

Office of the Information Commissioner

Guidance Note

Freedom of Information Act
2014 – Section 41: Enactments
Relating to Non-Disclosure of
Records

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Introduction

The Information Commissioner has prepared this Guidance Note in relation to section 41 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 41 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 41: Enactments Relating to Non-Disclosure of Records – Overview

1.1.1 This Note explains the Commissioner’s approach to the application of section 41(1) of the FOI Act. Section 41(1) protects certain records that are subject to a non-disclosure provision.

1.1.2 Section 41(1) is a mandatory exemption.

Non-Disclosure Provisions – Section 41(1)

1.2.1 Section 41(1)(a) applies if disclosure of the record is prohibited by law of the European Union or by an enactment which is not listed in Schedule 3.

1.2.2 Section 41(1)(b) applies if non-disclosure of the record is authorised in certain circumstances by an enactment which is not listed in Schedule 3 and the case is one in which the FOI body would refuse to disclose the record under that enactment.

1.2.3 Thus, section 41(1)(a) is relevant where disclosure is prohibited and section 41(1)(b) is relevant where non-disclosure is authorised. For the purpose of this Guidance Note both provisions prohibiting disclosure and provisions authorising non-disclosure are referred to as ‘non-disclosure provisions’.

Public Interest

1.3.1 There is no public interest test in section 41.

Section 41 Reports – Sections 41(2) - (6)

1.4.1 Sections 41(2) to (6) sets out a procedure for the review of the operation of non-disclosure provisions. Thus, this part of section 41 is not an exemption.

FOI History and Warning regarding Commissioner’s Decisions

1.5.1 Section 41 is similar to section 32 of the FOI Act 1997. This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 32 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 32 in those decisions have been replaced by section 41 of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (*).

1.5.2 Section 41(1)(a) of the FOI Act 2014 refers to disclosure of the record being “prohibited by law of the European Union or any enactment ...”. It should be noted that section 32(1)(a) of the 1997 Act did not include the reference to “law of the European Union”.

1.5.3 Reference may also be made in this Note to other provisions of the FOI Act 2014 which are relevant. Where reference is made to previous decisions of the Commissioner relating to 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 (*).

1.5.4 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.

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

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

2.0 Section 41(1) - Prohibited Disclosure or Authorised Non-Disclosure

What the Act states:

41(1) A head shall refuse to grant an FOI request if—

(a) the disclosure of the record concerned 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 of an enactment specified in that Schedule), or

(b) the non-disclosure of the record is authorised by any such enactment in certain circumstances and the case is one in which the head would, pursuant to the enactment, refuse to disclose the record.

2.1.1 Section 41(1) is a mandatory exemption. It provides that a request shall be refused where -

- disclosure of the record is prohibited by law of the EU or an enactment, other than a provision of an enactment listed in column (3) of Part 1 or 2 of Schedule 3 (subsection (1)(a)) or
- non-disclosure of the record is authorised by any such enactment in certain circumstances and the case is one where the FOI body would refuse to disclose the record under that enactment (subsection (1)(b)).

2.1.2 In effect, the non-disclosure provision overrides any right of access under FOI, unless that particular provision is specified in Schedule 3.

The Non-Disclosure Provision

2.2.1 An FOI body relying on section 41(1) for its refusal to grant access to a record should specify the relevant provision which, in its view, prohibits disclosure of the record or authorises its non-disclosure.

2.2.2 The relevant provision must prohibit disclosure or authorise non-disclosure.

Example: In Case 090250 the Commissioner found that the non-disclosure provision relied on by Dublin City Council did not prevent release of the records. , Amongst other things, the Council quoted section 15 of the Housing (Miscellaneous Provisions) Act, 1997 in seeking to withhold records. Having examined section 15, the Commissioner was satisfied that it authorised the Council to make relevant enquiries of various named public bodies in relation to persons seeking housing. However, the Commissioner was also satisfied that there was nothing in its provisions preventing release of records requested under FOI that were relevant to such enquiries. Accordingly, he found that the records were not exempt under 41* of the FOI Act by way of section 15 of the Housing (Miscellaneous Provisions) Act, 1997.

