

OFFICE OF THE INFORMATION COMMISSIONER
PROCEDURES MANUAL
(Last Updated 22 December 2021)

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PROCEDURES FOR THE CONDUCT OF REVIEWS UNDER SECTION 22 OF THE FREEDOM OF INFORMATION ACT 2014¹

The purpose of this procedures manual is to provide guidance for staff in relation to the conduct of reviews by the Information Commissioner² under section 22 of the Freedom of Information (FOI) Act 2014. The procedures are aimed at ensuring consistency and fairness in our approach to dealing with reviews. The procedures set out in this manual should, in the normal course of events, be adhered to insofar as is practicable. It should be noted, however, that the FOI Act provides that the Commissioner has discretion to adopt such procedures as are appropriate in all the circumstances of a case. It is also relevant to note that the Commissioner's review functions are inquisitorial and generally informal rather than adversarial in nature. In all circumstances, the Office will aim to ensure that the approach adopted by the Office is fair, and seen to be fair, to all the parties concerned.

1.0 Making review applications to the Office of the Information Commissioner

One of the functions of the Information Commissioner is to review decisions made by public bodies on requests for information made under the FOI Act. If, following an internal review decision, the requester is still dissatisfied, s/he can then apply to the Information Commissioner for an independent review of the decision.

- 1.1** A person who wishes for the Commissioner to review a decision made by an FOI body under the FOI Act must make the application for review in writing and pay the appropriate fee. The use of the online application facility on our website at www.oic.ie is [encouraged](#). An application may also be submitted by email to applications@oic.ie, but it is important to note that the application is not deemed to have been made until the

¹ The transitional provisions in section 55 of the 2014 Act provide that any action commenced under the Freedom of Information Act 1997 but not completed before the commencement of the 2014 Act shall continue to be performed and shall be completed as if the 1997 Act had not been repealed. Accordingly, in relation to cases that commenced under the Freedom of Information Act 1997 to 2003, references to the Act should be construed as referring to the Act of 1997 to 2003.

² It should be noted that a reference to the Commissioner may include an officer who has been duly authorised by the Commissioner to act on his behalf.

appropriate fee is paid (see chapter 2.0). Alternatively, an application may be made by post or hand-delivery³ to the Office at the following address:

Office of the Information Commissioner
6 Earlsfort Terrace
Dublin 2
D02 W773

The application should:

- state the applicant's name, address, telephone number and any other contact details, including an email address (if available),
 - include the appropriate fee for application to the Information Commissioner (see chapter 2.0),
 - include the relevant supporting information if it is claimed that no fee or a reduced fee is applicable (see chapter 2.0),
 - state the name of the FOI body to which the FOI request was made,
 - include the reference number of the FOI body's decision (if available),
 - include a copy of the decision making records (i.e. the original request, original decision, internal review request, and internal review decision) insofar as available, and
 - identify any particular aspect of the FOI body's decision that the applicant is unhappy with.
- A standard application form is also available on our website at <https://www.oic.ie/apply-for-a-review/how-to-apply-for-a-review/>.

³ At present, however, the Office is closed to all personal callers due to Covid-19. Please visit our website for more information on future office reopening.

- Applications should be made **not later than 6 months** after the notification of the decision. However, the application must be made **not later than 2 weeks** after the notification of the decision:
 - (i) if the decision is a decision on a request to which section 38 applies (see paragraph 4.2) or
 - (ii) if the decision is made to extend the time limit taken for considering the request under section 21 (see paragraph 4.5).

- An application to the Commissioner, irrespective of the means by which it is submitted, is deemed not to have been made until it is received by the Office and, if applicable, the appropriate payment has been made (see chapter 2.0).

1.2 Applications by Representatives

- 1.2.1 Applications can be made either by the individual concerned or by another person on behalf of the individual (e.g., a solicitor or relative).

Representatives Other than Solicitors

- 1.2.2 Where an application is made on behalf of the applicant by a **representative who is not a solicitor** written authorisation to act on the applicant's behalf should be provided. The written authorisation should include the applicant's original signature and contact details (unless the contact details are otherwise available). The person making the application will be informed that the review will not be processed until receipt of such authorisation.
- 1.2.2 Where an application is received from a representative, other than a solicitor, the Support Unit should immediately seek a letter of authority if none has been provided.
- In the case of such applications ***other than*** applications relating to (a) a decision on request to which section 38 applies or (b) a decision under section 14 to extend the time for the consideration of an FOI request, the representative will be informed that they should provide the letter of authority as soon as possible, but no later than 5 working days. The representative will also be

informed that, if the letter of authority is not received within that time, the review will not be processed and the case will be closed.

Should the representative fail to provide the letter of authority within the time-frame provided, the application should be closed and both parties informed.

Both parties should also be informed that the application will be re-opened upon receipt of the letter of authority, provided that it is submitted no later than six months after the notification of the internal review decision.

- If the application relates to (a) a decision on a request to which section 38 applies or (b) a decision under section 14 to extend the time for the consideration of an FOI request, the representative should *immediately* be informed in writing (and by telephone if possible) that, as the FOI Act requires the application for review in this case to be made not later than 2 weeks after the notification of the relevant decision, they should provide the letter of authority immediately and, in any event, by such date that the time limit for making the application for review is met. The representative will also be informed that, if the letter of authority is not received within that time, the review will not be processed and the case will be closed.
Should the representative fail to provide the letter of authority within the time period for making the application for review to the Commissioner, the case will be closed and both the representative and the FOI body informed. Both parties should also be informed in writing that, while the Commissioner may extend the time period for making an application for review if he is of the opinion that there are reasonable grounds for doing so, late applications are not admitted as a matter of course. They should be informed that such applications cannot be accepted unless the Commissioner is of the opinion that there are reasonable grounds for doing so and that particular considerations arise in relation to late applications for review of a decision to which section 38 applies.
(See further at paragraph 4.6 below regarding late ‘section 38’ applications.)

Solicitors acting as Representatives

- 1.2.3 Applications for review made by a solicitor on behalf of his/her client are treated differently from those made by other representatives. Under the Law Society professional practice guidelines, a solicitor can only act on instructions received from a client. Applications for review made by a solicitor may be accepted as valid without a written authorisation from the applicant to act on his/her behalf being provided.
- 1.2.4 Where the records sought contain, or are likely to contain, personal information about the applicant, written authorisation from the applicant confirming that the solicitor is acting on his or her behalf and authorising the solicitor to receive personal information relating him or her should be requested. The written authorisation should include the applicant's original signature and contact details (unless the contact details are otherwise available). The application itself, even in the absence of the authorisation, may still be regarded as valid for other purposes including, in particular, the meeting of time limits for making the application.

Applicants other than Individuals

- 1.2.5 Applications made on behalf of a person other than an individual (e.g., applications made on behalf of a body such as a newspaper, private company, etc.) will be regarded as being made by that body or organisation. If, for example, at the conclusion of the Commissioner's review the individual who made the application on behalf of the body no longer acts on behalf of that body, then all correspondence will be addressed to an appropriate individual in that body or organisation.

1.3. Recording the date of applications

All post received in the Office will be date-stamped immediately on receipt to enable compliance with the time limits set out in the Act to be monitored.

- 1.3.1 Where an application for review is received by the Office outside of office hours, i.e. outside the hours of 9.15 a.m. and 5.30 p.m. Monday to Thursday and 9.15 a.m. to 5.15 p.m. Friday, it will be deemed to have been received on the next day on which the Office is open.

2.0 **Application fees to the Office of the Information Commissioner**

While the 2014 FOI Act abolished application fees in relation to requests to public bodies, a charge applies for making an application for review to the Information Commissioner concerning access to non-personal records.

- In certain cases, a fee, normally €50, must be paid at the time of the making of an application for review to the Commissioner. Where a fee, which is required to be paid, is not paid, the Commissioner is obliged to refuse to accept the application and the application is deemed not to have been made. Further information regarding the fees payable is provided below:

Category A - Applications for review where NO FEE is payable:

- The records sought contain only personal information relating to the applicant (including applications made by an individual to whom regulations made under section 37(8) apply, e.g., the parents of a minor or next of kin of the deceased)
- The review relates to a decision by an FOI body following an application for the amendment of personal information in a record (section 9 application) or for a statement of reasons for an act of an FOI body (section 10 application)
- The review relates to a decision by an FOI body to charge a fee
- The application relates to a decision by an FOI body to grant access to records containing only personal information relating to a third party and the application is made by the third party
- Where an FOI body has failed to respond to an application for 'internal review' within the necessary time limit, including where the applicant seeks a review following notification of the FOI body's revised position on the request

- The application relates to a decision by an FOI body to refuse to grant access to additional records located during the course of a previous review by this Office that was brought to closure without a determination on the question of access to those records

Category B - Applications for review where a REDUCED FEE of €15 is payable:

- The applicant is a medical card holder or dependant of a medical card holder and the request is not made on behalf of another person who is seeking to avoid payment of the full fee
- The application relates to a decision by an FOI body to grant access to records relating to a third party (other than records containing only the personal information relating to the third party) and the application is made by the third party

Category C - Application for review where the FULL FEE of €50 is payable:

- All other applications
- Payment of the appropriate amount should be made to the Office at the time of the making of the application for review.
 - Where the FOI body handling the original FOI request has accepted that no fee is payable or that the applicant holds a medical card (or is the dependant of a medical card holder), evidence of this should be provided to the Office. Otherwise, where applicants for review are of the view that a fee is not payable or a reduced fee is payable, the relevant supporting information should be provided to the Office with the appropriate fee (if any) at the time of the making of the application for review. This will enable this Office to make a determination about the fee payable. For example, if it is considered that the application falls within Category A, a copy of the request / relevant decision should be furnished; if it is considered that the application falls within Category B, a copy of the medical card should be furnished.

- An application is deemed not to have been made to this Office if the correct fee has not been paid. The person making the application will be informed and no further action will be taken by the Office pending determination of the fee payable.
- Where a question arises as to whether or not a fee is due on an application for review, the application will be accepted as valid on the date when (a) the fee has been paid, (b) the applicant has confirmed that only personal information is being sought, or (c) it has been decided to accept the application on the understanding that only personal information is sought, having received no reply within the timeframe given (currently 1 week).

2.1 Payment of fees

Fees can be paid using any of the following methods:

Online: <https://www.oic.ie/apply-for-a-review/fees-for-a-review/>

Cheque / Bank Draft / Postal Order: crossed and made payable to the Office of the Information Commissioner.

Cash: Fees in cash may be paid in person at the Office of the Information Commissioner, 6 Earlsfort Terrace, Dublin 2, between the hours of 9.15 a.m. and 5.30 p.m. Monday to Thursday and 9.15 a.m. to 5.15 p.m. Friday.⁴

NOTE: Cash should not be sent by post.

- Regulations made under the FOI Act provide that an application fee will be refunded, if at any time prior to the conclusion of the review the applicant withdraws the application.

⁴ At present, however, the Office is closed to all personal callers due to Covid-19. Please visit our website for more information on future reopening.

3.0 Registering review applications

The following are instructions for Office staff dealing with review applications to the Office of the Information Commissioner.

- The application should be acknowledged immediately and the applicant informed that he/she will be notified as soon as the Commissioner has decided whether or not to accept the application for review.

- The FOI Liaison Officer of the FOI body concerned should be contacted by telephone or email. Generic email addresses should be used for written communications with the Liaison Officer wherever possible. In the case of applications for review, other than cases where section 38 applies, the Liaison Officer should be asked, where necessary, to forward by email to applications@oic.ie, within 3 working days, copies of:
 - the original FOI request,
 - the initial decision of the FOI body,
 - the request for internal review, and
 - the decision on internal review by the FOI bodyunless these documents have already been submitted by the applicant.

- If the Liaison Officer indicates that the request has not been through the process of internal review, then the FOI body should be asked to confirm this in writing and to forward a copy of the original request and the FOI body's initial decision.

- If the request which gave rise to the application for review appears to be one to which section 38 applies (see paragraph 4.2), the FOI Liaison Officer should be contacted and asked to forward by email to applications@oic.ie, again within 3 working days, copies of:
 - the original FOI request
 - the notification letters to third parties

- the replies to the notification letters
 - the letter(s) of decision issued to third parties
 - the letter of decision issued to the requester.
- If the application for review is from a person to whom section 38(2) applies and who objects to a proposed grant of access by the FOI body to the requester, the FOI Liaison Officer's attention should be immediately drawn to the provisions of section 26 of the Act. This requires the FOI body not to give effect to its decision to release the records pending the determination or withdrawal of the application for review. The Liaison Officer should be contacted by telephone and confirmation should issue by email. *(Where a fee for the section 38 application has not been received, the FOI Liaison Officer should also be contacted).*
- A separate file for each application for review should be opened.

4.0 Initial screening of applications

The purpose of the initial screening is to ensure that applications are valid, that there is no reason why the Commissioner should exercise his discretion under section 22(9) to refuse to accept the application, and to deal with other relevant administrative matters.

- Section 22(9) permits the Commissioner to refuse to accept an application if he is of the opinion that:
- the application is frivolous or vexatious,
 - the application does not relate to a decision which he is empowered to review under section 22,
 - the matter to which the application relates is, has been or will be, the subject of another review,
 - the applicant has failed to provide him with sufficient information or particulars, or otherwise has failed to co-operate,

- there is no longer any issue requiring adjudication, as access to the records in question has been granted by the FOI body,
 - the application forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who appear to have made the requests acting in concert, or
 - accepting the application would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of work of his Office.
- The initial screening should be carried out using the checklists at Appendices 1 and 2.
 - Following the initial screening, the file should be referred to the head of the Support Unit if:
 - it appears that the application is invalid, or
 - the applicant has or had other reviews (in case the application is related), or
 - the application appears to relate to a matter which is or has been the subject of another review by the Commissioner, or
 - the request is one to which section 38 applies and a decision on the request has been made on internal review.

Otherwise the application for review should be accepted (see paragraph 4.9).

4.1 Deemed refusals

In cases where the application for review has been accepted on the basis of a “deemed refusal” of an internal review request under section 19 of the FOI Act (i.e. on the basis of the FOI body having failed to issue a decision on a request for internal review within the statutory period required), the Support Unit should immediately instruct the FOI body to notify the applicant of its position on the request. Once the FOI body notifies the

applicant of its position on the request, the case file relating to the review accepted on the basis of the deemed refusal of the request should be closed and the parties notified that the Commissioner will review the revised position on the request if the applicant notifies the Office within a specified period (normally 6 months) that s/he remains dissatisfied. Where the applicant seeks a review of the revised position within the specified period, a new case file will be opened.

4.2 Applications for review of decisions on requests to which section 38 applies

Section 38 is a statutory notification requirement which FOI bodies are required to observe in relation to the exemptions contained in section 35 (information obtained in confidence), section 36 (commercially sensitive information) and section 37 (personal information about a third party). In the case of each of these exemptions, the FOI body may grant a request if it is considered that the public interest is better served by granting than by refusing the request. However, any proposal to release such otherwise exempt material is expressed by the Act to be subject to the provisions of section 38. That section requires the FOI body to notify certain third parties that it is proposed to grant the request in the public interest and that the FOI body will consider any submissions from the third parties before deciding whether to grant or refuse the request. Detailed instructions are contained in the Section 38 Guidance Note (available on the Intranet & at www.oic.ie) on how to decide whether a decision is one to which section 38 applies. However, where it is appears that the statutory time limits for notification have not been complied with by the FOI Body, the matter should be referred to an AP/Investigator or Senior Investigator for appropriate action.

4.3 Invalid applications for review

In some cases, it will be found that applicants apply to the Commissioner for review of a refusal to grant access to records which were not sought in the original request. For example, an applicant, as a result of his/her request, may become aware of the existence of further records which were not requested originally and ask for access to these when applying for internal review.

- If the records which are the subject of the application to the Commissioner were not included in the original request, then technically the review is invalid and both the FOI body and the applicant should be informed accordingly. Prior approval of a Higher Executive Officer, Administrative Officer, or higher grade, must be sought before rejecting the application.
- Where some of the records were included in the original request, then (provided all the other requirements of the Act have been fulfilled) the application for review should be accepted. However, the applicant should be informed in writing of the scope of the review and that a fresh application may be made to the FOI body for the records which were not included in the original request.
- Similar considerations apply in the case of an application, by a person claiming to be affected by an act of an FOI body, for a review of a decision on an application made under section 10 for a statement of the reasons for the act and of any material findings of fact. If the applicant raises a new question, not raised in the original request to the FOI body, then the approach outlined above in relation to requests under section 12 for access to records should be followed. Once again, an application for a review should only be rejected after clearance by a Higher Executive Officer, Administrative Officer, or higher grade.

