

Office of the Information Commissioner

# Guidance Note

Freedom of Information Act  
2014 Section 30 – Functions  
and Negotiations of FOI Bodies

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## **Introduction**

The Information Commissioner has prepared this Guidance Note in relation to section 30 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 30 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 30: Functions and Negotiations of FOI Bodies - Overview**

This Note explains how section 30 protects certain records relating to the functions of FOI bodies. It relates to:

- tests, examinations, investigations, inquiries or audits of FOI bodies (or the procedures or methods used for them)
- the management functions of FOI bodies and
- negotiations by or on behalf of the Government or FOI bodies.

It is a discretionary exemption.

### **1.1 Section 30(1)**

1.1.1 Section 30 applies where the granting of access to a record can reasonably be expected to cause a certain result. In considering the application of section 30(1) it is the effect of disclosure of the record(s) concerned that should be considered.

1.1.2 Subsection (1)(a) and (1)(b) are, what is known as, 'harm based' exemptions, i.e. they apply where the granting of access to a record can reasonably be expected to cause a particular prejudice or harm.

1.1.3 Subsection (1)(c) does not require any expectation of harm; it applies where the granting of access can reasonably be expected to disclose certain information.

1.1.4 FOI bodies must show how the harm anticipated (paragraphs (a) and (b)) or the disclosure anticipated (paragraph (c)) could **reasonably be expected** to result from the release of the record.

### **1.2 Section 30(2)**

1.2.1 The exemption is subject to a 'public interest override' i.e. even where the requirements of subsection (1) have been met, the exemption does not apply where the public interest would, on balance, be better served by granting access than by refusing to grant the request.

1.2.2 Where section 30(1) is being relied on for the refusal of a record, it is very important to go on to consider the public interest test provided for in subsection (2) in relation the record concerned.

### **1.3 Possible Overlap with Other Provisions of the FOI Act**

1.3.1 As is the case with regard to records generally, it is possible that other provisions in the FOI Act (other than section 30) may also be relevant when considering records, e.g. the records may contain personal information (section 37). However, there are also other exemptions in the FOI Act which may be particularly relevant when considering records in the context of section 30; in particular, it should be noted that both section 30(1)(a) and section 32(1)(a)(i) relate to investigations.

## **1.4 FOI History and Warning regarding Commissioner's Decisions**

1.4.1 Section 30 is similar to the equivalent provision (section 21) of the 1997 Act *after* it was amended in 2003. There are some differences between the current wording of section 30 and the wording of section 21 as it was *before* it was amended in 2003.

1.4.2 This guidance note makes reference to previous decisions of the Commissioner where the application of section 21 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 21 in those decisions have been replaced by the equivalent section 30 provision of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (\*).

1.4.3 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 (\*).

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

1.4.5 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](http://www.oic.ie)

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

## **2.0 Section 30(1)(a)**

### **What the Act states:**

**30(1)** A head may refuse to grant an FOI request if access to the record concerned could, in the opinion of the head, reasonably be expected to—

(a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of an FOI body or the procedures or methods employed for the conduct thereof,

### **2.1 A Harm Based Provision**

2.1.1 Section 30(1)(a) is what is known as a harm-based provision. Where an FOI body relies on section 30(1)(a) it should :

- identify the potential harm in relation to the relevant function specified in paragraph (a) that might arise from disclosure and
- having identified that harm, consider the reasonableness of any expectation that the harm will occur.

2.1.2 The FOI body should explain how and why, in its opinion, release of the record(s) could reasonably be expected to give rise to the harm envisaged. A claim for exemption under section 30(1)(a) must be made on its merits and in light of the contents of each particular record concerned and the relevant facts and circumstances of the case. A claim for exemption pursuant to section 30(1)(a) which is class-based is not sustainable e.g. a claim for exemption for 'any' draft report.

#### Identify the potential harm

2.1.3 The FOI body should identify the potential harm to the function concerned.

Example : In Case 99199 the Revenue Commissioners identified the potential harm as being a reduction in the effectiveness of its selection process for audit cases which would make it less likely that the process would achieve its purpose of identifying cases where there is a higher probability than normal of an incorrect return. The Commissioner found that this would constitute prejudice to "a method employed for the conduct" of audits.

#### The reasonableness of the expectation

2.1.4 The FOI body should then consider the reasonableness of its expectation that the harm will occur. In examining the merits of an FOI body's view that the harm could reasonably be expected, the Commissioner does not have to be satisfied that such an outcome will definitely occur. The test is not concerned with the question of probabilities or possibilities. It is concerned with whether or not the decision maker's expectation is reasonable. It is sufficient for the FOI body to show that it expects an outcome and that its expectations are justifiable in the sense that there are adequate grounds for the expectations.

