

Office of the Information Commissioner

Guidance Note

Freedom of Information Act
2014 – Section 27: Fees and
Charges

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Introduction

The Information Commissioner has prepared this Guidance Note in relation to section 27 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 27 of the Act by the Commissioner. It is intended to provide a brief summary of the relevant issues relating to this provision.

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

1.0 Section 27: Fees and Charges – Overview

1.1.1 Section 27 of the FOI Act provides for the making of a charge by FOI bodies for the cost of the search for, retrieval of and copying of records in respect of the grant of an FOI request. It also provides for the imposition of application fees in respect of certain applications.

Search, Retrieval and Copying (SRC) Charge

1.2.1 Section 27 and the Freedom of Information Act 2014 (Fees) (No. 2) Regulations 2014, S.I. 531 of 2014, (the Fees (No. 2) Regulations 2014) provide for the mandatory charging of fees for the search for, retrieval of and copying of (SRC) records.

1.2.2 Provision is also made for a maximum SRC charge, an overall ceiling limit on SRC charges and for a minimum amount below which there is no SRC charge.

1.2.3 The SRC charge does not apply where the records sought contain only personal information relating to the requester, unless the grant relates to a significant number of records.

1.2.4 The SRC charge may be reduced or waived where information in the records would be of particular assistance to the understanding of an issue of national importance.

Deposit

1.3.1 Section 27 also provides for the charging of a deposit where the estimated cost of the SRC is likely to exceed the minimum amount. In such circumstances, a deposit shall be charged and a written notice for payment of the deposit shall issue not later than two weeks after receipt of the request. The requirement to request a deposit not later than two weeks after receipt of the request is mandatory.

1.3.2 The four week time limit within which an FOI body must make its decision on an FOI request is altered in the following circumstances: where a deposit is payable; where a deposit is annulled; or, where the effect of a request being amended or limited is to eliminate a deposit.

Charge in Respect of the Grant of an FOI Request

1.4.1 The SRC charge is made in respect of the grant of an FOI request and, thus, applies in relation to records access to which is actually granted. Thus, while the deposit is based on the estimated cost of the search for and retrieval and copying of the records sought, the balance is based on the actual time/cost relating to the records to which access is actually granted.

Application Fees

1.5.1 There is no application fee in respect of an FOI request. Section 27 and the Fees (No. 2) Regulations 2014 make provision for the charging of an application fee

in respect of an internal review application and in respect of an application for review to the Commissioner. These are sometimes referred to as 'up-front' fees.

Section 27(12) and Section 15(1)(c)

1.6.1 Section 27(12) allows an FOI body to refuse to process a request where the amount of the SRC charge exceeds, or is likely to exceed, the overall ceiling limit prescribed (currently €700) provided certain requirements are met. Under section 15(1)(c) FOI bodies are also entitled to refuse requests where they consider that granting the request would cause a substantial and unreasonable interference with or disruption of their work, including disruption of work in a particular functional area, again provided certain requirements are met. There is a certain amount of overlap between these two provisions and both provisions may be relevant in certain cases. They are, however, separate provisions which operate independently of each other.

Refusal of a Request where Fee or Deposit has not been Paid - Section 15(1)(h)

1.7.1 Where a fee or deposit in respect of a request (or in respect of a previous request by the same requester) has not been paid, the FOI body may refuse to grant the request (section 15(1)(h) refers).

FOI History and Warning regarding Commissioner's Decisions

1.8.1 Section 27 is similar to (although not the same as) section 47 of the FOI Act 1997. (There are some significant differences between the two provisions e.g. relating to the introduction of a maximum charge, an overall ceiling limit, a minimum amount and in relation to subsection numbers etc.) This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 47 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 47 in those decisions have been replaced by section 27 of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (*).

1.8.2 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 (*).

1.8.3 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.

1.8.4 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 Cases may be found on the Commissioner's website at www.oic.ie.

1.8.5 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 Sections 27(1) to 27(12) - Charges & Deposits for Search, Retrieval & Copying

What the Act states:

27(1) Such amount as may be appropriate having regard to the provisions of this section shall be charged by the FOI body concerned under this subsection and paid by the requester concerned to the body in respect of the grant of an FOI request. The amount of a charge under this subsection shall be equal to the estimated cost of the search for and retrieval and copying of the record concerned by the FOI body concerned for the requester.

(2) For the purposes of subsection (1) “search for and retrieval” includes time spent by the FOI body in —

- (a) determining whether it holds the information requested,
- (b) locating the information or documents containing the information,
- (c) retrieving such information or documents,
- (d) extracting the information from the files, documents, electronic or other information sources containing both it and other material not relevant to the request, and
- (e) preparing a schedule specifying the records for consideration for release.

(3) For the purposes of subsection (1) —

- (a) the amount of the cost of the search for and retrieval of a record shall be calculated at the rate of such amount per hour as stands prescribed for the time being in respect of the time that was spent, or ought, in the opinion of the head concerned, to have been spent, by each person concerned in carrying out the search and retrieval efficiently,
- (b) the amount of the cost of the copying of a record shall not exceed such amount (if any) as stands prescribed for the time being, and the determination of that amount shall be in compliance with any provisions standing prescribed for the time being in relation to such determination,
- (c) subject to subsection (12) the total amount of a charge under subsection (1) shall not exceed such amount as stands prescribed for the time being as the appropriate maximum amount for search and retrieval and copying,
- (d) there shall be no charge under subsection (1) if, in the opinion of the head concerned, the total amount of the charge would be less than such amount (if any) as stands prescribed for the time being as the appropriate minimum amount for search and retrieval and copying, and
- (e) different maximum and minimum amounts may be prescribed under this subsection in respect of different public bodies or prescribed bodies and the power to prescribe such a maximum (in relation to any particular body) shall be exercised in a manner to take account of the greater amount that subsection (12) provides for the prescription of (in relation to that body) as concerns the overall ceiling limit.