4.4 Discretion to admit invalid applications

Where an application for review is totally invalid, in that it relates to a decision in respect of which the Commissioner has no jurisdiction, a Higher Executive Officer, Administrative Officer, or higher grade, should reject it under section 22(9)(a)(ii). Where the application is valid in part, the normal approach should be to only accept the application to the extent that it is valid. However, in exceptional cases of the kind described below, it may be decided at the discretion of an AP/Investigator to admit the application in full. In the case of requests under section 12, the approach to be adopted is that the application may be admitted in full where it appears that no useful purpose would be served by insisting that the applicant make a fresh application to the FOI body.

Examples of such situations are requests for records to which section 31(1)(a) or section 42 clearly apply. In such situations, subject to the agreement of the FOI body, it is better to accept the application for review in full, although the applicant should be informed that, technically, a review of the refusal of access could be refused or a challenge to the validity of the Commissioner's review could subsequently be made.

- Similar considerations apply in the case of an application, by a person claiming to be affected by an act of an FOI body, for review of a decision on an application made under section 10 for a statement of the reasons for the act and of any material findings of fact. However, some care is needed in deciding whether such applications are invalid. In practice, applicants may appear to be raising new matters at internal review or in the course of a review by the Information Commissioner, when all they are really doing is questioning the adequacy of the original section 10 decision. However, cases where the matter raised bears little or no relationship to the original request to the FOI body should not be accepted. Similarly, cases where the section 10 request arose first at internal review stage, prompted, perhaps, by access to records obtained in an original request, should normally be rejected.

4.5 Admission of late applications for review

Section 22(4) provides that applications for review must be made within the following time limits:

- In the case of decisions under section 14 to extend the time taken for consideration of a request - not later than 2 weeks after the notification of the decision to the relevant person concerned
- In the case of a decision on a request to which section 38 applies - not later than 2 weeks after the notification of the decision to the relevant person concerned, and
- not later than 6 months after the notification of the decision in other cases.

- However, in all three cases the Commissioner may extend this period if he is of the opinion that there are reasonable grounds for doing so.
- This means that late applications should not be admitted as a matter of course. Apart from the clear provisions of the Act, there may well be good reasons why an application should be refused. For example, in the intervening period the views of the FOI body may have changed and it is possible that a fresh FOI request will yield a different result. In other cases, the requirements of certainty suggest that an FOI body should not continue to be at risk of review of its decision after the elapse of a reasonable period of time.
- Among the grounds which might be considered reasonable in some cases are 'force majeure' situations, e.g. illness, absence from home, failure by the FOI body to give the applicant details of his/her right of appeal to this Office, or evidence of genuine confusion by the applicant(s) in relation to the appeal process. However, the Commissioner will decide each case on its merits and it is not possible to set out in advance a comprehensive set of grounds that will be considered reasonable.
- In cases where the application is made outside the deadline, the applicant should be informed in writing that the application is out of time and that the Commissioner will only admit a late application if there are reasonable grounds for doing so. The applicant will be invited to make a submission regarding any reasonable grounds for extending the application deadline.
- If the applicant requests the Commissioner to exercise his discretion and puts forward grounds for doing so, the matter should be discussed with a Senior Investigator prior to making a decision to accept or reject the application for review. In certain cases, the Commissioner may invite the FOI body's comments on a late application.

4.6 Late 'section 38' applications

In cases where the applicant is an objector under section 38, it may be impractical to admit late applications because the FOI body may have already released the information.

Where the applicant is the original requester, any attempt to admit a late application could be challenged by a third party objector. In such cases, both the applicant and the FOI body should be informed in writing that the application cannot be accepted unless the Commissioner is of the opinion that there are reasonable grounds for doing so (see paragraph 4.5).

- Before rejecting a late application by the original requester where it appears that the decision is on a request to which section 38 applies, it should be established that the request to the FOI body was, indeed, one to which that section applies. This will normally involve an examination of the FOI body's decision making file. The key concern here is whether the FOI body, prior to notifying a person to whom section 38(2) applies, had come to the view that the record was exempt by virtue of section 35(1), 36(1) or 37(1), but that by virtue of section 35(3), 36(3) or 37(5)(a), it should be released because, on balance, the public interest was better served by doing so. Normally, Investigating Officers should not seek to go behind a purported section 38 notification. However, where the evidence clearly indicates that the FOI body had already decided prior to the section 38 notification that some exemption (other than section 35, 36 or 37) applied to the record or had already concluded that the public interest would not, on balance, be better served by release, then the request should not be treated as one to which section 38 applies. In such cases, if the application for review concerns an initial decision made by the FOI body, then the application should be rejected as invalid. The applicant should be invited to apply to the FOI body for internal review and, if necessary, the FOI body should be invited to consider the admission of a late application under section 21(7). If the application for review concerns a decision made on internal review then the application may be treated as valid and accepted if it is within the 6 months time limit. (See also the Section 38 Guidance Note)

4.7 Multiple reviews

Where the applicant already has one or more reviews before the Commissioner, the head of the Support Unit should check whether the application for review relates to a matter

which is already the subject of another such review. If it does, then the applicant should be informed that it is not intended to accept the application, but that the matter will be considered in the context of the earlier review. In such a case, the file should be passed to the Investigating Officer dealing with the earlier review.

- It may sometimes occur that an application for review relates loosely to matters which are the subject of a separate application for review by the same party. Such applications should not be refused, but they should normally be allocated to the Investigating Officer dealing with the earlier review and brought to his/her attention.

4.8 Applications where the matter is, has been or will be the subject of another review

Section 22(9)(a)(iii) provides that the Commissioner may, at his discretion, refuse to grant an application for a review where the matter to which the application relates is, has been or will be the subject of another review under that section.

- In cases where applications relate to matters which have already been the subject of a completed review, the applicant (and the FOI body, if necessary) should be informed in writing of the outcome of the earlier review and given a copy of the earlier decision. The applicant should be informed that, unless it is shown to the satisfaction of the Commissioner that the new application is distinguishable from the earlier one, he is likely to exercise his discretion to refuse to accept the application for review. The applicant should be asked to forward any such evidence within 2 weeks, failing which a recommendation will be made to the Commissioner not to accept the application. If a submission is made by the applicant within the time permitted, then the file should be passed to an AP/Investigator or a Senior Investigator for further action.
- It is also open to the Commissioner to refuse to grant an application if the application relates to matters which are the subject of a current review. In practice, the Commissioner is unlikely to reject such an application unless there are compelling grounds for doing so.

4.9 Notification of acceptance of application

As soon as it has been decided to accept an application for review, it is necessary to notify:

- the FOI body
 - the applicant
 - in the case of a decision in respect of a request to which section 38 relates, the original requester if the application is made by the third party who gave the information concerned or to whom the information relates; otherwise any person to whom section 38(2) applies (see paragraphs 32896.32767o to 32896.32767o).
- The notification to the FOI body should include a request for a numbered copy of the subject records to be forwarded to this Office together with a schedule within 2 weeks of the date of acceptance (see Appendix 4). The request for a schedule should specify that the schedule should list the records sequentially by number and include the following information:
- the date of the record,
 - the title of the document or the name of its author or addressee,
 - a brief description,
 - the exemption claimed.
- In the case of released records, it is sufficient for the schedule to show the number of the record (provided numbered copies of the records are provided) and indicate that it has been released.
- The notification of acceptance to a party other than the FOI body should include an invitation to make submissions within 2 weeks of the date of acceptance.
- A decision in respect of a request to which section 38 relates means a decision in respect of a request for access to records which contain information obtained in confidence,

commercially sensitive information or personal information where the FOI body has formed the view (subject only to receiving the views of the party who gave the information to the FOI body and/or a party to whom the information relates) that the public interest would, on balance, be better served by granting than by refusing to grant the request. A person to whom section 38(2) applies means:

- in the case of a request to which section 35(3) applies, the person who gave the information to the FOI body and, if the FOI body considers it appropriate, the person to whom the information relates, and
 - in the case of a request to which section 36(3) or 37(5)(a) applies, the person to whom the information relates.
- The key concern here is whether the FOI body, prior to notifying a person to whom section 38(2) applies, had come to the view that the record was exempt by virtue of section 35(1), 36(1) or 37(1), but that by virtue of section 35(3), 36(3) or 37(5)(a), it should be released because, on balance, the public interest was better served by doing so.
 - If, on the other hand, the consultation was undertaken for some other reason, for example, with a view to seeking the consent of the party concerned or with a view to putting the party on notice that information about them was about to be released, then any application by a third party objector should be refused.
 - In practice, determining why a consultation was undertaken is not always straightforward and even a perusal of the correspondence may not resolve the matter but the following guidelines should be followed. If the FOI body decides to release the record and bases that decision on the provisions of section 35(3), 36(3) or 37(5)(a) then it can be assumed that the FOI body had formed this view prior to any consultation and, hence, that the decision is a decision on a request to which section 38 applies. In cases where the rationale for the decision is not apparent from the decision letter, the FOI body should be

asked to confirm whether or not it is based on the provisions of section 35(3), 36(3) or 37(5)(a). (See also the Section 38 Guidance Note)

5.0 Assessment & assignment

When the subject records have been received from the FOI body, the case file will be transferred to the Head of the Assessment Unit for screening. The screening should include a preliminary assessment as to whether a section 23 notice is warranted (see below).

5.1 Assessment Unit screening for immediate processing

The Assessment Unit will screen all cases for suitability for immediate processing, subject to capacity, by the Unit. Cases may be deemed suitable for immediate processing if the matters at issue are relatively straightforward, if few records are involved, or if the request concerned has been refused solely on administrative grounds under section 15 of the FOI Act.

- Administrative grounds for refusal include a claim that section 15(1)(c) of the FOI Act applies on the basis that the request relates to a voluminous number of records. Where an FOI body has relied on section 15(1)(c) in its decision and the applicant offers to narrow the scope of the request following the acceptance of the review, the Assessment Unit should invite the applicant to withdraw the application for review and to submit a revised FOI request to the FOI body. If the applicant declines to withdraw the application for review, the review should proceed to a decision on the question of whether section 15(1)(c) applies or not. If it is determined that section 15(1)(c) does not apply, the decision of the FOI body should be annulled with a direction to the FOI body to deal with the request on its merits.
- Cases involving more complex issues or a large number of records will be transferred to the Investigations Unit for processing in “date of receipt” order.

5.2 Notice under section 23

Upon assignment, the Investigating Officer, whether an Assessment Unit caseworker or an AP/Investigator, should give further consideration to whether the reasons given by the FOI body in its decision are adequate or not.

- Both section 13 and section 21 of the Act oblige an FOI 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 the provisions 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.

- To comply with the terms of these sections, it is not sufficient for an FOI body to simply paraphrase the words of the particular exemption. 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. Where the Commissioner considers that the statement of reasons is inadequate, section 23 of the Act requires that he direct the head of the FOI body to furnish a statement, both to the requester and to the Commissioner, containing any further information in relation to the above matters that is in the power or control of the head. If the statement of reasons is determined by the Investigating Officer to be inadequate, the case should be referred to a Senior Investigator for approval to issue a section 23 notice.

- If the proposed section 23 notice is approved by the Senior Investigator, the notice should issue immediately. The case should then be dealt with as in the normal course following assignment.

5.3 Request for focused submissions

As soon as possible following assignment (and, where warranted, the issuance of a section 23 notice), the Investigating Officer, whether an Assessment Unit caseworker or an AP/Investigator, will invite FOI bodies to make focused submissions in all cases involving access requests. If the case involves an application under section 9 or 10 of the Act, the guidance in chapter 10 below should also be followed. (As submissions serve a different purpose than a section 23 statement, a request for submissions is required regardless of whether a section 23 notice has issued, and the request should not be delayed pending receipt of a section 23 statement.) The request for submissions should normally identify specific or key questions for the FOI body to answer having regard to the contents of the subject records. The request should in any event refer to and follow, in as tailored and succinct a manner as possible, the format of the Sample Questions for FOI Bodies document that is available on our Intranet and website. Where appropriate, relevant Questions may be appended to the request. A period of 2 weeks should normally be allowed for the making of such submissions. As the invitation to make focused submissions generally represents the FOI body's final opportunity to justify its decision in cases where the FOI body bears the evidential burden under section 22(12) of the Act, the request for submissions should explain that failure to justify an exemption claimed may lead to a decision to release the record(s) at issue without further contact with the body.

6.0 Appraisal for best resolution

Following receipt of the focused submissions requested or the expiration of the deadline for making such submissions, the Investigating Officer should carry out an appraisal of the case, in consultation with his/her Manager where needed, to decide on the best approach for resolving the case.

- In each case, the Investigating Officer should check at the outset of the appraisal whether the point at issue has been decided already in another case or is currently under consideration in another case. The form of research is at the discretion of the Investigating Officer, but will normally involve, as a first step, reference to the relevant

Guidance Notes that are available on the Intranet. In cases involving technical or complex information, it should also involve a search of the Reference Database or discussion with a more experienced Investigating Officer and/or a Senior Investigator.

- As part of the appraisal, the Investigating Officer should attempt to:
 - assess whether any party, other than those referred to in paragraph 4.9, needs to be notified (see instructions in paragraphs 6.1 to 6.1.7),
 - identify cases which may be capable of being resolved without a binding decision (see chapter 7),
 - identify, in particular, cases which may be suitable for settlement, and
 - assess what, if any, further information is needed from the parties.

- Following the appraisal, progress on the review should be monitored through weekly/fortnightly case reviews with the Investigating Officer's Manager. In carrying out the investigation, formal preliminary view letters should not be used other than in exceptional circumstances (e.g., cases remitted by the Courts) and with the Manager's advance agreement. However, an Investigating Officer may set out his or her view of the likely outcome of the review on an informal basis, e.g., by telephone followed by a brief email/letter, in the following circumstances:
 - when seeking to narrow the scope of the review,
 - when endeavouring to effect a settlement in accordance with section 22(7) of the FOI Act or similar resolution (i.e. a withdrawal or discontinuance) without a binding decision (see chapter 7), and
 - when notifying parties of material issues for consideration.

- Where a view is provided, a period of no longer than 2 weeks should generally be given for making a response. The party concerned should be reminded of the evidential burden under section 22(12), if appropriate. It should also be noted that, where the party fails to

respond within the timeframe specified, the Commissioner may proceed to issue a decision without further reference to the party concerned.

6.1 Notification of other affected persons

Section 22(6) requires the Commissioner to notify the following parties of his proposal to review a decision of an FOI body:

- the head of the FOI body,
 - the applicant
 - in the case of a decision in respect of a request to which section 38 relates, the original requester if the application is made by the third party who gave the information concerned or to whom the information relates; otherwise any person to whom section 38(2) applies, and
 - any other person who, in his opinion, should be notified.
- The instructions in paragraphs 6.1.2 to 6.1.7 should be followed in deciding whether to notify a party other than the FOI body, the applicant, the requester or a person to whom section 38(2) relates, of the proposal by the Commissioner to review a decision of an FOI body. It is desirable that such notification be given as early as possible in the review.
- Section 24 provides that a party to a review or any other person affected by a decision of the Commissioner may appeal against that decision to the High Court on a point of law. Section 22(10) requires the Commissioner to notify his decision, *inter alia*, to any person to whom, in his opinion, it should be notified. Any person who would be affected by his decision should be notified, thus giving the person an opportunity to exercise his/her rights under section 24. Thus, a guideline for deciding whether or not to notify a third party under section 22(6) is whether that person is likely to be affected by the decision of the Commissioner.
- This means that, having accepted an application to review a decision to refuse access to a record which may contain third party information, it is necessary to:

- identify all third party information,
 - decide whether it is necessary to notify any third party other than a person to whom section 38(2) applies (the latter must be informed in accordance with the instructions in paragraph 4.9 above).
- As a general rule, it would not be desirable for the Commissioner to decide to release information which might affect someone's interests without that person's knowledge.
 - In large measure, the decision as to whether to notify a third party must be based on the Investigating Officer's initial judgment as to the likely outcome of the review insofar as it concerns third party information. If the decision of the FOI body to refuse access appears to be justified on the face of it, there is no need to notify the third party at the start of the review. If in doubt, however, the Investigating Officer should consult with a Senior Investigator.
 - In some cases, it will not be apparent at the outset that the records contain information furnished by a third party or about a third party who may need to be notified of the review by the Commissioner. Where this comes to an Investigating Officer's attention at a later stage in the review, the party should be notified without further delay.
 - The Commissioner's attention should be drawn to cases where third parties are mentioned and it is decided that they are not affected by a decision.

