

Office of the Information Commissioner

Guidance Note

Freedom of Information Act 2014
– Section 32: Law Enforcement
and Public Safety

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Introduction

The Information Commissioner has prepared this Guidance Note in relation to section 32 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 32 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 32: Overview

1.1.1 This Note briefly explains the Commissioner's approach to section 32 of the FOI Act. Section 32 protects certain records relating to law enforcement functions, public and personal safety, criminal and civil proceedings, the security of certain institutions and the security of certain communications systems. It also protects certain records where access to those records could reasonably be expected to facilitate the commission of an offence.

1.1.2 Section 32 is a discretionary exemption. It is not a class based exemption.

The Effect of Disclosure

1.2.1 In considering the application of section 32, it is the effect of disclosure of the record that the FOI body should consider. Subsection (1)(a) envisages that certain harms will result from the release of the record(s) – this is often referred to as a harm based exemption. Subsection (1)(b) and (c) envisage that certain outcomes will result.

1.2.2 FOI bodies should show how the harm (paragraph (a)) or outcome (paragraphs (b) and (c)) envisaged could reasonably be expected to result from the release of the records.

Limited Public Interest

1.3.1 The exemption is subject to a public interest test; however the public interest test arises only where certain limited circumstances exist (subsection 3). The public interest test should be considered before a decision is made to withhold a record.

Neither Confirm nor Deny

1.4.1 Section 32 has a 'neither confirm nor deny' provision (subsection (2)).

Other Provisions of the FOI Act

1.5.1 It is possible that other provisions in the FOI Act may also be relevant when considering records in the context of section 32.

Overlap with Section 30(1)(a)

1.5.2 There may be a degree of overlap with section 30(1)(a) which concerns records relating to investigations / inquiries. In Cases 99232 and 99199 the Commissioner expressed the view that arguments made by the Revenue Commissioners in relation to section 30(1)(a) and 32(1)(a)(ii) were interdependent.

Example: In Case 99232 the Commissioner, in finding that section 30(1)(a)* applied, accepted that disclosure of records could reasonably be expected to prejudice the effectiveness of certain Revenue investigations. For the same reasons, he accepted that disclosure could reasonably be expected to prejudice the

enforcement of, compliance with and administration of the tax laws and that section 32(1)(a)(ii)* also applied.

Overlap with Section 31

1.5.3 It is also possible that parts of section 31 may be relevant to records being considered under section 32(1)(a). For example, section 31(1)(a) relates to records which would be covered by legal professional privilege and section 31(1)(b) relates to records where disclosure would constitute a contempt of court.

Overlap Between Different Parts of Section 32

1.5.4 There may be a degree of overlap within or between the different parts of section 32 itself. For example, where release of certain records could reasonably be expected to prejudice an investigation of an offence, it is possible that their release could also reasonably be expected to prejudice the apprehension or prosecution of offenders.

FOI History and Warning regarding Commissioner's Decisions

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

1.6.2 Section 32 is similar to, although not the same as, section 23 of the FOI Act 1997. This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 23 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 23 in those decisions have been replaced by section 32 of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (*).

1.6.3 Reference is also 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 (*).

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

2.0 Section 32(1)(a) – Law Enforcement and Public Safety

What the Act states:

32. (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 or impair—

(i) the prevention, detection or investigation of offences, the apprehension or prosecution of offenders or the effectiveness of lawful methods, systems, plans or procedures employed for the purposes of the matters aforesaid,

(ii) the enforcement of, compliance with or administration of any law,

(iii) lawful methods, systems, plans or procedures for ensuring the safety of the public and the safety or security of persons and property,

(iv) the fairness of criminal proceedings in a court or of civil proceedings in a court or other tribunal,

(v) the security of a penal institution,

(vi) the security of a children detention school within the meaning of section 3 of the Children Act 2001,

(vii) the security of a remand centre designated under section 88 of the Children Act 2001,

(viii) the security of the Central Mental Hospital,

(ix) the security of a building or other structure or a vehicle, ship, boat or aircraft, or

(x) the security of any system of communications, whether internal or external, of the Garda Síochána, the Defence Forces, the Revenue Commissioners or a penal institution,

2.1.1 Section 32(1)(a) is a harm based exemption. It applies where access to the record concerned could reasonably be expected to prejudice or impair the matters specified in sub-paragraphs (i) to (x) above.

Sections 2.1.1 to 2.7.4 of this Note cover the general issues which arise in the application or interpretation of section 32(1)(a). Some specific aspects of the particular sub-paragraphs (i) to (x) are dealt with in sections 2.8 to 2.13. It is important to consider the general issues in 2.1.1 to 2.7.4 before proceeding to consider aspects specifically relating to a particular sub-paragraph.

2.1.2 Where an FOI body relies on section 32(1)(a), it should :

- identify the potential harm to the matters specified in the relevant sub-paragraph that might arise from disclosure
- having identified that harm, consider the reasonableness of any expectation that the harm will occur.

In doing this, the FOI body should show how or why releasing the particular record could reasonably be expected to cause the harm which it has identified. This is an important issue for the FOI body to address and its submission to the Commissioner should explain this.

