

Office of the Information Commissioner

Guidance Note

Freedom of Information Act
2014 – Section 10: Right of
Person to Information Regarding
Acts of FOI bodies Affecting the
Person

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Introduction

The Information Commissioner has prepared this Guidance Note in relation to section 10 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 10 of the Act by the Commissioner. It is intended to provide a brief summary of the relevant issues relating to this provision.

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

1.0 Section 10: Right of Person to Information Regarding Acts of FOI Bodies Affecting the Person - Overview

1.1.1 Section 10 of the FOI Act provides that a person who is affected by an act of an FOI body, and has a material interest in a matter affected by the act or to which it relates, is entitled to a statement of reasons for the act as well as a statement of any findings on any material issues of fact made for the purposes of that act.

Where Information or a Statement is not Required

1.2.1 Section 10 does not require an FOI body to give information in an exempt record or to disclose the existence or non-existence of a record where non-disclosure of its existence or non-existence is required by the FOI Act. (Section 10(2)).

1.2.2 The right to seek a statement of reasons does not apply in certain circumstances in relation to certain decisions of the Public Appointments Service, its Chief Executive or other licence holders. (Section 10(3)).

1.2.3 Where an FOI body decides not to give a statement of reasons pursuant to subsections (2) or (3), it must issue its decision not later than four weeks after receipt of the application. The notice of decision must specify certain matters – see section 10(4) and 10(9) and section 13(2)(d) of the Act.

Frivolous or Vexatious Applications

1.3.1 An FOI body may refuse to grant an application under section 10 where, in the opinion of the body, the application is frivolous or vexatious or forms part of a pattern of manifestly unreasonable applications (section 10(7)).

Making a Section 10 Application

1.4.1 An application under section 10 must be expressed to be such an application (section 10(10)). However, in certain circumstances, the FOI body must assist or offer to assist the individual in the preparation of an application under section 10 – section 10(11).

1.4.2 An application under section 10 must be made within 12 months after the date on which the person who is affected by the act becomes aware of it. However, where the particular circumstances warrant it, an FOI body may accept an application outside this time limit (section 10(12)).

Handling of a Section 10 Application by an FOI body

1.5.1 The requirements for an FOI body in acknowledging receipt of an application under section 10 are set out in section 10(8) and section 12(2) of the Act.

1.5.2 In certain circumstances, as stated above, an FOI body must offer assistance to an individual in the preparation of an application – section 10(11).

1.5.3 An FOI body must make its decision not later than four weeks after receipt of the application (section 10(1) and (4)).

1.5.4 In addition to seeking an internal review of an FOI body's decision to refuse an application under section 10 for a statement of reasons, an applicant may also seek an internal review of a decision regarding the contents of a statement furnished (section 21(1)(c)).

Applications by Parents/Guardians or in relation to Deceased Persons

1.6.1 Under section 10(6) the Minister may provide by regulations for the making of an application under section 10(1) by the parent or guardian of a person (if the person belongs to a specified class) or, where the person is dead, by a member of a class specified. The Freedom of Information Act 2014 (Sections 9(6), 10(6) and 37(8)) Regulations 2017 (S.I. No 53 of 2017) specify the relevant classes of persons. See further below.

FOI History and Warning regarding Commissioner's Decisions

1.7.1 It should be noted that a reference to the Commissioner in the context of the decisions referred to in this Guidance Note may include an officer to whom the function of making the decision had been delegated by the Commissioner.

1.7.2 Section 10 is similar to, although not the same as, section 18 of the FOI Act 1997. This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 18 was considered under the FOI Act 1997 (or under the FOI Act 1997 as amended) in so far as those decisions or parts of the decisions remain relevant. To simplify matters for the reader, all references to section 18 in those decisions have been replaced by the equivalent section 10 provision of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (*).

1.7.3 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 the equivalent provisions under the FOI Act 1997 (or the FOI Act 1997 as amended), those provisions are replaced with the relevant provision in the 2014 Act. Again, where this occurs, such references are denoted by an asterisk (*).

1.7.4 The previous decisions of the Commissioner (or of the officer delegated to make the decision) are referred to in this Note by Case Number. The decisions in these Cases may be found on the Commissioner's website at www.oic.ie

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

2.0 Statement of Reasons - Section 10(1), (5), (12) and (13)

What the Act states:

10. (1) The head of an FOI body shall, on application to him or her in that behalf, in writing or in such other form as may be determined, by a person who is affected by an act of the body and has a material interest in a matter affected by the act or to which it relates, not later than 4 weeks after the receipt of the application, cause a statement, in writing or in such other form as may be determined, to be given to the person—

- (a) of the reasons for the act, and
- (b) of any findings on any material issues of fact made for the purposes of the act.

What the Act also states:

10(5) For the purposes of this section a person has a material interest in a matter affected by an act of an FOI body or to which such an act relates if the consequence or effect of the act may be to confer on, or withhold from, the person a benefit without also conferring it on or withholding it from persons in general or a class of persons which is of significant size having regard to all the circumstances and of which the person is a member.

What the Act also states:

10(12)(a) An application under this section shall be made within 12 months after the date on which the person who is affected by the act becomes aware of it.

(b) Notwithstanding *paragraph (a)*, where the particular circumstances warrant it, the head may accept an application outside the time limit specified in that paragraph.