(4) Where the record or records concerned contains or contain only personal information relating to the requester concerned the charge under subsection (1) shall not be made, unless the grant concerned relates to a significant number of records, and in considering whether or not such a charge shall be made, the means of the requester shall be taken into account.

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(5) Subject to subsection (3), where, in the opinion of the head concerned, the estimated cost, as determined by the head, of the search for and retrieval and copying of a record the subject of an FOI request is likely to exceed the appropriate minimum level as prescribed —

(a) a deposit of such amount as may be determined by the head (not being less than 20 per cent of such cost) shall be charged by the FOI body concerned and paid by the requester concerned to the body,

(b) the process of search for and retrieval of the record shall not be commenced by the body until the deposit has been paid, and

(c) the head shall, not later than 2 weeks after the receipt of the request aforesaid, cause a notice in writing for payment of the deposit to be given to the requester and the notice shall include an estimate of the length of time that the process of searching for and retrieving the record will occupy and a statement that the process will not begin until the deposit has been paid and that the date on which a decision will be made in relation to the request will be determined by reference to the date of such payment.

(6) A head may reduce the amount of or waive a search and retrieval and copying charge or deposit under subsection (1) or (5) if, in his or her opinion, some or all of the information contained in the record concerned would be of particular assistance to the understanding of an issue of national importance.

(7) In a case to which subsection (5) applies, the head concerned shall, if so requested by the requester concerned —

(a) assist the requester if the requester wishes to amend or limit the request in order to reduce or eliminate the charges that arise or are likely to arise under subsection (1),

(b) if amendments are specified under paragraph (a), make such of them (if any) to the request as the requester may determine.

(8) Where a deposit under subsection (5) is paid, the amount of the charge under subsection (1) payable in respect of the grant of the FOI request concerned shall be reduced by the amount of the deposit.

(9) Where a deposit under subsection (5) is paid and, subsequently, the grant of the FOI request concerned is refused or is granted in relation to a part only of the record concerned, the amount of the deposit or, if a charge under this section is payable in respect of the grant, so much (if any) of that amount as exceeds the amount of the charge shall be repaid to the requester concerned.

(10) Where a charge or a deposit under this section is paid, and subsequently, the charge or deposit is annulled or varied under section 21, 22 or 24, the amount of the charge or deposit so annulled or, as the case may be, any amount thereof in excess of the amount thereof as so varied shall be repaid to the requester concerned.

Contd. Over/

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(11) Section 13(1) shall be construed and have effect —

- (a) in relation to a case in which a deposit is payable under subsection (5), as if the reference to 4 weeks were a reference to a period consisting of 4 weeks together with the period from the giving of the notice under subsection (5)(c) concerned to the requester concerned to the date of the receipt of the deposit,
- (b) in relation to a case in which such a deposit is annulled following a review under section 21 or 22 or an appeal under section 24, as if the reference to 4 weeks were a reference to a period consisting of 4 weeks together with the period from the giving of the notice under subsection (5)(c) to the requester concerned to the date of the decision under section 24 or, as the case may be, of the giving to the requester concerned of notice under section 21 or 22 of the decision, and
- (c) in relation to a case in which an amendment pursuant to subsection (7) has the effect of eliminating such a deposit, as if the reference to the receipt of a request under that section were a reference to the making of the amendment.

(12) (a) Where the amount of a search and retrieval and copying charge under subsection (1) exceeds or is likely to exceed the overall ceiling limit prescribed, under paragraph (b), for the purposes of this subsection —

- (i) the body concerned shall so inform the requester,
 - (ii) the body shall assist the requester if the requester wishes to amend or limit the request in order to reduce the charges that arise or are likely to arise under subsection (1) to an amount less than or equal to the overall ceiling limit so prescribed,
 - (iii) if the requester does not amend or limit the request such that the charges that arise or are likely to arise under subsection (1) are reduced to an amount less than or equal to the overall ceiling limit so prescribed, the body may refuse the request, and
 - (iv) where the body decides to process the request, the requester shall be required to pay the full cost of the charges likely to be payable and subsection (5) shall apply.
- (b) There shall be prescribed for the purposes of this subsection an amount to be called, and in this section referred to, as the overall ceiling limit; and different such amounts may be prescribed for those purposes in respect of different public bodies or prescribed bodies.

Onus of Proof and the Commissioner's Approach

2.1.1 Section 22(12) of the FOI Act, which places the burden of proof on FOI bodies to justify a decision to refuse to grant an FOI request, does not apply to a decision by an FOI body under section 27 in relation to a charge or fee.

2.1.2 The Commissioner has commented that many (although not all) disputes about fees will turn on the question of the head's estimate of the time to be spent on a search, retrieval and copying exercise that has yet to take place. He commented that it would be strange if the legislation were to raise a presumption that an estimate was not justified and to require the FOI body to rebut this presumption in the course of a review by him. The Commissioner's view is that the Oireachtas intended to confer some latitude on FOI bodies in their estimation of the time to be spent on a search and retrieval of records, but that this latitude was to have its limits.

2.1.3 At the same time, the Commissioner has also noted that the FOI Act confers on the Information Commissioner the jurisdiction to vary or annul an estimate where

such an estimate falls outside these limits. He considers that the FOI Act foresees that there will be cases in which the amount of the fee or deposit sought by an FOI body will be found by him to be inappropriate.