6.2 Form of notification of affected parties.

Unlike section 38, which specifies certain matters which have to be conveyed to the party being consulted, section 22(6) merely requires that the party be notified of the proposal to review the decision of the FOI body concerned.

- The content of a notice under section 22(6) will vary from case to case. Typically, it should contain the following:

- some details of the request made and what records pertaining to the third party were encompassed by the request,
 - an explanation of how the matter has come before the Commissioner and his role,
 - some details of the FOI body's decision, the evidential burden under section 22(12)(b), the exemptions relied on and any other relevant exemptions, and the need to meet the conditions of any exemption being relied upon,
 - notification of other material issues for consideration,
 - an invitation to consent to release (in suitable cases), and an invitation to make submissions (which need not be confined to the matters raised by the Investigating Officer) if the party objects to release.
- Any third party notified of a review should be given an appropriate opportunity to comment, usually no longer than 2 weeks. Where a party fails to respond within the timeframe specified, the Commissioner may proceed to issue a decision without further reference to the party concerned.

7.0 Settlements & withdrawals

As part of the appraisal for best resolution, the Investigating Officer should consider whether there is a reasonable possibility of resolving the case without issuing a binding decision by endeavouring to reach a settlement pursuant to section 22(7) or by discussing with an applicant whether, in the circumstances of the case, they may wish to withdraw their application. It is relevant to note that application fees are refundable in cases where a binding decision is not required because of a settlement of the review or withdrawal of the review application.

- A withdrawal may include a deemed withdrawal or discontinuance following a grant of access by the FOI body to some or all of the records in question where the applicant raises or pursues no further issue for review. Resolving cases through settlement or withdrawal has a number of advantages. From an applicant's point of view, settlement or

withdrawal can result in a speedier resolution of the matter and a refund of the application fee. From the point of view of the FOI body, granting access to the records in question can avoid the need for any further time consuming written submissions; for instance, where consideration of the request for focused submissions reveals that the body had misdirected itself in its decision.

- In endeavouring to reach a settlement, Investigating Officers should make it clear that settlement is not an exercise designed to reduce the rights of applicants in any way. Rather, it is a process which is aimed at narrowing the differences between the sides. In some cases, a point is reached at which the applicant is happy to accept the decision of the FOI body as modified in the course of the settlement procedure. In other cases, differences remain which can only be resolved by way of a binding decision of the Commissioner. Where the FOI body agrees to release a significant amount of additional records, the Investigating Officer should confirm interest before proceedings (in reference to section 22(9)(a)(iv) or (v) of the Act, if appropriate). Even if a binding decision is required, the settlement process can help to ensure that the decision concentrates only on the essentials of the dispute between the parties.

- In any case where the Investigating Officer considers that there is a possibility of settling the case or narrowing the differences between the parties, s/he should contact the parties concerned, using informal methods of communication wherever possible (e.g., telephone call followed by brief email), and outline the possible basis of the settlement. In considering the possibility for settlement, regard should be had not alone to granting access to the records at issue, but also to the possibilities that a different form of access might be acceptable to the parties or that a deferral of access for a specified period might be acceptable. The possibility of settlement should be considered in section 38 cases, section 9 cases and section 10 cases, as well as in straightforward access cases.

8.0 Notification of material issues

In cases that are not suitable for settlement or which otherwise do not prove capable of being resolved without a binding decision, the investigation should proceed towards the decision-making stage. As discussed below, the policy of this Office is that, in general, submissions will not be exchanged between parties to a review. However, before any binding decision is reached, the parties should be notified of any new material issues arising for consideration.

- As submissions made by one or more parties to a review are likely to contain sensitive information that may not be appropriate for disclosure to others, submissions are not exchanged as a general rule. In particular, care must be taken that the provisions of section 25(3) of the FOI Act are fully observed. Section 25(3) requires the Commissioner to take all reasonable precautions to prevent the disclosure of information contained in an exempt record or information which if included in a record would cause the record to be an exempt record, or information as to whether a record does or does not exist where the FOI body is required by the Act not to disclose this information. Any exception to the rule against the exchange of submissions requires the consent of the relevant parties and the prior approval of the relevant Senior Investigator.

- An Investigating Officer should, however, notify the relevant party or parties to a review, preferably by email, of new material issues arising for consideration insofar as they affect the interests of the party or parties concerned. Material issues are issues that are relevant to the outcome of the review. Such issues involve information of significance (i.e. of substance and importance) that is likely to influence the decision the Commissioner will make, i.e. information that will make a difference to the outcome of the review. Where the influence of new material issues is likely to be adverse to a party to a review, the party concerned should be given notice of the matter and an opportunity to respond. In other words, any new matter of which a party to a review is unaware and which is likely to cause the Commissioner to make a decision adverse to the interests of that party should be communicated to the party concerned. Such matters would generally include applicable exemptions not previously raised, pertinent search details not previously

disclosed to the applicant, and any new facts and new legal developments which are likely to have a significant bearing on the outcome of the review.

- The notification need not necessarily be detailed and should be given by informal means wherever possible, but the applicant should be made aware of the pertinent factual matters under consideration, particularly where and insofar as these matters are likely to cause the Commissioner to affirm the decision of the FOI body. By the same token, the FOI body or, where relevant, affected third party should be given notice where a new matter of relevance arises that is likely to result in a decision to direct release of the records concerned. (For the sake of clarity, please note that this would not include a simple failure of proof or conclusions drawn having regard to the contents of the records at issue. Furthermore, it would not include an explanation of how the Commissioner interprets and applies the exemptions claimed.)
- Thus, for instance, if an applicant who has been notified of new material issues arising from the FOI body's submissions raises pertinent factual matters in turn which appear to undermine the FOI body's case for exemption, the FOI body should be given an opportunity to respond before a decision is made. If, on the other hand, the applicant simply argues against the case made by the FOI body without identifying new material facts for consideration, the matter should be ready for decision even where the applicant's arguments are persuasive or the proposed decision is otherwise in the applicant's favour (subject of course to any required notification of affected third parties).
- As new claims for exemption are likely to involve new matters of relevance, these too should generally be notified to the applicant. The need for notification can arise even within an exemption category. For instance, a claim of trade secrets can differ substantially from a claim of mere prejudice to the competitive position of a company. Thus, where a general claim for exemption under section 36 has been made, it may be necessary to notify the applicant once the basis for the claim is identified by the FOI body or the affected third party. The same may be true for a claim of prejudice to

investigations v. a claim of a significant, adverse effect on the performance of a management function in relation to a refusal under section 30(1) of the Act.

- However, where the FOI body has identified all material facts that are relevant to more than one ground for refusal, such as an exemption and also a restriction involving the remit of the Act, it may not be necessary to put an applicant on notice that an alternative ground for refusal than the one referred to by the FOI body will be applied by the Commissioner. Thus, for instance, where the FOI body has refused access to a record under section 31(1)(a) on the basis that it contains legal advice provided by the Office of the Attorney General, it should not be necessary to notify the applicant before a decision is made finding that the record actually falls within the ambit of section 42(f) because it was created by the Office of the Attorney General and is not a record relating to general administration. Where an Investigating Officer is satisfied that no new material issues arise, or that the applicant has had an adequate opportunity to make submissions addressing the material issues arising in the case, s/he may make a recommendation to the Commissioner without further reference to the applicant.
- Determining the materiality of an issue, as well as the level of detail that may be required, is a judgment call. A standard of reasonableness has been found to apply in other legal contexts, but it nevertheless can be difficult to know what is truly “material” unless and until a challenge arises and the matter is determined in court. However, we should always have regard to our Values and Behaviours Framework, on the one hand, and the need for expediency (section 22(3) refers) and the requirements of section 25(3) on the other. Notification does not mean that a view on the matter must be taken or that a full explanation is required. Moreover, section 45(6) explicitly allows for the use of discretion and informality in determining our procedures; therefore, a simple phone call or brief email/letter should generally suffice.
- Parties notified of material issues arising for consideration should be given an appropriate opportunity to comment, usually no longer than 2 weeks. Where a party fails to respond

within the timeframe specified, the Commissioner may proceed to issue a decision without further reference to the party concerned.

9.0 Cases involving section 9 and/or section 10

The evidential burden under section 22(12) does not apply in relation to reviews concerning section 9 and section 10 applications. Moreover, such applications may involve threshold issues of eligibility that need to be addressed before it is appropriate to ask the FOI body to address additional questions.

9.1 Section 9 cases

In cases involving a section 9 application for amendment of records, it is important for the Investigating Officer to confirm at the outset that the application concerns personal information within the meaning of section 2 of the FOI Act. If in doubt, the request for focused submissions should ask the FOI body to address the question (in addition to any other key questions taken from the Sample Questions for FOI Bodies document). If satisfied that the information concerned is not personal information, but the application was refused by the FOI body on other grounds, then the applicant must be notified of this new material issue and given an opportunity to comment (usually no longer than 2 weeks). Once the applicant is aware that the records concerned do not qualify for amendment and has been given an opportunity to make submissions on the matter, the review should be ready to be brought to conclusion by way of a binding decision unless the applicant agrees to withdraw (or, alternatively, unless the conclusion that the information is not personal information was incorrect).

- If satisfied that the application concerns personal information, the Investigating Officer should seek focused submissions from both the FOI body (if not already requested) and the applicant based on the Sample Questions for FOI Bodies document (modified as appropriate for the applicant) and bearing in mind that the burden of proof is on the applicant. The request for focused submissions to the applicant should refer to the

burden of proof and explain that mere assertions or strong opinions are not sufficient to meet the balance of probabilities.

- If following receipt of the focused submissions requested or the expiration of the deadline for making such submissions, the Investigating Officer is not satisfied that the information concerned is incomplete, incorrect or misleading, the review should be ready to be brought to conclusion by way of a binding decision unless the applicant agrees to withdraw. If, on the other hand, the Investigating Officer is satisfied based on the submissions made that the information concerned is incomplete, incorrect or misleading, then the question of the form of amendment must be addressed, having regard to any suggestions made by the applicant and the FOI body. As in other suitable cases, the Investigating Officer should consider whether there is a reasonable possibility of settlement. If a proposal for settlement is made, the parties should be given a period of 2 weeks in which to respond. If the case is not suitable for settlement, or if the proposal made for settlement is not acceptable to either party, the matter should proceed to decision (provided no further material issues have arisen) with directions included regarding the appropriate form of amendment.

9.2 Section 10 cases

Upon assignment of a case involving a section 10 application for a statement of reasons, the Investigating Officer must initially determine whether the review involves a refusal to provide a statement of reasons in the first instance or whether it is the adequacy of the statement provided that is at issue. If the review involves a refusal to provide a statement of reasons, then the question to be addressed is whether the applicant is entitled to the statement sought. Unless the refusal is based on section 10(2) of the Act, both the FOI body and the applicant should be invited to make focused submissions based on the Sample Questions for FOI Bodies document (modified as appropriate for the applicant), bearing in mind that the applicant bears the burden of showing that s/he has a "material interest" in a matter affected by an "act" as those terms are defined in section 10(5) and section 10(13), respectively. The request for focused submissions to the applicant should refer to the burden of proof and explain that the standard of proof required is the balance

of probabilities. If following receipt of the focused submissions requested or the expiration of the deadline for making such submissions, the Investigating Officer is not satisfied that the applicant is entitled to a statement of reasons, the case should be ready to be brought to conclusion by way of a binding decision affirming the decision of the FOI body unless the applicant agrees to withdraw. If, on the other hand, the Investigating Officer is satisfied that the applicant is entitled to a statement of reasons, the review should be brought to closure by way of a binding decision directing the FOI body to provide a statement of reasons.

- If the refusal is based on section 10(2), or if a statement of reasons has been provided and it is the adequacy of the statement that is at issue, the Investigating Officer should confirm that the applicant is entitled to a statement of reasons in the first instance. Where there is reason to question the applicant's entitlement to a statement of reasons, both the FOI body and the applicant should be asked to address the question as set out above. Otherwise the FOI body should be invited to make focused submissions as in the normal course. Following receipt of the focused submissions requested or the expiration of the deadline for making such submissions, the Investigating Officer should consider whether there is a reasonable possibility of settlement (for instance, where the FOI body is willing to revise the statement of reasons provided). If a proposal for settlement is made, the parties should be given a period of 2 weeks in which to respond. If the case is not suitable for settlement, or if the proposal made for settlement is not acceptable to either party, then the matter should proceed to decision, with appropriate directions given where a new statement of reasons is required.

10.0 Search cases

Search issues arise where a request is refused, in full or in part, on the basis that the records concerned do not exist or cannot be found.

- In cases where the FOI body refuses the request on the grounds that records cannot be found after all reasonable steps to ascertain their whereabouts have been taken, the guidance in Appendix 3 should be followed.
- As a general rule, where an FOI body locates additional records during the course of a review, the review should be brought to closure without a determination on the question of access to those records. The FOI body should then make a new decision under section 13 of the FOI Act on the question of access to the records concerned (which in turn will be subject to right of review). Where access is refused, no application fees will apply for internal review or, where necessary, a further review by the Commissioner on the matter, since any such review would indirectly relate to a decision that was untimely in the first instances.
- However, the Investigating Officer has the discretion to include the additional records in the review already underway where consideration of the additional records would not unduly delay the completion of the review. It would be appropriate for the Investigating Officer to exercise his/her discretion to include the records in the current review where the additional records are few in number, third party notification would not be necessary, and the question of whether or not to release is otherwise straightforward.

11.0 Cases requiring further investigation or clarification

Although the opportunity to make focused submissions generally represents the FOI body's final opportunity to justify its decision in a case involving a refusal of access, a failure to justify the refusal does not necessarily mean that the decision should be annulled. The Commissioner's inquisitorial role requires an independent analysis of the contents of the records, and it may be necessary in the circumstances to seek further

information or clarification of certain matters in order to carry out the appraisal for best resolution or to make adequate recommendations to the Commissioner. However, the purpose of seeking further information or clarification should not be to afford the FOI body (or other parties, where relevant) a further opportunity to meet the evidential burden in the first instance.

- Seeking clarification in cases proceeding to decision is required when certain gaps must or should be addressed in order to remove an element of uncertainty or confusion in relation to material matters. The need for clarification typically arises when a prima facie case for exemption appears to have been made, but certain details are missing that are required in order for the Commissioner to give adequate reasons for affirming the refusal of access. Thus, for instance, where the records involve technical or complex information, clarification may be required in order to gain a better understanding of the subject matter or to distinguish the information at issue from other similar information that may appear to be available from other sources. It may also be necessary to check on the status of certain time-bound events that are relevant to a claim for exemption, for instance, whether a certain investigation or court proceedings remain ongoing.
- As a general rule, a period of no longer than two weeks should be allowed for providing the clarification sought. Where the element of uncertainty or confusion is not adequately addressed in the period allowed, the Investigating Officer may need to reconsider any conclusions that may have tentatively been drawn regarding the claims made for exemption. The Investigating Officer should not, however, continue to engage in correspondence over the matter without the approval of a Senior Investigator (who may determine that a section 45 notice is warranted or that the matter is ready to be brought to conclusion subject to any further notifications that may be required).
- Where the FOI body falls short of establishing a prima facie case for exemption in the first place, this is simply a failure to justify the refusal (though affected third parties may need to be consulted before the matter is ready for decision – see paragraphs 6.1 to 6.1.7). An example here would be where the FOI body makes general, unsubstantiated

assertions or class-based claims in relation to an exemption involving a harm test. In determining whether a prima facie case for refusal has been met, the Investigating Officer must of course have regard to the contents of the records at issue and any relevant Guidance Notes or other research (see para. 6.0.1 above). It should also be noted that seeking clarification is distinct from the requirement to notify parties of new material issues.

- Further submissions, made for whatever purpose, may give rise to further queries, but there are limits to any investigation. While the Commissioner's review is inquisitorial in nature, it is not the role of the Investigating Officer to determine beyond a reasonable doubt whether the decision of the FOI body was correct or not. Rather, the question for determination is whether it has been shown to the satisfaction of the Commissioner that the decision of the FOI body was justified or not. Section 22(3) requires the Commissioner to determine this question as soon as may be and, in so far as practicable, not later than 4 months after the receipt of the application for the review concerned. What is required is evidence that is sufficient in all of the circumstances. Therefore, further enquiries should be made only where necessary and with the approval of the Investigating Officer's Manager. However, the Investigating Officer and his/her Manager must be satisfied that the Commissioner has sufficient information on which to make a decision and that all relevant information before the Commissioner is given due consideration. Moreover, any uncertainty over material issues of fact must be adequately resolved if these are to be relied upon in any finding in the Commissioner's decision.
- In conducting reviews, Investigating Officers must of course adhere to fair procedures. However, the requirements of procedural fairness will depend upon the particular circumstances of the case. Where a question arises as to whether procedural fairness requires further engagement with a party or parties, the Investigating Officer should consult with his or her Manager so as to determine the appropriate course of action.