2.1.3 FOI bodies should bear in mind that there is a presumption in favour of disclosure. Section 22(12)(b) provides that a decision to refuse to grant access shall be presumed not to have been justified unless the FOI body shows to the satisfaction of the Commissioner that the decision was justified. The FOI body carries the burden of demonstrating to the Commissioner that the record should not be released.

Prejudice or Impair - Harm

2.2.1 The Commissioner considers that the words "prejudice" and "impair" were not intended to be synonymous and so, taking their ordinary literal meaning, the FOI body should consider whether the matter specified could reasonably be expected to be **prejudiced** (that is to say, injured or potentially injured) or could reasonably be expected to be **impaired** (that is to say, damaged or weakened).

Could Reasonably be Expected

2.3.1 Section 32(1) provides that an FOI body may refuse a request if access could reasonably be expected to lead to the harms detailed in paragraph (a). In interpreting the words "could reasonably be expected to", the Commissioner's view is that 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. He takes the view, as stated above, that a decision maker must firstly identify the potential harm to the functions covered by the exemption that might arise from disclosure and, having identified that harm, consider the reasonableness of any expectation that the harm will occur.

Harm to the Matters Specified

2.4.1 The harm identified must be a harm to a matter specified in the relevant sub-paragraph of section 32(1)(a). The FOI body should specify the particular matter(s) concerned.

Link between Release of the Record and the Harm Expected

2.5.1 Having identified the harm envisaged to the particular matter specified in the relevant sub-paragraph of paragraph (a), the FOI body is expected to show how release of the particular record could reasonably be expected to result in that harm. A mere assertion of an expectation of harm is not sufficient.

Example # 1: In Case 060233 a Council had argued that release of certain records relating to a new prison could possibly assist the escape of convicted prisoners. The Department of Justice, Equality and Law Reform had stated that some information, in the wrong hands, could place the operation of the prison in jeopardy. The Commissioner said that she would have expected some form of analysis of how specific items of information could, if disclosed, have the type of negative

consequence that the exemption is intended to prevent. She stated that where neither the Council nor the Department had identified, explained or considered the likelihood of a particular harm occurring, she was satisfied that there was nothing in the content of the records that persuaded her that the exemption claimed was justified.

Example # 2: In Case 120163 the Revenue Commissioners in their submission to the Commissioner outlined the background to an ongoing Revenue Special Projects Team investigation concerning a large number of companies. They argued that release of the records would reveal the methodologies in use by Revenue in sourcing information and documents in its investigation into the tax affairs of the applicant, and also in similar investigations in many other cases. Having examined certain affidavits and considered the submission in which Revenue described its processes and procedures in the investigation and detailed its reasons as to why the records should not be released, the Commissioner found that section 32(1)(a)(i)* applied.

2.5.2 The FOI body should specify what it is about the particular record or the particular information in the record which, if released, is expected to cause the harm envisaged and it should explain how or why that harm is expected to occur. An FOI body's submission to the Commissioner should be sufficiently detailed to demonstrate that link. Even if it is accepted that release of the records could lead the applicant (and/or others) to deduce certain information, the FOI body must still show how this could be expected to result in the harm envisaged.

Example : In Case 030830 the Commissioner found that the argument necessary to sustain a claim that records relating to an Inquiry into post mortem examinations were exempt under section 32(1)(a)(iv)* had not been made. The Commissioner found that although the Hospital said that individuals were taking proceedings against it, no records had been identified in the context of the "harm" envisaged; nor was it clear that any particular legal strategy, the disclosure of which might result in prejudice or unfairness, was evident from the records. On appeal to the High Court, Quirke J was satisfied that the Commissioner, having examined the relevant records, was entitled to make that finding. (The National Maternity Hospital -v- the Information Commissioner [2007] 3 I.R. 643)

2.5.3 While granting access to the records is likely to have some effect, this does not necessarily mean that it could reasonably be expected to prejudice or impair the relevant matter specified.

Example: In Case 98042 the Commissioner did not accept that release of the name of a charity which holds a tax exemption on the basis of its charitable status implied that the confidentiality afforded by the Revenue to taxpayers has been so significantly weakened as to affect enforcement, compliance with or administration of the tax code.

2.5.4 The fact that the records may relate to matters specified in paragraphs (i) to (x) does not, in and of itself, establish a link between their release and the harms envisaged in section 32.

Example: In Case 090073 Commissioner found that the fact that a record may relate to the investigation of criminal offences and potentially to matters of evidence in criminal proceedings does not, in itself, establish that one of the exemptions under section 32* of the FOI Act applies; otherwise, the Act would provide for a class-based exemption for such records, which it does not. She also found that the fact that access to a record through disclosure in District Court proceedings may or may not be available does not, in and of itself, establish that one of the exemptions under sections 32(1)(i) to (iv)* applies.

The Records & What They Reveal

2.6.1 The actual content of the records is important. Consideration should be given to what the records actually reveal. For example, the possibility that the information in the records may already be known or may easily be compiled or prepared may be relevant.

Example # 1: In Case 98086 the Commissioner considered a record which contained details of a list of offences and the associated regulations. He found that anyone with knowledge of the law applicable in this area would easily prepare such a list and that the applicants would have had little or no difficulty in establishing the relevant regulations, should a prosecution proceed. He found that section 32(1)(a)* did not apply.

