

Office of the Information Commissioner

Guidance Note

Freedom of Information Act
2014 – Section 35: Information
Obtained in Confidence

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Introduction

The Information Commissioner has prepared this Guidance Note in relation to section 35 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 35 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 35: Information Obtained in Confidence - Overview

1.1.1 This Note explains the Commissioner's approach to the application of section 35 of the FOI Act. Section 35 protects certain records containing information obtained in confidence.

1.1.2 Section 35 is a mandatory exemption.

Third Parties

1.2.1 Section 35 is one of three sections of the FOI Act which relate to third parties, either by relating to information given to an FOI body by the third party or to information which relates to the third party. Depending on the circumstances, it may be necessary for the FOI body to consult the third party concerned. The consultation procedure for the FOI body is provided for in section 38 of the Act. The section 38 procedure is dealt with in a separate Guidance Note.

Section 35(1)

1.3.1 Section 35(1) contains two provisions, paragraph (a) and paragraph (b). These are separate provisions – Fennelly J drew special attention to the fact that they are two distinct provisions in the Supreme Court decision in the case of *The Governors and Guardians of the Hospital for the Relief of Poor Lying-In Women v The Information Commissioner* [2011] IESC 26; [2013] 1 I.R. 1; [2012] 1 I.L.R.M. 301 (referred to further below as “the *Rotunda* case”).

Section 35(1)(a)

1.4.1 Section 35(1)(a) provides a mandatory exemption for certain records containing information given to an FOI body in confidence. A number of conditions must be met in order for the exemption to apply.

1.4.2 Section 35(1)(a) does not apply where the public interest would, on balance, be better served by granting than by refusing to grant the FOI request (see section 35(3)).

Section 35(1)(b)

1.5.1 Section 35(1)(b) provides a mandatory exemption for records where disclosure of the information would constitute a breach of a duty of confidence.

1.5.2 The public interest test provided for at section 35(3) does not arise in relation to a case where section 35(1)(b) has been found to apply. However, certain public interest considerations may be relevant to the issue of whether section 35(1)(b) applies.

Records Prepared by an FOI body (Section 35(2))

1.6.1 Section 35(1) does not generally apply where a record is prepared by a member of staff of an FOI body or a service provider, unless disclosure would constitute a breach of a duty of confidence which is owed to a person other than an FOI body, a member of staff of an FOI body or service provider.

1.6.2 As section 35(1) does not apply where the records fall within the terms of section 35(2), the application of section 35(2) to the facts of the case should be

considered at the outset. McMahon J adopted this approach in the case of *The Health Service Executive v The Information Commissioner* [2009] 1 I.R. 700.

Neither Confirm nor Deny

1.7.1 Section 35(4) is a 'neither confirm nor deny' provision which applies in certain circumstances in relation to records which are exempt under section 35(1).

1.7.2 Section 35(4) cannot be relied on, however, where section 35(2) or section 35(3) apply.

Definition of "Record" - Section 35(5)

1.8.1 Section 35(5) states that, subject to section 2, "record" in section 35 includes information conveyed in confidence in person, by telephone, electronically or in writing (including a written note taken of a phone message by a person authorised to receive such message).

Section 35 and the Particular Records

1.9.1 The Commissioner's decision with regard to the application of section 35 is made on the basis of the facts and circumstances of each individual case and on the basis of the particular records concerned.

FOI History and Warning regarding Commissioner's Decisions

1.10.1 Section 35 is similar to, although not the same as, section 26 of the FOI Act 1997. This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 26 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 26 in those decisions have been replaced by section 35 of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (*).

1.10.2 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. It should be noted, in particular, that the approach of the Commissioner to the application of this provision has changed since the Supreme Court decision in the *Rotunda* case (referred to above). 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).

1.10.3 In light of the change in the Commissioner's approach to this provision, **particular caution** should be taken when consulting or referring to any decision of the Commissioner which was made before the Supreme Court decision of 19 July 2011 in the *Rotunda* case (referred to above).

1.10.4 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 (*).

1.10.5 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.

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

2.0 Section 35(1)(a) – Information Given to an FOI Body in Confidence

What the Act states:

35. (1) Subject to this section, a head shall refuse to grant an FOI request if—

(a) the record concerned contains information given to an FOI body, in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body, or ...

2.1.1 Section 35(1)(a) applies to a record containing information given to an FOI body in confidence. In order for section 35(1)(a) to apply, it is necessary to show the following :

- that the information was given to an FOI body in confidence and,
- that the information was given on the understanding that it would be treated by the FOI body as confidential and,
- that disclosure of the information would be likely to prejudice the giving to the body of further similar information from the same person or other persons and,
- that it is of importance to the body that such further similar information should continue to be given to the body.

2.1.2 All four of these requirements must be satisfied in order for a record to be considered exempt from release under section 35(1)(a) of the Act.

2.1.3 As stated above, section 35(1)(a) is subject to the public interest test at section 35(3). Therefore, where section 35(1)(a) is being relied on for the refusal to grant access to a record, the public interest test provided for in subsection (3) must be considered in relation to the record concerned.

The First Two Requirements

2.2.1 The first two requirements of section 35(1)(a) are that the information in the record must be given to the FOI body in confidence and on the understanding that it would be treated as confidential.

2.2.2 The Commissioner's approach to these first two requirements of section 35(1)(a) is influenced by the decision of the Supreme Court in the *Rotunda* case. The decision of the Supreme Court related in part to section 26(1)(a) of the FOI Act 1997 and supersedes previous decisions of the Commissioner in relation to section 26(1)(a) of the FOI Act 1997 – now section 35(1)(a). For this reason, considerable caution should be exercised in referring to any decision of the Commissioner that relates to section 26(1)(a) the FOI Act 1997, or the FOI Acts 1997 & 2003, which

was made prior to the *Rotunda* decision as such a decision may not reflect the Commissioner's current approach.

2.2.3 It is the circumstances in which the information was imparted and received that is important in determining whether these first two requirements of section 35(1)(a) are met. Macken J in her judgment in the *Rotunda* case stated that what is protected under section 26(1)(a) – now section 35(1)(a) of the 2014 Act - "stems from the circumstances in which the material is given, and not from the nature of the material itself".

2.2.4 Thus, the information itself does not necessarily have to be private, secret or confidential. In the *Rotunda* case, Macken J stated that the exemption - does not impose an obligation that the information in question should have the characteristic of being "confidential information" or "private and secret" or subject to a "duty of confidence" ... or to have any so-called necessary "quality of confidence", as defined, other than as to the circumstances in which it was imparted and received. Macken J stated that it may be that the information given is, in fact, secret, but the section does not require it to be so. Thus, it is the circumstances in which the information was imparted and received which should be considered.