### *Onus on the FOI body*

2.1.5 The onus to produce evidence of prejudice falls on the FOI body and, in the absence of same, the Commissioner is entitled, under section 22 of the 2014 Act, to hold against the FOI body. (*Sheedy v Information Commissioner* [2005] 2 I.R. 272, [2005] 2 I.L.R.M. 374, [2005] IESC 35).

2.1.6 The FOI body should show *how* release of the record could reasonably be expected to cause the harm envisaged, i.e. it should show the link between granting access to the record concerned and the harm identified. It should do this by reference to the specific record being considered for release: what is it about the particular record or the particular information in the record which, if released, could reasonably be expected to cause the harm envisaged? An FOI body's submissions to the Commissioner should be sufficiently detailed to demonstrate that link.

Example # 1: In Case 98023 the Commissioner did not accept that disclosure of the record could cause the relevant harm. An FOI body had relied on section 30(1)(a)\* for its refusal of a comment sheet of a Shortlisting Board. Its main concern was to avoid disclosure of key performance indicators. However, it made no specific arguments to the Commissioner that release of the record (which did not contain those details) would prejudice the effectiveness of its testing procedures for a selection process. The Commissioner found that, even if such an argument had been made, he could not accept that disclosure of the records, which contained little more than a brief explanation of a Shortlisting Board's assessment and the mark awarded to a candidate, could impair the effectiveness of the selection process.

Example # 2: On the other hand, in Case 070155, University College Dublin (UCD) satisfied the Commissioner that it had identified the potential harm and that it had shown that the expectation of such harm was a reasonable expectation. The records related to examinations taken by the applicant. UCD argued that questions which were part of a Multiple Choice Question assessment were drawn from a pool of validated questions, the question pool was finite and questions used in one assessment would be used again in future assessments. It argued that the release of the records would increase the risk of "undeserving candidates gaining prior access to correct answers through the dissemination of the question pool" prior to their sitting the examinations and that UCD's ability to examine the factual knowledge of candidates would be undermined. The Commissioner found that UCD had made a convincing case that release of the records would, in light of the small finite pool of validated questions, seriously prejudice the effectiveness of the examinations in question.

### *A Mere Assertion is Not Sufficient*

2.1.7 A general prediction without any supporting evidence is not sufficient to satisfy the requirement that access to the record could reasonably be expected to result in the outcome envisaged. In the Supreme Court case of *Sheedy v the Information Commissioner* ([2005] 2 I.L.R.M. 374, [2005] 2 IR 272, [2005] IESC 35) Mr J Kearns stated "[A] mere assertion of an expectation of [prejudice] could never constitute sufficient evidence in this regard".

2.1.8 The FOI body should set out its case to the Commissioner. The Commissioner will consider the argument and supporting information provided by an FOI body.

Example # 1: In Case 99232 the Revenue Commissioners were able to satisfy the Commissioner that the harm identified could reasonably be expected to occur. The records related to a Revenue audit and opinion. Revenue identified the harm as prejudice to the effectiveness of other investigations then in progress. Revenue accepted that the investigation in relation to the applicant had concluded, but said that it was engaged in the investigation of about 100 other parties involving broadly similar tax arrangements. The Commissioner accepted the Revenue's evidence on this point. The records contained information which showed how the Revenue carried out its investigations in the case of the applicant, strategies for carrying out its enquiries and internal discussions or observations on the outcome of such enquiries and the identification of potential courses of action. The Commissioner found that the records contained information which would be of significant assistance to taxpayers subject to similar investigations, allowing them to predict the likely trend of Revenue enquiries and to prepare themselves in advance to deal with such enquiries. He found that putting such taxpayers in this advantageous position could reasonably be expected to prejudice the effectiveness of the investigations involving them.

Example # 2: On the other hand, in Case 000274 the Commissioner was not satisfied that the Department's expectation of prejudice was reasonable. The Department of Justice, Equality & Law Reform had argued that certain information which revealed the reasoning of the Refugee Appeals Authority in coming to its decision could, if released, be used by other applicants to build up a false case. The Commissioner found that there was nothing to prevent individuals who had been successful in obtaining refugee status from verbally passing on the facts of their cases to other applicants. He found that the repeating by applicants of patterns of fact similar to those of successful applicants must have already existed and assumed that officials had the necessary skills and experience to decide the matters. He was not satisfied that it was reasonable to expect that those skills and experiences would not be just as effective in the future in assessing the validity of applications merely because the detailed pattern of facts in individual applications were made public. With regard to the disclosure of reasons for accepting applications, the Commissioner found that to the extent that the relevant record explained why the application was allowed, this was done at such a level of generality as to be of little use to any other applicant seeking to fabricate evidence in support of his/her application. The Commissioner was not satisfied that it was reasonable to expect that disclosure of this part of the record could prejudice the effectiveness of future investigations or inquiries.