Schedule 3

2.3.1 Part 1 of Schedule 3 lists at column (3) the provisions of statutes which are excluded from the application of section 41 and Part 2 of Schedule 3 lists at column (3) the provisions of statutory instruments which are excluded. If the non-disclosure provision is listed in column (3) of either Part 1 or 2 of Schedule 3, an FOI body cannot rely on section 41 for refusing access to a record containing that information. Thus, where an FOI body is relying on section 41(1) for its refusal to grant access to a record, it should ensure that the relevant non-disclosure provision is not specified in Schedule 3.

2.3.2 It is important to bear in mind that a provision may be added to Schedule 3 by another piece of legislation.

Example: In Case 130165 the Commissioner found that one of the non-disclosure provisions relied on by the Department of Justice and Equality had been inserted in the Third Schedule*. The Department had argued that release of certain Environmental Health Officer (EHO) inspection letters sent to managers of asylum centres would be in violation of section 43 of the Food Safety Authority of Ireland Act 1998 which provides, amongst other things, for the non-disclosure of information obtained by staff in the performance of their duties. However, the Commissioner noted that this provision of the 1998 Act was inserted in the Third Schedule* by Schedule 2 to the Health Act 2007 as an enactment excluded from the application of section 41* and was therefore listed in that Schedule.

The Scope of the Provision

2.4.1 An FOI body relying on section 41(1) should consider the scope of the non-disclosure provision and should consider whether it applies in relation to the particular records at issue.

Example # 1: In Case 040302 the Commissioner did not accept the arguments of the Department of Justice, Equality and Law Reform that provisions of the National Archives Act 1986 applied to a list of file titles and reference numbers accompanying a certificate of withholding which issued under that Act. Sections 8(1) and (4) of the National Archives Act expressly refer to Departmental records which are over 30 years old. Even assuming that the term "Departmental records" would include the cover of a file, the Commissioner did not accept that either the statute, or the certificate accompanying the list of files at issue, provided for the withholding of the list simply because it would reveal information included on the file covers of the certified record. She found that the list of file names and reference numbers was a separate and distinct record from the actual records certified for withholding, which were all originally created over 30 years previously.

Example # 2: In Case 160187 the Department of Transport, Tourism and Sport argued that disclosing certain witness statements relating to an aviation accident was prohibited by an EU Regulation (No. 996/2010) and by Regulations (SI No. 460/2009). The EU Regulation referred, amongst other things, to statements taken "by the safety investigation authority in the course of the safety investigation". The 2009 SI referred, amongst other things, to statements taken "by the investigation authorities in the course of their investigation". Having considered the relevant statutory provisions, the Commissioner was satisfied that,

in order to decide whether the EU Regulation and/or the 2009 SI applied to the records, she must establish whether the statements were taken by the Air Accident Investigation Unit (AAIU) in the course of a safety investigation for the purposes of either of the pieces of legislation. Having regard to certain discrepancies in the Department's submissions and to consideration of the relevant records and the circumstances of their creation, as well as the statutory provisions, she was not satisfied that the witness statements were taken by the AAIU in the course of a safety investigation under the EU and Irish legislation cited. She found that the Department was not justified in refusing access to under section 41(1)(a).

2.4.2 The wording of the non-disclosure provision may require careful consideration.

Example # 1: In Case 000282 the Commissioner found that the records were not covered by the relevant provisions relied on by the Western Area Health Board. He found that the wording of the non-disclosure provisions relied on by the Board did not support the interpretation placed on those provisions by the Board. The records at issue concerned contacts made by third parties in relation to a prosecution by the Board under the Food Hygiene Regulations. The provisions relied on by the Board provided for the non-disclosure of information gathered "by virtue of inspections". The Board's view was that "all records containing information were created as a consequence of the inspection for the purposes of the enforcement...". The Commissioner found that records disclosing information gathered "by virtue of inspections" may be characterised as records containing facts and raw data (and any analysis deriving from those facts and raw data) which were extracted in the course of an examination or inspection. He found that records which concerned decisions as to what action should be taken by the Board on foot of an inspection or examination, or records concerning the implementation of any such action, could not (with one proviso) be said to comprise records which disclose information gathered "by virtue of inspections". This was subject to the important proviso that where such follow-on records contained information identical with, or of the same type as, information actually acquired "by virtue of inspections", then such follow-on records were likely to belong to the category covered by the non-disclosure provisions.