What the Act also states:

10(13) In this section—

“act”, in relation to an FOI body, includes a decision (other than a decision under this Act) of the body;

“act of an FOI body” means any act taken on or after the effective date by the FOI body concerned;

“benefit”, in relation to a person, includes—

- (a) any advantage to the person,
- (b) in respect of an act of an FOI body done at the request of the person, any consequence or effect thereof relating to the person, and
- (c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage affecting the person.

2.1.1 Section 10 provides that a person is entitled to a statement of reasons for an act of an FOI body where that person is affected by the act and has a material interest in a matter affected by the act or to which it relates.

2.1.2 Section 10(5) provides that a person has a material interest in a matter affected by an act of an FOI body or to which such an act relates if the consequence

or effect of the act may be to confer a benefit on, or withhold a benefit from, the person without also conferring the benefit on or withholding it from persons in general or a class of persons which is of significant size having regard to all the circumstances and of which the person is a member.

2.1.3 Section 10(13) defines “benefit” in relation to a person as including:

- (a) any advantage to the person,
- (b) in respect of an act of an FOI body done at the request of the person, any consequence or effect thereof relating to the person, and
- (c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage affecting the person.

2.1.4 The statement of reasons must give the reasons for the act and any findings on any material issues of fact made for the purposes of the act.

Act of an FOI body

2.2.1 Section 10(13) defines “act” in section 10 as including a decision (other than a decision under the FOI Act) of the FOI body.

2.2.2 Section 10(13) also defines “act of an FOI body” as meaning any act taken on or after the effective date by the FOI body concerned. See further at paragraphs 2.7.1 – 2.7.3 below.

2.2.3 It should also be noted that section 10(12) provides that an application under section 10 must be made within 12 months after the date on which the person who is affected by the act becomes aware of it. Section 10(12) also provides that, where the particular circumstances warrant it, the FOI body may accept a late application, i.e. outside the 12 month period.

2.2.4 An application for a statement of reasons should identify the act or decision for which the statement is sought. Where an act or decision is not identified, a statement of reasons may not be required.

Example: In Case 150271 the Commissioner found that several parts of the application for a statement of reasons did not identify acts or decisions for which reasons were sought. Rather, they comprised requests for specific information. For example, at part 1, the applicant simply wished to know if someone in St Vincent’s University Hospital had the authority to delay her daughter’s treatment without reference to her and her consultant. The Commissioner found that this was not an act for which a statement of reasons might be required.

Material Interest

2.3.1 To be entitled to a statement of reasons for an act of an FOI body, an applicant must be affected by the act and must have a material interest in a matter affected by the act or to which it relates.

2.3.2 As stated above, section 10(5) provides that a person has a material interest in a matter affected by an act of an FOI body or to which such an act relates if the

consequence or effect of the act may be to confer a benefit on, or withhold a benefit from, the person without also conferring the benefit on or withholding it from persons in general or a class of persons which is of significant size having regard to all the circumstances and of which the person is a member. See also section 10(13) referred to above (paragraphs 2.0 and 2.1.3) with regard to the definition of "benefit".

2.3.3 The requirement to provide a statement of reasons does not apply to every action of an FOI body. The Commissioner takes the view that the Oireachtas could not have intended that FOI bodies should be required, on demand, to provide a written statement of reasons and findings on any material issues of fact made for the purposes of every single action of the FOI body and its officials.

2.3.4 Taking section 10 as a whole, the Commissioner's view is that the word "act" in the section must be interpreted as the exercise of (or refusal to exercise) a power or function which may result in the conferring or withholding of a benefit.

2.3.5 In addition, the reasons for the act must have a bearing on the outcome of whether a person receives or does not receive a benefit or suffers a loss or a penalty or other disadvantage. In other words, if the same outcome would result regardless of the reasons for the act in question, then section 10 does not apply to that act.

Example: In Case 99212 the Commissioner found that the applicant was not entitled to a statement of reasons for various actions of two officials of the Department of Agriculture, Food and Rural Development. The actions included the alleged failure of the two officials to supply the applicant with certain documentation and alleged comments made by them. The applicant's case appeared to be that the alleged failures of the officials might have resulted in him incurring a penalty under the Sheep Headage Scheme and did, in fact, have other adverse consequences for him. He argued that this meant that he had a material interest and had an entitlement, therefore, to a statement of reasons as to why the two officials acted as they did. However, the Commissioner was satisfied that any reasons for the alleged failure of the two officials to supply the applicant with certain documentation and alleged comments made by them did not affect the outcome of his application for headage payments.

2.3.6 A key consideration in whether a person is entitled to a statement of reasons for an act of an FOI body is whether the act has the consequence or effect of conferring on, or withholding, a benefit from the person and whether that benefit is also conferred on or withheld from persons in general or a class of persons as set out in section 10(5) of the Act.

Example # 1: In Case 120148 the Commissioner found that the decision of the Department of Justice and Equality not to shortlist the applicant for the next stage of an internal competition was an act of the public body which withheld from the applicant a benefit and, accordingly, was an act to which section 10* of the FOI Act applied. In its submissions, the Department had appeared to be arguing that the "act" in question related to the positive selection of applicants who would go forward to the next stage of the competition and that, in effect, there was no "act" as a consequence of which others were excluded from proceeding to the next stage of the competition. It had also argued that there was no discrimination

between those who were not selected to go forward to the next stage of the competition. The Commissioner did not accept that there was no 'act' which had negative consequences for the applicant and, indeed, others.