First Requirement – Given in Confidence

2.2.5 In determining whether the information was given or imparted in confidence, a number of factors may be relevant, for example,

- the expectations of the person giving the information to the FOI body;
- any assurances sought regarding the information;
- the purpose for which the information was provided;
- any other action that the person giving the information to the FOI body may have taken with regard to the information e.g. whether s/he has provided copies to other parties and, if so, to whom and on what basis.

Second Requirement – on the Understanding that it would be Treated as Confidential

2.2.6 The information must have been given on the understanding that it would be treated by the FOI body as confidential. The circumstances in which the information was received are relevant in this regard. Factors that may be relevant include:

- any statements or assurances given at the time the information was given;
- the purpose for which the information was sought or provided;
- the practice, procedure or policy of the FOI body with regard to such information generally ;
- any action which the FOI body may be expected to take in relation to the information;
- the nature of the relationship between the provider of the information and the FOI body receiving it.

2.2.7 The understanding of confidentiality may be express or implied. In considering the facts and the circumstances of each case, the Commissioner may consider such matters as relevant documentation and the actions of the parties concerned.

Example # 1: In Case 020021 the Commissioner found that there was no explicit or implicit mutual understanding of confidence as between a former Health Board

and a former employer of the applicant who had provided a reference in relation to the applicant to the Board. The reference concerned was provided in response to an inquiry form sent by the Board to the referee which bore the words "Private and Confidential" at the top of it. It also stated that *"all personnel records, including references, are subject to the terms laid down in the Freedom of Information Act and may be available to the candidate at their request"* and that the referee *"will be contacted prior to disclosure or release"* of such records. The Commissioner found that the words "Private and Confidential" on the inquiry form sent to the referee, taken along with the mention of the FOI Act, indicated merely that the reference would not be disclosed to other job applicants or third parties. She found that, while it did not mean that the reference would definitely be released under the FOI Act, it did mean that the referee was not being given any assurance of confidentiality in so far as disclosure of the reference to the candidate was concerned. The Commissioner also found that, while the inquiry form said that the referee would be contacted prior to disclosure or release of the reference, this meant that the referee would be informed of the proposed release as a matter of courtesy rather than any right of veto over the potential release of the record.

Example # 2: In Case 99329 the Department of Justice, Equality and Law Reform had refused access to two Garda reports. However, the Commissioner found that letters from the Department to the applicant drew heavily from the reports which it had received from the Gardaí and contained many of the reports' details. He found that the reports were not given in confidence and on the understanding that they would remain confidential.

Example # 3: In Case 110044 the Commissioner was not satisfied that a company could have had any expectation, legitimate or otherwise, that it was making submissions in confidence or that they would be treated indefinitely by the Department of Justice and Equality as such. The records comprised two submissions to the Department of Justice and Equality in relation to the regulation of casino style operations. The Commissioner had regard to a number of factors including the lack of any evidence that assurances of confidentiality were sought or given at any point up to the making of the submission. She also did not accept the Company's assertion - some years after the event - that both submissions were "confidential" and made "in private", to be adequate evidence of any mutual understanding of confidentiality, regardless of the Department's supporting comments.

2.2.8 It is useful to bear in mind that, in order for section 35(1)(a) to apply, information must be given to an FOI body.

Example: In Case 99114 the Commissioner found that the sum paid by a local authority on foot of a compulsory purchase order did not consist of "information given to the public body concerned in confidence". He found that it consisted of information which revealed the outcome of a statutory process i.e. the compulsory purchase order. He acknowledged that it was possible that, in the course of a statutory process, information would be given in confidence and that section 35* might apply to such information, however, he did not accept that it was the situation in this case.

2.2.9 A distinction may be drawn between information given or imparted to an FOI body and information which comprises the opinion or observation of the FOI body or its staff. The Commissioner takes the view that in so far as information consists of opinions and observations formed by members of staff of an FOI body, the opinions and observations concerned are not 'imparted' to them by anyone. See further below at paragraph 3.4.11 – 3.4.12.

Third Requirement

2.3.1 In order to show that the third requirement of section 35(1)(a) has been met, it should be shown that disclosure of the information would be likely to prejudice the giving to the FOI body of further similar information from the same person or other persons. It is not necessary that disclosure would definitely prejudice the supply of information; rather what is required is that disclosure would be likely to prejudice the supply of similar information.

Example # 1: In Case 110095 the Commissioner did not accept that this third requirement had been met. The records contained information in an email from the Office of Fair Trading (OFT) in the UK to the Department of Transport requesting information in relation to Ryanair's shareholding in Aer Lingus and the Department's proposed and actual response. The OFT was considering whether a merger situation had been created. The Department argued that release could threaten continued open communication of this nature. However, the Commissioner did not consider it reasonable to suggest that the OFT would not seek the views of the Irish government if it were to carry out similar investigations in the future, nor was it reasonable to suggest that any similar body, in carrying out its statutory investigatory functions, would not seek the views of the Irish Government on a similar matter, given the role of the Government in relation to aviation policy and as a shareholder in Aer Lingus.

Example # 2: In Case 110200 the Commissioner found that it was not reasonable to suggest that the Gardaí would not notify the Health Service Executive of cases of possible child abuse as a consequence of the disclosure of information in records of the communications in that case. While the Commissioner accepted that there were circumstances in which the contents of communications between the Gardaí and the HSE would meet this third test, he stated that section 35(1)(a)* did not necessarily apply to all records which are communications between the Gardaí and the HSE.

Example # 3: In Case 99273 the Commissioner accepted that where confidential material supplied under the Mutual Assistance Agreement between the US and Irish customs authorities and relating to an ongoing investigation is disclosed, this would be likely to prejudice the giving of further similar information to the Revenue Commissioners.

2.3.2 A number of factors may be relevant in determining whether the giving of further similar information is likely to be prejudiced. For example, it may be in the interests of the supplier of the information to continue to give further similar information as they may stand to benefit in some way from providing the information.

Example: In Case 140052 the Commissioner was not satisfied that the third requirement was met. The records sought related to a Pre-Qualification Submission of a company for a tender competition. The Commissioner accepted that the first two requirements of section 35(1)(a)* had been met. However, he noted that the Submission was made for the purpose of establishing the company's suitability for selection and was not a tender. The Submission was successful and, following the tender competition, the company was ultimately awarded the contract. Neither the Council nor the company identified any information that was regarded as commercially or otherwise sensitive. The Commissioner found no basis for concluding that disclosure would be likely to prejudice the giving to the Council of further similar information from the company or other persons in future.

2.3.3 Factors to be considered may include, for example, the nature of the relationship between the provider of the information and the FOI body and the implications of any relevant statutory provision.