Example # 2: On the other hand, in Case 130052 the Commissioner found that release of the records would be contrary to the requirement of the provision which had been relied on by the Department of Justice and Equality in refusing the request under section 41(1)(a)*. The Department had relied on section 20 of the Court and Court Officers Act 1995 for its refusal to grant access to correspondence relating to the filling of judicial appointments. Section 20 provides that "All proceedings of the [Judicial Appointments] Board and all communications to the Board shall be confidential and shall not be disclosed except for the purposes of this Act". The applicant argued that, while section 20 may protect communications to the Board from release, it could not protect communications from the Board to the Department from release. However, the Commissioner found that an exchange of correspondence between the Department and the Board on matters relating to the filling of judicial appointments was part of the proceedings of the Board relating to the execution of its statutory functions. In considering the purpose of section 20 of the 1995 Act, he found that it was the clear intention of the Oireachtas that the proceedings of the Board relating to its

statutory function of "identifying persons and informing the Government of the suitability of those persons for appointment to judicial office" should remain confidential.

2.4.3 The non-disclosure provision may occasionally restrict the disclosure of the existence of a record of a particular type.

Example: In Case 000487 the Commissioner was satisfied that the Minister for Justice, Equality and Law Reform was required under section 12 of the Interceptions of Postal Packets and Telecommunications Messages (Regulations) Act 1993 to ensure that arrangements existed which would include provisions for refusing to confirm or deny the existence of records relating to authorised interceptions. He found that the records sought were records of a type whose non-disclosure was authorised and to which the Department would refuse access in accordance with the 1993 Act and that its refusal of the request was justified. He added that his finding should not be interpreted as a confirmation or denial of the existence of the relevant records.

FOI Body Receiving the Request

2.4.4 The Commissioner takes the view that the objective of section 41(1) - subject to the exceptions specified in Schedule 3 - is to protect the actual information, whether it is held by the body specified in the original enactment or by some other FOI body.

Example: In Case 99013** the Commissioner found that where the South Western Area Health Board held information of a type which equated with information whose release was prohibited by provisions in the Adoption Acts, the exemption at section 41(1)* applied. The relevant provisions in the Adoption Acts referred to the Adoption Board and the head of the General Register Office. The Commissioner considered whether section 41(1)(a)* applied to records containing information of the type specified in those provisions, but where the records were actually held by a health board (as opposed to the Adoption Board or the General Register Office). He found that the wording of section 41* was such as to convey the clear intention of the Oireachtas that the existing "non-disclosure" rule was to be extended for FOI purposes to any FOI body which held information of the same type.

**Aspects of this decision of the Commissioner were appealed to, and overturned by, the High Court, however this part of the decision was not appealed and is not affected by the High Court decision.

Section 41(1)(a) - Disclosure is Prohibited

2.5.1 Section 41(1)(a) applies where disclosure of the record is prohibited by law of the EU or any enactment (other than a provision specified in column (3) of Part 1 or 2 of Schedule 3 of an enactment specified in that Schedule).

Example: In Case 140153 the Commissioner found that section 41(1)(a)* applied to certain records held by the Department of Finance. The Commissioner had regard to section 30 of the Credit Institutions (Financial Support) Scheme 2008 (S.I. No 411 of 2008), which requires relevant information to be "treated as confidential" and also to section 33AK of the Central Bank Act which prohibits the

disclosure of certain confidential information by personnel from the Central Bank and the Financial Regulator (then part of the Central Bank).

