

Office of the Information Commissioner

# Guidance Note

Freedom of Information Act 2014  
Section 29 - Deliberations of FOI  
Bodies

August 2015

## Contents

Introduction .....	1
1.0 Section 29: Overview.....	2
Deliberative Process.....	2
Public Interest.....	2
Exceptions to the Exemption.....	2
FOI History and Warning regarding Commissioner’s Decisions.....	2
2.0 Section 29(1) .....	3
Two Requirements of section 29(1) .....	3
Matter Relating to the Deliberative Processes .....	3
- Deliberative Processes .....	4
- The Role of the FOI Body in Relation to the Matter.....	4
- Outcomes of Deliberations.....	5
- Deliberative Processes of ‘an’ FOI body .....	5
Contrary to the Public Interest.....	6
- Timing of Release.....	7
- Frankness and Candour .....	8
- The FOI body is about to make a Significant Decision .....	8
3.0 Section 29(2) .....	9
Section 29(2)(a): Rules, procedures, guidelines etc.....	9
Section 29(2)(b): Factual information.....	9
- Reliability of Information.....	10
Section 29(2)(c): The Reasons for a Decision of an FOI Body.....	11
Section 29(2)(d): Investigation or Analysis of the Performance of an FOI Body... ..	11
Section 29(2)(e): Expert Report.....	11
- Scientific or Technical Expert.....	11
- Decision pursuant to Enactment or Scheme .....	12
Deferral of Access - Section 16(1)(b).....	12
4.0 Important Amendments to this Exemption .....	14
The Public Interest Test .....	14
Secretary General’s Certificate .....	14
Deliberations of “a” body or “the” body .....	14
Factual Information .....	14

## **Introduction**

The Information Commissioner has prepared this Guidance Note in relation to section 29 of the Freedom of Information (FOI) Act, 2014.

The Note is a short commentary on the interpretation and application of section 29 of the Act by the Commissioner. It is intended to provide a brief summary of the relevant issues relating to this provision.

This Note is intended to provide general guidance only and is not legally binding. The application of the provision in any particular case will always depend on the particular record(s) and the relevant facts and circumstances.

## **1.0 Section 29: Overview**

1.1.1 This Note briefly explains how section 29 exempts records relating to the deliberations – referred to in the Act as “the deliberative processes” - of FOI bodies. Access may be refused to a record which contains matter relating to the deliberative processes of an FOI body.

1.1.2 This is a discretionary exemption.

### **Deliberative Processes**

1.2.1 A deliberative process involves the consideration of various matters with a view to making a decision on a particular issue.

### **Public Interest**

1.3.1 The exemption is subject to a public interest test and the public interest test is stronger than the public interest test in other provisions of the Act – it must be shown that the granting of the request would be *contrary* to the public interest.

### **Exceptions to the Exemption**

1.4.1 The exemption does not apply if and in so far as the record contains the matter or information specified in subsection (2); these include, for example, factual information.

### **FOI History and Warning regarding Commissioner’s Decisions**

1.5.1 It should be noted that a reference to the Commissioner in the context of these decisions may include an officer to whom the function of making the decision had been delegated by the Commissioner.

1.5.2 Section 29 is similar to (although not the same as) section 20 of the 1997 Act before it was amended in 2003. However, it is **significantly different** from section 20 after it was amended. See Section 4 - Important Amendments to this Exemption - at the end of this Note for more details regarding the amendments.

1.5.3 This Guidance Note makes reference to previous decisions of the Commissioner where the applicability of section 20 was considered under the FOI Act 1997 or under the FOI Act 1997 as amended in so far as they remain relevant. To simplify matters for the reader, all references to section 20 in those decisions have been replaced by the equivalent section 29 provision of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (\*).

1.5.4 While references in this Note are made to previous decisions of the Commissioner in so far as they remain relevant, it is possible that other parts of these decisions no longer represent the current position – this could be due to factors such as a change in the legislation or decisions of the Courts. Caution should be exercised in referring to any decision of the Commissioner that was made under the FOI Act 1997, or under the FOI Acts 1997 & 2003, to ensure that all parts of the decision being referred to remain relevant (including such decisions as are published on the OIC website).