Example # 2: However, in the same case (98086), the Commissioner found that another record was exempt from release pursuant to section 32(1)(a)(i)*. The record was a Forensic Science Laboratory report. The applicants were aware that a report had been prepared, that the report's findings very strongly supported an allegation that cattle tags were interfered with, and they had also been informed of the tag numbers for the tags in question. However, they were unaware of the exact nature of the alleged interference found.

2.6.2 The contents of each record should be considered. While some records may meet the requirements of the exemption, this does not mean that all the records in a particular case will do so.

Example: In Case 080246 the Commissioner found that certain records of communications between the Health Service Executive and the Competition Authority contained confidential, sensitive information concerning the enforcement of or compliance with the competition laws. She found that release of those records could reasonably be expected to deter or inhibit similar exchanges in future. She found that they were exempt under section 32(1)(a)(ii)*. However, having compared the contents of the relevant records, she found that section 32(1)(a)(ii)* did not apply to a further record.

Timing

2.7.1 The time at which the FOI decision is being made is relevant. It is possible that due to the passage of time the disclosure of the records could not reasonably be expected to result in the harm envisaged.

Example: In Case 98041 the Commissioner found that release of records relating to the Dublin Electoral Area Boundary Committee (DEABC) could not impact on the DEABC since that body no longer existed (it had ceased to exist after the original application had been made).

2.7.2 However, it is important to consider the issue of the passage of time carefully. The passage of time alone does not necessarily mean that the relevant exemption would no longer apply.

Example: In Case 090185 the records at issue included Garda witness statements relating to the disappearance of the applicant's sister many years previously. While very many years had passed since the disappearance of the applicant's sister, given that the Garda Commissioner's Office had stated that foul play in the case had not been ruled out and that the investigation remained open, the Commissioner found that section 32(1)(a)(i) applied to the Garda witness statements concerned.

2.7.3 Particular functions or processes may have different stages and, in this respect, timing may again be relevant. For example, where the function concerned is the investigation of offences, what is the stage of the investigation? Is it ongoing or is it complete? Until such time as a decision is made either to prosecute or not to prosecute in a case, the investigation may be regarded as not being complete.

Example: In Case 98086 the Commissioner found that release of the information in one record at that time, when investigations were still ongoing and the prosecution had not commenced, would be premature and could reasonably be expected to impair or prejudice the investigation and any subsequent prosecution.

2.7.4 The process of enforcement or administration of any law may also have stages and the position may change at different stages.

Example: In Case 98102 the records related to the applicants' tax affairs. The Commissioner considered briefly the nature of the tax administration regime in so far as it applied to the applicant. He found that the tax official must be allowed a fair degree of latitude to decide when information should be made available to the tax payer. He found that, in the normal case, the decision on when to release information must remain with the investigating tax official right up to the time that an assessment is made. However, he found that, having made an assessment of the tax due, the situation changes. He found that the Revenue was not entitled to refuse access to the records under section 32(1)(a)(iv)* in that case.

Sub-Paragraphs (i) to (x)

Sections 2.1 to 2.7 above cover the general issues which arise in the application or interpretation of section 32(1)(a). Some specific aspects of the particular sub-paragraphs (i) to (x) are dealt with in Sections 2.8 to 2.13 below.

It is important to consider the general issues in 2.1.1 to 2.7.4 before proceeding to consider aspects specifically relating to a particular sub-paragraph.

.....

Sub-Paragraph (i)

2.8.1 Section 32(1)(a)(i) is relevant where access to the record could reasonably be expected to prejudice or impair :

- the prevention, detection or investigation of offences
- the apprehension or prosecution of offenders or
- the effectiveness of lawful methods, systems, plans or procedures employed for the purposes of the matters above

2.8.2 Please Refer to Section 2.1 – 2.7 above before considering this part of the Guidance Note.

Investigations

2.8.3 The Commissioner has accepted, as a general proposition, that an investigator must be allowed a fair degree of latitude, subject to the need for fair procedures, to decide when information already in his or her possession should be made available to a party which is the subject of the investigation.

2.8.4 The Commissioner has stated that, if a party subject to investigation by an FOI body has a right to be fully informed at all times of the state of knowledge of the investigating authority, then it would appear to be inevitable that this would impair the investigation of offences. (See e.g. 98086).

Investigation of Offences and Timing

2.8.5 As stated above, the timing or stage of the investigation of an offence is a relevant consideration. The Commissioner has expressed the view that, where an investigation is still ongoing, a prosecution has not commenced and there is a strong possibility that a criminal prosecution will result, the arguments in favour of release of relevant records are weak and remain weak until such time as the investigation has been completed and a prosecution has been concluded or a decision has been taken not to institute a prosecution.

