One genuine barrier to the release of such material is the need to edit records before release. Sometimes a record may be capable of release but for a relatively small amount of exempt material. The FOI Act deals with this by providing that records may be edited to remove exempt material and the decision on what to edit is made by the FOI decision maker. If records are to be released in a proactive manner then the question of editing will have to be dealt with in each case. It might be argued that it is unnecessary for public bodies to take on such a burden in the absence of a formal FOI request. In practice and, as the experience of the Department of Finance in relation to the release of the Tax Strategy Group papers seems to illustrate, this is unlikely to be a significant burden, particularly if the task is undertaken by the authors of the records or by people who are familiar with their contents. In my view the burden of editing such records in advance is more than compensated for by the early release of worthwhile information which is of general interest.

The uncertainty which can surround the status of information obtained by public bodies from third parties can also inhibit the emergence of a culture of openness. It would help matters if the CPU were to publish further guidelines regarding the release of information obtained from third parties in circumstances which are common to many public bodies e.g. tendering, recruitment/selection references, staff complaints.

### **Informal procedures**

An issue which emerged in the course of the investigation was the degree to which some decision makers may feel bound to go through all the formal procedures of the Act even where this is not necessary from a practical point of view. Two contrasting examples will illustrate the point. Some public bodies stated that access requests for files not containing exempt records would sometimes be met simply by inviting the requester to inspect the relevant file and offering copies of any of the records which the requester wanted. In contrast, in one case noted in the course of the investigation, it took a five page letter to tell a requester that the public body did not accept that there was a right of access but that it was prepared to grant access administratively!



### **Promotion of Access**

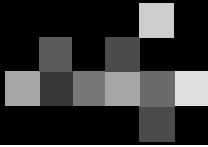
A striking feature to emerge during the investigation was the degree to which many public bodies, in practice, appeared to treat FOI as an operational matter which was concerned almost exclusively with the efficient processing of formal requests made under the Act. This may be understandable given the need to process requests efficiently and the desire to ensure that requesters' rights are not denied simply through administrative failures. However, it runs the risk of losing sight of the broader objective which is to increase openness, transparency and accountability. If the Act is to be fully effective then each public body needs to allocate responsibility, at senior management level, to promoting changes in procedures and attitudes which will result in more openness and a greater willingness to release information.

### **Recommendations**

Each public body should develop comprehensive guidelines on access to information outside of the FOI Act.

Each public body should identify classes of documents which are likely to be of general interest and adopt procedures to ensure that a proactive approach is taken to releasing them.

The Central Policy Unit should consider developing further guidelines regarding the provision of information from third parties in circumstances which are common to many public bodies e.g. tendering, recruitment/ selection references, staff complaints.



## A more open Public Service ?

Can it be said that some three years after the introduction of the FOI Act, the public has a better understanding of the business of government? Have we now a public service which is more open in its dealings with the citizen and more willing to explain its actions and activities?

### Media Usage of the FOI Act

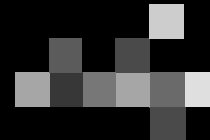
In a modern democracy one vital means of bringing information about the business of government into the public domain is through the media. It is important that the media's capacity to do this should not depend solely on channels where the choice of information and the timing of its release is at the discretion of the party providing it. The FOI Act, by giving a statutory right of access to information, shifts the initiative to the requester. Hence the importance of the media availing of this right on behalf of the community. Without wishing to suggest that any category of requester is more important than any other, I believe that effective use of the Act by members of the media is important. Journalists have recognised the value of the Act and media usage appears to be increasing. For example, media requests in the year 2000 totalled 2,548 - an increase of 58% over the previous year's figure.