2.1.4 In all cases, the Commissioner expects the FOI body to be able to explain how its estimate of the costs of search and retrieval was arrived at. If the FOI body concerned gives reasons for its estimate which indicate that there was a reasonable basis for the calculation of the fee or deposit decided upon by it, the Commissioner is not inclined to interfere with that decision.

Search, Retrieval and Copying (SRC) Charge

2.2.1 Section 27(1) provides for the mandatory charging by FOI bodies for the estimated cost of the search for and retrieval and copying of records (SRC charge).

Search and Retrieval

2.2.2 The charge for search and retrieval is calculated at an amount per hour in respect of time that was spent, or ought, in the opinion of the FOI body, to have been spent in carrying out the search for and retrieval of the records efficiently. This amount is currently set at €20 per hour under the Fees (No. 2) Regulations 2014 (Regulation 3(1)(a) refers).

2.2.3 Section 27(2) sets out what may be included in the time spent by an FOI body for search and retrieval; namely, time spent:

- (a) determining whether it holds the information requested,
- (b) locating the information or documents containing the information,
- (c) retrieving such information or documents,
- (d) extracting the information from the files, documents, electronic or other information sources containing both it and other material not relevant to the request, and
- (e) preparing a schedule specifying the records for consideration for release.

2.2.4 The Guidance Notice issued by the Central Policy Unit (CPU) of the Department of Public Expenditure and Reform – Guidance Note 6 (REV): Fees and Charges - states that it is not permissible to charge for time taken to examine the individual records with a view to determining whether or not they can be released.

2.2.5 The CPU Guidance Notice also advises that a written record should be kept of the basis for the SRC estimate so that it is available in the event of an appeal.

Copying

2.2.6 The Fees (No. 2) Regulations 2014 also set out the current, maximum amount which may be charged for copying a record – 4 cent per sheet in relation to a photocopy; €10 in relation to a CD ROM; and €6 in relation to an x-ray. (Regulation 3(3)(b) refers).

Appropriate Minimum Charge

2.2.7 There is no SRC charge if the total amount of the charge would be less than the prescribed, appropriate minimum charge – currently €101. (Section 27(3)(d) and Regulation 3(3) of the Fees (No. 2) Regulations 2014 refers).

Appropriate Maximum Charge

2.2.8 Subject to section 27(12) which relates to the overall ceiling limit, the total amount of a charge under section 27(1) shall not exceed the amount standing prescribed as the appropriate maximum amount, currently €500. (Section 27(3)(c) and Regulation 3(2) of the Fees (No. 2) Regulations 2014 refers).

Overall Ceiling Limit

2.2.9 Section 27(12) provides that an FOI body may refuse a request where the amount of a SRC charge exceeds, or is likely to exceed, the overall ceiling limit prescribed, currently €700 (Regulation 3(4) of the Fees (No. 2) Regulations 2014 refers). Before doing so, however, the FOI body must inform the requester and assist the requester if s/he wishes to amend the request to reduce the charges to an amount equal to or less than the overall ceiling limit.

2.2.10 Where the FOI body decides to process the request notwithstanding the fact that the amount of the SRC charge is likely to exceed the overall ceiling limit, the requester is required to pay the full cost of the charge likely to apply and the requirements relating to a deposit apply. The prescribed maximum amount (€500) for a SRC charge does not apply. See further below (paragraphs 2.4.1 to 2.4.12).

A Mandatory Charge

2.2.11 The making of a charge under section 27(1) is mandatory.

Example: In Case 160061 the applicant, in an appeal against a decision by Our Lady's Children Hospital to charge a fee, argued that she made a number of FOI requests in the same terms to other hospitals in the country and that Our Lady's Hospital was the only one to charge a fee. However, the Commissioner noted that the charging of search and retrieval fees in respect of the grant of requests is mandatory, provided the requirements of section 27 are met. As such, the fact that the other hospitals may not have charged search and retrieval fees could play no part in his consideration of whether the Hospital was justified in charging a fee in the case.

Whether Search and Retrieval is Efficient

2.2.12 The calculation of the cost of search and retrieval is made on the basis that the carrying out of the search and retrieval is done efficiently. The Commissioner may consider whether the search and retrieval process conducted by an FOI body was an efficient one.

Example: In Case 150212 the Commissioner commented that, if Dun Laoghaire-Rathdown County Council had been in a position to reduce the time spent on processing a request by conducting a more efficient search and retrieval process, then its decision to charge a fee based on a less efficient process would not be justified. He considered whether an electronic search would have been a more efficient process, rather than the manual search performed in that case. The 91 reports retrieved and examined by the Council in that case were also stored in electronic files in pdf format. However, while on its face, an electronic search might have appeared to present a more efficient process, the Commissioner accepted that all 91 pdf documents would have to have been accessed individually and the relevant information extracted manually, and that the schedule of information sought would have remained to be prepared. It was not, therefore,

clear to the Commissioner that such an electronic search would have made a clear and substantial difference in the time expended by the Council in this instance.

In Respect of the “Grant” of a Request

2.2.13 Section 27(1) provides for the charging of an amount “in respect of the grant of an FOI request”. The Act makes it clear that a charge falls to be paid in respect of the grant of a request and, therefore, it applies in relation to records access to which is actually granted.

2.2.14 The Commissioner takes the view that the time taken to search for and retrieve records which are ultimately refused or withheld must be disregarded in calculating the amount due. The Commissioner considers that his view in this regard is supported by section 27(9) of the Act which provides for a refund where a deposit is paid and subsequently the grant of the FOI request is refused or is granted in relation to a part only of the record concerned.

