

Office of the Information Commissioner

# Guidance Note

Freedom of Information Act 2014  
– Section 33: Security, Defence  
and International Relations

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## **Introduction**

The Information Commissioner has prepared this Guidance Note in relation to section 33 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 33 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 33: Overview**

1.1.1 This Note explains the Commissioner's approach to the application of section 33 of the FOI Act which protects certain records relating to security, defence, international relations and matters relating to Northern Ireland.

1.1.2 Section 33 includes both harm-based and class-based exemption provisions. It is also part-mandatory and part-discretionary.

### **Harm-Based and Class-Based Exemption**

1.2.1 As stated above, section 33 includes both harm-based and class-based exemption provisions.

#### **Harm-based**

1.2.2 Section 33(1) is a harm-based exemption. It applies where the harm specified can reasonably be expected to occur as a result of release of the record. It provides that an FOI body may refuse to grant an FOI request where access to a record could reasonably be expected to affect adversely any of the matters specified in the subsection. The matters specified are: the security of the State; the defence of the State; matters relating to Northern Ireland; and the international relations of the State.

1.2.3 Subsection (1) applies generally to any record where access to the record could reasonably be expected to result in the harm specified. Subsection (1) also refers, in particular, to records to which subsection (2) applies. Records listed in section 33(2) may qualify for exemption as follows:

- records falling within section 33(2), with the exception of those referred to at subsection (2)(b)(i) and (ii), may be refused under subsection (1) provided that the harm test at subsection (1) is met
- records falling within subsection (2)(b)(i) must be refused and there is no harm test (see further below)
- records falling within subsection (2)(b)(ii) must be refused where they meet the harm test within that provision, i.e. release could reasonably be expected to affect adversely the international relations of the State.

1.2.4 Where records are subject to a harm test, the FOI body should consider the effect of disclosure of the record concerned – could access to the record reasonably be expected to result in the harm or adverse effect specified?

#### **Class-based**

1.2.5 Subsection (2)(b)(i) and subsection (3) are class-based exemptions. They apply where a record falls within the description of any of the classes or categories of records set out in those provisions.

1.2.6 If a record meets the description of any of the records described in subsection (2)(b)(i) or subsection (3), it is exempt - there is no harm test.

### **Discretionary and Mandatory**

1.3.1 As mentioned above, section 33 is part-mandatory and part-discretionary. It is a mandatory exemption for records to which subsection (2)(b)(i) or (ii) or subsection (3) apply.

1.3.2 It is a discretionary exemption for records to which subsection (1) applies. This includes those records described in subsection (2), but excludes records to which subsection 2(b)(i) or (ii) apply.

### **Neither Confirm nor Deny**

1.4.1 Section 33 has a 'neither confirm nor deny' provision (subsection (4)). However, it only applies in relation to records to which subsection (1) applies.

### **Public Interest Test**

1.5.1 There is no public interest test in section 33.

### **Conclusive or Ministerial Certificates**

1.6.1 Section 34 provides for the issuing of conclusive or ministerial certificates in certain limited circumstances. Under section 34, where access to a record is refused under section 33 and the relevant Minister is satisfied that the record is of sufficient sensitivity or seriousness, the Minister may certify that the record is an exempt record by virtue of section 33.

1.6.2 Where a record is certified under section 34, the record is deemed conclusively to be an exempt record and there is no appeal by way of application for internal review or, if the certificate is made at internal review stage, there is no appeal by way of application for review to the Information Commissioner.

1.6.3 Where an application for internal review has been made, the certificate under section 34 must issue no more than three weeks after the date of receipt of that application.

1.6.4 The Central Policy Unit Guidance Note No. 13 states that these certificates should be required only in very exceptional circumstances. Section 34 sets out the procedure for the issuing of such certificates, their review and the notifications which are required.

### **Information Contained in an Exempt Record**

1.7.1 The Commissioner is required by section 22(10) of the FOI Act to give reasons for his decisions. However, this is subject to the requirement of section 25 that the Commissioner shall take all reasonable precautions to prevent the disclosure of information contained in an exempt record or matter that, if it were included in a record, would cause the record to be exempt. The Commissioner may, therefore, be constrained in the reasons he gives for his decision or in the description he gives of the records at issue.

1.7.2 The Commissioner is also mindful of the burden of proof. In a review of a decision by an FOI body to refuse to grant access to a record, such a refusal is presumed not to have been justified unless the FOI body shows to his satisfaction that it was justified (section 22(12)(b) of the FOI Act).

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

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

1.8.2 Section 33 is similar to, although not the same as, section 24 of the FOI Act 1997. There are some significant differences between section 33 of the 2014 Act and section 24 of the 1997 Act. (See Section 5:0 below.)

1.8.3 This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 24 was considered under the FOI Act 1997 (or under the FOI Act 1997 as amended) in so far as those decisions or parts of the decisions remain relevant. To simplify matters for the reader, all references to section 24 in those decisions have been replaced by the equivalent section 33 provision of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (\*).

1.8.4 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 the equivalent provisions under the FOI Act 1997 (or the FOI Act 1997 as amended), those provisions are replaced with the relevant provision in the 2014 Act. Again, where this occurs, such references are denoted by an asterisk (\*).