Example # 2: In Case 140279 the applicant asserted that the "decision" of the Department of Finance was its failure to reply to an email from him within the time frame set out in its customer charter. However, the Commissioner found that the Department's failure to respond to the applicant's email within the time frame set out in its customer charter did not involve the exercise of (or refusal to exercise) a power or function which might result in the conferring or withholding of a benefit. Furthermore, no argument had been made that any reasons the Department might have had for failing to reply to his email within the set time frame would have had a bearing on the conferring or withholding of such a benefit. The Commissioner found that the applicant did not have a material interest in the matter.

2.3.7 There will be many instances where a number of secondary actions/decisions are taken in the course of making a substantive decision which affects a person and where that person has a material interest in a matter affected by that substantive decision or to which it relates. While the person may be entitled to a statement of reasons for the substantive decision, the Commissioner considers that section 10 does not entitle a person affected by the substantive decision to a statement of reasons in respect of each and every action which was taken in arriving at that decision.

Example # 1: In Case 031099 the applicant sought the reasons why he was awarded certain marks under each of the 'components' or sub-sections of the marking criteria for a competition for a position in the Department of Agriculture & Food. The Commissioner did not accept that section 10* entitled the applicant to a statement of reasons for the marks awarded to him for each of the three components or relevant sub-sections. This was because it could not be said that any one of those particular 'decisions', alone, conferred on him or withheld from him a benefit. She found that, while the marks awarded for each of the three components clearly affected the applicant's overall marks and ultimately the Department's decision not to place him on the panel, it was only the substantive decision, i.e. the Department's decision not to place him on a panel, for which he was entitled to a statement of reasons under section 10*.

Example # 2: In Case 031015 the applicant sought a statement of reasons from University College Dublin (UCD) for a decision that marks claimed by him in an appeal to the Examination Appeals Committee were not correctly due. The applicant argued that UCD made 19 separate decisions relating to 19 separate points raised by him which, in his view, showed that incorrect marks had been awarded. However, the Commissioner found that the Appeals Committee did not take 19 separate decisions; rather it decided, on the basis of all the evidence submitted to it, whether his appeal should succeed. She also decided that even if it had taken 19 separate decisions, each of those decisions would not constitute an act for the purposes of section 10*, as each such decision would have been taken with a view to informing the overall decision as to whether or not the applicant's appeal should succeed. She found that those "secondary" decisions,

of themselves, would not have resulted in the withholding or conferring of a benefit although they would have informed the overall decision making process and the ultimate outcome which could, indeed, have resulted in the conferring or withholding of a benefit. She found that UCD was not required to provide a statement in respect of each mark claimed by the applicant in his submissions to the Appeals Committee. She found that the decision taken by UCD which affected the applicant, and in which he had a material interest in a matter affected by that decision, was the decision of the Appeals Committee concerning his appeal.

2.3.8 The substantive act or the act which confers on or withholds from the person a benefit will vary from case to case. In some cases it may be difficult to determine which particular act of the FOI body confers on or withholds such a benefit. As a result each section 10 application must be examined on its own merits having regard to the particular circumstances concerned.

Persons in General or a Class of Persons of Significant Size

2.3.9 The Commissioner takes the view that section 10(5) excludes acts which have general applicability. Rather, the act must affect a person particularly, albeit not necessarily exclusively. Where the act of an FOI body affects a wide class of people (i.e. a class of significant size having regard to all the circumstances) and applies equally to all members of the class, an applicant who is a member of that class does not have a material interest.

Example # 1: In Case 98101 the Commissioner considered a scoring scheme used by the Local Appointments Commissioners (LAC) for allocating specific points for particular courses or qualifications. The Commissioner found that the scoring scheme covered 15 different qualifications and would have applied to a wide class of persons of which the applicant was a member. He found that the scoring scheme applied equally to all persons who were members of that class and who applied for the job. There was a total of 117 candidates for the job, 64 of whom were shortlisted for interview (including the applicant). The Commissioner found that in such circumstances an individual candidate could not require the LAC to give reasons for its decision to adopt a particular marking scheme or to give findings on any material issue of fact under section 10*.

Example # 2: In Case 080258 the Commissioner found that the relevant "act" in the case was a decision by Fingal County Council to adopt Red Zones or Public Safety Zones in its County Development Plans and that this was a policy matter that had general applicability. The decision to adopt the Red Zones or Public Safety Zones affected every person who owned lands within the Red Zones or Public Safety Zones concerned. She found that the applicant did not have a material interest in the matter.

2.3.10 An example of a typical act in which the person concerned would have a material interest is an administrative decision on an application for social welfare or other such benefits. Where the act does not relate individually to the person concerned in such a manner, the decision maker must have regard to all of the relevant circumstances in determining whether the applicant is affected in at least some particular manner as compared to others. If others are similarly affected, this does not necessarily remove the act from the ambit of section 10. However, the

greater the number of persons similarly affected, the more general and remote the interests of the persons affected are likely to be.

2.3.11 The Commissioner takes the view that a material interest arises where the consequence or effect of the act on the person may be a relevant consideration in determining or undertaking the act. In this regard, the Commissioner has drawn a distinction between an administrative decision, for example on an application for benefits, and a policy decision. Where an act directly affects a very limited number of persons, it may be reasonable to conclude that the particular interests of those affected were of relevance. In contrast, a policy decision is based on the interests of the general public or community; therefore, the individual circumstances of the persons affected are less likely to be of relevance, and it is also less likely that any such person would be considered to have a material interest in the matter.