Example: In Case 120291 the Commissioner found no basis for concluding that the release of a Garda report would be likely to have any deterrent effect on the supply to the Minister for Justice and Equality or the Department of similar information in the future. The information concerned was contained in a Garda Report which had been provided to the Department of Justice and Equality in relation to certain concerts in the Phoenix Park. Section 41 of the Garda Síochána Act 2005 places a duty on the Garda Commissioner to provide information to the Minister for Justice and Equality and includes a provision giving the Minister the discretion to publish all or part of a report submitted to him or her. The Commissioner found that section 41 reflected the intent of the Oireachtas that Garda reports be given to the Minister as required without assurances of confidentiality attached. The Commissioner also found that it had not been shown that harm to the law enforcement functions of the Gardaí could reasonably be expected to arise from the release of the report.

2.3.4 The Commissioner will also consider the contents of the actual records and the particular circumstances of the case.

Example # 1: In Case 100192 a record contained a narrative account of the applicant's interview with a Garda Superintendent in relation to his application for a firearms dealership and the Superintendent's recommendation. The Commissioner found that the applicant was aware of what took place during his interview. The applicant was also aware that the Gardaí did not recommend his application to become registered as a firearms dealer. For these reasons, the Commissioner did not see how the release of the record could have any deterrent effect on the supply by the Gardaí of relevant information to the Minister for Justice and Equality. He also took the view that it would not serve the interests of local Gardaí to withhold relevant information from the Minister in relation to a firearms dealership application.

Example # 2: In Case 99097 the Commissioner accepted that disclosure of certain records would be likely to prejudice the future supply of further similar information to the Department of Tourism, Sport and Recreation. The records were two letters written to the Minister concerning a report of an inquiry into

matters relating to child sexual abuse in swimming. The Commissioner stated that the letters concerned private or secret matters and the authors had a reasonable expectation of confidential treatment. He noted that the authors gave the information to the Department voluntarily and did not stand to benefit directly in return in any tangible manner. The Commissioner found that, in these circumstances, a person whose reasonable expectation of privacy or confidentiality has been violated is likely to be deterred from making similar submissions in the future and others in her position are also likely to be deterred.

Fourth Requirement

2.4.1 The fourth requirement which must be met in order for a record to be exempt under section 35(1)(a) is that it must be of importance to the FOI body that further similar information should continue to be given to the body.

2.4.2 It may be that disclosure of the information would be likely to prejudice the giving of information to the FOI body in the future. However, the question raised by the fourth requirement is whether it is of importance to the FOI body to continue to receive that information.

Example # 1: In Case 98032 the Commissioner accepted that this requirement had been met with regard to information which related to the identity of informants to the Department of Agriculture & Food. He accepted that the detection of offences was of such importance as to require that, as far as possible, nothing be done to adversely affect the capacity of the Department to investigate offences. He accepted that it was of importance to the Department to continue to receive information about alleged offences. He also accepted that it was usually easier to determine the quality and accuracy of the information if the source is known. He accepted that it was of importance to the Department that informants continue to identify themselves or at least give such details about themselves as might assist the Department in assessing the quality of the information supplied.

Example # 2: However, in Case 120023 the Commissioner was not satisfied that this fourth requirement had been met. The record included an email, which had been sent to the FOI body by a third party after the third party had concluded an independent investigation relating to the applicant and was sent at a time when he was no longer a service provider to the FOI body. The Commissioner accepted that, on occasions, it may be of importance to a body to continue to receive certain information from third parties, e.g. a body may seek clarification on a particular issue that only the third party can provide. The FOI body had argued that service providers might be reluctant to undertake roles with it in the future if they felt that communications would fall to be released. However, it appeared to accept that it was not necessary for it to continue to receive information such as that contained in the withheld record. The Commissioner was of the view that the FOI body had not explained why it considered that service providers would be reluctant to carry out a service for it in accordance with an agreed contract for service which would set out the rights and obligations, including those in relation to the provision to the body of all necessary information.

2.4.3 Having regard to the fourth requirement of section 35(1)(a), the Commissioner takes the view that the purpose of section 35(1)(a) is to protect the flow of

information which relates to the exercise by the body of its statutory powers and functions. The nature of the information and its relevance to the exercise of the FOI body's powers or the performance of FOI body's functions are matters for consideration.

Example: In Case 000041 three letters were submitted to the Department of Enterprise, Trade and Employment for consideration in deciding whether to issue a work permit. In light of the criteria for deciding work permit applications, the Commissioner could not see how some of the information which had been provided was relevant to the processing of the work permit application or could have been legitimately considered in processing the application. The Commissioner accepted that the release of what he described as extraneous information would be likely to prejudice the giving of such extraneous information in the future, but he was not satisfied that it was of importance to the Department to continue to receive such information. On the other hand, he was satisfied that it was of importance to the Department to continue to receive information which was relevant to the processing of work permit applications, but he was not satisfied that release of the records at issue would be likely to prejudice the giving of such information in the future.

Allegations, Informants and Section 35(1)(a)

2.5.1 FOI bodies occasionally receive information which consists of allegations or complaints against individuals or businesses which may be described as 'informant-type' information. The information will frequently relate to some function of the FOI body concerned, for example an enforcement function.

2.5.2 Section 42(m) provides that the FOI Act does not apply to records relating to information whose disclosure could reasonably be expected to reveal or lead to the revelation of the identity of a person who has provided information in confidence in relation to the enforcement or administration of the law. While section 42(m) may be relevant to records containing such information, section 35 may also be relevant.

2.5.3 In the context of section 35, the Commissioner has drawn a distinction between information relating to the identity of the informant and information consisting of the actual contents of the allegation. For the purpose of applying section 35(1)(a) he may consider these two matters separately. The Commissioner has in certain cases accepted that information relating to the identity of the informant is exempt under section 35(1)(a), but information relating to the substance of the allegations is not exempt under that provision. The Commissioner's decision depends on the circumstances of each case.

Example # 1: In Case 98032 the Commissioner accepted that records relating to alleged activities of the applicant contained information which was given to the Department of Agriculture and Food in confidence, in the sense that the informant in each case understood that his identity would not be disclosed to the applicant. He found that the Department was entitled to rely on section 35(1)(a)* in order to refuse access to information about the informants. However, he was not satisfied that the content of the allegations was given on the understanding that it would be kept confidential. He found that the informants clearly hoped that the Department

would take action and there was no evidence that any of the informants requested that the existence of the allegations would not be disclosed to the applicant.

Example # 2: However, in Case 98103 the Commissioner accepted that release of any part of the record could identify the informant. He decided that section 35(1)(a)* applied to the whole of the contents of the record in this case. (The allegation was investigated and found to be without substance and, during the investigation, the applicant was informed generally of the allegation.)

2.5.4 While the Commissioner has accepted in certain cases that information relating to the identity of the informant is exempt, each case will be considered on the basis of its own facts and circumstances.