12.0 Conclusion of the review

Following investigation, the review should be ready to be brought to conclusion by way of settlement or binding decision.

- Having considered all the relevant facts and arguments contained in the submissions of all parties, along with any legal advice and any directions of the Commissioner, the Investigating Officer should review the status of the case. The Investigating Officer may conclude at this stage that the case is one which is capable of being settled as a result of a modification of the position of the FOI body or a modification of the request or both.
- On the other hand, the Investigating Officer may come to the conclusion that neither party is likely to further modify its position in a way which will lead to settlement of the case. In such cases, the Investigating Officer should prepare a submission and draft decision for transmission to the Commissioner, or, where appropriate, his delegate, along with the full file.
- In drafting the decision, the OIC Decision Style Guide should be followed (Appendix 5). Where appropriate, the decision should specify the period in which the Commissioner's decision is required to be implemented. If the decision is to grant access to any of the records at issue, the attention of the FOI body should be drawn to the provisions of section 26 of the FOI Act if the release of the records would affect the interests of any third parties who have been notified of the review.
- The purpose of a submission is to ensure that the Commissioner is fully informed as to the relevant facts of the case, arguments presented and any legal advice, and to explain the approach taken in the case to the extent that this is not apparent from the decision. The submission directs the Commissioner's attention to any documents in the file which the Investigating Officer considers will be of particular assistance to her in reviewing the case. A detailed submission is normally not required, however.

13 Closing Cases

This section sets out the applicable procedures for closing a case file once the review has been brought to its conclusion.

13.1 A review can be brought to a conclusion in a number of ways, viz:

- the application for review of the decision of the FOI body is withdrawn,
- the review is discontinued,
- a settlement is agreed between the parties,
- the Commissioner completes his review of the decision of the FOI body under section 22(2) of the Act.

13.2 At the conclusion of a review the Investigating Officer must:

- arrange for all parties to be notified of the outcome of the review in writing;
- if the decision is to grant access to any of the records at issue, the attention of the FOI body should be drawn to the provisions of section 26 of the FOI Act, especially if the release of the records would affect the interests of any third parties who have been notified of the review;
- clearly identify for the Support Unit all original files or records supplied to the Office of the Information Commissioner by the FOI body so that the Support Unit can arrange for their return to that body.

13.3 In the case of reviews which are concluded by way of withdrawal of the application, the following instructions should be followed. If the applicant indicates orally that the application may be treated as having been withdrawn, then written confirmation should be sought, preferably by email. A copy of the written notice of withdrawal or other appropriate notification of the withdrawal should be sent to the FOI body and any other relevant parties. If the applicant does not furnish written confirmation within a reasonable period of time, or where it is not practical to obtain written confirmation from the applicant, the Office will note the applicant's oral instruction that the application be

withdrawn, and will issue written confirmation by email to the FOI body and other relevant parties as appropriate.

- 13.4 Any case closed by decision should be given a rating of 1, 2, or 3. A rating of 1 applies if the decision is relatively routine, for instance, if it relies on previously used analysis. A rating of 2 applies if the decision is significant, especially if it is important for internal capture. A rating of 3 applies where the decision is exceptional, which triggers obligations under the Official Languages Act. A rating of 2 or 3 requires the approval of a Senior Investigator. If the decision is closed by means other than decision (e.g., withdrawal), then the rating is “0” for none.
- 13.5 Where a case has been closed by decision, the Investigating Officer should prepare a copy of the decision for publication on the Office’s website. The decision should be prepared in an anonymised format – removing all information which would identify, whether directly or indirectly, the applicant or other persons, including third parties. Where specific consent has been given by the applicant, their name may be published.
- 13.6 The appropriate steps should be followed and data entered as set out in the CRM manual when closing a case. This facilitates the implementation of the Records Retention Schedule (RRS) of the Office, which sets out the retention periods for case related records. The RRS is an essential component of the Office’s compliance with our obligations under the FOI Act and GDPR. Where a case is identified for retention, the approval of the Senior Investigator should be recorded on the case. Cases marked for retention will be reviewed periodically to determine if they still need to be retained. See CRM Manual for details of steps to be followed.
- 13.7 On receipt of the file from the Investigating Officer, the Support Unit should arrange for all original files or records supplied to the Office of the Information Commissioner by the FOI body to be returned to that body.

14 Appeals to the Courts

14.0.1 Appeals to the High Court against a decision of the Commissioner are generally received in hardcopy within 4-8 weeks from decision, as required under section 24(4) of the FOI Act 2014. Appeals may also be served on our solicitor.

14.1 Receipt and Recording of the Appeal

14.1.1 On receipt of an appeal, the Investigating Officer should ensure that the relevant Senior Investigator is notified of the appeal. The Investigating Officer should also request the Support Unit to scan the appeal papers and save them to the relevant case file on the CRM. The Senior Investigator will inform the Director General, the Commissioner and the Head of Legal of the appeal. If no Senior Investigators are available, the Investigating Officer should forward a copy of the scanned papers to the Senior Investigators, the Director General, the Commissioner and the Head of Legal. The hard copies may be given to the relevant Senior Investigator or placed on file.

14.1.2 Where the appeal is made by a third party against a decision of the Commissioner which directed the release of third party records, the Office should notify the FOI body of the appeal and instruct the FOI body not to release the records. (Section 26 of the FOI Act refers.)

14.1.3 The Investigating Officer should ask the Support Unit to update the Office website by adding a note to the relevant, published decision stating that the case has been appealed to the High Court (or Court of Appeal, or Supreme Court, as applicable). [Sample text: *Note: This decision was appealed to the High Court by the [applicant/body, as appropriate] in [Month Year].*]

14.1.4 The Investigating Officer should retrieve the hard copy of the file (where there is one) and ensure that all necessary entries regarding the making of the appeal are made on the CRM. This should ensure, amongst other things, that the electronic or hardcopy records are not deleted under the RRS until the appeal is finalised and the case completed. The

casefile and associated records (if any) should be retained and stored with the Investigating Officer's active cases.

14.1.5 The Investigating Officer should ensure that all correspondence relating to the appeal is saved onto the CRM and placed in the hard copy file. S/he should ensure that copies of final papers, as filed, are received from our solicitor and put on the file (e.g. the final version of affidavits as signed, submissions etc.). These documents should be clearly tagged on the CRM as set out in the CRM Manual.

14.2 Management of the Appeal

14.2.1 A decision will be made by the Senior Investigators, Director General and Head of Legal regarding whether the appeal will be defended and, if so, whether in-house or outside solicitors are to be instructed.

14.2.2 The Investigating Officer should, in consultation with the Senior Investigator, review the papers received – these are usually a Notice of Motion (setting out the grounds of appeal and the parties to the appeal) and a grounding Affidavit (setting out the appellant's view of relevant events). Any inaccuracies, errors or items worthy of comment should be noted.

14.2.3 The Senior Investigator will decide on the documents to be provided to the legal team. These should be copied and, together with a short cover letter, should be provided to the solicitors (by courier or hand delivery when the outside legal team is being instructed).

14.2.4 Depending on the case, the Investigating Officer or the Senior Investigator will deal with the solicitor. Where the Investigating Officer is dealing with the solicitor, the relevant Senior Investigator should be copied on all but the most routine correspondence.

14.2.5 All draft court documents provided by the legal team should be fact checked for accuracy and to ensure that they reflect the policy of the Office. The Investigating Officer, or Senior Investigator where appropriate, should monitor progress of the appeal ensuring

that all deadline dates for the filing of papers and exchange of submissions etc. are met – where possible, the Office should not contribute to any delay in progress.

14.2.6 Once the judgment has been delivered, notice and a summary of the judgment should be added to the relevant decision on the OIC website (section 47(1)(b) refers). As soon as the judgment becomes available, a link to the judgment should also be added to the website.

14.2.7 The Investigating Officer should ensure that all relevant records are entered on the CRM and that the CRM case details are fully updated appropriately.

14.3 Costs

14.3.1 The case is not completed until the issue of costs has been resolved. If an order for costs affecting the OIC is made or if any agreement regarding costs affects the OIC, the case is not closed until the costs are paid – either by or to this Office, depending on the order of the Court or agreement. The case should continue to be monitored regularly until the costs have been finalised.

14.4 System Case Closure

14.4.1 Once the Office is notified that the matter of costs has been finalised, or if costs were not an issue, the Investigating Officer should mark the case as completed and return the casefile to the Support Unit. All details and dates should be recorded on the CRM as these are relevant for the operation of the RRS timelines.

14.4.2 The Investigating Officer should provide a copy of any legal advice received and legal submissions filed to the Reference Database Manager.

14.4.3 If any case has been on hold pending the outcome of the now completed case, such a case should be discussed with the Senior Investigator and re-activated/closed and the parties informed as appropriate.

14.5 Further Appeal to the Court of Appeal or Supreme Court

14.5.1 If a further appeal (either to the Court of Appeal or Supreme Court) is made or received, the process outlined at paragraphs 14.1 to 14.19 above starts again and the relevant steps should be followed.

15 Arrangements for dealing with review applications

The Office will endeavour to deal with reviews as expeditiously as is practicable, having appropriate regard to the available resources.

15.1 It is the Commissioner's objective that, to the greatest extent possible, review applications should be decided within the 4-month guideline timescale provided for at section 22(3) of the FOI Act. Accordingly, all new cases are screened by the Assessment Unit for suitability for immediate processing, subject to capacity, by the Unit.

15.2 Cases already on hand and new cases not deemed suitable for immediate processing, i.e. cases assigned to the Investigations Unit, will continue to be processed alongside the cases assigned to the Assessment Unit. In determining the order in which these older or more complex cases will be dealt with, the criteria set out below will apply.

15.3 As a general rule, priority will be given to cases on the basis of age, i.e. older cases will generally be dealt with before more recent cases.

15.4 Cases will not be dealt with solely by reference to age. In some circumstances, more recent cases may be dealt with before older cases. The circumstances where this may arise include:

- where it is more efficient to deal with a particular recent case alongside an older case (for example, a recent case is very similar to an older case and the same issues arise in both);
- where it is more efficient to deal with a particular group of cases together because they involve related issues;

- where, for staff development purposes, a particular case or category of case is allocated to a particular Investigating Officer;
- where the applicant seeks priority for a specific pressing reason; however, as most applicants will be anxious, understandably, to have their cases expedited, this ground will apply in exceptional circumstances only;
- where the Commissioner forms the view that a particular case should be expedited, for example, in order to give general guidance to FOI bodies on the processing of a particular request or category of request.

16.0 Section 6 Dispute Resolution Process – Whether an Entity is a Public Body

- 16.1 Section 6(1) of the FOI Act describes the bodies or entities that are public bodies for the purposes of the Act. Under section 6(7) of the FOI Act, where a dispute arises between the Commissioner and any entity as to whether the definition of a public body applies (or as to the conditions arising), the dispute must be submitted to the Minister for Public Expenditure and Reform who will determine the matter.
- 16.2 Where a person has made an FOI request to an entity and been informed by that entity that it is not subject to the FOI Act, the person may contact the Office. All correspondence received by the Office in relation to such a matter should be acknowledged and the person informed that the matter is being examined. A template for such an acknowledgement is available on the CRM.

Initial Screening

- 16.3 The Support Unit should carry out an initial screening of the case. In doing so, the Support Unit may seek guidance from the Support Unit/Assessment Unit manager, as necessary.
- It may be clear that the entity concerned is not an FOI body (for example, where it is a private company with no relationship with another FOI body such as a supermarket). In such cases the Support Unit should contact the person and explain that the entity is not subject to FOI.

- It may be the case that the Commissioner has previously considered the status of the entity concerned. In such cases the Support Unit should contact the person and provide details of the Commissioner's view.
- The status of the entity may be unclear. In such cases, the matter should be prepared for referral to the Assessment Unit Manager.

Referral to the Assessment Unit Manager

- 16.4 If not already supplied, the Support Unit should seek a copy of the correspondence between the person and the entity (i.e. a copy of the FOI request and the entity's response, together with any other relevant correspondence). The matter may then be referred to the Assessment Unit Manager.
- 16.5 It is important to note that a section 6 dispute case is not a review by the Commissioner of a decision of an FOI body under section 22 of the FOI Act. The matter is not, therefore, accepted and processed in the same way as an application for review under section 22. The case is handled in accordance with the CPU Dispute Resolution process - <https://foi.gov.ie/guidance/foi-body-dispute-policy/>

Assignment and Assessment

- 16.6 The case will be assigned to a caseworker by the Assessment Unit Manager or a Senior Investigator. The caseworker should invite submissions (to be provided within two weeks) from the person who made the request and from the entity concerned. Each party should be asked to explain why, in their view, the entity is or is not (as the cases may be) a public body under the FOI Act. They should be referred to the provisions of section 6(1) of the Act.
- 16.7 Key questions to be addressed by the entity will depend on the nature of the entity concerned. They may include any issues raised by the person who made the request. They might also include, for example:
- how the entity was established
 - the structure, ownership, shareholding, voting rights and board members of the entity

- the sources and level of funding it receives from State bodies
- the degree of dependence it may have on public funding
- the nature and/or degree of control exercised or capable of being exercised by any public body.

16.8 Having concluded their analysis of the submissions received and any research undertaken with regard to section 6 of the Act, the caseworker should draft a recommendation for the Senior Investigator. Any research is likely to include an analysis of how the body was established, any relevant legislation, the role of any Government Minister in its establishment, who controls the entity in question, etc. The case should then be referred to the Senior Investigator.

Conclusion

16.9. If the Senior Investigator decides that the body is not a public body, the caseworker should prepare letters to the person who made the request and to the body informing each of them of the outcome the Commissioner's consideration. These letters should be drafted for the Senior Investigator's signature. (As stated above, this is not a decision under section 22 of the Act).

The caseworker should inform the Reference Database Manager and the Support Unit of the outcome of the case, so that it can be recorded on the Reference Database and on the OIC Website.

16.10 If the Senior Investigator decides that the entity is a public body, a letter to the Central Policy Unit of the Department of Public Expenditure and Reform should be prepared, requesting the Minister to make a determination on the matter in accordance with section 6(7) of the Act. Letters should also be sent to the requester and the body, informing them that the matter has been forwarded to the Minister for determination. The caseworker should also inform the Reference Database Manager and the Support Unit of the outcome of the case, so that it can be recorded on the Reference Database and on the OIC Website.

When received, the outcome of the Minister's determination should then be communicated to both parties. In the event that the Minister determines that the body is an FOI body, the body should be asked to process the FOI request. The caseworker should inform the Reference Database Manager and Support Unit again – this time of the updated position, so that the Reference Database and the OIC Website can be updated.

Appendix 1 Screening Checklist

Checklist for screening OIC applications for review

- ✓ The FOI body is within the remit of the FOI Act 2014. YES [] NO []

- ✓ The applicant has availed of the appropriate review process of the FOI body. YES [] NO []

- ✓ The application relates entirely to a matter contained in the original request. YES [] NO []

- ✓ The application is made within 6 months of the internal review decision of the FOI body.

YES [] NO []

- ✓ Is the application one to which section 14 or section 38 applies? YES [] NO []
If 'Yes', was the application made to this Office **within two weeks** of the decision of the FOI body? YES [] NO [] **If 'no' to this question, refer to the head of the support unit.**

If this is an application about s38, use 'Screening checklist for s38 applications'

Section 10

- ✓ Does the application concern a decision about section 10? YES [] NO []
If 'yes', did the applicant specify that the FOI request was being made under s10? YES [] NO []

If 'no', did the FOI body assist, or offer to assist, the applicant in making a section 10 request? YES [] NO [] **If 'no' to this question, refer to the head of the support unit.**

Delegated functions of the FOI body decision makers

- ✓ Is it clear that the original and internal review decisions have been made by decision makers to whom the relevant functions have been delegated? YES [] NO []

If 'no' to this question, refer to the head of the support unit.

Does a fee apply?