2.3.12 Thus, the Commissioner considers that the precise size of the class is less important than what the class size says about the interests of the persons affected. In other words, the class size is not in and of itself determinative; rather, it is an indicator of the relevance of the interests of the persons affected.

Example: In Case 090131 the Commissioner considered whether the applicant was entitled to a statement of reasons for the decision to close cancer services in Tallaght Hospital. It was not disputed that the applicant was affected by the decision to close cancer services at the Hospital: she lived within the immediate catchment area of the Hospital; she attended its Breast Clinic and said that she had a serious clinical condition; and she was very satisfied with the services she received. Nevertheless, the Commissioner found that she did not have a "material interest" in the matter. The Commissioner found that the decision to close cancer services at the Hospital had been made in the context of the national policy on cancer control. The decision not to select Tallaght Hospital as one of the eight cancer centres affected any person in the Dublin Mid-Leinster region availing of cancer services whose personal preference was to attend at Tallaght whether because of its closer proximity, the quality of care, or some other such reason. The Commissioner stated that such preferences might be of great importance to the individuals concerned; however, as such preferences were held by individuals availing of cancer services throughout the country, she did not accept that they established a material interest in the matter for the purposes of section 10* of the FOI Act. She also found that, even viewing the matter more narrowly, the "benefit" in question was the advantage of having a breast clinic within the immediate vicinity of a patient's home. As this was a benefit which was withheld from many patients of breast clinics in Ireland, regardless of the seriousness of their medical condition, she did not consider it sufficient to give the applicant a material interest in the matter.

Burden of Proof

2.4.1 The Commissioner takes the view that the applicant bears the burden of proof in establishing the standing necessary to be entitled to a statement of reasons for an act of an FOI body; i.e. the applicant bears the burden of showing that he or she has a material interest in the matter. The FOI Act is silent as to the standard of proof

which should apply in such cases. The Commissioner takes the view that the standard of proof required is that of "the balance of probabilities".

2.4.2 An applicant seeking a statement of reasons for an act of an FOI body under section 10 must show to the Commissioner that on the balance of probabilities, he or she has a material interest in a matter affected by the act or to which it relates. It may not be necessary in every case for the applicant to furnish material evidence to support his or her position. However, at a minimum, he or she must be in a position to set out the circumstances that establish an entitlement to a statement of reasons, by identifying the benefit in question, within the meaning of section 10(13) of the FOI Act, the basis upon which the act may be said to confer on or withhold from him or her that benefit, and the basis for holding that the act does not also confer or withhold the benefit from persons in general or a class of persons which is of significant size.

The Principal Features of a Statement of Reasons

2.5.1 The Commissioner takes the view that a statement of reasons should be intelligible and adequate having regard to the particular circumstances of the case. The statement should be sufficiently clear to enable an applicant to understand without undue difficulty why the FOI body acted as it did. It should identify the criteria relevant to the act and explain how each of the criteria affected the act.

2.5.2 However, the Commissioner does not consider that a statement should necessarily have to contain a detailed clarification of all issues identified by an applicant as relevant to a particular act or decision.

Understanding Why the FOI Body Acted as it Did

2.5.3 As stated above, a statement of reasons should be sufficiently clear to enable an applicant to understand without undue difficulty why the FOI body acted as it did.

Example: In Case 140276 the applicant sought a statement of reasons from An Bord Pleanála in relation to a decision of the Board concerning a matter which specifically affected his property. He sought the reason for the Board's decision not to accept the Inspector's recommendation in relation to a condition. The Commissioner found that an adequate statement, for the purposes of compliance with section 10*, would allow the applicant to understand why the Board decided not to include the relevant condition recommended by the Inspector in its decision on the planning appeal. He found that an adequate statement should contain both the reasons for the Board's decision not to include the relevant condition and any findings on any material issues of fact made for the purposes of that decision.

2.5.4 Provided the statement is adequate and clear, there is no requirement that it be in a particular form.

Example: In Case 150128, which followed Case 140276 above and related to the same matter, the Board issued a revised statement in which it stated: that it was satisfied that the proposed development, without the condition recommended by its Inspector, would not seriously injure the residential amenities of the property in the vicinity; that it concurred with an assessment of the planning authority that no

specific condition was required in relation to the party wall; and, that there were no other reasons for its decision. It also set out the material issues of fact it considered in relation to its decision. The applicant argued that the revised statement was not satisfactory. Among other things, he argued that the response of the Board should be "given in the form of a statement rather than embedded in a wider discourse." However, the Commissioner found that the Board's reasons were readily discernible from the revised statement issued to the applicant. The reality of the situation was that the Board was presented with two different opinions, that of the Council's planning official and that of its Inspector. Having considered the matter, the Board concurred with the assessment of the planning authority. This was why the Board did not accept the Inspector's recommendation. The Commissioner found that the Board had issued an adequate statement of reasons for the purposes of section 10*.

Criteria Relevant to the Act

2.5.5 As stated above, the Commissioner considers that a statement of reasons should identify the criteria relevant to the act and explain how each of the criteria affected the act.