Example : In Case 98092 the Commissioner found that the conditions necessary for section 35(1)(a)* to apply had not been met in relation to the names and addresses of signatories to a letter. The letter objected to grant aid for the fencing of land being paid to the applicant, due to the fact that the area of land being fenced included a right-of-way to a river. The applicant had been granted access to the text of the letter from which one could identify that the objectors were angling clubs. The letter mentioned that the applicant had turned down a request from the clubs to meet him. The Commissioner found that there was nothing to suggest that the information was provided to the Department of Agriculture and Food in confidence or that the names of those supplying the information should be withheld. The Commissioner had regard to the contents of the record and the circumstances in which it was created. The circumstances of the case were that there was a dispute between the applicant and the objectors. The Commissioner found that it was fair to assume that the objectors wrote the letter because they thought that the threat of non-payment of the grant might encourage the applicant to listen to their objections.

3.0 Section 35(1)(b) – Duty of Confidence

What the Act states:

35. (1) Subject to this section, a head shall refuse to grant an FOI request if—

...

(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in column (3) in Part 1 or 2 of Schedule 3 of an enactment specified in that Schedule) or otherwise by law.

3.1.1 A record is exempt under section 35(1)(b) where disclosure of the information would constitute breach of a duty of confidence provided for by agreement, enactment or otherwise by law.

Duty of Confidence Provided for by Agreement

3.2.1 A duty of confidence may be provided for by a provision of an agreement. Some contracts or agreements may include a confidentiality clause.

Example # 1: In Case 130259 the Commissioner found that an agreement included a confidentiality clause. The agreement was reached in settlement of a long-standing dispute between the Medical Defence Union (MDU) and the Department of Health. The Commissioner found that the confidentiality clause applied to the terms of the agreement except insofar as the parties agreed that information could be released in a particular press release of the Department and a certain report and accounts statement of the MDU. He found that the confidentiality clause provided for certain other limited exceptions, but none of the exceptions would allow for the release of the document under the FOI Act.

Example # 2: In Case 090077 the Commissioner found that certain Memorandums of Understanding (MoUs) were agreements encompassed by section 35(1)(b)* MoUs had been signed between Dublin Bus and the Department of Transport, Tourism and Sport stating, under the heading “Confidentiality”, that the information provided was “considered to be commercially sensitive” and that it was “being provided by Bus Átha Cliath on a confidential basis, for the purpose of this Memorandum”. The Commissioner found that it was clear that the Department and Dublin Bus had agreed that the information in the records was given only for a specific, limited, purpose, and not for publication to the world at large.

3.2.2. The Commissioner will consider the arguments and supporting information provided in any review in reaching his decision.

Example: In Case 070304 the third party, Helsinn Birex Pharmaceuticals Ltd argued that a duty of confidence was owed to it by the Irish Medicines Board (IMB) as a matter of contract law as well as equity. It referred to certain EU Rules and to the IMB’s Code of Conduct in its arguments. However, the Commissioner found no evidence to support the third party’s claims that a contractual obligation of confidence existed. Having examined the relevant EU Rules, the

Commissioner found that they actually acknowledged the potential for disclosure of information relating to medicinal products to the general public. She also found that the Code of Conduct referred to the IMB's obligations under the FOI Act. She found that the records (Periodic Safety Update Reports) were not given to the IMB by the third party on a voluntary or contractual basis, but rather as a condition of its marketing authorisations. She did not accept that a duty of confidence was provided for by a provision of an agreement or enactment.

Provided for by Enactment

3.3.1 A duty of confidence may be provided for by a provision in an enactment. The Commissioner considers that, in order for such a duty of confidence to exist, it must have been expressly created by a specific enactment.

Example #1: In Case 090163 the Commissioner found that, as no specific provision imposing a statutory obligation or duty of confidence had been identified by either the third parties or the FOI body, she had no grounds to accept that a duty of confidence arose from provisions of an enactment, in which case section 35(1)(b)* could not apply. She also found that, even if a duty of confidence could be implicitly provided for by provision of an enactment, that enactment would have to set out how such a duty could arise. In the absence of such detail, she found that the duty created would be no more than that created otherwise by law i.e. an equitable duty of confidence.

Example # 2: In Cases 130123 and 130187 the Commissioner accepted that release of records relating to 'taxpaying entities' would breach a duty of confidence to such persons provided for by an enactment. The enactment concerned was the Taxes Consolidation Act 1997 – section 851A.

3.3.2 However, if the provision concerned is specified in Schedule 3 of the FOI Act, then section 35(1)(b) does not apply. Thus, the provisions of statutes specified in Part 1 of Schedule 3 (column (3)) and the provisions of Statutory Instruments specified in Part 2 of Schedule 3 (column (3)) may not be relied on for the purposes of section 35(1)(b).

3.3.3 It should also be noted that section 41 of the Act provides that an FOI request shall be refused if disclosure of the record is prohibited by law of the European Union or any enactment (other than a provision specified in column (3) of Part 1 or 2 of Schedule 3). Section 41 also provides that a request shall be refused if the non-disclosure of the record is authorised by any such enactment in certain circumstances and the case is one in which the FOI body would refuse to disclose the record pursuant to the enactment. Section 41 is dealt with in a separate Guidance Note.

Otherwise by law

3.4.1 A duty of confidence provided for “otherwise by law” is generally accepted to include a duty of confidence arising in equity. The Commissioner accepts that breach of an equitable duty of confidence is comprehended by section 35(1)(b).

3.4.2. In the Supreme Court decision in the case of *Mahon v Post Publications Ltd* [2007] 3 I.R. 338 Fennelly J confirmed that the requirements for a successful action

based on a breach of an equitable duty of confidence, at least in a commercial setting, are found in the judgment of Megarry J in *Coco v. A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, at 47:

"[T]hree elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

Fennelly J summarised or restated the requirements of what he called "the contours" of the equitable doctrine of confidence as follows:

1. the information must in fact be confidential or secret: it must ... "have the necessary quality of confidence about it";
2. it must have been communicated by the possessor of the information in circumstances which impose an obligation of confidence or trust on the person receiving it;
3. it must be wrongfully communicated by the person receiving it or by another person who is aware of the obligation of confidence."

3.4.3 The Commissioner has adopted this approach in considering whether disclosure of information would constitute a breach of an equitable duty of confidence.

Quality of Confidence

3.4.4 In order to establish that an equitable duty of confidence exists, it should be shown that the information has the necessary quality of confidence. Factors relevant for consideration in this regard include, for example, whether the information is confidential or secret or concerns private matters.

Example: In Case 090163 the records related to claims for the Dual Abode Allowance (DAA). The Commissioner accepted that information necessary for the Revenue to determine one's tax liabilities, including the DAA, was of a private, personal nature and that it had the necessary quality of confidence. The Commissioner found that the details would reveal private details relating to the claimants.

3.4.5 While, generally speaking, it may be evident or relatively easy to establish that the information has the quality of confidence, in some cases it may be less straightforward.