## **2.0 Section 29(1)**

**29. (1)** A head may refuse to grant an FOI request—

(a) if the record concerned contains matter relating to the deliberative processes of an FOI body (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and

(b) the granting of the request would, in the opinion of the head, be contrary to the public interest,

and, without prejudice to the generality of *paragraph (b)*, the head shall, in determining whether to grant or refuse to grant the request, consider whether the grant thereof 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.

### **Two Requirements of section 29(1)**

2.1.1 The exemption has two requirements:

- the record must contain matter relating to the deliberative process, and
- disclosure must be contrary to the public interest.

These are two independent requirements and the fact that the first is met carries no presumption that the second is also met. It is therefore important for FOI bodies to show to the satisfaction of the Commissioner that both requirements have been met.

2.1.2 The public interest test at section 29(1)(b) is a strong test. Any arguments against release should be supported by the facts of the case and it should be shown how release of the record(s) would be contrary to the public interest.

2.1.3 The exemption does not apply in so far as the record(s) contain any of the information or matter referred to in section 29(2). Thus, where an FOI body is relying on section 29(1) for the refusal of a record, it is very important to go on to consider whether section 29(2) applies in relation to the record concerned.

2.1.4 There is nothing in the exemption itself which requires the deliberative process to be ongoing. The issue of whether the deliberative process is ongoing or at an end may be relevant to the issue of the public interest – see further below

### **Matter Relating to the Deliberative Processes**

2.2.1 The first requirement which must be met in order for section 29(1) to apply is that the record must contain matter relating to the ‘deliberative processes’ of an FOI body. An FOI body relying on this exemption should identify both the deliberative processes concerned and any matter in particular records which relates to these processes.

## Deliberative Processes

2.2.2 A deliberative process may be described as a thinking process which informs decision making in FOI bodies. It involves the gathering of information from a variety of sources and weighing or considering carefully all of the information and facts obtained with a view to making a decision or reflecting upon the reasons for or against a particular choice. Thus, it involves the consideration of various matters with a view to making a decision on a particular matter. It would, for example, include some weighing up or evaluation of competing options or the consideration of proposals or courses of action.

2.2.3 With regard to the exercise by an FOI body of purely procedural or service delivery functions, it should be noted that the Commissioner does not accept that there is a deliberative process where the FOI body's role is confined to establishing the facts and circumstances of a case and applying a pre-existing principle. (See Case 030611).

2.2.4 Examples of cases where the Commissioner has accepted that records have contained matter relating to the deliberative processes of an FOI body include:

Example # 1: the FOI body considered the record for the purpose of deciding on its input into policy and strategy in relation to unemployment (Case 98127)

Example # 2: the records were part of a pilot project, part of the purpose of which was to refine a process of evaluation and changes were made through the different phases of the pilot project (Case 98099)

Example # 3: the records related to the budgeting /estimates process and the FOI body was considering various options in relation to its estimated financial requirements for the year and the projected three year estimates under the Multi Annual Budgeting process (Case 98166)

Example # 4: the records contained information relating to a decision of the FOI body to review its position on the question of participation in the Partnership for Peace with a view to submitting a proposal in favour of participation to the Government (Case 99279).

On the other hand, the Commissioner did not accept that the following records contained matter relating to the deliberative process:

Example # 5: a list of provisional dates for Cabinet Meetings (which included a reference to meetings proposed, but which had not yet taken place, and to meetings proposed but not held) (Case 98040).

Example # 6: procedural type correspondence between a Hospital and an Inquiry (Case 030830)

## The Role of the FOI Body in Relation to the Matter

2.2.5 In considering whether the matter in the records relates to deliberative processes, it may be useful to consider what the FOI body's role is in relation to the matter contained in the records. The Commissioner has drawn a distinction between

an FOI body being engaged in a monitoring role or supervisory role and being engaged in a deliberative process.

Example: In Case 98078 the Commissioner found that certain correspondence from the Department of Health & Children warning health agencies that they must keep to budget or must take measures to ensure budget allocations were not exceeded did not relate to the deliberative process. He found that it related to the administrative or regulatory role of the Department in overseeing the expenditure.