Example # 1: In Case 99424 the Commissioner found that a revised statement of reasons provided by the Courts Service during the course of a review by his Office met the requirements of section 10*. The applicant had sought the reasons why a particular court case to which he was a party came to be listed on a particular date. The Courts Service indicated that, when listing cases in the Circuit Court, regard was had to (i) the Circuit Court Rules and relevant Circuit Court Practice Directions, (ii) the wishes of the parties in so far as they could be accommodated and (iii) the availability of dates. The Court Service stated that the onus of ensuring that all parties were ready for a case fell on the parties to the proceedings, that the Circuit Court Office did not enquire into the matter and that this practice was followed when dealing with the listing of the case. It indicated that it had particular regard to a letter from the applicant which stated that he hoped for a hearing date after 1 December and that, while he mentioned the possibility of a date for hearing in the new year further on in the letter, it was not clear from the letter that he no longer wanted a date in early December. It also explained that dates were allocated on a first come first served basis and that the date in the case was chosen as it was the first available date after 1 December. The Commissioner was satisfied that the Court Service adequately explained how the three factors identified affected the decision to list the applicant's case for hearing and that the revised statement of reasons met the requirements of section 10*.

Example # 2: In Case 120117 the applicant sought a written explanation of the reasons for the decision of South Dublin County Council to refuse to offer her a transfer under the Rental Accommodation Scheme, based on medical grounds. The Council's revised statement explained the relevant criteria considered in the applicant's transfer application. Among other things, the Council explained that the documents which the applicant supplied from her GP concerning her son's medical condition in support of her transfer application were forwarded to the Council's Medical Officer for a decision as to whether or not her son's condition entitled her to be considered for a transfer. The statement explained that the

Medical Officer reported that her son's condition was one which could be met through the provision of standard accommodation and did not award medical priority. It explained that as the Council was satisfied that the applicant's housing need was being met in standard accommodation, the Council decided that the applicant was not eligible for a transfer on medical grounds. The Commissioner found that statement of reasons was adequate for the purposes of compliance with section 10*.

2.5.6 Where an FOI body has a particular practice which it follows in taking decisions in a particular set of circumstances and where that practice has been followed then, normally, there should be no further need to enquire into the thought processes of the decision maker.

Not an Alternative Appeal Mechanism

2.5.7 The Commissioner considers that section 10 is not an alternative appeal mechanism. He considers that the purpose of section 10 is to ensure that such reasons for an act as may be identified are conveyed to the applicant and, where reasons cannot be identified, it is not the purpose of section 10 to require the creation, after the event, of such reasons.

Example: In Case 080003 the Commissioner was of the view that the applicant wanted to use section 10* to force the University of Limerick to reconsider his grounds for appeal from the marks actually awarded to him in an examination. In a letter to the University, the applicant stated that he "shall not accept as a statement of reasons any document [which] does not deal line by line with each point of my submission in support of my recheck application and later appeal". The Commissioner found that she did not need to decide whether the University adequately addressed the applicant's submissions in support of his recheck and appeal, because this was not what section 10* of the FOI Act required. She found that the relevant "act" was the decision not to award the applicant the full amount of marks allocated to certain questions of the examination script. She found that, even assuming that the University made that decision without regard to the applicant's submissions in support of his recheck and appeal, it was not the purpose of section 10* to rectify the situation. She said that section 10* only required that the University make available to the applicant the reasons and findings that were actually taken into account in reaching its decision. Thus, even if the decision was somehow flawed, this was not something that she could require the University to rectify under the FOI Act.

2.5.8 Section 10 is not concerned with the appropriateness, or otherwise, of administrative actions taken by public bodies, nor does the Commissioner have a role in examining such matters. Section 10 is concerned with providing the reasons for the act or decision and any findings on any material issues of fact made for the purposes of the act or decision concerned.

Example # 1: In Case 140051 the 'act' in question was the decision of the Public Appointments Service not to call the applicant to Stage 3 of a particular recruitment process. The Commissioner found that the applicant's detailed submissions took issue with the appropriateness or otherwise of the reasoning which led to his not being invited to the next stage of the recruitment process.

The Commissioner found that this was outside the scope of the review, which was solely concerned with the adequacy of the statement of reasons provided to the applicant.

Example # 2: In Case 140331 the Commissioner found that the substantive act of the Health Service Executive (HSE) was its decision to refuse the applicant's claim for incremental credit. He found that the applicant was, in essence, seeking to use section 10* to challenge that decision by asking the HSE to address the many issues she believed to be relevant to the decision, having regard to a particular Circular. However, the Commissioner found that, if a public body explains why it acted as it did at the time, then that is the end of the matter as far as section 10* is concerned, regardless of whether or not the act is subsequently found to have been inappropriate. In his view, the HSE had clearly explained why it refused to grant incremental credit in accordance with the Circular. As such he found that it had provided an adequate statement of reasons for that act.

Act of an FOI 'Body'

2.5.9 The requirement on an FOI body to provide a statement of reasons for an act of **the body** does not require each and every member of staff who might have contributed in any way or had been involved in the decision making process to provide an account of his/her reasons for every action he/she carried out during the course of the body's decision making process.

2.5.10 Thus, the Commissioner takes the view that section 10 requires the FOI body to provide a statement of reasons which adequately explains why **the body** acted as it did. For example, if a person applies for a statement of reasons as to why his/her application for payment of a grant was refused having been considered by a committee of, say, three officials, then an adequate statement will explain why the committee, on behalf of the FOI body, decided that payment should be refused (i.e. the act) and what facts were relied upon by the committee in making the decision to refuse payment. Section 10 does not require that each of the three members of the committee should individually explain their reasons for arriving at the decision.