Example: In Case 110023 certain alleged business activities of the affected third parties had received extensive publicity. The Commissioner accepted that information which has not been retracted must be regarded as being in the public domain. He noted, however, that not all information in the public domain is necessarily accurate and reliable. The Commissioner drew a distinction between published newspaper accounts based on undisclosed or anonymous sources of information, on the one hand, and primary documentation relating to the matters concerned, on the other. He also found that disclosure of the records would provide details and a new context for certain information which were not otherwise publicly available. He accepted that the information had the necessary quality of confidence about it.

3.4.6 Where records are marked “Confidential” or something similar, this may be a relevant consideration. However, the Commissioner takes the view that such labelling is not sufficient, in the absence of other evidence establishing the necessary quality of confidence, to impose an obligation of confidence with respect to the records concerned.

Communicated in Circumstances which Impose an Obligation of Confidence

3.4.7 The circumstances in which the information is communicated must be such that a duty or obligation of confidence is imposed. Relevant matters for consideration in this regard may include, for example, whether there were any assurances of confidentiality; the expectations of the parties and the reasonableness of any such expectation; the nature of the information; the purpose for which the information was provided; the functions being performed by the FOI body and the relevance of the information to those functions; and the broader context in which the information is provided and may be disclosed.

Example # 1: In Case 110023, while no evidence had been presented that any explicit assurance of confidentiality was given to the third parties who communicated with the Department of Jobs Enterprise and Innovation, the Commissioner found that an obligation of confidence existed. The case involved complex issues of international law particularly in relation to export control arrangements. There were also ongoing investigations by US authorities which were of some relevance. The Commissioner found that the information was inherently sensitive and that it was communicated for a limited or restricted purpose. There had also been direct involvement of a Minister of State in the matter which the Commissioner acknowledged would generally tend to undermine the reasonableness of any expectation of confidentiality insofar as it relates to information about the Minister's involvement. However, the Commissioner accepted that the sensitivities were such that no reasonable person could have failed to understand that confidentiality was expected.

Example # 2: On the other hand, in Case 120314 the Commissioner commented that he did not accept that an indefinite assurance of confidentiality could reasonably be expected by employers in respect of the fact of their participation in the JobBridge scheme or in respect of the details of the internships they sought to fill. While the Department of Social Protection had argued that the identities of employers who are recruiting generally are often kept secret, it did not explain how those employers could, or indeed, do, expect that their identities can be kept confidential indefinitely, much less beyond the point at which the applicant is invited to, or has attended for, interview. The Commissioner noted that interns that are taken on under JobBridge are under no obligation to keep the circumstances of their internship a secret.

3.4.8 The Commissioner has, on occasion, commented on the nature of certain assurances of confidentiality and the implications of certain statements in this regard.

Example # 1: In an early decision (Case 020425), given assurances by the Civil Service & Local Appointments Commissioners, the Commissioner was satisfied that a referee's comments were imparted in circumstances imposing an obligation of confidence on the CS&LAC. However, the Commissioner commented on the appropriateness of the giving of guarantees of confidentiality in light of the general

aim of FOI and noted that the CS&LAC had since revised its wording on employer forms and considered the later wording more appropriate.

Example # 2: In a later case (Case 020021) a reference was provided to a former Health Board by one of the applicant's former employers in response to an inquiry form sent by the Board. While the referee said that she did not consent to the release of the reference and that it would not have been provided if it had not been covered by confidentiality, the Commissioner did not accept that the information was imparted in circumstances imposing an obligation of confidence on the Board. The Commissioner found that the words "Private and Confidential" on the form sent to the referee by the Board, taken along with a mention of the FOI Act, indicated merely that the reference would not be disclosed to other job applicants or third parties, and that the mention of the FOI Act could only be taken as meaning that the reference might well be made available to the "candidate" under the FOI Act. He found that the referee was not being offered, and had no reason to expect, that confidence would apply to the reference insofar as the rights of the candidate were concerned.

3.4.9 In *HSE v Information Commissioner* [2009] 1 I.R. 700 McMahon J found it difficult to see how this second element of the test for breach of an equitable duty of confidence was established in relation to certain social work records of interviews with a number of teachers. He found that there was nothing in the records kept by the social worker suggesting that the teachers insisted or expected confidentiality when interfacing with the social worker and that there was no clear agreement to that effect. McMahon J interpreted an assurance by the social worker that the information would be protected "where at all possible", as indicating that the social worker could not guarantee absolute confidentiality given the provisions of the Freedom of Information Act 1997 and the context in which she worked.

3.4.10 In *HSE v The Information Commissioner*, referred to above, McMahon J also stated that the very nature of the functions being performed by the HSE and the information gathered, must have caused the HSE and both the school and the teachers to realise that the information may eventually have to be disclosed in the best interest, and to satisfy the constitutional rights, of the parent. He found that any expectation of confidentiality entertained by the school "would lack the requirement of mutuality and reasonable foundation on which to base an argument for breach of confidence".

"Communicated"

3.4.11 As stated above, a distinction may be drawn between information given, imparted or communicated to an FOI body and information which comprises the opinion or observation of the FOI body or its staff. The Commissioner takes the view that, where information consists of opinions and observations formed by members of staff of an FOI body, the opinions and observations concerned are not 'imparted' to them by anyone.

Example : In Case 000238 the Commissioner took the view that certain reports were prepared by inspectors who were members of staff of the Department of Education and Science in the course of their performance of their functions. He took the view that they consisted of the authors' own opinions and observations formed during the course of an evaluation process. He found that such matters

could not be the subject of a duty of confidence if for no other reason than the opinions and observations were not imparted to them by anyone. The Supreme Court found that the Commissioner was entitled to make this conclusion - *Sheedy v The Information Commissioner* [2005] IESC 35, [2005] 2 I.R. 272 .

3.4.12 It is important, however, to have regard to the overall circumstances in considering information 'imparted'.

Example : In Case 140057 the Commissioner considered a note of meetings of the Department of Finance with various multinational companies (MNCs). He found that information imparted by individual MNCs, including their identities and those of their representatives, was imparted in circumstances importing an obligation of confidence. In relation to the test which is concerned with "information imparted", the Commissioner found that it was not appropriate to focus on the identities of the companies in isolation. He found that, if he accepted that the details of the meetings were confidential, he should also accept that the MNCs would have expected, and been given, assurances of confidentiality about the fact that they met with the Department in the first place.

Wrongful Communication / Unauthorised Use

3.4.13 Where disclosure of the information would result in an unauthorised use to the detriment of the party who communicated it or where it is wrongfully communicated by the person receiving it or by another person who is aware of the obligation of confidence, the third requirement of establishing breach of an equitable duty of confidence is met.

Example # 1: In Case 090077 the Commissioner stated that he understood that "detriment" could arise simply where the relevant information is disclosed without the consent of the party to whom the information relates. In that case, the Department of Transport, Tourism and Sport and Dublin Bus had signed Memorandums of Understanding which stated that information was being provided by Bus Átha Cliath (Dublin Bus) on a confidential basis. The Commissioner found that, given that Dublin Bus objected to the release of the details at issue, the Department's release thereof under FOI would "wrongfully communicate" the details concerned.