### *The Records and What They Actually Reveal*

2.1.10 Consideration should be given to what the consequence of granting access to the particular record could reasonably be expected to be. What would disclosure of the record actually reveal? For example, where the information contained in the



record is already known or in the public domain or may be easily compiled, it may not be reasonable to expect that prejudice or harm would result for its disclosure.

Example # 1: In Case 090154 the Commissioner compared certain draft reports (which the Health Service Executive (HSE) claimed were exempt) with the final report (which had been released to the applicant). The HSE claimed that amendments to the draft report were significant. However, the Commissioner found that most of them were referred to in the final report, either explicitly or implicitly and found no basis to support the claim of prejudice under section 30(1)(a)\*.

## **2.2 Prejudice Effectiveness of Tests etc or Prejudice Procedures or Methods**

2.2.1 Section 30(1)(a) envisages two potential types of "prejudice" or harm. The decision maker must hold the view that the release of the record could reasonably be expected to

- prejudice the "effectiveness" of the tests, examinations, investigations, inquiries or audits
- or
- prejudice the "procedures or methods employed for the conduct thereof".

### **Prejudice the Effectiveness of Tests etc.**

2.2.2 The first potential type of "prejudice" or harm referred to in subsection (1)(a) is where release could reasonably be expected to prejudice the effectiveness of certain functions conducted by or on behalf of an FOI body. The FOI body should identify the relevant function concerned (i.e. the test, examination etc.) and the prejudice or harm to the effectiveness of that function which is envisaged.

### *Tests, examinations, investigations, inquiries or audits*

2.2.3 Section 30(1)(a) refers to "tests, examinations, investigations, inquiries or audits". Examples of functions which the Commissioner has accepted as falling within the scope of section 30(1)(a)\* include :

- an investigation being carried out by the Department of Agriculture and Food regarding alleged interference with cattle tags (Case 98086).
- an audit being carried out by the Revenue Commissioners (Case 99199)
- an inquiry or investigation into the welfare of a child directed pursuant to the Child Care Act, 1991 (Case 99146)
- the seeking of an employment reference (in that it forms part of a system of inquiry that the FOI body undertakes before employing a particular job candidate) (Case 020021)
- the processing of appeals by the Refugee Appeals Authority (000274)
- an investigation of a complaint under an FOI body's Grievance and Disciplinary Procedure (Case 060130)
- an investigation by a health board of complaints made against certain health professionals (Case 99273).

2.2.4 Section 30(1)(a) applies in relation to functions specified in paragraph (a) only.

Example: In Case 030830 the Commissioner did not accept that the collating of information by a Hospital's staff in order to respond to requests for information and queries posed by an Inquiry set up by the Minister for Health & Children would come within the type of "tests, examinations, investigations, inquiries or audits conducted" envisaged by this exemption. She found that the only records which related in any direct way to investigations or inquiries which the Hospital or any other public body had to conduct or refer to in order to respond to the Inquiry were certain records concerning pharmaceutical companies.

2.2.5 The Commissioner accepts that section 30(1)(a) is not aimed solely at investigations, inspections or evaluations now in progress but may also cover similar exercises conducted in the future (Cases 98099; 99273).

2.2.6 The test etc. concerned must be a test conducted by or on behalf of an FOI body.

Example: In Case 030830 the Commissioner found that section 30(1)(a)\* could not apply to the investigations of an Inquiry which was set up by the Minister for Health and Children to review post mortem examination policy, practice and procedure since it was not a public body under the FOI Act.

[NOTE: the equivalent provision of the 1997 Act prior to its amendment in 2003 applied to tests, examinations etc. by or on behalf of "the" public body (i.e. the FOI body making the FOI decision). However, since 2003 and under the 2014 Act the exemption extends to tests, examinations etc of "a" public body (2003 Act) and "an" FOI body (2014 Act) – i.e. not necessarily the FOI body making the decision.]

### *Effectiveness*

2.2.7 The Commissioner has found that the use of the word "effectiveness" in section 30(1)(a)\* must be interpreted as the ability of the test, examination or audit to produce or lead to a result of some kind (e.g. Case 080099).