2.5.2 The Commissioner takes the view that in order for section 41(1)(a) to apply, a provision must exist that explicitly prohibits the release of the records, that is clear in its meaning and effect, and that can be interpreted only as prohibiting disclosure of the information in question.

Section 41(1)(b) - Non-Disclosure is Authorised

2.6.1 Section 41(1)(b) applies where non-disclosure is authorised (as distinct from disclosure being prohibited). It applies where the non-disclosure is authorised by an enactment (other than a provision specified in column (3) of Part 1 or 2 of Schedule 3 of an enactment specified in that Schedule) in certain circumstances and the case is one in which the FOI body would refuse to disclose the record under that enactment.

Example: In Case 000065 the Commissioner found that section 53 of the Education Act 1998 authorised the Minister for Education and Science to refuse access to any information in a particular set of circumstances, that is to say, circumstances which would allow the compilation of the examination results of schools. The applicant had sought access to the results attained in each secondary school by its pupils in the Junior and Leaving Certificate examinations for 1998 and 1999. The Commissioner's view was that requests for examination results for all schools might, if the Minister were to refuse to disclose the information pursuant to section 53 of the Education Act, also be validly refused under the FOI Act. The Department had refused the request on the grounds of section 53. The Commissioner found that section 41* applied.

2.6.2 Section 41(1)(b) requires that non-disclosure is authorised; an absence of an obligation to release is not sufficient.

Example: In Case 150292 the Commissioner found that section 33(1) of the Statistics Act 1993 generally prohibited the disclosure of information that could be related to an identifiable individual, but that the general prohibition did not apply where the identifiable individual had given written consent for its disclosure. The Central Statistics Office argued that the Statistics Act did not place an obligation on it to release information or to grant a right to a person to receive such information. However, the Commissioner found that section 41(1)(b) requires that the non-disclosure of the records sought is authorised by the enactment; it does not require that disclosure is authorised by the enactment. He found that the circumstances of the case were that an individual was seeking access to information obtained under the Statistics Act that could be related to him and he had made a written request for that information. He found that the circumstances were such that the non-disclosure of the records sought was not authorised by the section 33(1) and that section 41(1)(b) of the FOI Act did not, therefore apply.

Data Protection Acts

2.7.1 Insofar as an FOI body may be concerned that the Data Protection Acts may prohibit disclosure or authorise non-disclosure, it should be noted that, under the

Data Protection Acts 1988 and 2003, a right conferred under the Data Protection Act shall not prejudice the exercise of a right under the Freedom of Information Act.

Retrospective or Retroactive

2.8.1 The High Court has considered whether a non-disclosure provision of an enactment, which came into force after the date on which certain FOI requests were made, was required to be applied by the Commissioner in his review of the decision on the FOI requests concerned. In the case of the *Minister for Education & Science v the Information Commissioner* [2001] IEHC 116 the High Court found that there was no bar to the provision applying in the subsequent decision by the Commissioner.

2.8.2 The High Court considered section 53 of the Education Act 1998 which came into force after the initial request had been made to the Department of Education & Science but before the Commissioner made his decision. Ó Caoimh J found that section 53 of the Education Act must apply in conjunction with what was then section 32 of the FOI Act 1997 – now section 41 of the FOI Act 2014. Ó Caoimh J found that the provisions of the FOI Act cannot be construed as granting a vested right in favour of an applicant, although the Act is framed in such a manner as to confer *prima facie* entitlement to information. He attached importance to the fact that the nature of the appeal to the Commissioner is by way of a hearing *de novo* by the Information Commissioner. In view of this, the decision by the Commissioner was to be made in light of the facts and circumstances applying at the date of the review by him and not those facts and circumstances pertaining on the date of the original decision. He concluded that the application of section 53 was retroactive, rather than retrospective. He also noted that it had been agreed that the hearing before the Information Commissioner did not amount to the administration of justice.