In relation to certain management reports, the Commissioner found that the Department's role was a monitoring or supervisory one. He found that where the records reflected a deliberative process they related to options or proposals being considered by CEOs of the health agencies for bringing their budgets back into line. He also found that, to the extent that certain proposal-type information submitted to the Department might be considered by it for the purposes of deciding whether to make a further allocation to the agency or to take other courses of action, it could be said to relate to the deliberative process.

The Commissioner has also drawn a distinction between matter relating to the deliberative process and administrative matters or arrangements.

Example: In Case 98040 the Commissioner decided that a record relating to a proposed visit of the then President of the EU Commission was not one containing matters relating to the deliberative processes of the Department of the Taoiseach. He said that it contained no discussions, opinions or advice on the merits or otherwise of the proposed visit or proposed itinerary. He said that it was concerned solely with the making of administrative arrangements in relation to the visit.

### Outcomes of Deliberations

2.2.6 A distinction may also be made between records relating to positions adopted by an FOI body following its deliberations and matter relating to the deliberative processes.

Example : In Case 030830 the Commissioner found that records disclosing substantive submissions made by a hospital to a non-statutory inquiry related to positions adopted by the hospital following its deliberations as opposed to material disclosing the internal thinking process within the hospital or the weighing up of options.

On appeal, the High Court (Quirke J) found that the preparation by the hospital of submissions could not be characterised as a deliberative process. Quirke J stated that there may have been a “deliberative process” which resulted in a decision on behalf of the hospital to co-operate with the inquiry; however, the preparation of the submission was not such a process. (*The National Maternity Hospital v The Information Commissioner* [2007] 3 I.R. 643, [2007] IEHC 113.)

### Deliberative Processes of ‘an’ FOI body

2.2.7 The records must contain matter relating to the deliberative processes of “an FOI body”.

In Case 030830 the Commissioner found that section 29\* did not cover the deliberations of a non-statutory inquiry which was not a public body<sup>1</sup> for FOI purposes.

However, provided the deliberative processes concerned are the deliberative processes of “an” FOI body, they are not required to be the deliberative processes of the FOI body making the decision. In this regard it is important to note the amendment made in 2003 – see further below under Section 4: Important Amendments to this Exemption.

### **Contrary to the Public Interest**

2.3.1 In addition to showing that a record contains matter relating to the deliberative processes of an FOI body, an FOI body relying on section 29 for its refusal to grant access to a record must show that release of the record would be contrary to the public interest. This requirement is provided for in section 29(1)(b).

2.3.2 The public interest test at section 29(1)(b) is a stronger public interest test than the public interest test in many other sections of the Act (which require that, on balance, the public interest would be better served by granting than by refusing to grant the request). The public interest test in section 29(1)(b) requires the FOI body to show that the granting of the request would be **contrary** to the public interest.

2.3.3 The Commissioner has found that the Act clearly envisaged that there will be cases in which disclosure of the details of an FOI body’s deliberations - whether before or, in some cases, after a decision based on those deliberations has been made - would be against the public interest. However, this was not to say that such disclosure is always, as a matter of principle, against the public interest. (See Case 98058).

2.3.4 Any arguments against release under section 29 of the Act should be substantiated and supported by the facts of the case. It is important that the FOI body shows to the satisfaction of the Commissioner how granting access to the particular record(s) would be contrary to the public interest, e.g. by identifying a specific harm to the public interest flowing from release.

Example # 1: In Case 98099 the Commissioner found that release of records would be contrary to the public interest. The records related to individual Whole School Evaluation Reports on certain schools which were part of a pilot project. The Department of Education & Science had published its report on the pilot project which contained an analysis and critique of the individual reports. The Commissioner accepted that the schools volunteered to participate in the project on the understanding that the reports would not be published. He found that to release information about parties, who had participated on a voluntary basis in a pilot project designed to test a new and a controversial concept, ran a very real risk of prejudicing the future capacity of the Department to secure such co-operation. Having had regard to all the arguments, and in particular to the

---

<sup>1</sup> Section 20 of the FOI Act 1997, as amended, referred to “a public body”; section 29 of the 2014 Act refers to “an FOI body”;

possibility of damage to the Department's capacity to secure co-operation in relation to future pilot projects, the Commissioner found that release of the reports would be contrary to the public interest.