### *Harm to the Effectiveness & the Reasonableness of the Expectation*

2.2.8 The FOI body should identify the potential harm or prejudice to the effectiveness of the relevant test, examination etc and show how release of the record could reasonably be expected to prejudice the effectiveness of tests, examinations etc.

Example : In Case 98102 the Commissioner was not satisfied that the expectation that release of records pertaining to a particular Revenue audit would prejudice the effectiveness of Revenue audits was reasonable. He found that the records did not contain a comprehensive list of the Revenue's audit selection criteria. He found that some records contained the criteria on which the particular case was selected for audit (although this was not particularly clear in the case of some of the records). He also found that, even if the Revenue's selection criteria were published, it did not follow that taxpayers who were determined to evade tax would be able to organise their affairs so as to avoid any possibility of selection in the future. He also found that, in a general way, many taxpayers and their agents knew the way the Revenue select cases. He stated that it was not really possible to keep audit selection criteria an absolute secret - even if that were desirable. He was satisfied that, even if the selection criteria used in that case could be clearly

identified, the disclosure of these criteria would not prejudice the effectiveness of Revenue audits.

2.2.9 Each case will be considered on its merits. The Commissioner has drawn a distinction between circumstances in Case 98102 (above) where the records pertained to a particular audit and the records in Case 99199 below.

Example : In Case 99199 the Commissioner found that there was a difference between releasing a record relating to a particular audit which may give some indication of why that case was selected and the release of material which indicated precisely the features in returns which would trigger a Revenue audit. In this case the Revenue had argued that release of information relating to the factors considered by the Revenue in the selection of cases for audit and the various audit tests which may be carried out would enable taxpayers to see how to avoid alerting Inspectors to possible evasion. The Commissioner accepted the Revenue's argument that if such information were made known then some taxpayers could reasonably be expected to conceal such features. He was satisfied that the release of the information could reasonably be expected to prejudice the effectiveness of future audits.

2.2.10 The stage of the process or the time at which the records are being considered for release may be relevant to the issue of prejudice.

Example: In Case 100112 the Commissioner found that a review process had effectively been completed and that the FOI body was at the stage of addressing outstanding issues relating to the implementation of the recommendations arising from that review. He found that the release of the records at that stage could not reasonably be expected to prejudice the effectiveness of the review process.

2.2.11 On the other hand, the fact that an investigation or inquiry is ongoing does not *necessarily* mean that release of a record relating to it could reasonably be expected to result in prejudice. Also, as stated above section 30(1)(a) may relate to future tests, examinations, investigations etc. An FOI body should deal with a request for records on its merits in light of the contents of each particular record and the relevant facts and circumstances.

#### Prejudice the Procedures or Methods Employed

2.2.12 The second potential type of "prejudice" or harm referred to in section 30(1)(a) is where release could reasonably be expected to prejudice "the procedures or methods employed" for the conduct of the tests, examinations etc.

#### *Harm to the Procedure or Method & the Reasonableness of the Expectation*

2.2.13 As this is a harm based exemption, the FOI body should identify the harm to the relevant procedure or method that might arise from disclosure and, having identified the harm, consider the reasonableness of the expectation that the harm will occur. The onus to produce evidence of prejudice falls on the FOI body.

Example : In Case 090192 the Commissioner was not satisfied that the Health Information and Quality Authority (HIQA) had met its burden of showing that its claim for exemption under section 30(1)(a)\* was justified. Access to parts of a

HIQA interim report had been refused. HIQA argued that its procedures required input from parties who made contributions on the understanding that interim, incomplete and unfinished findings would not be published. However, the Commissioner found that it had presented no evidence whatsoever to show that there was any understanding of confidence on the part of any of the relevant parties. The Commissioner found that no reasonable expectation of confidence could have arisen unless assurances of confidentiality had been given, which in any event would have been entirely inappropriate in the circumstances. She also found that the information at issue was largely a factual account based on evidence presented at the time of a validation visit to a hospital. She also referred to the contents of the final report which had been published.

2.2.14 However, each case is considered on the basis of its particular facts and circumstances.

Example : In Case 99273 the Commissioner found that the procedures adopted in an investigation in that particular case relied on assurances of confidentiality. He did so on the basis of the facts of that case, including for example, the contents of the records (statements made by certain health professionals) and the investigator's confirmation on the point. He accepted that breaching confidentiality in that case would have had the effect of creating a perception that similar breaches would occur in future and that, as a result, it was reasonable to expect that the parties would be less frank in their comments in the future or would insist on any statements being made through their legal representatives. He found that release could reasonably be expected to prejudice procedures of the kind adopted by the investigator, if they were employed in future investigations.