This application for review is about:

- personal information []
- non-personal information []
- a mix of personal & non-personal information []
- a case concerning section 37(8) []
- an application under section 9 []
- an application under section 10 []
- a decision to charge a fee []

Does a 'deemed refusal' at the internal review stage apply to this application?

YES [] NO [] To be determined [] * **see end of next page**

Does a fee apply to this application? YES [] NO [] To be determined []

Which fee applies?

€15 - Medical card holder []

€50 - Review about a request for access to non-personal information, or mixed information []

- ✓ Has the correct fee been paid? YES [] NO []

About the requester

- ✓ Does the applicant have other open reviews? YES [] NO []

If 'yes', list the review reference number/s.

- ✓ Is the person making the request to this Office the original requester? YES [] NO []

- ✓ Is the original requester represented by another person or body, i.e. acting on his/her behalf?
YES [] NO []
- ✓ If 'yes', to the above question, has the representative satisfied this Office that s/he has authority to act on behalf of the original requester? YES [] NO []

- ✓ Can the Office accept this application for review? YES [] NO []

Signed:

Date:

Post-acceptance

*Has it been established to the satisfaction of this Office that this application concerns a 'deemed refusal' of the internal review request? YES [] NO []

If the application concerns a deemed refusal of an internal review request, check if a fee has been paid and arrange for a refund, if appropriate.

Appendix 2 – Screening of s38 Applications. Checklist

Screening of S38 applications for review to the Information Commissioner - Checklist

Section 38 is a requirement by the FOI body to notify the party who gave the information, or to whom the information relates, before making a decision.

1.

- ✓ This is an application relating to S38 only. YES [] NO []
- ✓ This is an application relating to S38 and a decision on other records*. YES [] NO []
 - ✓ Should this application be split into two separate applications? YES [] NO []

2.

- ✓ The s38 application is from the original requester to the FOI body. YES [] NO []
- ✓ The s38 application is from a third party**. YES [] NO []
- ✓ If the application relates to a third party, was the party notified by the FOI body within 2 weeks of receipt of the FOI request? YES [] NO []
If 'no', seek clarification from the FOI body.

3.

- ✓ The FOI body considered the provisions of section 38 at the
Original decision stage only [] Internal review stage []
- ✓ If 'Original decision stage only', was this S38 application made to this Office within two weeks of the FOI body's original decision? YES [] NO []
If 'no', contact the applicant for an explanation why the application was not made to this Office within two weeks.
- ✓ If the decision was made at the internal review stage, **check with the head of the support unit on the status of the application.**
- ✓ Can this application for review be accepted by the Office?
YES [] NO []

If 'No', please state the grounds. _____

***Where some records are not subject to the notification procedure, the normal OIC review mechanism applies in relation to those records.**

****If this is an application from a third party, the FOI body must be informed as soon as possible (by phone) that it should not release the records at issue until it is advised by this Office.**

4. Does a fee apply?

This application for review is about a:

S38 application from a third party []

S38 application from the original requester (the applicant to this Office) []

Did the FOI body make a decision within two weeks of receipt of a submission from the third party, or within two weeks of the expiration of the time available to the third party to make a submission (whichever is earlier)? YES [] NO []

Does a fee apply to this application? YES [] NO [] To be determined []

Which fee applies?

€15 – S38 application from a third party []

€50 – S38 application from the original requester (the applicant to this Office) []

€15 – S38 application - original requester is a medical card holder []

Has the correct fee been paid? YES [] NO []

Signed:

Date:

Office of the Information Commissioner

Guidance Note

Freedom of Information Act
2014 – Section 15(1)(a): Record
Does not Exist or Cannot be
Found

May 2020

[Table of Contents]

Introduction

The Information Commissioner has prepared this Guidance Note in relation to section 15(1)(a) of the Freedom of Information (FOI) Act 2014.

The Note is a commentary on the interpretation and application of section 15(1)(a) of the Act by the Commissioner. It is intended to provide a 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.

References

References to the Commissioner

The Information Commissioner and the Office of the Information Commissioner are referred to as ‘we’ or ‘us’ in this Note. Where the terms ‘we’, ‘us’ or ‘our’ appear, they refer to the Commissioner, his Office or the officer to whom the function of making a decision has been delegated by the Commissioner, as appropriate.

References to Decisions

Our decisions are referred to in this Note by Case Number.

- Cases up to 2019 had case reference numbers with the first two digits of the number indicating the year in which the application for review was made to our Office. Such cases typically had the format, for example, 080001 for the first case in 2008.
- During 2019 the case reference number system in the Office changed. The full case numbers for these later cases are somewhat lengthy and typically have the format OIC-12345-A1B2C3. Where a decision with the later style of reference number is referred to in this Note, it is referred to by the middle five digits only. Thus, Case OIC-12345-A1B2C3 would be referred to as Case 12345.

The Cases may be found on our website at www.oic.ie using the Case numbers used in this Note.

1.0 Section 15(1)(a) – Overview & Background

1.1.1 This Note explains our approach to section 15(1)(a) of the FOI Act. Section 15(1)(a) provides for the refusal on administrative grounds of a request for a record where the record does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken.

Administrative Provision

1.2.1 This is a discretionary administrative provision. It allows for the refusal to grant a request on administrative grounds, as opposed to providing for the refusal of a request on the grounds that the record is exempt.

Requests for Records

1.3.1 The FOI Act provides for a right of access to records held by an FOI body (section 11 refers). Requests for information or for answers to questions, as opposed to requests for records, are not valid requests under the Act, except to the extent that a request for information or for an answer to a question can reasonably be inferred to be a request for a record containing the information or answer sought.

1.3.2 . The FOI Act is concerned with the provision of access to records that are actually held. It does not provide for a right of access to a record which ought to exist. The Act does not require FOI bodies to create a record if none exists, apart from a specific requirement to extract records or existing information held on electronic devices.

Some General Recommendations

1.4.1 The Decision Maker's Manual issued by the FOI Central Policy Unit of the Department of Public Expenditure and Reform states that, in the event that an FOI body is refusing access to records on the basis of section 15(1)(a), it should be able to refer to or demonstrate a number of matters. These include:

- referring to (and providing) the FOI body's policies, guidelines and relevant documents relating to the records sought
- showing the areas that have been searched, who searched and how they searched
- demonstrating that it has considered other areas where the records could potentially be held
- showing that it has engaged with relevant staff who may have handled the records or who know the records management in the area.

Records Management & Searching

1.4.2 We take the view that good records management practices enhance FOI rights. We consider that FOI bodies need to have clear and well developed records management policies and practices.

1.4.3 In 2007 we made a number of recommendations arising out of an investigation into the operation of what was then section 10(1)(a) of the FOI Acts 1997 & 2003, now section 15(1)(a) of the FOI Act 2014 (available on our website www.oic.ie). The recommendations, which are still relevant, included the following –

- Every public body should draw up and implement a comprehensive records management policy as a priority.
- There should be consistency in searches for records by public bodies. A checklist should be used for this purpose. Templates of how/where searches are to be conducted should be prepared and made available to all staff, with steps taken to ensure that the procedures in the templates are adhered to. Details of searches conducted should be noted and retained on the FOI decision making file.

Section 15(1)(a) and FOI Decisions

1.4.4 Our recommendations arising out of the 2007 investigation into the operation of section 10(1)(a) (now section 15(1)(a)) included:

- Decision letters should always include detailed information relating to the nature of the searches carried out and of the locations searched.

The inclusion of additional background information and detail, as to the nature of the searches carried out or of the locations searched, presents a more complete picture to requesters of the efforts made to locate the requested records.

Decision letters should always explain the basis on which the FOI body concluded that the requested records did not exist or could not be found.

- Decision letters should always set out the requester's rights of review/appeal. It is not correct to say that the request is being granted in full in cases where the decision is that requested records cannot be found or do not exist, although all other records (relevant to a request) in the possession of the body are being released.

FOI History and Warning regarding Commissioner's Decisions

1.5.1 Section 15(1)(a) is similar to section 10(1)(a) of the FOI Act 1997. This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 10(1)(a) 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 10(1)(a) in those decisions have been replaced by section 15(1)(a) of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (*).

1.5.2 Reference may also be made in this Note to other provisions of the FOI Act 2014 which are relevant. Where reference is made to previous decisions of the Commissioner relating to such provisions under the FOI Act 1997 (or the FOI Act 1997 as amended), those provisions are replaced with the relevant, equivalent provision in the 2014 Act. Again, where this occurs, such references are denoted by an asterisk (*).

1.5.3 While references in this Note are made to previous decisions 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 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 15(1)(a) – The Commissioner’s Review

What the Act states:

15 (1) A head to whom an FOI request is made may refuse to grant the request where —
(a) the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken,

2.1.1

Section 15(1)(a) may apply where:

- the records sought never existed
- the records may have existed in the past, but do not currently exist or cannot now be found.

2.1.2 As cases in which section 15(1)(a) arises often concern the steps taken to search for and find records, such cases are frequently referred to as “search” cases.

The Role of the Commissioner and the Review Process

2.2.1 Our role in these cases is to review the decision to refuse the request for access to a record on the ground that the record sought does not exist or cannot be found after all reasonable steps have been taken to ascertain its whereabouts and to decide whether that decision was justified.

2.2.2 We will have regard to the relevant information available and assess the adequacy of the searches conducted by the FOI body. The relevant information in “search” cases generally consists of the steps actually taken to search for the records and information about the record management practices of the FOI body, insofar as those practices relate to the records in question. It may also include further information provided by the applicant for review and/or the FOI body.

2.2.3 In reviewing a decision to refuse access under section 15(1)(a), we will generally need to

- find out what steps were taken to search for the record(s) and
- find out what the records management practices of the FOI body are as they relate to the record(s) in question.

We will also generally consult the requester.

2.2.4 We may also seek further information which we deem relevant to the review. Occasionally, we may also visit the FOI body. We will consider all the relevant information and decide whether the decision that section 15(1)(a) applies was justified. It is not normally the function of the Commissioner to search for records when reviewing a decision under section 15(1)(a).

Steps Taken by FOI Body to Find the Record(s)

2.3.1 We will generally seek to establish in detail the steps taken by the FOI body to find the record(s) including, how and by whom searches were carried out and what records were actually searched for.

2.3.2 The information which we will seek regarding the steps taken will depend on the nature of the record(s) at issue and the circumstances of the case. FOI bodies may, for example, be asked to provide some or all of the following:

- an outline of the exact locations/areas which were searched for the records
- whether there are any other locations/ areas (other than those searched) where such records might be (as opposed to ought to be)
- a description of the searches which were conducted in such locations/ areas, including, for example, details of the files searched
- details of how the searches were carried out (manually, by computer, by name, by reference number, by key words etc.)
- whether relevant individuals were consulted and their records searched and, if so, details of the individuals concerned, the response(s) received, the searches carried out and the outcome of those searches
- whether it is possible that any relevant records were destroyed, in accordance with policy or otherwise.

2.3.3 Establishing the steps taken to find the records may include establishing that a general email or memorandum was circulated and has been responded to by all recipients. In some circumstances, this may not be sufficient. Depending on the circumstances, it may be necessary to know what the recipients of the email or memorandum did.

2.3.4 Sometimes all reasonable steps have been taken, but the FOI body did not properly record the steps. This situation is less likely to arise where, for example, the FOI body circulates a form (email or hard copy, as appropriate), which each recipient is obliged to return certifying that he/she has searched the areas under his/her control (and giving details of how the search was conducted) and that the file(s)/record(s) have not been found.

2.3.5 In considering whether all reasonable steps have been taken to search for the record(s), it may be useful to ask the question whether there are any additional steps the FOI body would take if it had to find the record(s) urgently for a senior official such as the Secretary General or CEO.

Relevant Searches in Particular Cases

2.3.6 The circumstances of the case are relevant. Specific search issues may arise in a particular case. For example, information available may suggest that particular locations or particular databases should have been searched or it may suggest that certain staff members should have been asked about the location of records.

Example # 1: In Case 53515 we found, amongst other things, that the Health Service Executive (HSE) took too narrow an interpretation of the applicant's request and should have consulted with a wider range of relevant staff in an effort to identify relevant records.

Example # 2: In Case 180013 we noted that certain parliamentary questions suggested that the Department of Justice & Equality might hold relevant records that it had not identified when processing the request.

2.3.7 The applicant may provide information regarding the existence or location of records. We may ask FOI bodies to respond to particular contentions of an applicant regarding the creation of, or searches for, records.

Example: In Case 170356 the applicant challenged a decision by University College Cork (UCC) to refuse access to a certain agreement. He also provided reasons for believing that additional records should exist. He referred to the history of the agreement, the requirement to receive approval from the Higher Education Authority, and communications with the Department of Education, the Public Accounts Committee and others about the matter. UCC was asked to detail the steps taken to search for relevant records. In response, UCC indicated that it had misinterpreted the request. Following a fresh search for records, it identified further records as relevant to the request.

2.3.8 The search terms used by the FOI body in carrying out its searches are also important.

Example: In Case 55912 the applicant stated in his FOI request to the Department of Culture, Heritage and the Gaeltacht that he used three variations of his name; the English spelling, the Irish spelling and a combination of both. When we queried the search terms used by the Department, it confirmed that searches were carried out using the English spelling and the Irish/English combination spelling. It said it did not carry out searches using the Irish spelling of the applicant's name, as it had never communicated with the applicant using that spelling. However, we noted the use of the Irish spelling of the applicant's name in a number of the records that had been released. We found the Department's failure to search for records using the Irish spelling of his name to be an important omission. We found that it did not carry out all reasonable searches for relevant records.

Ensuring the Searches were Actually Carried Out

2.3.9 FOI bodies should ensure that the searches they describe to us are the searches which were actually carried out.

Example: In Case 150389 the submission of the Rotunda Hospital to our Office was made on the assumption that procedures for searching and retrieving boxes held in external archives had been complied with. However, during the course of our review, the Hospital informed us that the wrong box number had been given to the external archive company at the outset, and so the archive company checked the wrong box. Also, the Hospital had not retrieved the box concerned from the archive company (which was what it would normally do if the archive company did not find the file). Thus, despite the Hospital's comprehensive search policies, the searches actually carried out by the Hospital were not as described in its submission.

Misfiling/ Mislacing

2.3.10 Consideration may need to be given to whether a search has been conducted of locations where the record might be as opposed to should be. The misfiling or mislacing of records is a common enough occurrence. Thus, if the FOI body has confined its search to the places where the records ought to be, then it can hardly be said to have taken all reasonable steps. The following two examples refer to whole files, but similar steps could be devised for individual records, depending on the type of records being sought.

- Consider whether the file was misfiled (i.e. placed in the wrong order in a series of files which are ordered by name or number). Misfilings are common but experienced record keepers have techniques for finding such files e.g. where filed by numbers, look at half a dozen files either side of the number, look at transposed numbers, dropped digits etc. It may be necessary to obtain evidence from the record keeper.

- Consider whether the file was misplaced (i.e. associated with another unrelated file or filed in the wrong series altogether). Once again, if there is someone who has overall responsibility for the files, they will know the common causes of files "going missing" and may be able to suggest further ways of locating such files.

Limiting Searches

2.3.11 We accept that generally the FOI body is best placed to determine which of its areas, sections or divisions etc. might hold the records sought. However, we expect the FOI body to be in a position to justify any decision to limit its searches to particular areas.

Example: In Case 180013 (referred to above) we found that the searches undertaken by the Department of Justice and Equality fell short of the requirements of section 15(1)(a). We considered that this view was supported by the fact that the Crime Division in the Department was not requested to conduct a search, but had been found to hold relevant records. We found that the Department had not adequately explained the basis on which it limited its searches when processing the requests in the case.

Records Management Practices of FOI Body

2.4.1 We will generally look for information about the records management practices of the FOI body insofar as those practices are relevant to the record(s) at issue. The degree of detail which will be required will vary according to the type of records being sought. An exhaustive description of the FOI body's records management practices will not normally be needed, nor in many cases would it be useful.

2.4.2 The information we seek will depend on the nature of the record(s) at issue and the circumstances of the case. For example, FOI bodies may be asked to provide some of the following information:

- a description of the records, or kind of records, at issue
- a description of the relevant filing systems
- how and when such records are typically created or received
- how such records are (or were) used
- what sections within the FOI body would normally consult such records

- where such records are (or were) kept while in active use
- in the case of "dormant" files (i.e. files no longer in active use), who is responsible for them
- whether there is a register of files and, if so, what it discloses about the records at issue
- details of the records management policy for such records, including the retention policy and the policy and practice for the destruction of such records.