Subjective Ratings or Assessments

2.5.11 The Commissioner accepts that there are practical limits to the degree of explanation which can be given as to why a particular subjective judgement was made. However, in the case of employee assessment forms, for example, he considers that it is generally reasonable to expect that, in making such an assessment, an assessor would have regard to certain criteria or benchmarks which would enable him/her to judge the most appropriate rating for each party being assessed. In deciding how a particular candidate measures up to those criteria and benchmarks, s/he would presumably have regard to certain facts about the individual or his/her work performance. The Commissioner takes the view that an FOI body should be in a position to explain to such an individual what the criteria and benchmarks were and what facts were taken into account.

The Commissioner's Role

2.6.1 Applications for review of a decision of an FOI body in relation to a section 10 matter may arise where the FOI body has refused to provide a statement of reasons.

In such cases, the Commissioner's review is concerned with whether the FOI body was entitled to refuse to provide the statement of reasons.

2.6.2 Applications may also be made to the Commissioner for a review where the applicant is not satisfied with the contents of a statement of reasons which the FOI body has provided. In such cases, the Commissioner's role is confined to deciding whether the FOI body has complied with the requirements imposed on it by section 10, i.e. is the statement given adequate? The role of the Commissioner in such a review is to ensure that all reasons for a decision, and all findings on material issues of fact, are made available to the requester. In other words, the Commissioner's role is to ensure that the requester is fully informed of the basis for the decision

2.6.3 The Commissioner has no role in examining how an FOI body performs its functions generally, or in regard to complaints against an FOI body. Furthermore, his remit does not extend to examining the appropriateness or otherwise of the particular act for which reasons are sought. Thus, he has no role in determining whether the decision or act of the FOI body was justified.

The Date of the Act

2.7.1 An application must, generally speaking, be made within 12 months after the date on which the person who is affected by the act becomes aware of it. However, section 10(12) provides that, where the particular circumstances warrant it, the FOI body may accept an application outside the 12 month limit.

2.7.2 Section 10(13) defines an "act of an FOI body" for the purposes of this section as meaning any act taken on or after the effective date by the FOI body concerned. The 'effective date' is defined in section 2 of the Act as follows:

- 21 April 1998 for an entity that, immediately before the enactment of the FOI Act 2014 (i.e. 14 October 2014), had been a public body within the meaning of the FOI Act 1997 (other than the Health Service Executive (HSE) or a local authority);
- 21 October 1998 for the HSE or a local authority;
- 21 April 2008 for an entity that, immediately before the enactment of the FOI Act 2014 (i.e. 14 October 2014), was not a public body within the meaning of the FOI Act 1997, but is a public body under the FOI Act 2014 (unless contrary provision is made by order);
- for a prescribed body, the date the order prescribing the body is made (unless a later date is specified in the order).

Thus, the right to a statement of reasons only applies in relation to an act which took place on or after the **effective date** as defined in section 2.

2.7.3 It is important to note that section 10(12), which relates to the date on which the person who is affected by the act becomes aware of it, and the reference in section 10(13) to any act "taken on or after the effective date" are new provisions with no equivalent in the FOI Acts 1997 & 2003. Thus, caution should be exercised with regard to any decision of the Commissioner under the FOI Acts 1997 & 2003 regarding the date of the act for which a statement of reasons was required.

3.0 Statement or Information not Required – Section 10(2), (3) & (4)

What the Act states:

10 (2) Nothing in this section shall be construed as requiring—

(a) the giving to a person of information contained in a record which would fall to be refused as an exempt record, or

(b) the disclosure of the existence or non-existence of a record if the non-disclosure of its existence or non-existence is required by this Act.

(3) *Subsection (1)* shall not apply to—

(a) a decision of the Public Appointments Service or other licence holder concerned under section 24(8) of the Public Service Management (Recruitment and Appointments) Act 2004, not to accept a person as qualified for a position referred to in that section, or

(b) a decision of the Chief Executive of the Public Appointments Service made by virtue of section 7 of the Local Authorities (Officers and Employees) Act 1926, not to recommend a person to a local authority for appointment to an office referred to in that section,

if, in the opinion of the head concerned, the giving of a statement under *subsection (1)* in relation to the decision would be likely to prejudice the effectiveness of the process for selecting a person for appointment to the position or office.

(4) If, pursuant to *subsection (2)* or (3), the head of an FOI body decides not to cause a statement to be given under *subsection (1)* to a person, the head shall, not later than 4 weeks after the receipt of the application concerned under *subsection (1)*, cause notice, in writing or in such other form as may be determined, of the decision to be given to the person.

Information in an Exempt Record/ Non-disclosure of the Existence or Non-Existence of a Record

3.1.1 Section 10 does not require an FOI body:

- to give information in an exempt record or
- to disclose the existence or non-existence of a record if the non-disclosure of its existence or non-existence is required by this Act.

3.1.2 This may mean that an FOI body is not in a position to give a statement or, perhaps, not in a position to give as full a statement as may otherwise be required.

Example: In Case 000101 the Commissioner found that the Office of the Director of Public Prosecutions could only have granted the applicant's section 10* application by the release of information contained in an exempt record. (Section 46 of the 1997 Act provided that the Act did not apply to a record held or created by the DPP's Office other than a record concerning the "general administration" of that Office. Also, such a record fell within the definition of "exempt record" in the 1997 Act.) The applicant had sought a statement of reasons for the decision of the DPP to prosecute him in relation to a road traffic accident. The Commissioner found that the information required to provide the reasons requested by the applicant was contained on a specific file created in connection with the decision

on whether or not to prosecute. He found that the records were exempt and he affirmed the decision of the DPP's Office to refuse to give a statement of reasons.