NOTE: There is a degree of overlap between section 30(1)(a) and section 32(1)(a)(i) insofar as both subsections deal with investigations.

### **2.3 Investigations or Inquiries and Confidential Information**

2.3.1 Issues can arise as to whether information provided in the course of an investigation or inquiry may have been given in confidence. It may be argued that individuals might not cooperate in providing information or might be less frank in the information they provide, if the records containing that information were to be released. This may raise the issue as to whether release of that information under FOI could reasonably be expected to prejudice the effectiveness of the investigation or inquiry or to prejudice the procedures or methods used for its conduct.

2.3.2 Each case will be considered on its merits. Persons giving information to an investigator or auditor are not always entitled to expect confidentiality. A number of factors may be relevant, such as, for example whether there are procedures in place for the conduct of the inquiry / investigation and, if so, what those procedures provide for or require; the nature of the investigation / inquiry and whether it relates to an organisation or FOI body or to an individual; whether assurances of confidentiality were given and relied on and, if so, whether they were appropriate; and, the identity of the person(s) providing the information concerned.

2.3.3 The Commissioner has commented in a number of decisions that there is a general onus on public servants to co-operate in regard to matters relating to their employment (Cases 080144 & 090154). However, the Commissioner will consider each case on the basis of its facts and all the particular circumstances.

Example # 1: In Case 030693 the Commissioner stated, in the context of a review of a decision of the Department of Education & Science concerning internal audit records, that it was reasonable to assume that all staff of public bodies would co-operate with audit inquiries where such inquiries relate to their work areas or functions. She found that it was not sustainable that anything other than full co-operation would be given by public employees to the Department's Internal Audit Unit.

Example # 2: However, in Case 020240 the Commissioner found it reasonable to assume that without the assurance of confidence in that case the information would not have been provided. The records related to a special investigation carried out by the Internal Audit Unit of the Department of Education & Science into an Institute of Technology which resulted in a special report. The Department stated that it was not a standard internal audit and that the investigation was a very complex one. The special report stated unequivocally that information was provided to the investigators in strict confidence and that an assurance of confidence was given in this regard. A key component of the investigation was obtaining information from staff of the Institute. The Commissioner found that part of the procedure or method of the investigation included the receipt of information, in confidence, through individual interviews with Department officials. Given the nature of the investigation and the relationships within the Institute and between the Department officials and the staff of the Institute, the Commissioner found it reasonable to assume that without the assurance of confidence the information would not have been provided. He found that the release of records containing information given in confidence to the Department in the course of this particular investigation would prejudice the procedures or methods employed for the conduct of such investigations in the future.

### **3.0 Section 30(1)(b)**

#### **What the Act states:**

**30(1)** A head may refuse to grant an FOI request if access to the record concerned could, in the opinion of the head, reasonably be expected to - ...

(b) have a significant, adverse effect on the performance by an FOI body of any of its functions relating to management (including industrial relations and management of its staff) ...

### **3.1 Harm Based Provision**

3.1.1 Section 30(1)(b) is, like section 30(1)(a) above, a harm-based provision. Where an FOI body relies on section 30(1)(b) it should :

- identify the potential harm to the performance by an FOI body of any of its functions relating to management that might arise from disclosure and
- having identified that harm, consider the reasonableness of any expectation that the harm will occur.

3.1.2 The requirements to be met by an FOI body when relying on a harm based provision are dealt with in some detail under section 30(1)(a) of the Act at Section 2.1 above. See Section 2.1 above before proceeding further.

3.1.3 The FOI body should identify the function relating to management concerned and identify the significant adverse effect on the performance of that function which is envisaged. It is important to note that significant adverse effect requires stronger evidence than the prejudice standard of section 30(1)(a) - see 'Significant Adverse Effect' below.

3.1.4 The FOI body should also consider the reasonableness of the expectation that the harm will occur.

3.1.5 Like Section 30(1)(a) above, the FOI body should explain how and why, in its opinion, release of the record(s) could reasonably be expected to give rise to the harm envisaged. A claim for exemption under these provisions must be made on its merits and in light of the contents of each particular record concerned and the relevant facts and circumstances of the case. A claim for exemption pursuant to paragraph (b) which is class-based is not sustainable e.g. a claim for exemption for 'any' draft report.

### **3.2 Significant, adverse effect**

3.2.1 When invoking section 30(1)(b), the FOI body must make an assessment of the degree of importance or significance attaching to the adverse effects claimed. Establishing "significant, adverse effect" requires stronger evidence of damage than the "prejudice" standard of section 30(1)(a). In other words, not only must the harm be reasonably expected, but it must also be expected that the harm will be of a more significant nature than that required under section 30(1)(a).