Example: In Case 060358 the Health Service Executive had charged the applicant a fee of €62.85. The Commissioner found that 20 (31%) of the 65 records identified as coming within the scope of the part of the request in respect of which a fee had been charged by the HSE were withheld. The HSE did not dispute this and informed the Commissioner that it was prepared to refund 31% (€19.48) of the fee paid by the applicant. The Commissioner directed the HSE to refund the applicant the sum of €19.48.

2.2.15 The CPU Guidance Notice 6 (REV): Fees and Charges states -

When the records relating to the FOI request are ready to be released to the requester, the FOI body should calculate how much SRC was actually involved in processing the request in respect of the records actually released. In that regard, unless the FOI body has evidence to calculate differently, it is reasonable to calculate the cost of the released records on the basis of the proportion of the total records.

Deposit

2.3.1 Section 27(5) provides that where the estimated cost of the search, retrieval and copying is likely to exceed the appropriate minimum level, currently €101, the body shall charge a deposit of not less than 20% of the cost. The process of search and retrieval shall not start until the deposit has been paid. The Commissioner has commented that the requirement to request deposits helps to ensure that FOI bodies do not allocate scarce resources to processing requests which requesters may not ultimately pursue because of the cost involved

Notice for Payment of Deposit – Timeframe & Contents

2.3.2 In circumstances where a deposit is payable, the FOI body shall issue a notice in writing to the requester requiring payment of the deposit not later than two weeks after receipt of the request. The notice must include an estimate of the length of time that the process of search and retrieval will take and a statement that it will not begin until the deposit has been paid and that the date on which a decision will be made will be determined by reference to the date of payment.

2.3.3 The Commissioner takes the view that the requirement on the FOI body to notify the requester of the requirement to pay a deposit within two weeks of receipt of the request ensures that requests are not unduly delayed as a result of charges arising. In the normal course, FOI bodies are required to issue decisions on requests within four weeks of receipt. Section 27(11) provides that where a deposit is required, the normal four week time-frame for making decisions may be extended by the period from the giving of notice of the deposit to the date of receipt of the deposit. While the clock is stopped for the period while the deposit is outstanding, the general requirement to process the request within four weeks remains.

Mandatory

2.3.4 The requirement to request a deposit is mandatory. It is also mandatory that the notice requesting payment of the deposit issues not later than two weeks after receipt of the request. CPU Guidance Note 6 (REV): Fees and Charges states that in order to charge SRC fees, notification of a deposit (of at least 20%) must be sent in writing to the requester within 10 working days of receipt of the request.

Example: In Case 150029 the Commissioner found that it was mandatory that the request for a deposit should issue not later than two weeks after the request. The applicant had submitted a revised request, having submitted an earlier request some time previously. The Health Service Executive (HSE) treated the later request as a new request in light of additional information sought. However, it did not issue the notification of the deposit until more than 10 weeks later. The Commissioner found that the HSE failed to comply with the provisions of s27* and, for this reason, was not justified in charging a search and retrieval fee. He annulled the decision to charge a fee and directed the HSE to process the request.

Reduction of SRC

2.3.5 Section 27(8) provides that where a deposit is paid, the amount of the SRC charge shall be reduced by the amount of the deposit.

Assistance to the Requester

2.3.6 Where a deposit is payable, section 27(7) provides that, if asked by the requester, the FOI body shall assist the requester to amend the request in order to reduce or eliminate the SRC charges arising under section 27(1) and make any such amendments specified.

2.3.7 Where an amendment under section 27(7) has the effect of eliminating a deposit, the time period for the making of a decision by the FOI body is four weeks after the making of the amendment. (Section 27(11)(c) and section 13(1) refer).

Refusal Where Charge Exceeds the Overall Ceiling

2.4.1 Section 27(12) allows an FOI body to refuse to process a request where the amount of a SRC charge exceeds, or is likely to exceed, a prescribed amount, currently €700. This is referred to as the overall ceiling limit. However, before the body can refuse to process a request on those grounds, it must:

- inform the requester that the SRC charge exceeds, or is likely to exceed, the overall ceiling limit and

- assist the requester if the requester wishes to amend or limit the request in order to bring the charges that arise or are likely to arise to an amount less than or equal to the overall ceiling limit.

2.4.2 The Commissioner takes the view that the entitlement to refuse to process requests where the estimated SRC charge exceeds, or is likely to exceed, the overall ceiling limit is an acknowledgement that there are limits on the administrative efforts required of FOI bodies in processing requests. On the other hand, the Commissioner also takes the view that safeguards for requesters include the obligation on an FOI body to assist the requester if s/he wishes to amend a request in order to reduce the cost and/or to ensure the request is processed.

2.4.3 The application of section 27(12) is mandatory. Therefore, where the SRC charge exceeds or is likely to exceed the overall ceiling limit of €700, the body must follow the procedures outlined in the section.

Time Frame for Ceiling Limit Notice

2.4.4 The Act is silent on the time-frame within which an FOI body must notify a requester that it is considering refusal under section 27(12). However, the Commissioner takes the view that, if an FOI body is to be in a position to comply with the remaining provisions of section 27, including the provisions relating to the charging of a deposit set out in section 27(5) either in circumstances where the requester is willing to amend the request or where the public body decides to process the request regardless of the fact that the search and retrieval costs exceed €700, then it must issue the notification under section 27(12) within two weeks. Failure to do so would mean that the body cannot comply with the provisions of section 27(5).