Example # 2: In Case 99279 the Commissioner did not accept that release of certain records would be contrary to the public interest. He had accepted that certain non-factual information in the records related to the deliberative processes of the Department of Foreign Affairs – the decision of the Department to review its position on the question of participation in the Partnership for Peace (PfP) with a view to submitting a proposal in favour of participation to the Government. However, the Commissioner noted that the proposal had been submitted, and apparently agreed to, by the Government and that Ireland was at that stage a participant in the PfP. In the absence of any specific arguments by the Department to substantiate its claim that release of the records would be contrary to the public interest, and given the passage of time, he found that the Department had failed to establish a basis for exemption under section 29(1)\*. The Commissioner noted that, while the release of the records could give rise to further debate on the issue of Irish participation in the PfP, he did not accept this as an argument against the public interest.

### Timing of Release

2.3.5 The time at which records are released may be significant. For example, it is possible that release of a particular record at a particular point in time would be contrary to the public interest, but that with the passage of time this would no longer be the case.

2.3.6 The fact that a deliberative process exists and is ongoing does not mean that the exemption automatically applies without consideration of all the provisions of section 29. Equally, the fact that a deliberative process is at an end does not mean that the exemption automatically does not apply.

2.3.7 The Commissioner does not accept that the purpose of section 29 is to protect the deliberative process until its completion. In Case 98127 the Commissioner stated that, if the purpose of the exemption was 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.

2.3.8 It is possible, for example, that the release of sensitive information may be premature in situations where the deliberative process is at an early stage or ongoing. On the other hand, if the deliberative process is at an end, the need to withhold the release of the information may be weakened.

Example: In Case 98166 the Commissioner accepted that the release of records giving details of the negotiations between the Department of Finance and other Departments on the Estimates and projections for future years, during the course of those negotiations, might be contrary to the public interest. However, he did not accept that this argument applied once the Estimates and projections have been agreed and the Revised Estimates Volume published.

2.3.9 Where there is information in the record(s) which falls within paragraphs (b), (d) or (e) of section 29(2) and the timing of the release of the record(s) is problematic, then the provisions of section 16(1)(b) may possibly be relevant. See further below.

### Frankness and Candour

2.3.10 An argument sometimes advanced in the context of this provision is that disclosure would prejudice the frankness and candour of public servants participating in deliberations. The Commissioner has indicated that, in exceptional cases, an argument regarding frankness and candour might be sustainable in the context of the public interest test in this exemption. However, he made it very clear that arguments about inhibiting frankness and candour must be supported by the facts of the case and the specific harm to the public interest flowing from that inhibition must be identified.

Example : In Case 98127 while the Commissioner accepted that open and frank discussion is often required in order to evaluate and assess policy options, he did not accept as a general proposition that the FOI Act would have the effect of preventing public servants from properly carrying out their functions. He made clear that he was rejecting the Department's argument in the light of the actual contents of the record in that case. He found that the record was in the nature of an information paper and there was nothing in it which he could imagine its authors would have omitted if they had known from the outset that it would be the subject of an FOI request.

### The FOI body is about to make a Significant Decision

2.3.11 Another feature of the public interest test which is unique to section 29 is the specific reference to considering whether the requester would, by the release of the record(s), become aware of a significant decision that the relevant FOI body proposes to make. This factor must be taken into account in considering whether the granting of the request would be contrary to the public interest. If, by the release of the record(s), a requester would become aware of such a significant decision this would, in most cases, support an argument that release would be contrary to the public interest.

### **3. Section 29(2)**

**29 (2) Subsection (1)** does not apply to a record if and in so far as it contains any or all of the following:

- (a) matter such as rules, procedures, guidelines, interpretations and precedents used, or intended to be used, by an FOI body for the purpose of making decisions, determinations or recommendations;
- (b) factual information;
- (c) the reasons for the making of a decision by an FOI body;
- (d) a report of an investigation or analysis of the performance, efficiency or effectiveness of an FOI body in relation to the functions generally or a particular function of the body;
- (e) a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise or a report containing opinions or advice of such an expert and not being a report used or commissioned for the purposes of a decision of an FOI body made pursuant to any enactment or scheme.