Example : In Case 98020 the FOI body argued that its function of finding persons willing to serve on its interview boards might be affected by the release of the records. The Commissioner found that, while it was possible that some prospective interviewers would be deterred, no evidence was offered that this could be expected to happen to such a degree as to have a *significant* adverse effect on the ability of the FOI body to find suitable interviewers.

### *Significant Adverse Effect and the Reasonableness of the Expectation*

3.2.2 Having identified the significant adverse effect envisaged, the FOI body should explain how release of the particular record(s) could reasonably be expected to result in this significant adverse effect. The reasonableness of the expectation that the significant adverse envisaged will occur should be considered.

Example : In Case 98099 the Commissioner found that, if the sole consequence of release of a record would be to cause a "potentially difficult industrial relations situation", then the exemption at section 30(1)(b)\* would not apply. However, he also found that to release information about parties who had participated on a voluntary basis in a pilot project designed to test a new and a controversial concept, ran a very real risk of prejudicing the future capacity of the Department of Education and Science to secure such co-operation. He found that release could reasonably be expected to have a significant adverse effect on the performance of the Department's functions of pilot testing new initiatives in the education system.

## **3.3 Functions relating to management**

3.3.1 The wording of section 30(1)(b) makes it clear that the words "industrial relations and management of its staff" are, in the context of that section, a subset of "functions relating to management". Other than the specific references to industrial relations and the management of staff, section 30(1)(b) does not indicate what other management functions are embraced by the term "functions relating to management".

3.3.2 The Commissioner has found that management is a word of wide import and that it is apt to cover a variety of activities of an FOI body apart from management of staff and industrial relations, including

- strategic planning, the management of financial resources and the management of operational matters (Case 98169).
- management of operations, including reviewing how those operations are carried out, and devising and testing new methods of conducting the operations through the use of pilot projects (Case 98099)
- investigating complaints against it, members of its staff and parties under contract to it (Case 99273)
- attending to complaints from or about members of staff (Case 000180)

3.3.3 In Case 010459 the Commissioner found that it was not correct for a local authority to equate the performance of its functions under the Housing Act, 1988 with the performance of "functions relating to management". She found that the performance of "functions relating to management" was a narrower category than that of the performance of statutory functions more generally.

### **3.4 Functions beyond the FOI body itself**

3.4.1 Section 30(1)(b) refers to the performance by “an FOI body” of any of “its” functions relating to management. In some cases, however, the issue of whether the functions are functions relating to management of that FOI body may not be clear cut. However, the facts and circumstances of each case are always relevant. The role the FOI body is performing is relevant.

Example # 1: In Case 98104<sup>1</sup> the Commissioner found that the management function of the Department of Education & Science in the area of industrial relations extended beyond the confines of the Department itself. He accepted for the purpose of the argument in that particular case that the industrial relations referred to in section 30(1)(b)\* could include in the broadest sense the relations between teachers and their employing schools and teachers and the Department.

Example # 2: However, in Case 98169, given the lack of clarity about the role of the Department of Education & Science in cases of complaints against teachers, the Commissioner was unable to identify any function of the Department relating to management which might have been adversely affected by release of a record. The record related to a complaint against a teacher and the Department did not explain to the Commissioner which of its functions relating to management could be affected by its release. The Commissioner found that the Department of Education & Science performed a management role in relation to some aspects of teaching. However, while the Department could have a role to play in relation to the investigation of complaints made against teachers, the Commissioner found that it did not follow necessarily that it had a role in relation to all such complaints or that it was always performing a management function when it became involved in such complaints.

NOTE: the equivalent provision of the 1997 Act – section 21(1)(b) of the 1997 Act - prior to its amendment in 2003 referred to the performance of management functions by “the” body (i.e. the public body making the FOI decision). This was changed in 2003 to the performance by “a” public body of any of its functions relating to management and under the 2014 Act to the performance by “an” FOI body of any of its functions relating to management. Thus, the wording of both the 2003 and 2014 Acts covers the performance of management functions by an FOI body other than the FOI body making the decision. However, it does not extend to the performance of management functions by a person or body other than an FOI body.

### **3.5 Other possible exemptions**

3.5.1 Where records relate to investigations of complaints from or about staff of an FOI body (including, for example, bullying and harassment claims) it may be appropriate to consider the application of section 30(1)(b). However, as stated above, it is possible that other provisions of the FOI Act may also be relevant and, in the case of records relating to investigations of complaints from or about staff, section 37, in particular, may be relevant. Where section 37 is relevant, it is important to note that the public interest test in section 37 is somewhat different from the public interest test in section 30.