Example # 2: In Case 090163 the Commissioner commented that she could accept that the release of information that claimants under the Dual Abode Allowance scheme might otherwise have expected to remain secret (particularly in the context of the confidentiality of one's tax returns) could be seen by them as detrimental to their interests, and where applicable, those of any spouses with whom they are jointly assessed.

3.4.14 In the High Court decision in the case of *HSE v Information Commissioner*, referred to above, McMahon J found that there was no evidence that disclosure would result in a detriment or prejudice to the third parties (teachers). The teachers had submitted that disclosure might threaten the relationship between the teacher and the parent, a relationship which needs to be based on trust. However, McMahon J found that this was not a threat to the teacher's detriment, but rather a concern for the education of the child. He said that teachers and other professionals are frequently confronted with difficult decisions of this nature as they discharge their

duties in what they hope will be an atmosphere of trust and respect. McMahon J stated -

“Professional life is full of such dilemmas and the law cannot guarantee that difficult decisions will never have to be made by professionals in these situations. It is this responsibility which distinguishes professional people from those who pursue non-professional careers.”

3.4.15 The Commissioner will consider the positions of the relevant parties when considering whether disclosure would be unauthorised or wrongful.

Example: In Case 98169 the records included a response by a teacher sent to her Board of Management in relation to a complaint made against her by the applicant which had been given by the Board to the Department of Education & Science. In considering whether release of the record would be unauthorised and to the detriment of the party communicating it, the Commissioner considered the position of both the Board and the teacher. The Commissioner had found that the report was given to the Board by the teacher in confidence and that the Board could reasonably conclude that the Department would treat it with the same degree of confidence as was expected from the Board. He found that, in the absence of a specific permission from either the Board or the teacher, release of the report would be unauthorised.

3.4.16 The Commissioner may have regard to legislative provisions in considering whether disclosure may be authorised.

Example: In Case 100260 the Commissioner found that disclosure of the records would not be unauthorised. The records consisted of the medical records of the applicant's deceased husband. The Commissioner accepted that the records met the first two tests for establishing an equitable duty of confidence. However, given the express provision in article 4(1)(b)(i) of the FOI Act 1997 (Section 28(6)) Regulations, 2009 (SI No 387 of 2009) for the granting of access to records of a deceased individual to the personal representative of that individual acting in due course of administration, the Commissioner considered it untenable to find that such disclosure would be unauthorised. On the question of detriment to the deceased, while noting that this is not a settled area of law, she was not prepared to accept in the circumstances of the case that an authorised disclosure to a specified individual (the personal representative of the deceased) in accordance with a statutory provision could be to the detriment of the deceased.

Confidential Information Passed to FOI Bodies

3.5.1 Where confidential information passes to an FOI body, disclosure of the information by the FOI body may be a breach of that duty of confidence. For example, where information is passed to an FOI body who is on notice of the confidential character of that information, an equitable duty of confidence may arise.

Example: In Case 130017 the Commissioner found that the Department of Public Expenditure and Reform was bound to observe confidentiality requirements in relation to an interim arbitration award which had been forwarded to it. The applicant argued that the duty of confidence applied only to the parties to the dispute and the arbitrator, not the Department, and also that the disclosure of the award to the Department had resulted in a waiver of confidentiality. The

Commissioner found that the Department was a party on notice of the confidential nature of the arbitration award. He found that the award had the necessary quality of confidence to give rise to a duty of confidence and that it was disclosed by the arbitrator to the Department for the limited or restricted purpose of compliance with the arbitration rules. He found that confidentiality had not been waived.

Duty of Confidence and Public Interest

3.6.1 Section 35(1)(b) is not subject to the general public interest balancing test in section 35(3). However, it is established that the action for breach of confidence is itself subject to a public interest defence and the Commissioner may consider the public interest defence in the context of section 35(1)(b).

3.6.2 The Commissioner has recognised that the parameters of the public interest defence to an action for breach of confidence continue to be in a state of development in various jurisdictions.

3.6.3 The Commissioner has also acknowledged that the public interest grounds which may justify or excuse a breach of a duty of confidence are quite narrow and include, for example, the revelation of wrongdoing or danger to the public. He also noted that, while certain information may be of interest to the public in the sense that it may satisfy public curiosity, this does not necessarily mean that there is a public interest in disclosing the information.

Example # 1: In Case 090163 the Commissioner referred to Court precedent and commented that the Courts have found the public interest grounds on which disclosure may be favoured to be quite narrow (such as exposure or avoidance of wrongdoing and ensuring the maintenance of the principles of justice as per *National Irish Bank v Radio Telefis Eireann* [1998] 2 IR 465 and as per the comments of Hardiman J. in *O'Callaghan v Mahon and Others* [2005] IESC 9). However, in this case she found that the public interest in ensuring the maintenance of the principles of justice was irrelevant and there was no evidence of wrongdoing in respect of the claims the subject of the records at issue (claims under the Dual Abode Allowance). She also noted that the Revenue Commissioners considered that disclosure of information the subject of a duty of confidence may be warranted in cases involving public health or safety, but found this was irrelevant to the case at hand.

Example # 2: In Case 110023 the Commissioner noted that there were on-going investigations by US authorities which were of some relevance in the case. However, he found that this was not to say that any public interest grounds existed which would permit disclosure of the records concerned under FOI, which is regarded as being to the "world at large". He found that, on the contrary, it suggested that justice should be allowed to run its course through the normal law enforcement and judicial channels without the added complications that granting the applicant's FOI request might entail.

4.0 Section 35(2) – Record Prepared by an FOI Body

What the Act states:

35(2) Subsection (1) shall not apply to a record which is prepared by a head or any other person (being a director, or member of the staff of, an FOI body or a service provider) in the course of the performance of his or her functions unless disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law and is owed to a person other than an FOI body or head or a director, or member of the staff of, an FOI body or of such a service provider.

4.1.1 Under section 35(2) the confidentiality exemption at subsection (1) does not apply to a record which was:

1. Prepared by a head, director or staff member of an FOI body or a service provider
2. Prepared in the course of the performance of his or her functions
3. UNLESS disclosure would constitute a breach of a duty of confidence that is owed to a person other than an FOI body etc.

4.1.2 As section 35(1) does not apply where the records fall within the terms of section 35(2), section 35(2) should be considered at the outset. In the case of *The Health Service Executive v The Information Commissioner* [2009] 1 I.R. 700 McMahon J stated that it was logical to consider the provisions of what is now section 35(2) and its application to the facts of the case first as, if this subsection applied, it would be unnecessary to consider the arguments based on what is now section 35(1).

4.1.3 McMahon J further stated that section 26(2) of the FOI Act 1997 (now section 35(2) of the FOI Act 2014) was aimed at limiting the use of the confidentiality exemption when the records are internal records of the public body.