2.8.6 The Commissioner has also indicated that, in cases where the prosecution has taken place or there is not going to be a prosecution, the bias moves in favour of

release of the record; in such cases there is far less likelihood of prejudice or impairment to the investigation or prosecution. (Case 98086)

A Single Offence

2.8.7 While section 32(1)(a)(i) refers to offences and offenders (i.e. in the plural), the Commissioner has accepted that the section applies even if access could reasonably be expected to prejudice or impair the investigation of only one particular offence. (Case 98086)

Investigations and Prosecutions

2.8.8 The Commissioner takes the view that it is reasonable to say that, if the investigation of an offence can be expected to be prejudiced or impaired, then any subsequent prosecution can be expected to be similarly affected. However, once a prosecution has actually commenced, different issues may arise. (Case 98086)

Effectiveness of systems

2.8.9 Case 98190 the Commissioner considered the effectiveness of systems employed for the purposes of the detection and prevention of offences. The records included a file title concerning the location of an individual who was involved in the exchange of information on criminal activity. The FOI body argued that the release of the title could highlight the presence of the individual and as a result his/her safety could be put at risk. The Commissioner found that the release of the information could attract attention to the presence of the individual and that this could reasonably be expected to result in the effectiveness of the systems employed for the detection and prevention of criminal offences being impaired.

Sub-Paragraph (ii)

2.9.1 Section 32(1)(a)(ii) is relevant where access to the record could reasonably be expected to prejudice or impair :

- the enforcement of, compliance with or administration of any law,

2.9.2 Please refer to Section 2.1 – 2.7 of this Guidance Note above before considering this part of the Guidance Note on section 32(1)(a)(ii).

Any Law

2.9.3 Public bodies, by their nature, are engaged in the performance of statutory functions and, frequently, are engaged in the administration of a range of laws. In many cases, the FOI body itself or another body will also be engaged in the enforcement of, or ensuring the compliance with, a range of laws.

2.9.4 In Case 000528 the Commissioner found that the reference to the administration of **any** law clearly indicates that, in order for it to apply, a law must be at issue. The FOI body should indicate the relevant law concerned

Example: In Case 000528 the Commissioner found that where an FOI body seeks to rely on this provision, it should be in a position to identify the particular law(s) concerned. While the FOI body had, in that case, referred to the civil law of the State, the Commissioner found that the civil law comprises a whole body of law, including law relating to disputes between individuals. The FOI body had also referred to the disposal of legal actions in accordance with civil law. However, the Commissioner found that this does not concern any particular law within the meaning of section 32(1)(a)(ii)*.

Sub-Paragraph (iii)

2.9.1 Section 32(1)(a)(iii) is relevant where access to the record could reasonably be expected to prejudice or impair :

- lawful methods, systems, plans or procedures for ensuring the safety of the public and the safety or security of persons and property

2.9.2 NOTE: Please refer to Section 2.1 – 2.7 of this Guidance Note before considering this part of the Guidance Note on section 32(1)(a)(iii).

Methods, Systems, Plans or Procedures

2.9.4 This provision is not directly concerned with the safety or security of persons and property. Rather, it is concerned with the protection of lawful methods, systems, plans or procedures for ensuring the safety of the public or the safety or security of persons and property. Where, for example, a system operates to ensure safety and that *system* could reasonably be expected to be prejudiced or impaired, then this exemption may be relevant.

Names of Officials

2.9.5 In a number of cases the Commissioner, whilst expressing no opinion on its appropriateness or efficiency, has accepted that the Department of Justice & Equality operates a policy of not disclosing the names of officials working in certain Divisions in view of the sensitivity of the work generally carried out by those Divisions and that the purpose of such a policy is to ensure the safety and security of its officials. He has found that the disclosure of the identities of the officials named could reasonably be expected to prejudice or impair that policy or system and that section 32(1)(a)(iii) applies to the names concerned. (See, for example, Cases 060092; 080263).

2.9.6 However in Case 080263, while the Commissioner found that section 32(1)(a)(iii)* applied to the names/signatures/ initials of officials, he found that the Department had not justified its refusal of details in records comprising a fax number in Garda Headquarters.

Sub-Paragraph (iv)

2.10.1 Section 32(1)(a)(iv) is relevant where access to the record could reasonably be expected to prejudice or impair -

- the fairness of:
 - criminal proceedings in a court or
 - civil proceedings in a court or other tribunal

NOTE: Please refer to Section 2.1 – 2.7 of the Guidance Note above before considering this part of the Guidance Note on section 32(1)(a)(iv).

Proceedings

2.10.2 The FOI body should identify the proceedings at issue and the relevant court or tribunal concerned.

Example: In Case 060023, in so far as the FOI body had relied on section 32(1)(a)(iv)*, the Commissioner said that she would expect it to be able to refer to proceedings that were either underway or that might reasonably be contemplated.

2.10.3 The fact that proceedings are not actually in being does not necessarily mean that the exemption does not apply; if there is a real likelihood, as opposed to a remote possibility, of such proceedings coming into being, this may be sufficient.

Example # 1: In Case 99017 the Commissioner found that the fact that at the time of his decision there were no proceedings in train before the Circuit Court was not fatal to the Revenue Commissioner's case. He found that such proceedings were not just a remote possibility but a real likelihood in the event that the Appeal Commissioners upheld the opinions of the Revenue. He found that the level of likelihood of the coming into existence of such proceedings was sufficient for section 32(1)(a)(iv)* to apply.

Example # 2: However, in Case 100192, while the case file indicated that appeal proceedings were initiated following a decision to refuse the applicant's firearms dealership application, the Commissioner found that it had not been shown by the FOI body that the proceedings remained ongoing. He said that, in any event, the FOI body had not identified any harm to the fairness of such proceedings that could arise from the release of the relevant record, nor had it shown that its expectation of any harm arising from the release of the record was reasonable.