3.1.1 Section 29(2) provides that the exemption in section 29(1) does not apply in so far as the record(s) contain any of the information or matter listed in section 29(2). Where an FOI body is relying on section 29(1) for the refusal of a record, it is very important to go on to consider whether section 29(2) applies in relation to the record concerned before reaching a conclusion on the application of the exemption.

3.1.2 Thus, the contents of the record should be considered in order to establish whether the record contains any of the information or matter listed in subsection (2).

#### **Section 29(2)(a): Rules, procedures, guidelines etc**

3.2.1 It should be noted that section 8 of the FOI Act requires an FOI body to include in its publication scheme the rules, procedures, practices, guidelines and interpretations used by the body and any precedents kept by it for the purposes of decisions, determinations or recommendations for the purposes of any enactment or scheme administered by the body. Such information would therefore not be exempt.

3.2.2 The exemption at section 29(1) does not apply to a record if and in so far as it contains matter such as rules, procedures, guidelines, interpretations and precedents used, or intended to be used by an FOI body for the purpose of decision making or recommendations (section 29(2)(a)).

#### **Section 29(2)(b): Factual information**

3.3.1 The exemption at section 29(1) does not apply to a record in so far as it contains factual information (section 29(2)(b)). Section 2 of the Act states that “factual information” includes information of a statistical, financial, econometric or empirical nature, together with any analysis thereof.

The term “factual information” is used in section 28 of the Act (section 19 of the 1997 Act) as well as in section 29 of the Act (section 20 of the 1997 Act) and it has been considered by the Commissioner in decisions in the context of both these exemptions. In a number of cases (030714, 030414, 050381 and 110166) the

Commissioner found that the use of the word "includes" in this definition means that, while information of a statistical, econometric or empirical nature should be regarded as factual, regard must also be had to the ordinary meaning of the term.

In Case 030714 and 050381 reference was made to the definition of the word "factual" as *"pertaining to or concerned with facts of the nature of fact, actual, real"* and of the word "fact" as *"[s]omething that has really occurred or is actually the case; something certainly known to be of this character; hence, a particular truth known by actual observation or authentic testimony, as opposed to what is merely inferred, or to a conjecture or fiction; a datum of experience, as distinguished from the conclusions that may be based upon it"*.

The Commissioner regards factual information as including material presented to provide a factual background to the central topic in a record and that factual information is distinguishable from information in the form of proposal, opinion or recommendation.

Example # 1: In Case 98078 the Commissioner found that reports of actual expenditure, amount of budget variance, steps already taken to keep within budget, changes which had occurred to cause increased expenditure etc. were all factual information. He said that the only parts of the records which were not factual information were the records or parts of records in that case which reflected proposed courses of action being considered.

Example # 2: In Case 98127 the Commissioner considered the minutes of certain meetings. He said that it might be argued that minutes are entirely factual on the basis that they record matters of facts i.e. the events which occurred, the decisions reached and the contributions made, at a meeting. However, he said that the reporting of the fact that opinions, advice or recommendations were proffered at a meeting does not mean that those opinions, advice or recommendations are factual information. The Commissioner decided that the minutes in that case consisted almost entirely of non-factual information. He found that the attendance lists for the meetings were factual information.

3.3.2 The wording of this exception to the exemption was amended by the FOI Amendment Act in 2003 and slightly amended again in 2014 – see further below. So care should be taken with regard to the *wording* of any decision of the Commissioner where the review was carried out under the provisions of the FOI Act 1997 or the FOI Acts 1997-2003.

3.3.3 Where there is information in the record(s) which falls within section 29(2)(b) and the timing of the release of the records is problematic, then the provisions of section 16(1)(b) may be relevant. See further below.