While I see this increased usage as a good thing, I also recognise that the media are not totally disinterested parties publishing material solely in the public interest. They have competitive pressures and commercial interests of their own, a point made by the distinguished English judge, Sir John Donaldson, and quoted by Keane J in *National Irish Bank Ltd. v Radio Telefís Eireann* ([1998] Supreme Court 484) :

*"The media .....are an essential foundation of any democracy. In exposing crime, anti-social behaviour and hypocrisy, and in campaigning for reform and propagating the views of minorities, they perform an invaluable function. However, they are peculiarly vulnerable to the error of confusing the public interest with their own interest. Usually these interests march hand in hand, but not always."*

The confusion of self-interest with the public interest has surfaced in the media use of the Act over the last few years. For example, competition for "scoops" has led some journalists to argue that the information which they are seeking should be released in the public interest but that they should be given access before anyone else. This ignores the fact that where a public body has decided to release records to one requester (or where it is required to release it following a review by the Information Commissioner) then, in most cases, there will be no justification under the FOI Act for refusing to release the same records to other requesters at the same time. The reason for this is that the Act gives requesters a legal right of access to records subject only to the specific exemptions contained in the Act. If a public body has already decided that none of these exemptions apply to the records then there is no basis under the Act on which it can properly refuse access to anyone else who may make a FOI request or on which it can even defer the offering of access to such a person. It follows that the fact that a requester was the first person to request particular records does not confer any special rights of access on that person to the exclusion of any other requester.

There are a few exceptions to this approach. The first is where the material being released contains information given in confidence, personal information about the requester, or commercially sensitive information. In such cases, the normal requirements of the Act, designed to protect the interests of third parties, must be observed. The second possible exception arises in cases where there are a significant number of records involved and a large number of



requesters. In these circumstances it may not be practicable, from an administrative point of view, for a public body to provide the information to all the requesters at the same time without incurring a significant delay. In such cases, the order and manner of release of the information is at the discretion of the public body, although all other things being equal, one would expect the information to be released in the order in which it was requested. I would expect such a phased release to be the exception rather than the rule. A third possible exception concerns the situation in which charges are being levied by the public body. In such cases, a delay in paying the charge will result in delayed access. In short, while the Act may enable journalists to achieve "scoops", it was not designed for this purpose and public bodies cannot apply the Act to facilitate this if to do so would involve an encroachment on the legal rights of others.

Sometimes the choice and presentation of material appeared to have more to do with self-interest than the public interest. This includes the publication of trivia which, in the words of the Irish Times, were "quite forgettable". In other cases the presentation of information acquired under the Act has highlighted disagreements between public servants or Ministers as if such disagreements were somehow unusual rather than something that must be expected in the ordinary course of conducting business. Paradoxically, the very number of such stories has helped to demonstrate that much advice is formulated and many decisions made after considerable debate and disagreement and that Ministers can quite properly decide to decline the advice of senior civil servants on an issue.

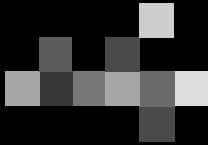
There have been other occasions on which media self interest and the public interest have marched hand in hand. Many stories have given an insight into how public business is conducted in this country. The publication of the reports of the Social Services Inspectorate has given some graphic illustrations of the problems faced by health boards in discharging their child care responsibilities and how they have responded. The reports reveal problems such as the use of temporary staff; the use of unsuitable and sometimes unsafe accommodation; the placement of children in inappropriate centres due to the lack of foster placements. The publication of the Tax Strategy Group's papers gives detailed background to the formulation of fiscal policy. The publication of material released by the Department of Agriculture, Food and Rural Development disclose details of its efforts over a three year period to combat widespread sheep smuggling. Other records have shown how commercial interests lobbied successfully to have proposed planning restrictions amended.

In referring to these stories I am not suggesting any wrongdoing or incompetence on the part of the public officials involved. My point is that they have enabled the public to see at first hand how government business is done in a way that was unheard of in the era of official secrecy.

### **Dealings with Citizens**

Gains have also been made in terms of openness in dealing with the ordinary citizen. The requirement to publish details of rules, interpretations, practices and an index of precedents in relation to schemes administered by public bodies allows the citizen more than ever before to find out whether or not he or she is being treated properly. The right of a person to a written statement of reasons for acts of a public body affecting him/her means that public servants now have to explain their actions to clients of the public body.

The gains referred to above are not easily measurable, particularly in terms of releases under the Act. Indeed, as pointed out earlier in this report maximising the impact of the Act and



achieving its purpose requires that, over time, more information be released administratively. Statistics on the release of information will not record this, thus tending to understate the effect of the Act. Nevertheless, it is of some interest to examine the statistics for releases under the Act for each year since its enactment and to compare them with the experience in Australia, a jurisdiction with a not dissimilar access regime.