2.10.4 The fact that proceedings may be pending does not, of itself, mean that release of records could reasonably be expected to prejudice the fairness of those proceedings.

Court or Tribunal

2.10.5 While the question of what constitutes a court may generally be relatively straightforward, the question may arise as to what constitutes a 'tribunal'. The Commissioner has accepted that the Appeal Commissioners in Revenue cases are a tribunal for the purposes of this provision. (See 99017)

Reciprocity

2.10.6 The fact that release of the records by the FOI body may provide the applicant with information in a situation where there is not a corresponding requirement on the applicant to provide the FOI body with similar information, does not necessarily, or *of itself*, prejudice or impair the fairness of the proceedings. The lack of reciprocity alone does not mean that the fairness of the proceedings will be prejudiced or impaired.

Example: In Case 98102 the Commissioner found that the making available of evidence in advance by the Revenue Commissioners did not, in principle, prejudice or impair the fairness of appeal hearing proceedings. The Revenue Commissioners had argued that release of records relating to a case which was pending before the Circuit Court on appeal at the time of the Commissioner's decision, in the absence of a similar requirement in relation to the applicants, would be manifestly unfair. However, the Commissioner noted that a feature of trials in certain criminal courts is the serving of the Book of Evidence in which the prosecution discloses the evidence which it will be presenting during the course of a trial and that this manifestly does not affect the fairness of such a trial.

Fairness

2.10.7 The principal purpose of section 32(1)(a)(iv) is to prevent the disclosure of information which could result in unfairness in the conduct of proceedings. As stated above, the fact that proceedings may be pending does not, of itself, mean that release of records could reasonably be expected to prejudice the fairness of those proceedings. Also, the making available by an FOI body of evidence in advance of a hearing does not, in principle, prejudice or impair the fairness of the hearing. In Case 99108 the Commissioner said that the mere fact that disclosure of certain information might weaken the prosecution or strengthen the defence was irrelevant as such disclosure would not, of itself, damage the fairness of the proceedings.

2.10.8 The FOI body should show how or why release of the withheld information at the time of the Commissioner's review could reasonably be expected to harm the fairness of the proceedings. The FOI body should consider the specific aspects of the record which are of concern.

Example: In Case 020481 the Commissioner found that section 32* could not be applied to particular records simply as a result of their falling within a particular class of records. He accepted that there are many instances where the release of information could prejudice or impair the fairness of such proceedings; for example, if the disclosure of information were to result in prejudicial pre-trial publicity, the manufacture or destruction of evidence, interference with potential witnesses, etc. However, having examined the records at issue, the Commissioner found that it was not clear how the disclosure of the records could possibly give rise to the fairness of the court proceedings being prejudiced or impaired.

2.10.9 The Commissioner has drawn a distinction between records which are in the nature of a submission which has been prepared with a view to being seen by other parties and records which relate to the preparation by the FOI body for its conduct of a

case or its legal strategy. He has accepted, as a general point, that the release of material relating to the proposed conduct of a case is likely to prejudice the fairness of future proceedings.

Example: In Case 99017 the Commissioner found that certain records were not the equivalent of legal submissions which are exchanged between parties to court proceedings and are drafted with a view to being served on the other side and submitted to the court - these are carefully drafted and puts the drafting party's "best foot forward". The Commissioner found that access was being sought to material which was drafted in the belief that it would never be disclosed to any outside party and that it could provide fodder for the devising of tactical advantages. Based on the lack of reciprocity, the potential for making a possible detrimental inroad into the Revenue's ability to prepare confidentially for the conduct of proceedings in the case and on his rejection of the argument (also made in the case) that access to the records was actually required in order to comply with the audi alteram partem rule, he found that it could reasonably be expected that release could prejudice or impair the fairness of any proceedings before the Circuit Court.

2.10.10 As was indicated in Case 020481 above, the Commissioner has also accepted as a general principle that where release of records could result in prejudicial pre-trial publicity, the manufacture or destruction of evidence or interference with potential witnesses this could prejudice or impair the fairness of proceedings.

2..10.11 The particular facts and circumstances of each case are relevant.

Example # 1: In Case 98102 the Commissioner stated that the imposition of a requirement on the Revenue Commissioner to disclose its proposed conduct of a case in advance without a corresponding requirement in the case of the appellant would, in many cases, impair the fairness of the proceedings. However, while he accepted this as a general proposition, he found that the Appeal Commissioners hearing in the case was over and that it was fair to assume that some of the material contained in the disputed records was revealed to the requesters at that hearing. Revenue had not explained what specific aspects of the records were of significance or how they would reveal anything to the requesters which they did not already know from the appeal hearing or from the other records.

Example # 2: In Case 110238 the Commissioner formed the view that certain records would inform the basis of the Revenue Commissioner's defence in an appeal of its decision. He found that release of those details at that stage would disclose aspects of the case that the Revenue might wish to put before the Appeal Commissioners. He found that, if the records were released, the applicant would become privy to sensitive details additional to, and significantly in advance of, what he would otherwise receive in the course of the hearing before the Appeal Commissioners. He also found that release of the records would seem to remove any discretion the Revenue would otherwise have had in selecting those details that it wished to put forward as the best possible defence.