### Reliability of Information

3.3.4 While information may not be reliable, it does not mean that it is not factual.

Example # 1: In Case 110166 the Department of Health argued that identified inaccuracies in data made the figures contained in a report unreliable. The Commissioner noted that the Department had no plans to revise the statistical data in the final report. He found that the figures were a factual representation of

data taken from the system and, in the circumstances, he was satisfied that the information could be described as factual information and the question of reliability of the data was not a relevant consideration.

### **Section 29(2)(c): The Reasons for a Decision of an FOI Body**

3.4 Section 29(1) does not apply in so far as a record contains the reasons for the making of a decision by an FOI body (section 29(2)(c)).

Note also that section 10 of the Act requires an FOI body to provide a person who is affected by an act or decision of the body with a statement of the reasons for the act or decision and of any findings on any material issues of fact made for the purposes of the act or decision.

### **Section 29(2)(d): Investigation or Analysis of the Performance of an FOI Body**

3.5.1 Section 29(1) does not apply to a report of an investigation or analysis of the performance, efficiency or effectiveness of an FOI body in relation to the functions generally or a particular function of the body (section 29(2)(d)).

Example: In Case 090023 the Commissioner found that a report on a review of acute services in the HSE South was a report of an investigation or analysis of the HSE's performance, efficiency or effectiveness in relation to its functions in so far as acute services were concerned and was excluded from the exemption.

3.5.2 The investigation or analysis must be of the performance, efficiency or effectiveness of "an FOI body".

Example: In Case 98099 the Commissioner found that Whole School Evaluation reports were analyses of the performance of individual schools which were not prescribed as public bodies for the purposes of the FOI Act. The Commissioner found that section 29(2)(d)\* was not therefore relevant.

3.5.3 Where there is information in the record(s) which falls within section 29(2)(d) and the timing of the release of the records is problematic, then the provisions of section 16(1)(b) may be relevant. See further below.

### **Section 29(2)(e): Expert Report**

3.6.1 The exemption at section 29(1) does not apply to a record if and in so far as it contains a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise or a report containing opinions or advice of such an expert and not being a report used or commissioned for the purposes of a decision of an FOI body made pursuant to any enactment or scheme (section 29(2)(e)).

3.6.2 Where there is information in the record(s) which falls within section 29(2)(e) and the timing of the release of the records is problematic, then the provisions of section 16(1)(b) may be relevant. See further below.

#### **Scientific or Technical Expert**

3.6.3 While those who prepare a report may have particular qualifications or experience, this does not necessarily mean that they are acting as scientific or technical experts in doing so.

Example # 1: In Case 98099 the Commissioner considered whether the inspectors who wrote Whole School Evaluation reports were scientific or technical experts. Having considered the statutory outline of the duties and functions performed by the Inspectorate, the Commissioner was satisfied that individual members of the Inspectorate would have a variety of educational qualifications and expertise. However, he found that in preparing the reports they were not acting as scientific experts. The Commissioner also considered that an Australian interpretation of the term “technical expert” - as being intended to describe experts in the mechanical arts and applied sciences generally - was appropriate to the Irish FOI Act. He also found that the school inspectors were not acting as technical experts when preparing the reports.

Example # 2: In Case 020358 the Commissioner found that drafts of a risk assessment undertaken by scientists in which they reviewed and drew conclusions from data and research available in relation to the effects of fluoridation in water were records comprising “a report, study or analysis of a scientific expert” within the meaning of this exception to the exemption.

### Decision pursuant to Enactment or Scheme

3.6.4 A decision of an FOI body made pursuant to an enactment or scheme is one where the FOI body is authorised to make that decision under a specific provision.

Example # 1: In Case 020358 the Commissioner found that the type of “decision” envisaged by paragraph (e)\* is one which a public body is authorised to make on foot of a specific provision where, for example, an application is made for a grant or a licence and scientific or technical advice is sought from experts to assist in the decision making process.

In Case 090023 the Commissioner found that any decisions of the HSE on foot of the recommendations of a report on a review of acute services in the HSE South were not being made pursuant to any enactment or scheme.