### General Trend

There is some evidence that most users of the Act are satisfied with the response of public bodies. For example, the number of applications for internal review is relatively small (919 in the year 2000 out of over 13,000 requests dealt with). The percentage of initial decisions which proceed to internal review has also fallen from 14% in 1998 to 11% in 1999 and 7% in 2000. However a slightly different picture emerges when release and refusal rates are examined. Tables 1 and 2 show the percentage of requests granted in full, granted in part and refused analysed by year for the civil service, local authorities and health boards, respectively. One striking aspect of the figures is, with the exception of the health boards, the consistency of refusal rates from year to year. It might have been expected that an initial period of caution about release might have been followed by a greater willingness to release as public bodies became more confident in dealing with the requirements of the Act. These figures provide little evidence that this has happened generally.

**Table 1 : Overall outcome of decisions by Civil Service bodies, Local Authorities and Health Boards (1), (2)**

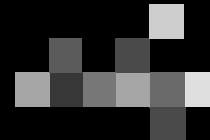
Decision	1998	1999	2000
Granted in Full	51%	52%	56%
Granted in Part	25%	30%	23%
Refused	24%	18%	21%

**Table 2 : Analysis by sector (1), (2)**  
**Civil Service**

Year	1998	1999	2000
Granted in Full	48%	43%	46%
Granted in Part	27%	38%	30%
Refused	25%	19%	24%

### Local Authorities

Year	1998	1999	2000
Granted in Full	58%	70%	70%
Granted in Part	23%	13%	12%
Refused	19%	17%	18%



### Health Boards

Year	1998	1999	2000
<b>Granted in Full</b>	64%	72%	75%
<b>Granted in Part</b>	17%	14%	12%
<b>Refused</b>	19%	14%	13%

Source : Civil Service Users Network, Public Service Users Network, CPU - Dept of Finance

### Notes:

- (1) Figures represent the percentage of requests dealt with under the FOI Act, i.e. it excludes requests handled outside the FOI Act, withdrawn by the requester or transferred to another public body.
- (2) Requests "refused" include requests refused on administrative grounds, e.g. where no records exist in relation to the FOI request, or where no right of access exists under the FOI Act

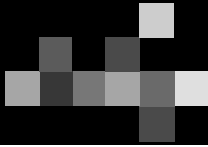
### Comparison with Australia

Australia introduced its Freedom of Information Act for the Federal Government in 1982. The legislation is broadly similar in scope to the Irish legislation. Each year since 1982 the Office of the Attorney-General has published statistics on the release rates of individual agencies and of public bodies in aggregate. The figures for the latest available years (1998/99 and 1999/00) are shown in Table 3. It should be noted that these figures are in line with the release rates in earlier years. A significant factor contributing to these high release rates appears to be the high number of requests to certain agencies by persons seeking access to personal information about themselves. Table 4 shows the figures adjusted to take some account of this by excluding requests to the Department of Veterans' Affairs, which receives a high number of requests, most of them for information which is capable of release outside the FOI Act. It is clear that even with this adjustment, refusal rates for the Federal Government in Australia are significantly lower than in Ireland.

Data from some of the Australian State governments show a similar picture. The figures for Western Australia and Queensland for 1999/2000 are shown in Table 5. These release rates appear to be in line with release rates in earlier years.

**Table 3 : Australia (Federal Government) - Outcome of decisions on FOI requests**

Decision	1998/99	1999/2000
<b>Granted in Full</b>	80%	77%
<b>Granted in Part</b>	15%	18%
<b>Refused</b>	5%	5%



**Table 4 : Australia (Federal Government) - Outcome of decisions on FOI requests excluding Dept of Veterans' Affairs**

<b>Decision</b>	<b>1999/2000</b>
<b>Granted in Full</b>	61%
<b>Granted in Part</b>	31%
<b>Refused</b>	8%

Source : Office of the Attorney General, Australia - Annual Report 1999/2000

**Table 5 : Australian State Government Agencies - 1999/2000**

<b>Decision</b>	<b>Queensland</b>	<b>Western Australia</b>
<b>Granted in Full</b>	81%	69%
<b>Granted in Part</b>	6%	24%
<b>Refused</b>	13%	7%

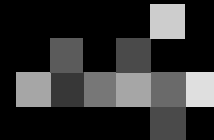
There are some factors which make a proper comparison of the Australian and Irish figures difficult. The first is the fact that in Australia there was full retrospective access instead of the partial retrospection provided for in Ireland. This means that the refusal rates in Ireland may be inflated by requests for records created prior to the commencement of the Act. On the other hand this is a factor which might be expected to be of declining significance as more records fell into the potentially available category and as repeat users of the Act, such as journalists, learned the rules. However, the figures for refusals do not support such a conclusion.