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

1.8.6 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 33(1) and (2): Security, Defence and International Relations**

**33.** (1) A head may refuse to grant an FOI request in relation to a record (and in particular but without prejudice to the generality otherwise of this subsection, to a record to which *subsection (2)* applies) if, in the opinion of the head, access to it could reasonably be expected to affect adversely—

- (a) the security of the State,
- (b) the defence of the State,
- (c) matters relating to Northern Ireland, or
- (d) the international relations of the State.

(2) This subsection applies to a record that—

(a) contains information that relates to the tactics, strategy or operations of the Defence Forces in or outside the State, or

(b) contains a communication between a Minister of the Government or his or her Department or Office and a diplomatic mission or consular post in the State or of the State or a communication between the Government or an officer of a Minister of the Government or another person acting on behalf of such a Minister and another government or a person acting on behalf of another government—

(i) other than where such information was communicated in confidence or relates to negotiations between the State and the other state in question or in relation to such a state, or is a record of that other state containing information the disclosure of which is prohibited by that state, or

(ii) other than a record containing analysis, opinions, advice, recommendations and the results of consultations or information the release of which, in the opinion of the head, could reasonably be expected to affect adversely the international relations of the State,

in which case (that is to say, either of the cases falling within *subparagraph (i)* or *(ii)*), the request shall be refused.

2.1.1 An FOI body relying on the exemption at section 33(1) must –

- identify the potential adverse effect on one of the matters specified in paragraph (a), (b), (c) or (d) of subsection (1) that might arise from disclosure of the record and
- having identified that adverse effect, consider the reasonableness of any expectation that the adverse effect will occur.

2.1.2 Section 33(1) applies where access to the record could reasonably be expected to affect adversely one of the following matters:

- the security of the State (paragraph (a))
- the defence of the State (paragraph (b))
- matters relating to Northern Ireland (paragraph (c))
- the international relations of the State (paragraph (d)).

2.1.3 In addition, subsection (2) provides a non-exhaustive list of categories of records that may qualify for exemption. With the exception of records falling within section 33(2)(b)(i) or (ii), the mere fact that a record falls within a category of records

described in subsection (2) is not sufficient to render the record exempt pursuant to subsection (1); it must also meet the harm test in subsection (1).

2.1.4 Where section 33(1) applies to a record (including a record described in section 33(2) other than a record falling within section 33(2)(b)(i) or (ii)), access to the record may be refused. Section 33(1) is a discretionary exemption.

2.1.5 If a record falls within the description of records set out in section 33(2)(b)(i), there is no requirement to meet the harm test in subsection (1); this is a class-based exemption. This is also a mandatory exemption.

2.1.6 If a record falls within the description of records set out in section 33(2)(b)(ii), it must also meet the harm test set out in that provision, i.e. that release of the record could reasonably be expected to affect adversely the international relations of the State. Where the record falls within the description of records at section 33(2)(b)(ii) and meets that harm test, it is subject to a mandatory exemption.

2.1.7 It should be noted that records relating to the security or defence of the State or to matters relating to Northern Ireland or to the international relations of the State may fall within the description of records set out at subsection (3). If they do so, subsection (3) is relevant and should be considered. As stated above, subsection (3) is a mandatory, class-based exemption.

2.1.8 Sections 2.1.1 to 2.5.6 of this Note cover general issues which arise in the application or interpretation of section 33(1)(a). Some specific issues of particular relevance to paragraphs (a) to (d) and to subsection (2) are dealt with in Sections 2.6.1 to 2.10.6. It is important to consider the general issues in 2.1.1 to 2.5.6 before proceeding to consider aspects specifically relating to a particular sub-paragraph or to subsection (2).

### **Potential Adverse Effect**

2.2.1 As stated above, an FOI body should identify the potential adverse effect on a matter specified in subsection (1) that might arise from disclosure of the record.

Example: In Case 98190 the Commissioner was satisfied that the Department of Foreign Affairs had identified a potential adverse effect on matters relating to Northern Ireland, viz a potential risk to some officials of the Department who dealt with matters relating to Northern Ireland.

### **Could Reasonably be Expected to Affect Adversely**

2.3.1 For an FOI body to succeed in its arguments that section 33(1) applies, the Commissioner has to be satisfied that granting access to the record in respect of which the exemption is claimed could reasonably be expected to have the adverse effect identified.

2.3.2 The Commissioner does not have to be satisfied that the adverse effect will definitely occur. It is sufficient for the FOI body to show that it expects such an

outcome and that its expectations are reasonable in the sense that there are adequate grounds for them.

Example # 1: In Case 99279 the records included reports of high-level, face-to-face talks between the Taoiseach and the former United States Secretary of State, Madeleine Albright, and his counterpart in the Netherlands, Prime Minister Wim Kok, respectively. The Commissioner found that it was apparent from the frank and candid nature of the talks that they were held on an understanding of confidentiality. He accepted that the international community expects communications of this nature to remain confidential. He was satisfied that the release of the records could reasonably be expected to have a deterrent effect on diplomatic communications of this nature and thus to impair the conduct of international relations and that the records were exempt under section 33(1)(d)\*.