2.4.5. Thus, given that the FOI body must also comply with the provisions of section 27(5), it must issue the notification under section 27(12) and the notification requiring payment of a deposit under section 27(5) not later than two weeks after receipt of the request.

2.4.6 The CPU Notice 6 (REV): Fees and Charges states:

[I]n order to refuse a request under section 27(12), the following procedure should be followed:

- i. Letter telling requester that his/her request is to be refused under Section 27(12) and offering assistance in refining the request must issue within 10 working days or request cannot be refused on that basis;
- ii. In order to charge fees for the refined request, the letter issuing under Section 27(12) must also request a deposit in the event that the request is refined;
- iii. A specific deposit must be requested and should be calculated as a proportion of the appropriate maximum amount (currently €500, 20% of which is €100);
- iv. The FOI clock stops once this letter issues (including the request for a deposit);
- v. If letter does not issue within 10 working days informing the requester that his/her request exceeds the overall ceiling limit, the request cannot be refused on that basis and no fees can be charged;
- vi. When a request is refined under Section 27(12), the refined request does not constitute a new FOI request but the clock starts again when the deposit is paid.

Example: In Case 150134 the Commissioner found that Sligo County Council was not justified in deciding to refuse the request under section 27(12)(a)(iii) as it failed to comply fully with the provisions of section 27. While the Council had issued a notification to the requester under section 27(12) in which it (i) informed her that the amount of the search and retrieval charge was likely to exceed €700, (ii) invited her to amend her request, and (iii) informed her that a deposit would be required in the event that the request was amended to bring it within the ceiling, it did not do so within two weeks of the date of receipt of the request. The letter did not issue until almost four weeks after the requester submitted an amended request. The Commissioner found that the Council had not fully complied with the relevant provisions and he annulled the decision to refuse the request under section 27(12)(a)(iii).

Procedure Following the Ceiling Limit Notice

2.4.7 Where the requester does not amend the request so that the SRC charge likely to arise is less than or equal to the overall ceiling limit, the body may still decide to process the request, in which case the requester will be required to pay the full charge. (Section 27(12)(a)(iv)). The prescribed maximum amount of €500 for a SRC charge does not apply in such circumstances. However, the body must also comply with the provisions of section 27(5) relating to the charging of a deposit.

Example: In Case 160284 the Department of Jobs, Enterprise and Innovation notified the applicant that the estimated cost of €1,440 for the search for, and retrieval of, relevant records was in excess of the overall prescribed limit of €700. It informed the applicant that it had decided to process the request and notified him that he would be required to pay the full amount of the estimated search and retrieval costs, not exceeding €500. While the Commissioner found that the Department was not justified in its decision to charge an SRC fee as it failed to comply fully with the provisions of sections 27(5) and 27(12), he also commented on the Department's approach. He noted that the prescribed maximum amount of €500 that applies in respect of the amount that an FOI body may charge for SRC fees does not apply where a body decides to process a request under section 27(12) notwithstanding the fact that the charge exceeds the ceiling limit of €700. In this case, the Department estimated an SRC fee of €1,440. The Commissioner noted that, had it complied with the other provisions of section 27, it would have been entitled to seek payment of that fee.

2.4.8 Equally, where the amount of a SRC charge exceeds or is likely to exceed the overall ceiling limit and the FOI body decides to process the request, the other requirements of section 27(12) and of section 27(5) must still have been complied with. Thus, where an FOI body decides to proceed with such a request it is still required to notify the requester that the SRC charge exceeds, or is likely to exceed, the overall ceiling limit and to assist the requester if s/he wishes to amend or limit the request.

2.4.9 Where the requester amends the request, thereby reducing the charges to the required level, the FOI body can no longer rely upon the provisions of section 27(12) to refuse access. However, the Commissioner has noted that the other requirements of section 27 remain to be considered, including the requirement to charge a deposit.

Relationship with Section 15(1)(c)

2.4.10 FOI bodies are also entitled to refuse requests where they consider that granting the request would cause a substantial and unreasonable interference with or disruption of their work, including disruption of work in a particular functional area (section 15(1)(c) refers). There is, therefore, a certain amount of overlap between section 27(12) and section 15(1)(c).

2.4.11 While there is a certain amount of overlap between section 27(12) and 15(1)(c), it is important to note that they are entirely separate, stand alone, provisions which operate independently of each other.

Example: In Case 160284 the Commissioner found that the Department of Jobs, Enterprise and Innovation was incorrect if it considered that assisting the requester under section 15(4) in amending a request so that it no longer fell to be refused under section 15(1)(c) was sufficient for the purposes of compliance with the requirement under section 27(12) to assist the requester in amending the request in order to bring the search and retrieval and copying charge to an amount below the prescribed limit. The Department's decision to charge a fee followed an earlier decision by the Commissioner to annul a previous decision of the Department to refuse part of the applicant's request under section 15(1)(c). The Department had then engaged with the applicant to allow him an opportunity to narrow the scope of his request, following which the applicant submitted a revised request. The Department then notified the applicant that the estimated cost for the search for, and retrieval of, the relevant records was in excess of the overall prescribed limit of €700. However, it informed him that it had decided to process the request in accordance with section 27(12)(a)(iv). The Commissioner found that the Department's engagements with the requester were carried out in accordance with the requirements of section 15(4). Once the requester submitted a revised the request, the Department decided to proceed with an examination of that revised request. The Commissioner found that it was only at that stage that the provisions of section 27 must be considered. Rather than inform the requester of its decision to process the request under section 27(12), it should have informed him of the fact that the charge was likely to exceed the overall ceiling limit and given him a further opportunity to limit or amend the request. Furthermore, it should have done so within two weeks of having received the amended request that it decided to process.