An appeal by the applicant to the High Court against the Commissioner's decision in this case was dismissed (*Deely v Information Commissioner* [2001] 3 I.R. 439).

Decisions of the Public Appointments Service & Others

3.2.1 The entitlement to a statement of reasons does not apply in relation to certain decisions of the Public Appointments Service, its Chief Executive or other licence holders if the giving of a statement would be likely to prejudice the effectiveness of the process for selecting a person for appointment to certain positions. (Section 10(3)).

Statement Required unless Excluded

3.3.1 The Commissioner takes the view that FOI bodies are required to provide a statement of reasons under section 10(1) unless expressly excluded from the requirement.

Example: In Case 020353 the Commissioner annulled the decision of the Department of Justice, Equality and Law Reform to refuse to provide a statement of reasons. The Department had argued that the Irish Nationality and Citizenship Act 1956, as amended, provided that a certificate of naturalisation was granted at the absolute discretion of the Minister and that the FOI Act did not impose a duty on the Minister to give specific reasons for the refusal of a certificate where the Irish Nationality and Citizenship Acts contained no such requirements. However, the Commissioner found that section 18 of the FOI Act 1997 altered and put beyond doubt the position where previously it may have been considered that there was a non-entitlement to reasons. The Commissioner referred to the express mention of decisions taken under provisions referred to in section 18(3) of the 1997 Act [similar to provisions referred to in section 10(3) of the 2014 Act] and he took the view that this would appear to indicate, *prima facie*, that all other decisions were affected by section 10(1)* unless otherwise excluded by reference to the general provisions of section 10(2)*.

Decision not to Give a Statement of Reasons

3.4.1 Section 10(4) provides that, if an FOI body decides not to give a statement of reasons pursuant to subsections (2) or (3), it must issue notice of its decision to the applicant not later than four weeks after receipt of the application. Section 10(9) provides that this notice must comply with section 13(2)(d) of the Act.

4.0 Making of Applications by Certain Individuals – Section 10(6)

What the Act States:

10 (6) Notwithstanding *subsection (1)*, the Minister may provide by regulations for the making of an application under that subsection—

- (a) by the parent or guardian of a person referred to in that subsection if the person belongs to a class specified in the regulations, or
- (b) in a case where such a person is dead, by a member of a class specified in the regulations.

4.1.1 Under section 10(6) the Minister may provide by regulations for the making of an application under section 10(1) by:

- the parent or guardian of a person referred to in section 10(1), if the person belongs to a class specified, or
- where such a person is dead, by a member of a class specified.

(A person referred to in section 10(1) is a person who is affected by an act of the FOI body and has a material interest in a matter affected by the act or to which it relates).

4.1.2 The Freedom of Information Act 2014 (Sections 9(6), 10(6) and 37(8)) Regulations 2017, S.I. No 53 of 2017, (“the 2017 Regulations”) prescribe the classes of persons who may make such an application or in relation to whom such an application may be made. These Regulations were made on 17 February 2017.

Applications by Parent or Guardian

4.3.1 The 2017 Regulations provide that an application under section 10 may be made and shall, subject to the other provisions of the FOI Act, be granted where:

- the applicant is a parent or guardian of the individual (i.e. the person affected by an act of an FOI body, and having a material interest in a matter affected by that act or to which it relates) and that individual belongs to the following classes of individual:
 - (a) individuals who, on the date of the application, have not attained full age, or
 - (b) individuals who have attained full age, being individuals who—
 - (i) at the time of the application have, or are subject to, a psychiatric condition, mental incapacity or severe physical disability, the incidence and nature of which are certified by a registered medical practitioner, and
 - (ii) by reason of that condition, incapacity or disability, are incapable of exercising their rights under the Freedom of Information Act 2014

and

- the granting of the application would, having regard to all the circumstances, be in the individual’s best interests.

Applications where the Individual is Dead

4.4.1 The 2017 Regulations also provide that an application under section 10 may be made and shall, subject to the other provisions of the Act be granted, where the individual (i.e. the person affected by an act of an FOI body, and having a material interest in a matter affected by that act or to which it relates) is dead and the applicant is:

- a personal representative of the individual acting in due course of administration of the individual's estate or any person acting with the consent of a personal representative so acting, or
- a person on whom a function is conferred by law in relation to the individual or his or her estate acting in the course of the performance of the function, or
- the spouse or the next of kin of the individual and, having regard to all the circumstances, the public interest, including the public interest in the confidentiality of personal information, would on balance be better served by granting than by refusing to grant the application.

4.4.2 The Regulations define spouse for the purposes of the Regulations as follows:

“spouse” includes, in addition to a lawful spouse:

- (a) a party to a marriage that has been dissolved, being a dissolution that is recognised as valid in the State, and a person who is living apart from his or her spouse pursuant to a deed of separation;
- (b) a man or woman who was not married to, but cohabited as a spouse with, the deceased individual; and
- (c) a civil partner within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (No. 24 of 2010).

4.4.3 The Regulations also define ‘next of kin’ and ‘personal representative’ for the purposes of the Regulations.

5.0 Frivolous, Vexatious or Pattern of Manifestly Unreasonable Requests – Section 10(7)

What the Act States:

10 (7) A head to whom a request is made under this section may refuse to grant the request if the request is, in the opinion of the head, frivolous or vexatious, or forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the head, appear to have made the requests acting in concert.