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<sup>1</sup> The High Court overturned the Commissioner’s decision on this case. However, it did so on a different issue – the application of section 53 of the Education Act 1998.



## **4.0 Section 30(1)(c)**

### **What the Act states:**

**30(1)** A head may refuse to grant an FOI request if access to the record concerned could, in the opinion of the head, reasonably be expected to ...

(c) disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations carried on or being, or to be, carried on by or on behalf of the Government or an FOI body.

4.0.1. Paragraph (c) is designed to protect positions taken for the purpose of any negotiation carried on by or on behalf of the Government or an FOI body. It is important to note that this exemption does not contain a harm test (unlike section 30(1)(a) and 30(1)(b)). It is sufficient that access to the record concerned could reasonably be expected to disclose such negotiation positions, plans etc.

4.0.2 There is no requirement to take a view on the consequences of the disclosure of those positions or that disclosure would have an adverse effect on conduct by the Government or the FOI body of its negotiations. However, this matter may be relevant to the public interest test in section 30(2) – see further below.

### **4.1 Negotiations**

4.1.1 An FOI body relying on section 30(1)(c) should identify the relevant negotiations at issue.

Example: In Case 110095, no negotiations had been identified by the Department of Transport. The Commissioner found that section 30(1)(c)\* could not be applied. The Department had argued that the disclosure of certain records would disclose a position taken in response to a query by the UK Office of Fair Trading (OFT). It had not, however, argued that the position taken was for the purpose of any specific negotiations and the OFT stated it did not consider that there were any negotiations to which the provisions of Section 30(1)(c)\* might apply.

4.1.2 The Oxford English Dictionary defines "negotiation" as "the action or business of negotiating or making terms with others". It goes on to define the verb "negotiate" as "to hold communication or conference (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to some settlement or compromise".

4.1.3 Relevant factors in considering whether there is or was a negotiation include whether the FOI body was trying to reach some compromise or some mutual agreement. The Commissioner also accepts that, generally speaking, proposal-type information relating to a public body's negotiations would also be exempt under section 30(1)(c).

4.1.4 In deciding whether there are negotiations for the purpose of section 30(1)(c), factors to consider include, for example, whether there is:

- any proposal for settlement or compromise
- any indications of 'fall-back' positions
- information created for the purpose of negotiations
- the FOI body's negotiating strategy
- an opening position with a view to further negotiation.

Example # 1: In Case 000257 the Commissioner had regard to the factors above in considering the Irish response to a reasoned opinion of the European Commission. He found that there was no evidence that the response was drafted as the State's opening position with a view to further negotiation. He found that there was no room for negotiation on the net issue involved (although there was clearly room for argument) and that the Irish position, as stated, was unequivocal. He found that section 30(1)(c)\* did not apply.

Example # 2: In Case 080246 the Commissioner noted that a record referred to what might be considered to be a "plan", but the plan appeared to have been in the nature of an information-gathering exercise. She found that there was nothing to indicate that the plan related to a particular confidential process referred to in that case or to any other negotiations.

Example # 3: In Case 070339 the Commissioner found that release of the records would disclose the professional advice given to the Council in its preparation of its negotiating position relating to possible future negotiations to be carried on by/on behalf of the Council. The records related to a process of analysis and examination of information supplied by the applicant's accountants to the Council's advisers in relation to the applicant's claim for losses which might be suffered should the Council / National Roads Authority compulsorily purchase certain land. The Council argued that, while formal negotiations had not commenced, it intended to deal with the claim.

4.1.5 The wording of section 30(1)(c) extends to negotiations carried out by an FOI body other than the body making the FOI decision. However, it does not extend to negotiations carried out by a person or body that is not an FOI body.

4.1.6 Records relating to past, present or future negotiations may be protected under section 30(1)(c).

## **4.2 Positions etc for the Purpose of any Negotiations**

4.2.1 An FOI body must show to the Commissioner that release of the record could reasonably be expected to disclose positions taken (or to be taken) or plans etc used or followed (or to be used or followed) for the purpose of any negotiations.

Example : In Case 100279 the Commissioner found that, subject to the public interest test, section 30(1)(c)\* applied to certain records. The records estimated the cost of the Metro North project and gave the view of the Department of Finance on possible sources of funding for the project. They detailed the proposals considered to be relevant to the completion of the project which, according to the Department, would be subject to commercial negotiation and

public tender. They also disclosed the views of previous Ministers on how best to proceed with the project.