Personal Information

2.5.1 Section 27(4) provides that a SRC charge shall not be made where the records contain only personal information relating to the requester, unless the grant of the FOI request relates to a significant number of records and, in considering whether to make such a charge, the means of the requester must be taken into account.

2.5.2 Section 27(4) applies where the records concerned contain only personal information relating to the requester

Example: In Case 130115 the Commissioner was satisfied that the information contained in the records was not personal information relating to the applicant. The applicant had sought access to records relating to the National Memorial for

Victims of Institutional Abuse from the Department of Education and Skills. The Department informed the applicant of an estimated fee of €838 for the cost of the search and retrieval of the records and it sought payment of a deposit of €167.60. The applicant appealed the decision to charge search and retrieval fees, maintaining that the information sought was personal information in that it directly related to him and others who were incarcerated in such institutions. The Department's description of the different types of records held was: arranging of meetings/room hire/payment of expenses; memos of meetings between Survivor Groups/interested parties and the Committee; placement of public notices as instructed by the Committee; circulation of the OPW draft competition documentation to Committee members; records regarding logistics surrounding the International Juror's participation in both competition stages; payments regarding the Committee and competition expenses; and, Ministerial Representations and Parliamentary questions regarding the project. The Commissioner considered the definition of personal information in the FOI Act and found that the information in the records was not personal information relating to the applicant.

2.5.3 Even if the records sought contain only personal information, section 27(4) provides for the charging of a SRC charge if the request relates to a significant number of records.

Example: In Case 130115 (see above) the Commissioner was satisfied that even if the information sought had fallen within the definition of personal information, having regard to the broad nature of the applicant's request and to the explanation provided by the Department of Education & Skills as to the type of records held, a significant number of records were at issue in the case. The applicant had sought access to records relating to the National Memorial for Victims of Institutional Abuse. The Department had provided a description of the different types of records held (see above) and had reported that references to the Memorial project were also to be found in the following: Appropriation Accounts material; Public Accounts Committee briefing material; Select Committee hearing briefing material; Overall Redress issues briefing material; Financial reports including annual estimates and monthly profiling; and, Government Memos, updates on the Committee's progress, etc.

2.5.4 While section 27(4) provides for the charging of SRC charges if the request relates to a significant number of records, it also provides that, in considering whether or not such a charge shall be made, the means of the requester shall be taken into account.

2.5.5 While the wording of the equivalent provision in the FOI Acts 1997 & 2003 was significantly different from the wording of section 27(4) in the 2014 Act, it included a reference to the means of the requester. It provided, amongst other things, that if the record contained only personal information relating to the requester, the estimated cost of copying the record "shall be disregarded if ... it would not be reasonable, having regard to the means of the requester and the nature of the record concerned, to include the cost...". In considering the application of that provision the Commissioner took the view that a public body was bound, especially when the issue of means was highlighted in the FOI request, to form an opinion as to whether

the charging of the fee was reasonable having regard to the means of the requester. Given that the Oireachtas had put the provision in the Act, the Commissioner was of the view that it was not open to the body to disregard it.

Example: In Case 090039 which concerned the application of the differently worded provision in the FOI Acts 1997 & 2003 the Commissioner was not satisfied that the Health Service Executive (HSE) had justified its decision to charge a copying fee for x-rays. The applicant had made reference to his means in his FOI request and, in applying for an internal review, he had said that he was subject to State Benefits in another European country and queried the reasonableness of the charge. Other than references to the fact that "a medical card does not cover costs" and "Unfortunately, we cannot waive this fee", the HSE's decision making records and its response to queries from the Commissioner's Office did not disclose any consideration of the means of the requester or the reasonableness of applying the statutory charge at the time the decision was made. It appeared to the Commissioner that undue emphasis had been placed on the fact that the applicant was represented by a particular firm of solicitors. The Commissioner found that there was no evidence that the HSE had made any enquiries to validate the Applicant's claim in regard to his means. She annulled the decision in relation to the fee.

An Issue of National Importance

2.6.1 Section 27(6) provides that an FOI body may reduce or waive a SRC charge or deposit if some or all of the information in the records would be of particular assistance to the understanding of an issue of national importance. The Commissioner has found that to meet this criterion, the record must satisfy two requirements: it must relate to a matter of national importance, and, if it does, the record must assist in understanding an issue of national importance.

2.6.2 The Commissioner has also highlighted that section 27(6) does not provide for a fee waiver where records contain information that might be made available in the public interest. Rather, the record must assist in the understanding of "an issue of national importance", which the Commissioner considers to be a much higher test.

2.6.3 The Commissioner considers that it is not possible to devise a formulaic definition, applicable in all circumstances, of what constitutes a matter of national importance. In the context of an FOI review where section 27(6) might apply, he considers that each case would have to be examined on its merits in light of all the circumstances pertaining at the time.

Example: In Case 030421 the Commissioner pointed to the experience of tribunals and public enquiries in Ireland to support the view that it is not possible to devise a formulaic definition of what constitutes a matter of national importance. She stated that many of the matters examined did not necessarily involve a substantial amount of money, nor did they affect a large number of people directly, nonetheless they had been considered to be matters of national importance in so far as their impact on Irish society was concerned. The Commissioner stated that the reality is that it is society itself which determines if an emerging issue is a matter of national importance at a particular time and not just a matter of general public interest or a matter of widespread discussion.