### Deferral of Access - Section 16(1)(b)

3.7 The question of whether release of a record on or before a particular date would be premature may occasionally be an issue. Section 16(1)(b) allows an FOI body to defer access to a record where the information contained in the record falls within paragraph (b), (d) or (e) of section 29(2) and where it believes that the release of information contained in the record on or before a particular day would be contrary to the public interest.

Deferral of access pursuant to section 16(1)(b) may therefore be relevant in certain circumstances to which paragraphs (b), (d) or (e) of section 29(2) applies. It is important to note that section 16(1)(b) is subject to a strong public interest test – the deferral of access is justified where disclosure on or before a certain date is *contrary* to the public interest.

Example: In Case 110166 the Commissioner found that the Department of Health was not justified in deciding to defer access under section 16(1)(b)<sup>2</sup>. He

---

<sup>2</sup> The decision in Case 110166 referred to section 11(1)(b) of the FOI Acts 1997 & 2003, which is similar to section 16(1)(b) of the FOI Act 2014. However, to simplify matters for the reader, the reference to section 11(1)(b) of the FOI Acts 1997 & 2003 has been replaced with section 16(1)(b) of the 2014 Act.

had found that the information at issue was factual information. However, he found that the Department had not provided any compelling arguments that showed that the release of the information would be contrary to the public interest.

## **4. Important Amendments to this Exemption**

4.1 As stated above, section 29 is similar to (although not the same as) section 20 of the 1997 Act before it was amended in 2003. It is **significantly different** from section 20 after it was amended.

Thus, it is important to exercise caution in referring to any decision of the Commissioner relating to this provision that was made pursuant to the FOI Act 1997, and particularly any decisions made pursuant to the FOI Acts 1997 & 2003, so as to ensure that all parts of the decision being referred to remain relevant (including such decisions as are published on the OIC website).

As the amendments made to this exemption are significant, a summary of the more important changes is provided below.

### **The Public Interest Test**

4.2 This is the more significant of the changes to section 29. The exemption in the original FOI Act 1997 (section 20) included a requirement at subsection (1)(b) that the granting of the request would be contrary to the public interest. This was removed by the 2003 Amendment Act and replaced with a public interest balancing test (i.e. that the exemption did not apply where the public interest would, on balance, be better served by granting than by refusing to grant the request). The original public interest test - that the granting of the request would be contrary to the public interest - was re-introduced by the FOI Act 2014.

Thus, decisions of the Commissioner relating to this exemption made pursuant to the FOI Act 1997 as amended in 2003 are made on the basis of a public interest test which no longer applies under the 2014 Act.

### **Secretary General's Certificate**

4.3 The 2003 Amendment Act introduced a new provision (s20(1A)) which provided for the refusal of a record where a Secretary General issued the relevant certificate. This provision was not re-introduced by the 2014 Act and therefore no longer exists.

### **Deliberations of "a" body or "the" body**

4.4 Prior to the FOI Amendment Act 2003 this exemption (section 20 of 1997 Act) applied where the record(s) related to the deliberative processes of 'the' public body concerned, i.e. the body which was making the FOI decision.

However, under the FOI Act as amended in 2003, the exemption applied to the deliberative processes of 'a' public body and under the FOI Act 2014 to the deliberative processes of 'an FOI body'. Thus, since the 2003 Amendment Act, provided the body which is or was engaged in the deliberations is an FOI body, it does not have to be the FOI body making the decision on the request.

### **Factual Information**

4.5.1 Section 29(2)(b) provides that the exemption does not apply to a record if and in so far as it contains factual information. The definition of 'factual information' in section 2 states that "'factual information' includes information of a statistical,

financial, econometric or empirical nature, together with any analysis thereof". This is very similar to the wording introduced in the 2003 Amendment Act (although the 2003 Act did not include the word 'financial'). However, in the original 1997 Act the wording of this provision (then section 20(2)(b)) was somewhat different; it stated that the exemption did not apply if and in so far as the record contained "factual (including statistical) information and analyses thereof".

4.5.2 While the *wording* of this exception to the exemption changed, in real terms the amendment was not very significant. However, care should be taken with regard to the wording of any decision of the Commissioner where the review was carried out under the provisions of the FOI Act 1997 or the FOI Acts 1997-2003.