4.2.2 A distinction should be made between the *outcome* of negotiations and a position taken or plan, procedure etc used for the purpose of a negotiation. While a record might reveal the outcome of negotiations, it may not necessarily be reasonably expected to disclose the positions taken or reveal plans or procedures etc. used for the purpose of a negotiation. The Commissioner has also distinguished between disclosing the existence of a fact and disclosing a position or plan used for the purposes of negotiations.

Example : In Case 98078 the Commissioner found that information relating to actual expenditure, budget variances, steps already taken to keep within budget etc. was not information relating to positions under section 30(1)(c)\*.

4.2.3 The likelihood that disclosure of certain information in the record might have particular consequences does not necessarily mean that its disclosure could reasonably be expected to result in the disclosure of *a position or plan etc* as envisaged by paragraph (c). The FOI body should show that the granting of access to the record could reasonably be expected to disclose *a position, plan, procedure etc.* as specified in paragraph (c).

Example: In Case 98078 the Department argued that disclosure of the existence of unfunded posts could cause industrial relations problems and public confusion. Whereas the Commissioner accepted that such disclosure might very well invite public comment, he found that it did not amount to disclosure of a position taken or plans, procedures, criteria or instructions used or followed for the purpose of any negotiations carried on or to be carried on.

### **4.3 Disclosure**

4.3.1 In considering whether a position, plan etc could reasonably be expected to be disclosed by the granting of access to the record, regard may be had to such matters as information already available or published.

Example # 1: In Case 99454 the Commissioner found that the negotiating position of Ministers was already known. He also found that the Department of Finance had already made certain factual information available through the release of the edited version of the record. He found that the release of parts of the record concerned (certain findings and recommendations) under FOI would not reveal any further information relevant to the negotiating positions of the relevant Departments.

Example # 2: In Case 080246 the Commissioner found that the Health Service Executive had not shown, nor did she otherwise find, that access to a record could reasonably be expected to disclose any position taken or plans to be used for the purpose of a particular confidential process. In considering what was she described as "a candid statement of the risks" in the record, the Commissioner found that such risks would have been self-evident. She also had regard to a public acknowledgement by the HSE in a press release of a "significant clinical risk".

#### **4.4 Absence of a Harm Test**

4.4.1 Section 30(1)(c) makes no distinction between disclosures which have the potential to prejudice current or future negotiations, or to cause some other harm, and disclosures which do not. However, the Commissioner has found that such a distinction should be made in applying the public interest test in section 30(2) to records which could reasonably be expected to disclose positions taken etc. for the purposes of past negotiations (Case 98166). See further below under Section 30(2) – the Public Interest Test.

## **5.0 Section 30(2) – the Public Interest Test**

### **What the Act states:**

(2) *Subsection (1)* shall not apply in relation to a case in which in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the FOI request concerned.

5.0.1 The exemption provided for at section 30(1) does not apply where, on balance, the public interest would be better served by granting the request than by refusing it. Where an FOI body is relying on section 30(1) for the refusal of a record, it should go on to consider the public interest test under section 30(2).

5.0.2 The public interest is dealt with in a separate Guidance Note. However, matter relating to the public interest test in the particular context of section 30 is addressed below.

### **5.1 Records relating to Negotiations and the Public Interest**

5.1.1 As stated above, section 30(1)(c) does not contain a harm test. The provision makes no distinction between disclosures which have the potential to prejudice current or future negotiations or to cause some other harm and disclosures which do not. However, such a distinction should be made in applying the public interest test in section 30(2) to records which could reasonably be expected to disclose positions taken etc. for the purposes of negotiations.

5.1.2 In Case 98166 the Commissioner found that, if release of such records could not harm current or future negotiations or cause any other harm, then the public interest in openness in the workings of Government meant that, in the absence of any other applicable exemption, the records should be released. However, he found that, if access to records which disclose positions taken etc. for the purposes of past negotiations could reasonably be expected to prejudice current or future negotiations or cause some other harm, then this was a matter which must weigh heavily in the application of the public interest balancing test.

Example: In Case 030095 the Commissioner found that, subject to the public interest test, section 30(1)(c)\* applied to certain property valuation reports held by a Town Council. He found that the public interest would, on balance, be better served by releasing the information. He found that, in view of the time which had elapsed since the valuation reports were written and the fact that negotiations for the properties in question had concluded, it was not reasonable to expect that disclosure of the reports would have significant negative consequences for the negotiating capacity of the Town Council. On the other hand, he found that there was a strong public interest in members of the public exercising their rights under the FOI Act and in public bodies being open and accountable, particularly in relation to the use of public funds.