Practice or Procedure of the FOI Body

2.4.3 We may have regard to the general practice and procedures of the FOI body.

Example: In Case 98079/98080, amongst other things, the applicant sought access to all personnel records made available to an interview board. The Department of Agriculture and Food claimed that the only information made available to boards consisted of the application form submitted by the applicant together with an assessment from the candidate's reviewing/superior officer. It also stated that its personnel division did not, as a matter of course, make any input into the selection of candidates and that the placings of candidates in competitions were entirely a matter for the interviewing board. Having considered all of the circumstances surrounding the applicant's interview and having considered the practices of the Department in relation to interview boards generally and the board in this case in particular, we found no evidence had come to light which would suggest that the applicant's personnel file was made available to the board or that any other records were created for the purposes of the interview.

2.4.4 We may look for details of the records management practices of the FOI body, including guidelines for the archiving and destruction of records. We may seek copies of any relevant documentation, including, for example, the FOI body's Record Retention Schedule and any authorisation necessary under the National Archives Act for the destruction of records. We may have regard to such matters in our decision.

Example: In Case 99046 the Department of Social, Community and Family Affairs outlined its policy on the storage and destruction of records. It provided us with the authorisations given by the Acting Director of the National Archives and the Departmental Circular regarding the destruction of documents. In the circumstances of the case, we were satisfied that the Department's then current archival policy was as outlined to us and that authorisation had been obtained from the Director of National Archives for the destruction of records of the nature at issue. We were satisfied that the Department was justified in concluding that certain records were once held by it, but that they no longer existed, having been destroyed in accordance with the Department's normal practice.

The FOI Body's Records and Records Management Systems

2.4.5 FOI bodies should be aware that generally we will be unfamiliar with their systems and processes. We rely on FOI bodies to provide a clear and sufficiently detailed explanation of their systems and processes in order to allow us to reach informed conclusions as to whether all relevant records have been considered for release.

2.4.6 Where FOI bodies provide the full and detailed explanations sought by us, it avoids prolonged engagements with our Office. Such explanations should be provided by the FOI body when sought by us.

Example: In Case 53286 we considered that the Health Service Executive (HSE) did not provide a sufficiently detailed explanation of its systems and processes. We found that many of the HSE's response to specific queries raised by us were quite limited, to the extent that further clarifications were deemed necessary on several occasions. We found some of the responses given were contradictory, thus also resulting in the need to seek further clarifications. We were of the view that, had the HSE provided the full and detailed explanations that were sought from the outset, the prolonged engagements would not have been necessary.

2.4.7 A clear understanding on the part of the FOI body regarding the nature of the records and files which it holds is very important in identifying records that exist and which are captured by the FOI request.

Example: In Case 160384 the Property Registration Authority (PRA) stated that at first it was understood that an Ordinance Survey Ireland (OSi) update received from the OSi was an automated "system to system" process and that no files relating to the process were held by the PRA. On foot of our enquiries, it became evident that a file was held on the PRA systems relating to each OSi update. The PRA clarified that the process was not in fact system to system; an electronic file was sent to the PRA from OSi and uploaded onto its system for processing under the PRA's OSi Update Module. The PRA accepted that its handling of the applicant's request fell short of the standards required. It committed to reviewing its decision-making process as a result of issues raised during the review.

The General Role of the FOI Body in relation to the Matter & Other Information

2.5.1 In addition to the information concerning the records management practices of the FOI body and its searches, other background information may also be relevant to our review. For example, the role of the FOI body in the subject matter concerned and the history of its involvement with the applicant may be relevant.

Example: In Case 160402 the applicant argued that further records should exist documenting the involvement of the Department of Agriculture, Food and the Marine in the movement of his cattle. The Department provided an explanation of its role in relation to the movement of cattle to us. It stated that it did not authorise the movement of the animals in this case. In addition to the other information it provided, it gave details of its contact with the National Beef Assurance Section regarding compliance certificates. Essentially, the Department's position was that no further relevant records existed as it had no role in authorising the movement

of the animals, and that the movement of the animals was not processed in the normal way through compliance certificates. Given the circumstances under which the cattle were moved and given also the Department's explanation as to its role in the matter, we were satisfied that the Department has conducted reasonable searches to locate relevant records in the case.

Consulting the Applicant

2.6.1 Section 12(1)(b) of the FOI Act obliges requesters wishing to exercise their right of access to provide sufficient particulars in relation to the information concerned to enable the relevant records to be identified by the taking of reasonable steps. It is helpful if requesters provide the FOI body with as much information as they can in order to assist the FOI body in ensuring that any searches it undertakes for relevant records are comprehensive. If there are specific records that a requester wishes to access, s/he should say so.

2.6.2 We will generally consult the applicant during the review process. In doing so, we may provide the applicant with the relevant information received from the FOI body such as, for example, details of the searches it carried out or relevant details of its records management practices relating to the record(s) concerned as provided by the FOI body.

2.6.3 In some cases, we may consider it appropriate to consult the applicant in relation to a particular issue in the review. For example, we could ask an applicant why precisely s/he thinks records exist or for a history of his/her dealings with the FOI body or any other evidence such as reference numbers, dates etc. which might help in the search. The purpose of such questions is to facilitate us in pursuing the matter of whether the FOI body has taken all reasonable steps to ascertain the whereabouts of relevant records.

2.6.4 The applicant may be satisfied that all reasonable steps have been taken to search for the records and that the record(s) do not exist or cannot be found. Where the applicant is not satisfied, s/he would then have the opportunity of providing the Commissioner with further information or evidence. For example:

- o the applicant might provide information that suggests that further searches or enquiries would be reasonable - such information could, for example, include details of the applicant's interactions with particular staff or sections of the FOI body in relation to the subject matter of the records where the staff or sections concerned have not already been contacted or searched
- o where an FOI body claims that a record did not exist, the applicant might provide information or evidence to suggest that the record did, in fact, exist – this could, for example, include documents which indicate the existence of the record.

Example: In Case 150014 the applicant sought access to a copy of his personal medical records. The Defence Forces indicated that the provision of details of specific records by the applicant at internal review and during our review allowed them to locate records which were not kept on his medical file.

2.6.5 We consider that, while the FOI Act demands that FOI bodies meet very high standards in dealing with requests, the corollary is that the legislation assumes reasonable behaviour on the part of requesters. In consulting with an applicant, we consider that it is not unreasonable for us to expect to receive the applicant's cooperation in securing a thorough and efficient review. Where an applicant has information which would assist us in pursuing the matter with the FOI body and would assist the FOI body in ascertaining the whereabouts of records, we expect the applicant to provide such information to us at an early stage.

Seeking Information from the FOI Body

2.7.1 We will generally look for information from the FOI body at an early stage relating to the steps it has taken to find the records and its records management practices. Depending on the circumstances, we may also seek further relevant information from the FOI body – this may occur, for example, following receipt of particular information from the applicant.

2.7.2 Further information or clarification may be sought when certain gaps should be addressed in order to remove an element of uncertainty or confusion.

2.7.3 While we may seek information from the FOI body, we do not require the FOI body to carry out further searches. The purpose of seeking the information concerned is to enable us to reach a conclusion as to whether all reasonable steps have been taken to find the record(s).

3.0 The Commissioner's Decision

3.1.1 We will review the decision to refuse the request for access to a record on the ground that the record does not exist or cannot be found after all reasonable steps have been taken to ascertain its whereabouts. We will decide whether the decision was justified. This requires the exercise of judgement and each case will be considered on its merits.

3.1.2 Section 22(12)(b) provides that, in a review by the Commissioner, a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the FOI body shows to the satisfaction of the Commissioner that the decision was justified.

Reasonableness

3.2.1 The test in section 15(1)(a) is whether searches have been reasonable. We take the view that the FOI Act does not require absolute certainty as to the existence or location of records, as situations arise where records are lost or simply cannot be found. What section 15(1)(a) requires is that the FOI body takes all reasonable steps to locate relevant records.

Relying on Section 15(1)(a)

3.3.1 Occasionally, an FOI body's decision may effectively be a refusal under section 15(1)(a), even where this has not been explicitly stated or expressly relied on by the FOI body in its decision. For example, a requester may argue that records, or further records exist, but the FOI body's position may be that no records relating to the applicant's request exist, or no further/additional records sought by the applicant exist. In such circumstances, we may take the view that the FOI body's decision is effectively a refusal under section 15(1)(a).

Section 15(1)(a) not Justified

3.4.1 We may find that a decision to refuse access under section 15(1)(a) was not justified. This may occur in a number of circumstances. For example, we may conclude that we have not been provided with sufficient information regarding the searches undertaken or we may not be satisfied that all reasonable steps have been taken to locate the relevant record(s).

Example # 1 In Case 120179 we found it very difficult to accept that no further records existed relating to arrangements for and amounts of payments to certain companies by the Irish Greyhound Board (IGB) given their role in a particular project and the sums of money involved. The IGB stated that it had access to the emails of the former CEO. However, it had not provided any information as to the searches, if any, conducted for the information or the outcome of the searches. This was despite the issue being raised by us with the IGB and it being made absolutely clear that it must be addressed. In these circumstances, we stated that it was not possible to make a finding that all reasonable searches had been conducted and that section 15(1)(a)* applied. We annulled these elements of the IGB's decision and remitted them to the IGB directing it to make a fresh consideration and decision.

Example # 2: In Case 150306 we found that, while comprehensive details of the searches undertaken by the Health Service Executive (HSE) to locate all relevant records coming within the scope of the applicant's request had been sought by us, there was no real and substantive engagement by the HSE with us on those matters. Furthermore, the HSE did not adequately explain to us why certain records did not exist, if this was, indeed, the case. We found that the HSE was not justified in refusing to consider further relevant records for release.

3.4.2 Other circumstances in which we may decide that a decision to refuse access under section 15(1)(a) was not justified include circumstances where a record, initially refused by the FOI body on the basis that it did not exist or could not be found, is subsequently found by the FOI body during the course of our review. See further below – ‘Records Found During the Course of a Review’.

3.4.3 Where we are not satisfied that a decision to refuse access under section 15(1)(a) was justified, we may decide to annul the FOI body’s decision and remit the matter for fresh consideration and decision by the FOI body.

Example: In Case 180013, following receipt of the responses of the Department of Justice and Equality to our request for further details, we were of the view that Department had not justified its refusal of the applicant’s requests under section 15(1)(a). We found that the Department had not adequately explained the basis on which it limited its searches, that it had not explained how a record was subsequently located within a Division (in circumstances where that Division had previously stated that no relevant records existed) and that certain searches appeared to suggest that relevant records might exist. We annulled the decisions and directed it to conduct a fresh decision-making process in respect of each of the applicant’s requests.

3.4.4 Where we are not satisfied that all reasonable steps have been taken to search for the record(s), we may identify the parts of the FOI body’s searches which were not satisfactory or we may direct further steps to be undertaken when annulling its decision.

Example: In Case 170287 Louth County Council granted access to the applicant’s housing file, but the file released did not include the applicant’s 2004 housing application. It was not disputed that the housing application should have been available but was missing. It seemed that the Council closed the application file from 2004. We noted that the Council said that it had searched the filing cabinets where similar files which were not closed were stored, but it had not stated whether any search had been undertaken of the filing cabinets or other relevant storage facilities where the closed files were kept. We also noted that the decision maker had not received requested search details from the relevant staff members who may have had further knowledge of the application. In the circumstances, we were not satisfied that all reasonable steps had been taken to search for the missing application. We annulled the Council's decision and directed that further steps be undertaken to search for the missing record, such steps to include consulting further with the relevant staff members and carrying out a search of any storage facilities where closed housing applications may be kept.

Section 15(1)(a) Justified

Record(s) Cannot be Found

3.5.1 It is possible - and it is clearly envisaged by the Act - that records may exist, but still may not be found after all reasonable steps have been taken to ascertain their whereabouts.

3.5.2 In certain cases and depending on the circumstances, an FOI body may not be a position to state definitively what happened to the records or why they cannot be found. However, we take the view that, in acknowledgement of the fact that situations can arise where records cannot be found, the FOI Act does not require such certainty. Rather, it requires the body to take all reasonable steps to ascertain their whereabouts.

3.5.3 The FOI Act does not require an FOI body to continue searching indefinitely for records that cannot be found. We may conclude that an FOI body has conducted reasonable searches even where records were known to have existed but cannot be found.

Example: In Case 160095 we had in 2004 previously affirmed a decision of St James's Hospital to refuse access to the applicant's medical records relating to the period 1989 to 1992 on the ground that the records sought could not be found. The applicant made a new request to the Hospital in 2015 seeking records held relating to the same period. We provided the applicant with details of the recent searches provided by the Hospital, including details of its manual searches and its searches in relation to files on microfilm. The Hospital said that the possibility of the original chart still being in existence was unlikely. It was not clear to us that any further examination of the issue would assist the Hospital in locating the records sought, given the significant passage of time since the details were recorded on the Hospital's Patient Administration system

3.5.4 We do not generally expect FOI bodies to carry out extensive or indefinite general searches for records simply because an applicant asserts that more records should or might exist, or rejects an FOI body's explanation of why a record does not exist. The test in section 15(1)(a) is whether searches have been reasonable.

Example # 1: In Case 170399, following receipt of details of the searches by the Department of Social Protection for records he sought, the applicant narrowed the scope of his review to one specific letter which he stated that he received from the Department in October 2015. The Department located a letter dated 20 October 2015 that the Deciding Officer in Illness Benefit Section sent to the applicant. The applicant believed that this letter was not the letter that he was seeking. Having examined the letter, we noted that it accurately fitted the description of the letter the applicant was seeking. However, based on the possibility that another, similar letter might exist, we sought further details from the Department as to the searches undertaken and further details were provided. Having regard to the searches undertaken by the Department, and to the contents of the record that the Department found and released during the course of the review, we found that the Department had taken all reasonable steps to ascertain the whereabouts of further relevant records.

Records Do Not Exist / No Longer Exist

3.5.5 An FOI body may claim that a record never existed. In some cases, it may be more the circumstances of the case, rather than the searches carried out, that are most relevant.

Example: In Case 160417 we found that a decision by St James's Hospital to refuse the applicant's request was justified on the basis that no relevant records existed. The applicant had been informed by the Hospital that access to medical treatment by a doctor in the UK (Dr X) was not possible as Dr X no longer worked for the NHS. The applicant sought access to records relating to a telephone conversation which he believed took place between Dr X/his secretary and a staff member of the Hospital. The Hospital informed us that it had written to Dr X requesting an assessment of the applicant and as no reply was received, the Hospital's Medical Director conducted an internet search and concluded from the result of the search that Dr X no longer worked for the NHS. The Hospital maintained that there was no telephone call and, accordingly, no records within the scope of the applicant's request. It stated that the applicant's file had been searched and that there was no record relating to contact with Dr X by the Hospital other than the letter to Dr X which had already been released to him. We affirmed the decision of the Hospital.

3.5.6 An FOI body may claim that a record existed in the past, but no longer exists. This may be relatively straightforward, depending on the circumstances. For example, where a record may have existed at one stage but the FOI body claims that it has been destroyed, a contemporaneous note that particular records (of which the requested record was one) had been destroyed would normally be acceptable as evidence. Our decision will depend on the facts and circumstances of the case.

Example: In Case 170041 we found that the Defence Forces were justified in the decision to refuse the applicant's request for a copy of an original draft investigation report on the ground that the record no longer existed. The Defence Forces stated that the document sought by the applicant was a printed copy of an Investigating Officer's report which was used to brief the applicant about the investigation. They stated that the electronic copy of the report was progressed in a digital format until the final report was completed and that the particular hard copy of the report sought by the applicant was shredded as it was out-of-date and no longer required. They said there was no policy to retain drafts of documents unless a specific requirement applied to the circumstances and that, in this instance, the document was not required to be retained. We affirmed the decision of the Defence Forces.

Reasonable Searches

3.5.7 As stated above, the test in section 15(1)(a) is whether the searches have been reasonable. Where we consider that an FOI body has conducted all reasonable searches, we will generally affirm the decision on that basis, even where records an applicant believes to exist have not been located.

Example # 1: In Case 160007 Our Lady's Hospice confirmed that, with regard to the retention of records in backup digital storage, it maintained a backup drive on site. However, it stated that the drive was placed into "dormant" mode in February 2016 and that its reactivation would involve repairs and a significant amount of work to search through backup files for the records sought. Furthermore, the

Hospice stated that significant costs would be involved in carrying out such works. In the circumstances, we did not consider it reasonable to expect the Hospice to undertake these steps in relation to the applicant's request.