Discovery

2.10.12 The fact that it may be open to the applicant to seek the records pursuant to discovery does not mean that s/he may not seek access to the records under FOI. It is important to note, however, that if an order for discovery has been made in relation to the records, section 31(1)(b) (contempt of court) may be relevant – see separate Guidance Note on section 31.

2.10.13 In Case 020179 the Commissioner did not accept that obtaining documents in advance of an order for discovery could affect the fairness of the proceedings in that case. She said that she was aware of no restrictions on the use of the FOI Act as a means of obtaining documents held by a FOI body which might otherwise be available through the process of discovery. She noted the following comments of O’Neill J in the High Court in the case *E.H. v The Information Commissioner* [2001] 2 IR 463 at page 486 –

“I think it will undoubtedly be the case that as the public grow accustomed to the opportunities of disclosure contained in the Act, as time goes by and where litigation may be contemplated or indeed where it has even occurred they may opt to seek disclosure of documents via the Act rather than via the traditional method of discovery”.

Settlements

2.10.14 While the release of records may have implications for the reaching of a settlement of proceedings, this would be a separate matter to the issue of the fairness of the proceedings.

In Case 020179 (referred to above) the Commissioner accepted that it was possible that release of records might make it more difficult but not impossible, for the Department of Arts, Sport and Tourism to effect a settlement. She did not accept that this would prejudice or impair the fairness of civil/criminal proceedings in a court. Judicial review proceedings had been taken against the State and the Department and the Department had argued that release of records would undermine its position and adversely affect its ability to reach a settlement as the applicant might be in a position to put additional pressure on the State by using the records to generate adverse publicity, etc.

Overlap with other Provisions of the FOI Act

2.10.15 As stated above, it is possible that, in certain circumstances, there may be a degree of overlap between section 32 and other sections of the FOI Act. In the context of 32(1)(a)(iv), it should be noted in particular that there may be a degree of overlap with section 31(1)(b), which relates to contempt of court.

2.10.16 Contempt of court will arise if there is a breach of the *sub judice* rule. It may also be a relevant consideration in certain circumstances where an order for discovery has been made. See separate Guidance Note on Section 31 of the FOI Act.

Sub-Paragraph (v)

2.11.1 Section 32(1)(a)(v) is relevant where access to the record could reasonably be expected to prejudice or impair:

- the security of a penal institution,

NOTE: Please refer to Section 2.1 – 2.7 of the Guidance Note above before considering this part of the Guidance Note on section 32(1)(a)(iv).

2.11.2 This provision, by its nature, is only likely to apply in limited circumstances, i.e. circumstances relating to the security of a penal institution.

A Penal Institution

2.11.3 Section 32(4) defines “penal institution” as -

- (a) a place to which the Prisons Acts 1826 to 2007 apply;
- (b) a military prison or detention barrack within the meaning, in each case, of the Defence Act 1954;
- (c) Saint Patrick’s Institution.

2.11.4 The fact that records may relate to a prison does not mean that the records are automatically exempt. The Commissioner has made it clear that this is not a class based exemption. The onus still rests with the FOI body to show how the harm envisaged by the provision could reasonably be expected to occur.

Example: In Case 060233 the Commissioner made it clear that section 32(1)(a)(v)* was not a form of class based exemption whereby, regardless of the content, a record is exempt from disclosure if it contains any information about a prison. The records held by a Council related to the replacement of an existing prison with a new prison on a greenfield site. The Commissioner stated that she would have expected some form of analysis of how specific items of information could, if disclosed, have the type of negative consequence that the exemption in question is intended to prevent.

2.11.5 A number of decisions by the Commissioner have concerned records which included Prisoner Profile forms (Cases 060350, 060375 and 070064). The information in these forms is personal information about the applicant’s particular profile as a prisoner. The decisions clearly indicate the need to show that the requirements of the exemption are met on the basis of the *actual* records in each case, rather than arguing for a class-based exemption in respect of these forms.

Example: In Case 060350, while the Commissioner acknowledged that it might not always be the case with such forms, he found that there was little information of a security nature that the applicant would not have been aware of on the particular records in the case before him.

Sub-Paragraphs (vi),(vii), (viii) and (ix)

2.12.1 Section 32(1)(a)(vi), (vii), (viii) and (ix) are relevant where access to the record could reasonably be expected to prejudice or impair -

- the security of a children detention school within the meaning of section 3 of the Children Act 2001 (sub paragraph (vi));
- the security of a remand centre designated under section 88 of the Children Act 2001 (sub paragraph (vii));
- the security of the Central Mental Hospital (sub paragraph (viii)); and
- the security of a building or other structure or a vehicle, ship, boat or aircraft (sub paragraph (ix)).

NOTE: Please refer to Section 2.1 – 2.7 of the Guidance Note above regarding the general issues which arise in the application or interpretation of section 32(1)(a).

2.12.2 These provisions, by their nature, are only likely to apply in limited circumstances. They relate to the security of a children detention school, a remand centre under the Children Act, the Central Mental Hospital or of a building (or other structure) or of a vehicle, ship, boat or aircraft.