The figures are also not directly comparable because the Irish figures include cases where access was refused on the grounds that the records sought did not exist. Some public bodies suggested to me that this alone explained the difference in the Irish and Australian statistics. If this is so then I suggest that public bodies need to consider why there is such a high rate of cases where records do not exist and, in particular, whether it results from deficiencies in record keeping.

The level of refusal of requests is, on the face of it, a little surprising in the context of a regime which is designed to give access to information to the greatest extent possible subject to the requirements of the public interest and the right of privacy. It also appears to compare unfavourably with the Australian experience. Further statistical information would be useful to help identify the most common bases on which information is refused, to help monitor the use of exemptions and to determine whether there are significant differences in release rates as between personal information and official information.

### **Recommendations**

Each public body should arrange to gather statistics on the use of the different exemptions and on the granting of requests for personal and official information. The statistics should record the basis of refusals of requests including administrative grounds of refusal (i.e. non-existence of records and records created before the commencement of the Act).



## **List of public bodies examined for the purposes of this investigation**

Department of Agriculture, Food and Rural Development

Department of Education and Science

Department of Enterprise, Trade and Employment

Department of Finance

Department of Health and Children

Department of Justice, Equality and Law Reform

Department of Social, Community and Family Affairs

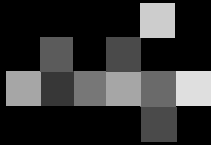
Office of the Revenue Commissioners

Eastern Regional Health Authority

Southern Health Board

Dublin Corporation

Wexford County Council



## **FOI Central Policy Unit Notice No.5 - Release of Information outside of the FOI Act**

1.1 The Freedom of Information Act specifically acknowledges that FOI is not the only means of accessing information and that nothing in the Act is intended to interfere with alternative administrative arrangements for access:

6(8) "Nothing in this Act shall be construed as prohibiting or restricting a public body from publishing or giving access to a record (including an exempt record) otherwise than under this Act where such publication or giving of access is not prohibited by law".

1.2 Following from this, the FOI Central Policy Unit supports an active approach by public bodies to the disclosure of information outside of the FOI Act. In particular, public bodies should be proactive in the release of non-contentious information.

### **2. Release of information outside of the FOI Act on request**

2.1 Administrative arrangements for release of information outside of the FOI Act can work to the benefit of both the public body and the requesters. Such release enhances the confidence of clients in the body and also allows the body to handle information requests informally without adhering to the statutory processing requirements of the Act.

2.2 *Staff require clear guidance from departmental management as to what may or may not be properly disclosed outside of the FOI Act. Accordingly, it is recommended that departments develop instructions for staff clearly specifying the arrangements governing access to broad classes of non-contentious information outside of the Act.*

2.3 Such instructions should be specifically authorised at senior management level (preferably not below Assistant Secretary level). Such authorisation will remove any doubt as to whether disclosure of the information is considered to be "duly authorised" for the purposes of the Official Secrets Act, 1963.

2.4 Staff instructions should:

1. identify those records that can be released informally to persons outside of the FOI Act (e.g. certain personal information, personnel records, etc. to the individuals concerned).
2. identify who may be allowed access to the records e.g. only the person concerned in relation to personal information, member of staff concerned in relation to personnel matters.
3. identify any exceptions to this general principle (e.g. where information of a third party is contained in the records, an investigation is ongoing, etc.) .
4. specify the grades/ divisions authorised to release information.
5. where some information is being withheld, give clear guidance that requesters are to be advised of this fact and of their rights under the FOI Act.

### **3. Release of information under the FOI Act**

3.1 Departments are reminded of the importance of ensuring that all staff know that information can only be released under the FOI Act by specific decision makers, designated for that purpose.