Non-Disclosure Provisions in the Context of FOI

2.9.1 In the case of *Sheedy v the Information Commissioner* [2005] 2 I.R. 272 the Supreme Court considered the extent to which a non-disclosure provision is affected by the intent or policy of the FOI Act. The Supreme Court considered section 53 of the Education Act 1998 which provided that “[n]otwithstanding any other enactment, the Minister [for Education and Science] may refuse access to ...” in the context of a refusal to grant access to certain school reports. Kearns J found that the use of a “notwithstanding” clause can operate to nullify or override other provisions of the same piece of legislation or inconsistent provisions contained in previous legislation. He found that the court could not force a construction on section 53 of the Education Act -

“so as to yield up an interpretation which fits the aims and policy of the [FOI] Act of 1997 when there is no ambiguity whatsoever in the opening words of s. 53...”

Section 53 of the [Education] Act 1998 overrides or “trumps” any provision of the [FOI] Act of 1997, unless it can be shown that the school reports in questions do not come within the protection offered by s. 53”.

3.0 Section 41 Review Procedure

What the Act states:

41 (2) A joint committee of both Houses of the Oireachtas shall, if authorised in that behalf by both such Houses (and such a committee so authorised is referred to subsequently in this section as “the committee”) —

- (a) review from time to time the operation of any provisions of any enactment that authorise or require the non-disclosure of a record (other than a provision specified in the said column (3)) for the purpose of ascertaining whether, having regard to the provisions, purposes and spirit of this Act —
 - (i) any of those provisions should be amended or repealed, or
 - (ii) a reference to any of them should be included in the said column (3),

and

- (b) prepare and furnish to each such House a report in writing of the results of the review aforesaid and, if it considers it appropriate to do so, include in the report recommendations in relation to the amendment, repeal or continuance in force of, or the inclusion in the said column (3) of a reference to, any of those provisions.

(3) A Minister of the Government shall, in accordance with subsection (6), prepare and furnish to the committee reports in writing —

- (a) specifying, as respects any enactments that confer functions on that Minister of the Government or on an FOI body in relation to which functions are vested in that Minister of the Government, any provisions thereof that authorise or require the non-disclosure of a record, and
- (b) specifying whether, in the opinion of that Minister of the Government and (where appropriate) any such FOI body, formed having regard to the provisions, purposes and spirit of this Act —
 - (i) any of the provisions referred to in paragraph (a) should be amended, repealed or allowed to continue in force, or
 - (ii) a reference to any of them should be included in the said column (3),and outlining the reasons for the opinion.

(4) A Minister of the Government shall cause a copy of a report prepared by him or her under subsection (3) to be furnished to the Commissioner and to be laid before each House of the Oireachtas.

(5) The Commissioner may, and shall, if so requested by the committee, furnish to the committee his or her opinion and conclusions in relation to a report under subsection (3) or any matter contained in or arising out of such a report or any matter relating to or arising out of the operation of this section.

(6) The first report under subsection (3) of a Minister of the Government shall be furnished by him or her in accordance with that subsection not later than 30 days after the fifth anniversary of the day on which the last previous report, under section 32(3) of the Act of 1997, by him or her was furnished to the joint committee concerned, and subsequent reports under subsection (3) of that Minister of the Government shall be so furnished not later than 30 days after the fifth anniversary of the last previous such report by him or her was so furnished.

3.1.1 Section 41 provides for a review by a joint Oireachtas Committee of any enactments requiring or authorising non-disclosure.

3.1.2 Provision is made for every Minister to furnish the Committee with a report on the enactments within their area that contain non-disclosure provisions and to specify whether such provisions should be amended, repealed or allowed to continue or whether they should be included in Schedule 3. Each Minister must lay a copy of that report before each House of the Oireachtas and provide a copy to the Commissioner.

3.1.3 The Commissioner may (and shall, if requested by the Committee) furnish his opinion and conclusions in relation to such a report or any matter relating to or arising out of the operation of section 41 to the Committee.

3.1.4 Section 41 also provides that the joint Committee provides its report of the results of the review to each House of the Oireachts.

3.1.5 Copies of the Commissioner's reports to the Committee may be found on the Commissioner's website at www.oic.ie under Special Reports.