Sub-Paragraph (x)

2.13.1 Section 32(1)(a)(x) is relevant where access to the record could reasonably be expected to prejudice or impair:

- the security of any system of communications, whether internal or external, of the Garda Síochána, the Defence Forces, the Revenue Commissioners or a penal institution,

NOTE: Please refer to Section 2.1 – 2.7 of the Guidance Note above before considering this part of the Guidance Note.

System of Communications

2.13.2 The FOI body should identify the system of communications concerned.

Examples of a record that might fall within this exemption include a record that gives technical details of the location and/or type of equipment used by the Garda Síochána for their electronic communications or one that gives details of codes or waveband frequencies used in the transmission of communications (see Case 99329).

2.13.3 In considering the application of this exemption, a distinction may be drawn between an administrative practice and a system of communication as envisaged by the Act. A mere administrative practice may not be considered to be a system of communication.

Example: In Case 99329 the Commissioner found that what was being disclosed represented an administrative practice rather than a system of communication as envisaged by the Act. The Department of Justice, Equality and Law Reform had argued that disclosing Garda reports would reveal the method by which reports are communicated within the Garda Síochána and between the Garda Síochána and the Department. The Commissioner found that all that was being disclosed was the fact that reports are passed between different levels within the Garda Síochána and between the Garda Síochána and the Department. He found that this represented an administrative practice and that administrative practices of this nature are common in many public bodies and would be generally known to members of the public.

Security

2.13.5 It is also important to note that it is the security of the system of communication which this exemption seeks to protect. The harm envisaged must be to the security of that system.

Example: In Case 99329 the Garda Síochána suggested that the release of internal Garda reports on foot of FOI requests to the Department of Justice, Equality and Law Reform could have a detrimental effect on the manner in which such communications were carried out. However, the Commissioner did not accept that any such detrimental effect represented prejudice to or impairment of the 'security' of the system.

3.0 Section 32(1)(b) – Endanger Life or Safety

What the Act states:

32. (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) endanger the life or safety of any person,

3.1.1 This exemption is not commonly used. The Commissioner takes the view that this is an exemption which should not be applied without careful consideration having been given as to whether the expectation set out in the subsection is a reasonable one in all the circumstances. He considers the exemption is such that it should only be invoked in circumstances of the most serious nature.

3.1.2 An assessment of the expected consequences of releasing particular records in terms of endangering life or safety is required. It is not necessary, or indeed possible, to establish that such physical harm **will** occur, but the FOI body should show that there is reasonable expectation of this.

Example # 1: In Case 110200 the Commissioner found that in order for the exemption to be upheld, it should be possible to clearly link the expectation of serious harm arising to the content and context of the records. The HSE had argued that this exemption applied to information in Garda reports and to records where information provided by the Gardaí was restated or reported. However, the Commissioner did not find that the evidence available to him provided a sufficient basis for the application of the exemption.

Example # 2: In Case 090066 the records included comments made on the applicant's examination papers by identifiable members of staff of a College. The College sought to apply section 32(1)(b)* on the basis of the applicant's alleged involvement in a number of serious incidents in the College. It also said that, since the review process had begun, further incidents had occurred. These points were put to the applicant by the Commissioner's investigator, but he did not respond. The Commissioner found, from the submissions made, that the applicant's behaviour was not confined to verbal or email communication and that individuals felt under threat of violence. She made no judgement on the reasons for the applicant's behaviour or on his state of mind at the time; however, she was satisfied that there was evidence of behaviour about which the College was extremely concerned. She accepted that the College had legitimate concerns about the release of those parts of the records which, by reason of their identification of staff and their assessment of some of the applicant's examinations, were linked to the danger apprehended.

4.0 Section 32(1)(c) – Facilitate the Commission of an Offence

What the Act states:

32. (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) facilitate the commission of an offence.

4.1.1 If an FOI body is relying on this exemption it should

- show how the release of the record could make the commission of an offence easier
- consider the reasonableness of that occurring.

4.1.2 It should also indicate the nature of the relevant offence(s) concerned. It should show the link between the particular record at issue and how its release could make the commission of the offence(s) easier.

Facilitate

4.2.1 The Commissioner has considered this provision and the meaning of "facilitate", noting that the Oxford English Dictionary states that the word "facilitate" means "to make easier" or "to render easier". He has found that the question is not whether such an offence will occur, but whether release of the information could make it easier to commit an offence. (Case 98190)

Example # 1: In Case 98190 the Commissioner found that release of the names of certain companies could, in the circumstances of the case, reasonably be expected to make it easier for the commission of an offence and that section 32(1)(c)* applied. The records included the names of transport companies employed by the Department of Foreign Affairs for use by their own and visiting officials. The Department argued that officials involved in Northern Ireland had been the subject of threats. The Commissioner found that, given the uncertainty surrounding Northern Ireland affairs, there was no guarantee that at some point in the future the safety of the Department's officials and other officials involved in Northern Ireland affairs would not come under threat.