4.1.4 In Case 080232 the Commissioner, in considering section 35(2)*, stated that clearly the section 35(1)* exemption was not intended to protect the interests of a public body or the interests of persons acting as a contractor to a public body.

Prepared by an FOI Body or a Service Provider

“Prepared”

4.2.1 In the case of the *Health Service Executive (HSE) v The Information Commissioner*, referred to above, McMahon J considered the proposition that records were not “prepared” by the staff of the HSE within the meaning of section 35(2)* on the basis that the staff merely “transcribed” statements given by certain teachers. He did not agree with this argument, stating:

“It is clear ... that there is a “record” and that the record was not made or prepared by the teacher. To attempt to construe the word “prepare” as signifying something other than

“compile” or “make” in that context, or to suggest that “prepare” involves some creative or original input by the note taker, is to attempt to impose an artificial meaning on a perfectly clear word in a perfectly clear context.”

Example: In Case 080232 JC Decaux argued that clauses in a contract with Dublin City Council expressly prohibited release of confidential information. The Council said that the contract had been drafted by solicitors on its behalf and that its law agent had made amendments. The Commissioner found that the majority of the records were prepared by or on behalf of the Council and that the decision of the High Court in *The Health Service Executive v The Information Commissioner* (referred to above) rejected an argument that a document reciting information given by a third party cannot be said to have been "prepared" by a public body within the meaning of section 35(2)*.

Prepared by an FOI Body

4.2.2 For section 35(2) to apply the record must be prepared by one of the following in the course of the performance of his/her functions:

- a head, director or member of staff of an FOI body or
- a service provider, i.e. person who, at the time the request was made, was not an FOI body but was providing a service for an FOI body under a contract for services (a contract for services includes an administrative arrangement between an FOI body and another person) (definition of ‘service provider’ in section 2(1) refers).

4.2.3 Where the record was prepared by a person other than those listed above section 35(2) does not apply.

Example: In Case 130017 the Commissioner found that section 35(2)* had no relevance. The record was an interim arbitration award. The Commissioner found that the arbitrator who prepared the interim award was a barrister of independent standing, i.e. she was not acting as a staff member of a public body or a person providing a service for a public body under a contract for services. The Commissioner also found that the parties to the dispute were not public bodies for the purposes of the FOI Act, nor were they persons providing a service for a public body under a contract for services.

Prepared in the Course of the Performance of his/her Functions

4.3.1 In considering whether section 35(2) applies, consideration must be given to whether the record was prepared by a member of staff of an FOI body or a service provider etc. “in the course of the performance of his or her functions”.

Example # 1: In 030830 the Commissioner found that certain records were prepared either by the staff of a Hospital or by its legal team in the course of the performance of their functions. The Hospital had argued that the preparation of submissions to a non statutory Inquiry set up to review post mortem examination policy, practice and procedure was not part of the performance of normal duties of its staff. While the Commissioner accepted that involvement in the Inquiry process would not be part of the routine work of many Hospital staff, she was satisfied that one of the functions of staff, especially senior staff and those providing advice or assistance under a contract for services, was to represent the

Hospital's position when engaging with Government, public bodies, the courts, tribunals, inquiries or other agencies concerned with matters relating to the business of the Hospital. The Commissioner's findings were upheld on appeal - *The National Maternity Hospital v The Information Commissioner* [2007] IECH 113; [2007] 3 I.R. 643.

Example # 2: However, in Case 000528 the Commissioner found that, insofar as a hospital consultant or his legal representatives were involved in the preparation of certain settlement agreements, this was not something done in the course of the performance of the consultant's functions as a member of staff of the North Eastern Health Board. The Board had agreed the settlement with the consultant who had taken legal proceedings against the Board. The settlement agreements were signed by the consultant and on behalf of the Board and were witnessed by the respective solicitors for the two sides.

UNLESS disclosure would constitute a breach of a duty of confidence that is owed to a person other than an FOI body etc.

Breach of a Duty of Confidence

4.4.1 Disclosure of the information concerned must constitute a breach of a duty of confidence. Thus, it must be established that a duty of confidence exists and that disclosure would constitute a breach of that duty.

4.4.2 In *HSE v The Information Commissioner* [2008] IEHC 298; [2009] 1 I.R. 700 McMahon J stated that the purpose of section 26(2) (now section 35(2)) is "to make available to the requestor internal records prepared by staff in public bodies in the course of the performance of their functions." He also stated:

"The subsection, however, goes on to add that such records, although usually subject to disclosure, will not have to be disclosed if "disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law to" a third party. This escape clause does not apply in the present case for although the teachers, etc., may be third parties, there would be no "breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law".

4.4.3 See Section 3 above regarding establishing a duty of confidence and establishing that disclosure would result in a breach of a duty of confidence.

Duty of Confidence Owed to a Person Other than an FOI Body

4.4.4 The duty of confidence must be owed to a person **other** than an FOI body or a member of its staff or a service provider.

Example: In Case 030830 the Commissioner found that in order for section 35(1)* to apply, any duty of confidence which may have been owed by a Hospital in respect of records which it had prepared, must be owed to a person other than an FOI body or a member of its staff or a person providing a service for it under a contract for services. The Hospital had argued that it owed a duty of confidence to its consultants and patients as well as to a non-statutory Inquiry. The Commissioner found that since its consultants were either on the staff of the Hospital or were employed on a contract for services, the duty of confidence, if it existed, could not under section 35(2)* be owed to the consultants.

Case 030830 was appealed to the High Court. The High Court upheld the Commissioner's findings, including that section 26(1)(b) (now section 35(1)(b) of the 2014 Act) was intended to protect the interests of persons to whom a duty of confidence was owed by the Hospital. *The National Maternity Hospital v The Information Commissioner* [2007] IEHC 113; [2007] 3 I.R. 643.

Example # 1: In Case 090191 the Commissioner found that any duty of confidence which might be owed by the Health Service Executive would have been owed to one of its own contractors, a private ambulance service. The record, which was part of a settlement agreement, showed the amount paid to the contractors arising from a High Court case. The contractors argued that the disclosure of the terms of the settlement would be in breach of the confidentiality terms of that settlement. However, the Commissioner was satisfied that section 35(2)* applied in the case and that section 35(1)(b)* could not apply to this record.

Example # 2: In Case 090077 the Commissioner considered the relationship between Dublin Bus and the Department of Transport, Tourism and Sport. The Commissioner noted that the introduction to Memorandums of Understanding (MoUs) signed between Dublin Bus and the Department stated that they were "of no legal effect and [are] not binding" on the parties, who "do not intend any part of [the MoUs] to have any contractual status of any kind." He also had regard to the historic responsibility for the provision of bus services. The Commissioner found that he had no reason to consider Dublin Bus to have been providing or provided a service for an FOI public body under a contract for services. As a result, he considered that it was possible for the Department to owe Dublin Bus a duty of confidence in relation to the details at issue.