5.1.1 This is a discretionary provision which allows for the refusal to grant an application for a statement of reasons where the application is frivolous or vexatious. An application may also be refused where it forms part of a pattern of manifestly unreasonable applications from the same applicant or from different applicants who appear to be acting in concert.

5.1.2 The refusal of an application under section 10(7) is not something that should be undertaken lightly. The provision and any of the Commissioner's decisions should not be taken as encouragement to ignore the rights of applicants.

5.1.3 The terms "frivolous or vexatious" and "pattern of manifestly unreasonable requests" also appear in section 15(1)(g) - which concerns requests to FOI bodies for access to records - and sections 22(9)(a)(i) and (vi) of the Act – which concern applications for review to the Commissioner. A refusal by an FOI body of a request under section 15(1)(g) or the refusal of an application or discontinuance of a review by the Commissioner under sections 22(9)(a)(i) or (vi) is an entirely separate matter to a refusal under section 10(7). However, the reasoning and interpretation by the Commissioner of the terms "frivolous or vexatious" and "pattern of manifestly unreasonable requests" in the context of reviews of such refusals by FOI bodies or in the context of such a refusal or discontinuance by the Commissioner may be of assistance in understanding the term in section 10(7).

5.1.4 The Commissioner has published a separate Guidance Note in relation to the application of section 15(1)(g) which FOI bodies may find helpful in considering the application of section 10(7).

6.0 Making an Application, its Receipt & Notice of Refusal - Section 10(8), (9), (10) and (11)

What the Act states:

(8) A head shall cause the receipt by him or her of an application under this section to be notified to the applicant in the manner specified in *section 12(2)*.

(9) In the case of a decision to refuse to grant an application under this section the notice under *subsection (4)* in relation to the decision shall comply with *section 13(2)(d)*.

(10) An application under this section shall be expressed to be such an application.

(11) Notwithstanding *subsection (10)*, where an FOI body receives either—

(a) an application which purports to be an application under this section but which is not in the proper form, or

(b) an application which does not purport to be an application under this section but which applies for the information access to which can be obtained only by way of an application under this section,

the head shall assist, or offer to assist, the individual in the preparation of an application under this section.

Handling a Section 10 Application

6.1.1 Section 10(8) and 10(9) specify some of the procedure to be followed by an FOI body in handling an application under section 10 for a statement of reasons, including the procedure for acknowledging receipt of the application and the nature and content of any decision to refuse to grant the application.

6.1.2 Acknowledgement of receipt of the application must issue no later than two weeks after its receipt and must include certain details, including information concerning the deemed refusal of the application and the rights of review, as referred to in sections 12(2) and 19.

6.1.3 Section 10(4) provides that, if an FOI body decides not to give a statement of reasons pursuant to subsections (2) or (3), it must issue notice of its decision to the applicant not later than four weeks after receipt of the application. Section 10(9) provides that this notice must comply with section 13(2)(d) of the Act.

Making a Section 10 Application

6.2.1 An application under section 10 must state that it is such an application.

6.2.2 An application under section 10 should identify a specific act of the FOI body for which a statement of reasons is required and indicate that a statement of reasons is required. Any subsequent appeal to the Commissioner must concern an 'act' which had been the subject of the original application to the FOI body.

Example: In Case 000028 the Commissioner found that a letter from the applicant to the Department of Justice, Equality and Law Reform was not a valid section 10* application. The applicant had first referred to section 10(1)* in a letter in which

he requested a reply to two earlier letters concerning two issues, viz. (i) ownership of intellectual property rights and (ii) the process which led to awarding of contracts. The Commissioner found that the applicant did not identify, in his later letter, a specific act of the Department for which a statement of reasons was required, nor did he indicate that a statement of reasons was required. Rather, this letter was a request that the Department reply to two previous letters. The Commissioner found that that this, of itself, was not a valid section 10* request.

An appeal against the Commissioner's decision in Case 000028 was dismissed by the High Court, see *Killalea v Information Commissioner* [2003] I.R. 402.

6.2.3 On the other hand, it is also important to note that where an application is made to an FOI body which purports or appears to be a section 10 application, but is not in the proper form, or which does not purport or appear to be an application under section 10, but which applies for the information access to which can be obtained only by way of a section 10 application, then the FOI body must assist or offer to assist the individual in the preparation of the application (section 10(11)).

Example: In Case 150084 the Commissioner found that there had been some degree of confusion on the part of both the applicant and the Revenue Commissioners regarding the type of application which had been made under the FOI Act. The Commissioner's view was that some of the questions asked by the applicant of the Revenue concerned information which could only have been obtained by way of section 10*. It did not appear to the Commissioner that the Revenue assisted the applicant in the manner required by a provision in Regulations then in force (similar to what is now subsection (11)). He therefore considered that the applicant's request, insofar as it concerned section 10*, to be valid.

6.2.4 Where an applicant seeks a statement of reasons after having made an original FOI request, e.g. at the time of making an application for internal review, or for an act not specified in the original application to the FOI body, the appropriate way for the applicant to proceed is to make a fresh section 10 application.

Company as an Applicant

6.2.5 The Commissioner takes the view that there is nothing to prevent a company making an application under section 10.

Example: In Case 120305 the Revenue Commissioners refused an application under section 10* on the basis that the applicant, as a company, was not a person and was therefore not entitled to a statement of reasons. However, the Commissioner, having considered the definition of person in the Interpretation Act 2005, saw no reason to prevent the applicant making the application.