Example # 2: In Case 080288 the Commissioner found that section 32(1)(c)* applied. The record(s) at issue were described as being in the nature of a directory giving the precise locations and antennae height of the majority of the broadband transmission sites in the country, including the exempted structures on property in private ownership. The Commissioner found that release would be the equivalent of publishing this detailed and comprehensive source of information about the telecommunications infrastructure of the country for all the world to see. She found that the more information that potential criminals have about an intended target, the

better they can plan for and execute the intended criminal enterprise, whether it is the mere theft and vandalism of a particular transmission site or whether it is launching a coordinated attack on a number of sites in a given area in order to reduce or weaken coverage and thus facilitate a larger criminal operation such as a bank robbery.

Reasonable Expectation

4.3.1 Having considered how release of the record(s) could make the commission of the offence(s) easier, it is important also to consider the reasonableness of that occurring.

Example: In Case 010459 the Commissioner was not satisfied that there could be a reasonable expectation that the release of the information would facilitate the commission of an offence. The records at issue contained details of certain properties that were owned, used, rented or utilised by a Council's Homeless Unit. The Council relied on section 32(1)(c)* in relation to the withheld information. It argued that it had a responsibility to the residents of emergency accommodation and it would be a grave neglect of that responsibility to place residents in a position where they would have to pass a demonstration against them to gain access to and from their accommodation. However, the Commissioner found that even if the release of the information could reasonably be expected to lead to protests, people generally have the right of assembly. She found that she had no reason to assume that those protests might be anything other than peaceful and within the law and that one must assume that An Garda Síochána would take requisite action to prevent the "commission of an offence".

Release to the World at Large

4.4.1 When considering the application of this exemption, it is important to bear in mind that release of record(s) under FOI is regarded as release to the world at large. It is not a matter of forming the view that the applicant/ requester would be engaged in the commission of the offence.

Example: In Case 000093 the Commissioner, in making his findings, stated that he was not suggesting that the requester would be a party to particular attacks or would condone them. The information withheld comprised the names and addresses of fur farms in Ireland. The Commissioner noted that there were people who object strenuously to the existence of fur farms and that some of these people had, in the past, attacked farms in the UK, causing material losses. He accepted that the public availability of the names and addresses of Irish fur farms could reasonably be expected to result in similar activities. He was satisfied that making such information available under the FOI Act would facilitate (in the sense of make easier) the commission of offences in the form of attacks on these farms.

5.0 Section 32(2) - Neither Confirm nor Deny

What the Act states:

32 (2) Where an FOI request relates to a record to which *subsection (1)* applies, or would, if the record existed, apply, and the head concerned is satisfied that the disclosure of the existence or non-existence of the record would have an effect specified in *paragraph (a), (b) or (c)* of that subsection, he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists.

5.1.1 This is called a 'neither confirm nor deny' provision. It provides for the refusal of a request for access to a record and for the refusal to disclose whether or not such a record exists, provided the requirements of the subsection are met.

5.1.2 It is relevant where, in the opinion of the FOI body, disclosing whether or not the record sought exists or does not exist would cause the harm or outcome envisaged in paragraphs (a), (b) or (c) of subsection (1).

5.1.3 It is appropriate to rely on this provision where it is the disclosure of the existence or non-existence of the record – as opposed to disclosure of the contents of the record – that would have that effect.

See separate Guidance Note on 'neither confirm nor deny' provisions.

6.0 Section 32(3) Public Interest

What the Act states:

32 (3) Subsection (1) does not apply to a record—

(a) if it—

(i) discloses that an investigation for the purpose of the enforcement of any law, or anything done in the course of such an investigation or for the purposes of the prevention or detection of offences or the apprehension or prosecution of offenders, is not authorised by law or contravenes any law,

or

(ii) contains information concerning—

(I) the performance of the functions of an FOI body whose functions include functions relating to the enforcement of law or the ensuring of the safety of the public (including the effectiveness and efficiency of such performance), or

(II) the merits or otherwise or the success or otherwise of any programme, scheme or policy of an FOI body for preventing, detecting or investigating contraventions of the law or the effectiveness or efficiency of the implementation of any such programme, scheme or policy by an FOI body,

and

(b) in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request concerned.

6.1.1 If a record falls to be refused under section 32(1), the FOI body must still consider the public interest test under section 32(3).

6.1.2 The public interest test is dealt with in a separate Guidance Note. However, the public interest test provided for in section 32(3) differs from the public interest balancing test which exists in other exemptions.

Limited Test

6.2.1 The public interest test in section 32 is limited to certain specified circumstances specified in paragraph (a)(i) or (a)(ii). If any of those circumstances exist and the FOI body considers that the public interest would, on balance, be better served by granting the request, then the exemption at section 32(1) does not apply.

Thus, section 32(1) does not apply where:

- the record discloses that certain specified investigations or anything done in the course of such an investigation or for the purposes of the prevention or detection of offences or the apprehension or prosecution of offenders is not authorised by law or contravenes any law, or
- the record contains information concerning the performance of the functions of an FOI body whose functions include functions relating to the enforcement of law

or the ensuring of the safety of the public (including the effectiveness and efficiency of such performance), or

- the record contains information concerning the merits or otherwise or the success or otherwise of any programme, scheme or policy of an FOI body for preventing, detecting or investigating contraventions of the law or the effectiveness or efficiency of the implementation of any such programme, scheme or policy by an FOI body,

and

where the public interest would, on balance, be better served by granting than by refusing to grant the request concerned.