5.0 Section 35(3) - Public Interest Test

What the Act states:

35(3) Subject to section 38, subsection (1)(a) 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.

5.1.1 The exemption at section 35(1)(a) does not apply where, on balance, the public interest would be better served by granting the request than by refusing it.

5.1.2 Where an FOI body is relying on section 35(1)(a) for the refusal of a record, it must go on to consider the public interest test under section 35(3).

5.1.3 It is important to note that the public interest test at section 35(3) applies only where a refusal is contemplated pursuant to section 35(1)(a). It does not apply where the decision to refuse is pursuant to section 35(1)(b).

5.1.4 The public interest is dealt with in a separate Guidance Note. However, issues relating to the public interest test which are of particular relevance in the context of section 35 are addressed below.

The Public Interest in the Protection of Confidential Information

5.2.1 Section 35(1)(a) itself reflects the public interest in the proper preservation of confidences.

5.2.2 In the *Rotunda* case (referred to above) Macken J made a number of comments with regard to the public interest test at section 35(3)*. While the comments were, in her words, “wholly obiter”, she made the following comments with regard to the wording of what was then section 26(1)(a) – now section 35(1)(a) – in particular, the reference to disclosure having a likely prejudice on giving to the body further similar information “from the same person or other persons” and the importance which the body attaches to “further similar information continuing to be given to the body”:

“It might, with legitimacy, be considered that these words in the section are intended also to satisfy a public interest in ensuring, in the context of a hospital, and having regard to the critical medical impact of age in the case of women presenting to give birth the protection of such information, and the continued supply of information, as well as patient confidentiality.”

Third Parties and the Public Interest

5.3.1 As stated above, section 35 is one of three exemptions in the FOI Act which relate to third parties. The other exemptions are section 36 (which relates to commercially sensitive information) and section 37 (which relates to personal information about a third party).

5.3.2 Any proposal to grant access, pursuant to section 35(3), to records which would otherwise be exempt is expressed by the Act to be “[s]ubject to section 38”. Section 38 requires the FOI body to notify certain third parties that it is proposed to grant the request in the public interest, that the person may make submissions to the FOI body and that the FOI body will consider any such submissions before deciding whether to grant or refuse the request.

5.3.3 The Commissioner’s approach to the application of section 38 is dealt with in a separate Guidance Note. FOI bodies may wish to have regard to the FOI Central Policy Unit Notice No. 8 “Requests involving third parties - A step by step guide”, which sets out for decision makers the steps involved in processing FOI requests relating to third parties. This is available on the Department of Public Expenditure and Reform, FOI Central Policy Unit, website at foi.gov.ie

5.3.4 In the *Rotunda* case (referred to above) Macken J referred to the consultation procedure set down in what was then section 29 of the FOI Acts 1997 and 2003 – now section 38 – and stated

“This clearly implies that the interests of both the donor and the holder of the information must be considered, even then presumably so as to ensure rights are not infringed, and to provide for possible refusal.”

6.0 Section 35(4) – Neither Confirm nor Deny

What the Act states:

(4) Where—

(a) an FOI request relates to a record to which subsection (1) applies but to which subsection (2) and (3) do not apply or would not, if the record existed, apply, and

(b) in the opinion of the head concerned, the disclosure of the existence or non-existence of the record would have an effect specified in subsection (1),

he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists.

6.1.1 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.

6.1.2 It may be relied on where subsection (1) applies, but not if subsection (2) or (3) applies.

6.1.3 Subsection (4) is relevant where, in the opinion of the FOI body, disclosing whether or not the record(s) sought exist would have an effect specified in subsection (1). It applies 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 the effect specified.

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

7.0 Confidentiality and Tender Documentation

7.1.1 The granting or refusal of a request for access to records containing tender information will generally be considered in the context of section 36 of the FOI Act – Commercially Sensitive Information. However, the issue of confidentiality - section 35 - may also be relevant.

7.1.2 CPU Notice No.5 – FOI and Public Procurement – states that the FOI Act 2014 means that FOI bodies are not in a position to give guarantees of confidentiality.

Tender Process

7.2.1 The Commissioner has accepted that certain elements of tenders submitted to FOI bodies may have the necessary quality of confidence about them at the time the tender is submitted. He has accepted that, at the time the tender is entered, the information has the necessary quality of confidence in the sense that the price is known only to the tenderer(s) and that they disclose their prices to the FOI body on the understanding that it will keep the information confidential - until the conclusion of the tendering process.

Successful Tenderers

7.3.1 The Commissioner has also taken the view that once a contract is awarded, the relationship between the FOI body and the successful tenderer becomes that of vendor/purchaser, in which there is no general expectation that certain elements will be kept secret. For example, he has found that when a contract is awarded, successful tender information loses confidentiality with respect to price and type and quantity of goods supplied.

7.3.2 The Commissioner has also accepted that, generally, other successful tender information which is commercially sensitive (for example, details of the internal organisation of a tenderer's business, analyses of the requirements of the public body, or detailed explanations as to how the tenderer proposed to meet these requirements) may remain confidential.

Example: In Case 98188 the Commissioner noted that information about such matters as a tenderer's pricing strategy has more to do with the company's own business than with the expenditure of public money. He also stated that, while there may be no general expectation that a purchaser will keep secret the price paid for goods or services, a purchaser does not ordinarily have access to the type of detailed information about the vendor's business, or possibly even the goods or services supplied, that may be given to a public body in the course of a tender competition.

Unsuccessful Tenderers

7.4.1 The Commissioner has also found that unsuccessful tender information which is commercially sensitive generally remains confidential after the award of a contract.

Example: In Case 98188 the Commissioner stated that there are two crucial differences between successful and unsuccessful tenderers; the first difference being in relation to their expectations of confidentiality and the second relating to the benefits that are gained from tendering. He found that where an offer has

been rejected, no vendor/purchaser relationship exists, and no public funds are involved. He accepted that there was a mutual understanding of confidence that the FOI body in that case was obliged to observe.

Circumstances of Each Case

7.5.1 It is very important to bear in mind that the Commissioner considers each case on its own merit. The Commissioner's decision in any particular case will depend on the facts and circumstances of that case.

Example: In Case 030182 the Commissioner found that, given the circumstances of the case, successful tender records should be released in full. The records sought were the successful tender submissions relating to the flotation of Telecom Eireann. The Commissioner considered the case distinguishable from other cases concerning tender documentation in light of (1) the age of the tender (at five years old, it was more historic than those previously considered) and (2) the circumstances of the Telecom Eireann flotation, particularly the impact on the public and the fees received by the advisors. She stressed that, while paragraph 5.9 of the *Guidelines on Public Procurement* (1994 Edition), presented some support for a claim under section 35* of the FOI Act, it was not, in and of itself, determinative with respect to any type of tender information.