2.6.4 The Commissioner takes the view that the FOI Act clearly provides, at section 27(6) that the decision maker, having estimated the search and retrieval cost of records in the scope of the request, may, *in advance of their retrieval*, decide that the records, or some of the records, may *potentially* be of particular assistance to the understanding of an issue of national importance and reduce or waive the deposit accordingly. Thus, in circumstances where records have not yet been retrieved and a deposit is requested, the FOI body is limited, in its consideration of section 27(6), to making a judgement as to whether some or all of the records that are the subject of a given request may *potentially* contain information which "would be of particular assistance to the understanding of an issue of national importance".

Example: In Case 030421 at the request of the Commissioner's Office, the Department of Finance reconsidered its position and decided to reduce the deposit which it had sought by €10. The deposit was reduced on the basis that there might *potentially*, be some information in the records which met the requirement of section 27(6)*. The Commissioner considered the Department's decision to reduce the deposit payable, without prejudice to the final determination on the case which could be made only on review of the records, to be reasonable and justified. It was then open to the applicant to pay the deposit and have the Department retrieve the records. On receipt of the records the applicant could consider that there were grounds for a waiver of the fee, in which case it would be open to him to appeal the decision at that time. The Commissioner noted that section 27(10)* provided that where a fee is paid and the fee is annulled or varied, the amount of the fee so annulled, or the amount by which the fee is varied, shall be repaid to the requester.

Time Periods for Decision

2.7.1 Where a deposit is payable, the time period for the making of the decision by the FOI body on the FOI request is extended. It consists of the four week period referred to in section 13 and the period from the giving of the notice under section 27(5)(c) to the requester (i.e. the notice seeking payment of the deposit) to the date of receipt of the deposit. (Section 27(11)(a)).

2.7.2 Where a deposit is annulled on appeal, the time period for the making of the decision by the FOI body on the FOI request is extended. It consists of the four week period referred to in section 13 and the period from the giving of the notice under section 27(5)(c) to the requester (i.e. the notice seeking payment of the deposit) to the date of the giving of notice of the internal review decision or the decision by the Information Commissioner or, in the case of an appeal to the High Court, to the date of the decision of the High Court. (Section 27(11)(b)).

2.7.3 Where a request is amended under section 27(7) and the effect of the amendment is to eliminate the deposit, the time period for the making of the decision by the FOI body on the FOI request is four weeks after the making of the amendment.

Refund

2.8.1 Section 27(9) provides that where a deposit is paid, and the grant of the FOI request is subsequently refused or is only part granted, the deposit or, if a charge is payable, the amount of the deposit which exceeds the amount of the charge, shall be repaid to the requester. As stated above, the charge is made in respect of the grant of an FOI request. The Commissioner regards section 27(9) as providing support for his view that the time taken to search for and retrieve records which are ultimately refused or withheld must be disregarded in calculating the charge. See paragraphs 2.2.13 to 2.2.15 above.

2.8.2 Section 27(10) provides that where a deposit or charge is paid and the deposit or charge is subsequently annulled or varied on internal review, by the Commissioner or by the High Court, the deposit/ charge annulled or any amount in excess of the varied amount shall be repaid to the requester.

2.8.3 The Fees (No. 2) Regulations 2014 provide that where a fee prescribed by the Regulations is paid and subsequently the request or, as the case may be, the application for internal review or the application for review to the Commissioner, is withdrawn, the amount of the fee shall be refunded. (Regulation 6 refers).

3.0 Section 27(13) – Application Fees

What the Act states:

- (13) (a) A fee of such amount (if any) as may be prescribed shall be charged by the FOI body concerned under this subsection and paid by the applicant concerned to —
- (i) the body in respect of an application under section 21, or
 - (ii) the Commissioner in respect of an application under section 22.
- (b) A fee under this subsection shall be paid at the time of the making of the application concerned and, if it is not so paid, the head concerned or, as the case may be, the Commissioner shall refuse to accept the application, and it shall be deemed, for the purposes of this Act, not to have been made.
- (c) Fees of different amounts may be prescribed under paragraph (a) in respect of different classes of applicant.

3.1.1 Section 27(13) provides that a fee shall be charged in respect of an internal review application and in respect of an application for review to the Information Commissioner. These application fees are sometimes referred to as ‘up-front’ fees.

3.1.2 Application fees must be paid at the time of the application for internal review or the application to the Commissioner for review. If the fee is not paid, the application must be refused and it is deemed as not having been made.

3.1.3 Under the Fees (No. 2) Regulations 2014 the following application fees are payable:

- €30 in respect of an application for internal review (or €10 where the person making the application is a medical card holder or dependant of a medical card holder)
- €50 in respect of an application for review to the Information Commissioner (or €15 where the person is a medical card holder, a dependant of medical card holder or a third party under section 38(2) of the Act).

3.1.4 Under the Fees (No. 2) Regulations 2014 a fee is not payable in respect of an application for internal review where:

- (a) the record(s) contain only personal information relating to the applicant
- (b) the application is in relation to a decision under section 9 or 10 or
- (c) the application is in relation to a decision to charge a fee or deposit, or a fee or deposit of a particular amount, under section 27

(Section 9 relates to the amendment of records relating to personal information. Section 10 relates to the right of a person to information (statement of reasons) regarding acts of FOI bodies affecting them.)

3.1.5 No application fee (up-front fee) is payable to the Office of the Information Commissioner in the following situations:

- 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
- 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

Personal Information

3.2.1 As stated above, an application fee is not payable where the records sought contain only personal information relating to the applicant. Where records contain some information that is not personal information relating to the requester, it follows that the records do not contain “only personal information relating to the requester”.