Example # 2: In Case 180050 the applicant stated that he did not receive copies of certain, specific emails between the Irish Greyhound Board (IGB) and the Department of Agriculture, Food and the Marine on certain dates in 2013 that he believed to exist. The IGB stated that its email systems were updated in November 2013, which involved "back-up" of its system, transferring from a tape based system to a "cloud" environment. It stated that, as a result, only the electronic records of staff working with the IGB at that time migrated to the new system and therefore its records prior to November 2013 were incomplete. It stated that back up tapes existed containing the records of former staff. However, it submitted that external assistance would be required to access material on the tapes. According to the IGB, the likely cost of doing so on a per tape basis would have been prohibitive, notwithstanding subsequent issues surrounding identification of any relevant information held on the tapes. It seemed to us that there was no way of knowing definitively whether relevant information would be identified if such measures were taken. In the circumstances of this case, we found that it was not reasonable to require the IGB to access information held on the tapes.

Implications of a Decision by the Commissioner that Section 15(1)(a) Applies

3.6.1 A decision by the Commissioner that an FOI body was justified in its decision to refuse a request under section 15(1)(a) is a decision that the FOI body was justified, at the time of our decision, in coming to the conclusion that the records concerned do not exist or cannot be found after all reasonable steps have been taken to ascertain their whereabouts. Thus, a decision that section 15(1)(a) was justified does not rule out the possibility that further records may come to light at a later stage. Neither does the subsequent discovery of an additional record undermine an earlier decision on section 15(1)(a).

3.6.2 In the event that further records falling within the terms of the request are located by the FOI body at some point in the future, we would expect the FOI body to make those available to the applicant. If, for any reason, the FOI body were to decide that such records could not be made available, we would expect it to deal with the matter on the basis of a new FOI request from the applicant as this would guarantee the applicant's right of appeal to our Office, should s/he wish to appeal.

4.0 Section 15(1)(a) – Further Issues which may Arise

4.1.1 A number of issues may arise during the course of our review of a decision relating to section 15(1)(a) of the Act. Some of these are discussed below.

Records found during the Course of a Review

4.2.1 As a general rule, where an FOI body locates additional records during the course of a review, we will bring the review to a close without a determination on the question of access to those records. The FOI body should then make a new decision under section 13 of the FOI Act on the question of access to the records concerned (which in turn will be subject to a right of review). Where access is refused, no application fees will apply for internal review or, where necessary, a further review by the Commissioner on the matter, since any such review would indirectly relate to a decision that was untimely in the first instance.

Example: In Case 180433, during the course of the review, we put a number of detailed questions to the Health Service Executive (HSE) about the searches carried out for particular records covered by the applicant's request. The HSE told us that searches had resulted in four further files of records being found. Because the HSE had not decided on these records on foot of the applicant's request, we decided that it had effectively refused access to them. In order to enable the HSE to make a fresh decision on the records and to preserve the applicant's various rights of appeal, we annulled the HSE's effective refusal of the records and directed it to make a fresh decision on them under the FOI Act.

4.2.2 It is important to note, however, that we have a discretion to include additional records located during a review in the review already underway where consideration of the additional records would not unduly delay the completion of the review. This may be appropriate where the additional records are few in number, third party notification would not be necessary, and the question of whether or not to release is otherwise straightforward.

4.2.3 Where the FOI body finds records during the course of a review and releases those records to the applicant, we will have regard to this in our consideration of the case.

Example: In Case 170153, during the early stages of the review, Dublin City Council informed us that it had located 25 additional records relevant to the applicant's request and had forwarded copies of those to the applicant. (The Council had also granted access to 44 further records when it issued its internal review decision.) We stated that it was unfortunate that the Council did not conduct full and proper searches in the first instance. However, we were satisfied, having regard to the details of the totality of the searches conducted that it had, at that stage, taken all reasonable steps to locate the records sought by the applicant

Scope of the Request

4.3.1 The scope of the request is always important. FOI bodies should carefully consider the scope of the request and the extent of the records captured by it.

Access to “Records”

4.3.2 While the purpose of the FOI Act is to enable members of the public to obtain access to information held by public bodies, the mechanism for doing so is by accessing records held by those bodies. In other words, a person wishing to obtain information from a public body must make a request for records that contain the information sought.

4.3.3 Requests for information or for answers to questions, as opposed to requests for records, are not valid requests under the Act, except to the extent that a request for information or for an answer to a question can reasonably be inferred to be a request for a record containing the information or answer sought.

Records within Scope

4.3.4 Our decision may relate to the interpretation of the scope of the request. We may decide that the application of section 15(1)(a) was not justified where we conclude that the FOI body has not taken all reasonable steps to locate all the relevant records coming within the scope of the request.

Example # 1: In Case 58152 the applicant’s request to Westmeath County Council sought access to any correspondence relating to submissions for expressions of interest for social housing between 2016-2018 at a named site. Following queries raised by us, it appeared that the Council had taken an unduly narrow view of the scope of the request by treating it as a request for copies of expressions of interest as opposed to a request for correspondence relating to expressions of interest. The Council agreed that upon reflection, its response to another request (a copy of which had been provided to us by the applicant) suggested that records coming within the scope of the applicant’s request did, indeed, exist. It was clear to us that the Council had not taken all reasonable steps to ascertain the whereabouts of relevant records coming within the scope of the applicant’s request and that it was not justified in refusing the request. We annulled the Council’s decision.

Example # 2: In Case 160072 we considered whether the Dept of Justice & Equality was justified in refusing to release certain information on the grounds that the records sought did not exist in the format requested. It seemed to us that the Dept had interpreted the applicant’s clarification of his request (which related to legal aid claim forms) as confirmation that he was not seeking access to individual forms. We found that the applicant had not stated that he was not seeking access to individual forms. We found that records containing the information sought by the applicant were, indeed, held by the Dept. Accordingly, we found that the Dept was not justified in refusing the request under section 15(1)(a).

Example # 3: In Case 170444 a number of separate but similar requests were submitted by the International Transport Workers Federation (the ITF) to the Dept of Justice & Equality on behalf of a number of individuals, including the applicant. The Dept explained that as the FOI requests it received, including that relating to the applicant, were submitted by the ITF who represented

sea fishers, it was considered that the requests related only to the Atypical Sea Fisher applications. However, it was clear from the wording of the request that the applicant was, in fact, seeking access to all records held relating to him, and not just those relating to his application under the scheme in question. We found that the Department had not taken all reasonable steps to ascertain the whereabouts of all of the records sought. While the Department indicated its willingness to expand the search for records beyond the confines of its original decision, our view was that its decision should be annulled.

Clarifying the Request

4.3.5 Section 11(2) of the FOI Act requires an FOI body to give reasonable assistance to a person who is seeking a record under the Act in relation to the making of the FOI request for access to the record. It is open to the FOI body to clarify the request with the requester where the wording of the request is not clear.

Example # 1: In Case 150306 we found that the FOI request was somewhat complex or, at least, some issues arose as a result of the applicant's description of a medical procedure to which the request related. We stated that, if there was any concern or lack of clarity as to the precise information sought, it was open to the Health Service Executive (HSE) to clarify the matter with the requester. We found that no such clarification was sought. We also found that there was no real and substantive engagement by the HSE with our Office regarding the searches undertaken to locate relevant records and that it did not adequately explain why certain records did not exist, if this was, indeed, the case. We annulled the HSE's decision and directed it to undertake a fresh decision making process in relation to the request. In doing so, we suggested that the HSE contact the applicant to clarify exactly what records and information she was seeking, if this was not clear from the wording of the FOI request.

Example # 2: In Case 53306 we were of the view that the applicant had submitted an extremely broad request, having regard to the period for which records were sought and to the apparent breadth and variety of engagements with the Department of Agriculture, Food and the Marine. While the parties exchanged a considerable amount of correspondence before the Department issued its decisions on the applicant's request, it seemed that those engagements might have proven to be more beneficial had the Department given the applicant more specific information on the types of records it might expect to hold and had the applicant been more specific in relation to the information she was hoping to access. We annulled the decision of the Department and directed it to consider the applicant's request afresh. We commented that it seemed that, as a first step in processing the request afresh, it would be beneficial for both parties to agree, in the first instance, on the precise nature of the records sought.

4.3.6 We take the view that, when proper clarification of a request has been sought by an FOI body and not provided by requester, the FOI body should tell the requester, in writing, what it considers the request to have sought and make it clear that it will proceed on that basis unless the requester indicates otherwise. Not only does this give the requester a further chance to clarify the matter and possibly correct careless wording, but it provides a stronger basis for an FOI body to stand over the reasonableness of its understanding of a request should it not get the requested clarification. It is worth noting that requests for "all information relating to"

a particular matter run the risk of being interpreted differently by the requester and the FOI body.

4.3.7 Further to section 12(1)(b) of the FOI Act, a person who wishes to exercise the right of access must ensure that the request contains sufficient particulars in relation to the information concerned to enable the record to be identified by the taking of reasonable steps.

4.3.8 Section 15(1)(b) of the FOI Act enables an FOI body to refuse a request that does not comply with section 12(1)(b). Such a refusal is, however, subject to section 15(4). Section 15(4) provides that the FOI body shall not refuse to grant an FOI request under section 15(1)(b) unless it has assisted, or offered to assist, the requester.

4.3.9 We consider that there is an onus on requesters to provide sufficient information to allow the FOI body to identify the records sought by the taking of reasonable steps (section 12(1)(b) mentioned above refers).

Records which 'Ought' to Exist

4.4.1 The FOI Act provides for a right of access to records held by FOI bodies. We take the view that the FOI Act does not require FOI bodies to create records if none exist, apart from a specific requirement, in certain circumstances, to extract records or existing information held on electronic devices.

4.4.2 Thus, a review by us is not concerned with the question of what records should exist. If a record does not exist, that is the end of the matter, regardless of the applicant's views as to the appropriateness or otherwise of the absence of certain records.

Example # 1: In Case 99025 we noted that the failure to make and retain certain notes of local interviews might indicate poor record-keeping practice. However, we were satisfied that enquiries and searches were made in relation to the possible existence of such records and that no such records were found. The Defence Forces confirmed to us that the local interview board kept no notes at all of the candidates interviewed and no records were kept of the selection criteria used (apart from the general directions which were supplied to the applicant). While we noted that the failure to record the guidelines used by the local interview board in selecting candidates could not be considered good administrative practice, we decided that section 15(1)(a)* applied.

Example # 2: In Case 170551 the records sought related to a service agreement between the applicant and the Health Service Executive (HSE) and the applicant queried why there were no records of phone calls between him and representatives of the HSE. The HSE stated that no recordings of telephone calls existed in relation to the applicant's FOI request. It said there was no formal policy in relation to documenting phone calls; that calls were not logged or recorded and no notes of calls were located during its searches. We noted that while the applicant clearly felt that the HSE should have recorded more details of its interactions in relation to the creation of the service agreement, the FOI Act was concerned with the provision of access to records actually held. We also

explained that our Office has no role in examining the administrative actions of public bodies.

Visiting the Premises of the FOI Body

4.5.1 FOI bodies should be aware that it is open to our staff to visit their Departments or Offices. As stated above, it is not normally our function to search for records when reviewing a decision under section 15(1)(a). We do not, as a matter of course, visit FOI bodies to inspect or check the searches they say they carried out. However, occasionally and depending on the particular circumstances of the case, we may visit the premises of an FOI body. We may wish, for example, to establish the nature and extent of the searches carried out, to examine their records management practices or to carry out further enquiries.

Example: In Case 150389 we were very concerned that, despite the very comprehensive search policies of the Rotunda Hospital, the searches it actually carried out were not as described in its submission. In the circumstances of the particular case, an investigator from our Office met with the Hospital to discuss what had happened. She conducted spot checks of some of the records that the Hospital's submission said were searched.

4.5.2 Section 45 of the FOI Act provides the Commissioner with certain powers. Section 45(2) provides that the Commissioner may for the purposes of a review or investigation enter any premises occupied by an FOI body and there –

(a) require any person found on the premises to furnish him or her with such information in the possession of the person as he or she may reasonably require for the purposes aforesaid and to make available to him or her any record in his or her power or control that, in the opinion of the Commissioner, is relevant to those purposes, and

(b) examine and take copies of, or of extracts from, any record made available to him or her as aforesaid or found on the premises.

4.5.3 If we are of the view that the circumstances of the case warrant it, we may exercise the powers under this provision.

Example: In Case 120179 it was some six months before the Irish Greyhound Board (IGB) provided us with a copy of the records relevant to the review in a manner that appeared to relate to the original request. It was subsequently evident that the records provided by the IGB were not sufficient to allow the review to progress. We determined that not all relevant records had been provided to us by the IGB and that there should have been considerably more records falling within the scope of the request. Our investigator actively engaged with the IGB but no real progress was made. In view of the seriousness of the matter and the resources which had already been devoted to this review, the Commissioner then used his powers under section 45(2)* of the FOI Act. Consequently, our investigators visited the IGB offices, by arrangement and with the cooperation of the IGB.

Possible Deliberate Interference with Records.

4.6.1 Section 52 of the FOI Act states:

Where an FOI request has been made in respect of a record, a person who without lawful excuse and with intention to deceive destroys or materially alters a record shall be guilty of an offence and be liable on summary conviction to a class B fine.

4.6.2 Where there is the possibility that records which were the subject of an FOI request were deliberately removed or interfered with, we consider this to be a very serious matter. We also take the view that, if the circumstances of the case are such that it appears to be a situation of possible wilful removal of records, then what constitutes reasonable steps to locate records is substantially different from the steps which might be taken in the normal course of events.

Example: In Case 130242 the records the subject of the review were created by staff at a Community Hospital (managed by the Health Service Executive (HSE)) in the normal way and placed on the patient's file. At some point, the records went missing. The records which were missing related to a period during which the patient's family had concerns regarding his care. It appeared to us that the situation was one of possible wilful removal of records from a patient's file. Given the timing of the records' apparent removal, we considered the possibility that records which were the subject of an FOI request were deliberately removed to be a very serious matter. We considered that what constituted reasonable steps to locate the records in this case was substantially different. Our enquiries were extensive and included, amongst other things, asking the HSE if any investigations or enquiries had been conducted or if the matter had been referred to An Garda Síochána. We also asked the HSE to provide signed statements from the staff who attended certain meetings with the applicant regarding what they remembered in relation to the missing notes. While not applicable to this particular case (as it was a review under the FOI Acts 1997 – 2003), we noted that the FOI Act 2014 provided at section 52 that a person who destroys a record with intention to deceive shall be guilty of an offence and be liable on summary conviction to a fine.

Official Information in Non-Official Systems, Email Accounts and Devices

4.7.1 The Central Policy Unit of the Department of Public Expenditure and Reform has published a Guidance Note on the FOI Act implications for any official information held in non-official systems, email accounts and devices – see CPU Guidance Note 24. The Note states that, if records relate to official functions and/or business activities of a public body and if the public body has a legal right to procure the records regardless of whether they are held in official or non-official systems (including web-based email such as Gmail or Hotmail), these records are subject of the FOI Act.

4.7.2 The issue of official information in non-official systems, email accounts and devices is dealt with in a separate Guidance Note. See Guidance Note on Records Held by an FOI Body.

Records Held by Service Providers

4.8.1 FOI bodies should bear in mind that records in the possession of independent contractors employed by them are covered by the FOI Act to the extent that they relate to the service being provided to the FOI body. Section 11(9) of the Act makes it clear that records in the possession of the service provider are deemed to be held by the FOI body and the FOI body has a right to have these provided to it for FOI purposes.

4.8.2 The issue of records in the possession of service providers is dealt with in a separate Guidance Note. See Guidance Note on Records Held by an FOI Body.

Access in a Particular Form – Whether the Record Exists

4.9.1 An FOI body may argue that records do not exist in the particular format sought and therefore the relevant records do not exist. Insofar as we consider whether section 15(1)(a) applies in such circumstances, our Guidance Note on section 17 of the Act is relevant. See separate Guidance Note on Section 17: Manner of Access to Records.

Information in More than One Record – Extracting Information

4.10.1 A request may seek information which is, or may be, contained in more than one record. In such circumstances, a number of considerations may arise.

4.10.2 Where the information is held electronically, section 17(4) may be relevant.

4.10.3 Where the information may be contained in hard copy records and obtaining the information requires the examination of a number of hard copy files or records and the extraction of the information from the records, then a number of matters may be relevant for consideration. Generally speaking, the specific circumstances and the context in which the request falls to be considered are relevant. A number of provisions of the FOI Act may also be relevant, such as, sections 2, 18 and 15(1)(c).