3.2.2 Thus, a fee is payable if records other than those confined to the applicant’s own personal information are sought.

Example: In Case 050287 the Commissioner accepted that at the very least a record contained a mixture of both non-personal and personal information. She noted that the records sought by the requester did not relate exclusively to her personal information and, therefore, fees were payable. She affirmed the decision of the Department of Education and Science that a fee was payable.

Refund

3.3.1 Where an application fee is paid and subsequently the application for internal review or application for review to the Commissioner is withdrawn, the amount of the fee should be refunded. (Fees (No. 2) Regulations, 2014, Regulation 6 refers).

4.0 Section 27(14) - Payment Facility

What the Act states:

(14) An FOI body shall endeavour to establish a facility by which payment or refund of any fees due under this Act may be made electronically

4.1.1 Section 27(14) provides that FOI bodies should endeavor to establish a system for the electronic payment and refund of fees.

5.0 Appeals of Decisions that Charges or Fees are Payable

Internal Review

5.1.1 Application may be made for an internal review of a “decision to charge a fee or deposit, or a fee or deposit of a particular amount under section 27”. No application (up-front) fee is payable in respect of such an application for internal review.

Application for Review to the Information Commissioner

5.2.1 Under section 22(1)(d) of the Act, application may be made to the Commissioner for a review of a decision to charge a SRC fee or deposit exceeding €25 (which is the amount prescribed for the time being under the Fees (No. 2) Regulations 2014).

5.2.2 Application may also be made to the Commissioner for a review of a decision by an FOI body that an internal review application fee (up-front fee) be charged on the grounds that :

- the records do not contain only personal information relating to the applicant or
- the applicant is not a medical card holder or dependant of a medical card holder.

5.2.3 No application (up-front) fee is payable in respect of such an application for review to the Commissioner.

Commissioner’s Review of Deposit/SRC Charge

5.3.1 An FOI body making a charge under subsection (1) should be in a position to show the Commissioner that there is a reasonable basis for the calculation of the charge. As stated above, the CPU Guidance Notice advises that a written record should be kept of the basis for the SRC estimate.

Example: In Case 160061 the Commissioner was satisfied that Our Lady’s Children Hospital, Crumlin had provided a reasonable basis on which it calculated a search and retrieval fee at €320. The Commissioner had regard to the detailed breakdown provided by the Hospital of the basis on which it had estimated the time required to process the request at 16 hours and details of the steps that would be required to search for and retrieve all relevant records. The Commissioner stated that, where an FOI body gives reasons for its estimate which indicate that there was a reasonable basis for the calculation of the fee or deposit decided upon by it, his Office is not generally inclined to interfere with that decision. He was satisfied that the Hospital had provided a reasonable basis on which it calculated the fee. He noted also that the Hospital had confirmed that it had carried out the searches detailed in its submission, and that the search and retrieval had taken considerably longer than had been initially estimated. He found that it was justified in its decision to charge the fee.

5.3.2 The Commissioner’s understanding is that section 27 envisages that, on receipt of the deposit, the actual search and retrieval process can begin. The balance of the search and retrieval fee is not required until the requested access is being granted. In other words, the decision on the FOI request, together with the

schedule of records retrieved on search, is the trigger for determining the balance of the fee to be paid by the requester. The deposit is based on an estimate; the balance is based on the actual time spent on search and retrieval of the records to which access is being granted.

5.3.3 Thus, in certain cases the Commissioner's review will concern the FOI body's decision to charge a deposit and/ or SRC charge on the basis of its estimate. As stated above, where an FOI body gives reasons for its estimate which indicate that there was a reasonable basis for the calculation of the fee or deposit decided by it, the Commissioner is not inclined to interfere with that decision.

Example: In Case 130115 the Department of Education & Skills charged a search and retrieval fee of €838 and sought a deposit of €167.60. The applicant had sought all information regarding the total process and instigation for the National Memorial for Victims of Institutional Abuse as recommended in the Commission to Inquire into Childhood abuses in Residential Institutions (The Ryan Report). The Department outlined the background to the Memorial Committee's work and the type of records which it held. It stated that in an attempt to establish the cost of the search and retrieval fees, it initially selected one random month and ascertained that it would take one hour to gather together all the relevant records for that month. As the Committee had been in existence for three and a half years or 40 months, the Department estimated that it would require 40 hours to complete the search and retrieval work. The Commissioner was satisfied that the basis on which the Department calculated the search and retrieval estimate was reasonable and affirmed its decision to charge a fee of €838.

5.3.4 On the other hand, the FOI body may have carried out the search and retrieval process at the time of the Commissioner's review. While its decision to impose a charge may have been based on an estimated cost of SRC, the FOI body may be in a position to provide details of the actual time spent on SRC at the time of the Commissioner's review or during the course of that review.

Example: In Case 150212 Dún Laoghaire-Rathdown County Council charged a fee of €160 for the search and retrieval of the records sought. During the course of the Commissioner's review, the Council confirmed that the applicant paid the required fee and the relevant information was released. Accordingly, while the Council's decision to charge a fee was based on the estimated cost of processing the request, it provided details of the time actually spent on the search for and retrieval of the information. The Council stated that one staff member spent eight hours searching for and retrieving the relevant information sought. It stated that the staff member spent one hour determining whether and where the information was held, five hours extracting the relevant information and two hours preparing the schedule of information. This required the retrieval and examination of 91 hard copy reports, in order to extract the information sought by the applicant in his FOI request and the preparation of a document containing the relevant information. The Commissioner affirmed the decision to charge a fee of €160.