See separate Guidance Notes on Section 17 and Records Held by FOI Bodies.

Appendix 4 - Liaison arrangements with FOI Bodies for the purposes of the Freedom of Information Act 2014

Liaison arrangements with FOI Bodies for the purposes of the Freedom of Information Act 2014

Introduction

The purpose of this document is to set out, in a general way, the type of liaison arrangements which the Information Commissioner's Office will operate in its dealings with FOI bodies following the process changes implemented in June 2014. As time limits are a factor in all FOI decisions, including those of the Commissioner, it is very important that all contacts between the Commissioner and FOI bodies are conducted efficiently and speedily. For this reason, it is essential that clear liaison arrangements are set out to ensure efficient communication between the Commissioner and FOI bodies. The Office may agree individual arrangements with individual bodies but these will always be within the context of the broad arrangements described below.

Liaison Arrangements

The central feature of the liaison arrangement is the appointment, by each relevant FOI body, of a staff member to act as liaison officer in all dealings with the Commissioner's Office. The following observations apply to the role of the liaison officer:

Functions of Liaison Officer

The liaison officer's main functions in relation to the Office of the Information Commissioner are:

- to act as the initial point of contact in all transactions / reviews / investigations / mediations / publication of information between the Commissioner's Office and the body;

- to ensure that any written or oral enquiries from the Commissioner's Office are immediately directed to the appropriate person within the body for attention;
- to ensure that all time limits applying to requests for information, from the Commissioner's Office, are met;
- to ensure that all relevant files and documents are readily available for inspection when requested by the Commissioner's Office;
- to ensure that the Commissioner's staff are provided with suitable facilities on their visits to the body;
- to ensure that any actions required to implement decisions of the Commissioner are taken;
- to ensure that, where relevant, the reports required under section 22(11), (specifying the certificates issued by a Minister) and section 41(4) (in relation to the secrecy provisions in other enactments).

Reviews by the Commissioner

As provided for at section 45(6) of the FOI Act, the Commissioner sets such procedures for the conduct of reviews (and of investigations) as he considers appropriate. These may be as informal as is consistent with the due performance of the functions of the Commissioner. In determining appropriate procedures in any particular case, however, the Commissioner must have regard to section 22(3) of the FOI Act, which sets a 4-month deadline for completion of reviews, in so far as practicable.

When an application for a review has been received, and the Commissioner is satisfied that the case is one which, on the face of it, should be considered, the liaison officer of the body will be contacted. Generic email addresses will be used for written communications with the liaison

officer wherever possible. The liaison officer should inform the officials who took the initial and review decisions that an application for a review has been received.

The liaison officer should ensure that no actions are taken which would prejudice the review, e.g., release of information where a third party seeks a review of the decision to release that information, destruction or removal of any relevant records.

If the liaison officer indicates that the request has not been through the process of internal review, then written confirmation of this will be required along with a copy of the original request and the FOI body's initial decision.

It is the Commissioner's intention that, to the greatest extent possible, he will decide these review cases within the 4-month timeframe laid down by the Oireachtas. Achieving this objective requires a high level of co-operation from FOI bodies. It should be noted that, following the process changes implemented in June 2014, this Office no longer issues written reminders. Instead, missed deadlines for the provision of documentation or records will result in one follow-up telephone call or email followed by a section 45 notice. Where two or more section 45 notices are issued to the same FOI body within a period of 6 months, the Commissioner may correspond directly with the head of the FOI body on the matter.

Documentation on requests

Before we can decide whether a review application may be accepted, it is necessary to see the four basic decision-making documents relating to the request, i.e.:

- the letter of request,
- the initial decision,
- the application for internal review, and
- the internal review decision.

In cases which appear to involve section 38, the following are required:

- the original FOI request
- the notification letters to third parties
- the replies to the notification letters
- the letter(s) of decision issued to third parties
- the letter of decision issued to the requester.

We will encourage the submission of any available decision-making documents by applicants. However, where necessary, the decision-making documents will be requested from the FOI body by email to a generic email address. In this event, these documents should be emailed to this Office at applications@oic.ie within 3 working days of the request. If the documents have not been received by the fourth day after our request, we will make one follow-up telephone call/email requiring immediate action, which will in turn be followed within 3 working days by a notice to the head of the FOI body under section 45 of the FOI Act. Details of section 45 notices are published in the Commissioner's Annual Report.

Provision of records

In the majority of cases it will be necessary for this Office to inspect the records the subject of the FOI request. In practical terms, this requires the provision to this Office of the relevant records, whether in the original or by way of copies (depending on the case). In requesting records, this Office will allow a period of 2 weeks for the FOI Body to provide same.

Where this deadline is not met, we will make one follow-up telephone call/email requiring immediate action. Where the records are not provided within 3 working days of the follow-up telephone call/email, the Commissioner will issue a notice under section 45 of the FOI Act, to the head of the FOI body, requiring the provision of the records. Again, details of section 45 notices are published in the Commissioner's Annual Report.

In providing these records, it is very important that they be properly scheduled and that it is clear which records or parts of records have been withheld and which released (e.g. by the use of a highlighter marker). The schedule should list the records sequentially by number and include the following information for each withheld record:

- the date of the record,
- the title of the document or the name of its author or addressee,
- a brief description,
- the exemption claimed.

In the case of released records it is sufficient for the schedule to show the number of the record (provided numbered copies of the records are provided) and indicate that it has been released.

Submissions

The FOI body will be invited by an Investigating Officer to make focused submissions addressing the particular issues arising. This Office generally regards the invitation to make focused submissions as representing the FOI body's third and final opportunity to justify its decision in cases where the FOI body bears the evidential burden under section 22(12) of the FOI Act. The request for focused submissions may ask specific questions which should be answered if the FOI body wishes to justify its decision. A period of **2 weeks** will normally be allowed for the making of such submissions. **Failure to justify an exemption claimed within this timeframe may lead to a decision to release records without further contact with the FOI body.** In this context, it is worth bearing in mind that where a request for records (made under section 12 of the FOI Act) has been refused, there is a presumption that the refusal is not justified unless the FOI body shows "to the satisfaction of the Commissioner" that it is justified.

Conclusion of review

Following the review, the Commissioner may affirm or vary the decision of the FOI body, or annul the decision and, possibly, make another decision.

A decision of the Commissioner, arising from a review application, does not have effect until the expiry of the time limits which apply for the making of a High Court appeal on a point of law. Where such an appeal is made, the Commissioner's decision does not have effect unless and until the appeal has been decided in the Commissioner's favour or withdrawn.

Given the expense and resources involved in participating in Court cases, it is the policy of the Office to seek to recover costs in all cases where the Courts have found in the Commissioner's favour.

Section 38(5)

Where cases arise under section 38(5) of the Act and the head is unable to comply with the consultation requirements of subsection (2), the consent of the Commissioner is required before the head may proceed with a decision. The body's liaison officer should write to the Commissioner seeking his consent to the setting aside of the consultation requirement. In order to facilitate the Commissioner's decision, details of all attempts to contact the individual, otherwise required to be consulted, should be given.

Where possible, the Commissioner will make a decision (in relation to cases referred to in the preceding paragraph) within 2 weeks and inform the liaison officer if consent is being granted. Where the Commissioner does not consent, the liaison officer will be advised of the steps to be taken to comply with section 38(5) and should ensure that these steps are taken within the period specified in the Commissioner's reply. If further information is required in these cases, the Commissioner's Office will contact the liaison officer in the first instance.

Production of documents, witnesses, etc.

The Commissioner may, for the purposes of a review or investigation, require that any information or record relevant to his review or investigation should be furnished to him. Where appropriate, the Commissioner may require any person who, in his opinion is in possession of any such information or record to attend before him for the purpose of furnishing it to him.

Bodies must comply with the Commissioner's requirements in this respect. Subject to the Commissioner's agreement, and at the request of the official concerned, the liaison officer may attend any interview between the Commissioner (or his staff) and a relevant official of the FOI body.

Liaison Officer to be informed by Commissioner's Office

As the liaison officer is the primary channel of communication between the Commissioner's Office and the FOI body, the Commissioner's Office will seek to ensure that the liaison officer is kept fully informed by, for example, routing queries through the liaison officer, by sending the liaison officer copies of all significant correspondence, and by informal contacts. A generic email addresses will be used for written communications with the liaison officer wherever possible. The level of such contact will vary from body to body depending on the nature of the case and the structure of the FOI body.

The liaison officer will be advised when a review has been completed and will be notified of the decision. Depending on the nature of the decision, the liaison officer will be expected to communicate this decision within the body and to ensure that any actions required to implement it are undertaken. The liaison officer will also be informed if a review application is withdrawn.

Any files or papers returned to the FOI body must be acknowledged by the body concerned and the receipt placed on the case file.

Appendix 5 OIC Decision Style Guide

OIC Decision Style Guide

In order to maintain consistency in the decisions issuing from the OIC, the following style guide should be used when drafting decisions.

FRONT PAGE OF DECISION

(A sample front page is set out at Page four of this guide for ease of reference.)

- The front page of the decision should be in Calibri 12pt font.
- **Do not** use full stops at the end of text under the first five headings (Case Number, Applicant, Public Body, Issue and Review).
- Use full stops at the end of text under the remaining headings (Decision and Right of Appeal), as the text should comprise full sentences.
- **Applicant:** do not use (the applicant) or “the applicant” after the applicant’s name and address as this is denoted by the heading.
- **Public Body:** if you intend to use a shortened version/acronym of the public body’s name in the decision put it in brackets (no inverted commas) after the full name, e.g. The Department of Justice and Equality (the Department)
- Use **Double Spacing** between text and next heading.

BODY OF DECISION: FORMATTING

- Use Calibri 12pt font throughout the remainder of the decision.
- Text should be left justified.
- **Headings** should be as follows:
 - Section Heading: **12pt Bold Underlined**
 - Level 1 Subheadings: **Bold**
 - Level 2 Subheadings: Plain, underlined
 - Level 3 Subheadings: Plain.

- **Use bold:** where necessary, to add **emphasis** to a quote or comment.

BODY OF DECISION: REFERENCING

- **References to OIC Cases:** use a hyperlink to the Case Number, not in bold or italics, together with a hyperlink to the website. For example: "[Case 170570](#), which is available on our website www.oic.ie".
- **References to Court Cases:** Case name in italics, rest of citation in standard font, as a hyperlink to the judgment (where practicable), e.g. [Grange -v- The Information Commissioner & anor \[2018\] IEHC 108](#).
- **Quotations** from previous decisions and court cases: place the quote in inverted commas, indented, on a new line with a line's space between the quote and the preceding paragraph. Do not use italics.
- **References to sections of the Act**
 - Paraphrasing should be done in the body of the paragraph, with no italics or inverted commas.
 - Direct citations should be placed in inverted commas, indented, on a new line with a line's space between the quote and the preceding paragraph. Do not use italics.

BODY OF DECISION: LANGUAGE

- **Date style:** use 18 June 2014, not 18th June 2014, 18 of June 2014, 18/06/14, etc
- **References to a public body:** use "it" not "they",
- **References to the Commissioner:** refer to the Commissioner, not the Information Commissioner.
- **References to the Office of the Information Commissioner** should refer to "the Office", not "the office".
- **References to the name of the public body** (e.g. the Department, the Council, etc) should be in upper case. References to **public bodies in general** should be lower case.
- **References to Judges:** Surname followed by J., e.g. McKechnie J., Carney J., etc.

- **References** to the applicant, decision maker, sections (of the Act) should all be in lower case.
- **Bullet points:** use single indent bullet points, not numbered lists.
- **Numbers:** spell cardinal numbers up to nine, from 10 on use figures: i.e. one record, 11 records, etc.
- **Latin legal phrases** should be used only when necessary and should be in italics e.g. *ultra vires*
- Keep the **verb tenses** consistent. For example, “The Department argued” followed later by “the Department contended” is fine. “The Department argued”, followed later by “the Department contends”, is not. Saying that “the Department originally argued” but that “It now contends” is fine
- Use **plain language** where possible.

STANDARD PARAGRAPH FOR USE IN DECISIONS TAKEN UNDER 1997-2003 ACTS

To be inserted at end of Background Section

- In the interests of clarity, I should point out that this review was carried out under the provisions of the FOI Acts 1997-2003 notwithstanding the fact that the FOI Act 2014 has now been enacted. The transitional provisions in section 55 of the 2014 Act provide that any action commenced under the 1997 Act but not completed before the commencement of the 2014 Act shall continue to be performed and shall be completed as if the 1997 Act had not been repealed.

SAMPLE FRONT PAGE OF DECISION

Review Application to the Information Commissioner under the Freedom of Information Acts 1997 and 2003 (the FOI Act)

or

Review Application to the Information Commissioner under the Freedom of Information Act 2014 (the FOI Act)

Case Number: OIC-XXXXX-XXXXXX

Applicant: John Murphy, 12 Alphabet Street, Coolock, Dublin 5

Public Body: The Department of Justice and Equality (the Department)

Issue: Whether the Department was justified in deciding to refuse access to records relating to the applicant on the ground that they do not exist or cannot be found

Review: Conducted in accordance with section 34(2) of the FOI Act by Stephen Rafferty, Senior Investigator, who is authorised by the Information Commissioner to conduct this review

Decision: The Senior Investigator found that the Department was justified in deciding to refuse access to records relating to the applicant on the ground that they do not exist or cannot be found. He affirmed the decision of the Department.

Right of Appeal: A party to a review, or any other person affected by a decision of the Information Commissioner following a review, may appeal to the High Court on a point of law arising from the decision. Such an appeal must be initiated not later than eight weeks from the date on which notice of the decision was given to the person bringing the appeal.

Appendix 6

Glossary of Terms

Applicant - A person who has applied to the Information Commissioner for a review of a decision of an FOI body. The term covers both a person who has made a request to an FOI body under the FOI Act and a person who has objected to the granting of a request by some other party for access to information either about the applicant or which the applicant gave to the FOI body.

Assessment Unit – A unit staffed by Administrative Officers and Higher Executive Officers that is managed by an Investigator at Assistant Principal Officer level. The unit screens all newly accepted cases for suitability for immediate processing, subject to capacity, by the unit.

Internal review - The review of an initial decision on a request conducted by a member of staff of the FOI body of higher rank than the person who made the initial decision. This contrasts with reviews by the Information Commissioner which are external to the FOI body.

Investigations Unit – A unit staffed by AP/Investigators who report directly to a Senior Investigator. The unit processes cases, generally in “date of receipt” order, which are not deemed suitable for immediate processing by the Assessment Unit, usually because of the complex issues or large number of records involved.

Person to whom section 38(2) applies - In the case of a request for records which contain information obtained in confidence, the person who gave the information to the FOI body, and, if the head considers it appropriate, the person to whom the information relates. In the case of a request for records which contain personal information or commercially sensitive information, the person to whom the information relates.

Policy Section – Established to develop guidance for Investigating Officers on the provisions of the FOI Act.

Request to which section 38 relates - A request for access to records which contain information obtained in confidence, commercially sensitive information or personal information where the FOI body has formed the view (subject only to receiving the views of the party who gave the information to the FOI body and/or a party to whom the information relates) that the public interest would, on balance, be better served by granting than by refusing to grant the request.

Requester - A person who makes a request to an FOI body under the FOI Act. A requester to an FOI body may become an applicant to the Office of the Information Commissioner.

Section 9 application - Section 9 of the FOI Act provides a right of amendment of personal information relating to an individual contained in a record held by an FOI body where the information is incomplete, incorrect or misleading.

Section 10 application - Section 10 of the FOI Act entitles a person who is affected by an act of an FOI body and who has a material interest in a matter either affected by that act or to which that act relates to request a statement of the reasons for the act and any findings on any material issues of fact made for the purpose of the act.

Section 38 - Section 38 provides for a formal notification procedure whenever an FOI body is considering the release of information obtained in confidence, commercially sensitive information or personal information in the public interest. It requires the FOI body to notify the person who gave the information to the FOI body, and, if the FOI body considers it appropriate, the person to whom the information relates, of the request and that the request falls to be granted in the public interest. Any person so notified may then make submissions to the FOI body which must be considered before deciding whether to grant or refuse access.

Support Unit - The unit which provides administrative support to Investigating Officers and Senior Investigators in the Office of the Information Commissioner. This unit is headed by a Higher Executive Officer.