Example # 2: In Case 98194 the Department of Foreign Affairs claimed that the acknowledgement of the existence or non-existence of details of files and records could indicate the broad basis on which political intelligence regarding individual countries was organised, as well as priorities in this regard. It claimed that this indication would undermine the Department's capacity to effectively conduct international relations in the national interest. However, the Commissioner did not accept that the effects of release identified by the Department could reasonably be expected to undermine the Department's capacity to effectively conduct international relations. He found that inferences about priorities in international relations could be drawn from many aspects of information already in the public domain, e.g. location of embassies, trade figures and visits to and from other countries.

2.3.3 The Commissioner takes the view that there must be adequate grounds for an FOI body's expectation of the adverse effect at the time the decision to refuse is made.

2.3.4 An FOI body should show **how** access to the record could reasonably be expected to have the adverse effect expected.

Example: In Case 98040 the Commissioner found that release of certain information could not reasonably be expected to cause an adverse effect on international relations. The records concerned future visits/meetings listed in the Taoiseach's programme of foreign engagements which had not yet taken place but had been confirmed. The Commissioner accepted that an argument against release might arise where there was a need to keep the visit secret or where there was a likelihood that by disclosing the information the visit could be adversely affected or where security issues might arise. However, he found that the onus was on the Department of the Taoiseach to show how international relations could reasonably be expected to be adversely affected and it had not done so or even attempted to do so.

### **Expertise of the FOI Body**

2.4.1 In all cases the Commissioner gives serious consideration to any arguments put before him by an FOI body as to why any particular record should not be released. In doing so, however, the Commissioner will have regard to the provisions of the FOI Act and, in particular, section 22(12) which provides that a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the FOI body shows to the satisfaction of the Commissioner that the decision was justified.

2.4.2 The CPU Decision Makers Manual states that the strength of the protections provided by section 33 does not relieve the decision maker of the obligation to assess the effects of disclosure in cases to which section 33(1) applies and to explain, where appropriate, how release of the records in question will adversely affect one of the interests outlined in that subsection. The Decision Makers Manual states that it is to be expected that decisions on FOI requests relating to this type of material will only be taken at a senior level.

2.4.3 While an FOI body may have particular expertise in an area, it must still satisfy the Commissioner that its decision to refuse access to a record was justified. The Commissioner has made it clear that, unless it is readily apparent how or why a harm could occur, he expects an FOI body making the claim to provide a specific and coherent explanation in support of its position.

Example: In Case 99279 the Commissioner found that the fact that an FOI body might have substantial expertise in a particular field did not relieve it of its obligation of satisfying him that its decision to refuse access to a record was justified. The Department of Foreign Affairs had argued that, given the complex nature of international relations, its judgement on the application of section 33(1)\* should be accorded considerable weight. It argued that, once the Commissioner was satisfied that the decision makers had duly formed the opinion that there was a reasonable expectation of harm, the Commissioner should affirm the decision, even if he reached a contrary view. The Commissioner found that in determining whether access "could reasonably be expected to affect adversely" one of the interests outlined in section 33(1)\*, there must be adequate grounds for any such expectation at the time the decision to refuse access was made. The mere possibility of some adverse effect was not sufficient.

### **The Record – its Content, what it Reveals and the Harm Expected**

2.5.1 A number of factors may be relevant in considering whether a decision to refuse access to a record under section 33 was justified.

2.5.2 It is the actual record in question which is relevant when considering whether access could reasonably be expected to affect adversely one of the matters listed in subsection (1). Consideration should be given to the particular record at issue and its contents.

Example # 1: In Case 98194 the Department of Foreign Affairs had, in its submission regarding its refusal of access to a list of file titles, referred to section 33(2)(a)\* which related to the "tactics, strategy or operations of the Defence Forces in or outside the State...". However, the Commissioner found that, while it

might be that some of the records on the files contained information that related to the tactics, strategy or operations of the Defence Forces, none of the file names on the list actually contained such information.

Example # 2: In Case 020295 the Commissioner found that an examination of the contents of the records at issue was necessary in order to determine the applicability of section 33(1)\*. The records comprised a letter from the Tánaiste to the Secretary for Commerce in the US and a letter from the American ambassador to the Tánaiste. The Commissioner did not accept that all diplomatic correspondence which could allow for inferences to be drawn and comparisons to be made as to the nature of the relationships between the parties involved in such correspondence should be protected as a matter of course regardless of the sensitivity, or otherwise, of the subject matter of the correspondence.

2.5.3 The Commissioner will consider what the records actually reveal. For example, do the contents of the records reveal anything of substance or anything that could reasonably be expected to affect adversely one of the matters specified in subsection (1)?

Example: In Case 98190 the Commissioner found that the Department of Foreign Affairs had not identified any adverse effect that could occur from release of the title of a file held in the Anglo Irish Division relating to a geographical area. The Department had claimed that access should be refused for security reasons. However, the Commissioner found that there might be a number of reasons why the Department had a file on this particular area and anyone who was reasonably familiar with the area or Northern Ireland generally might be aware of the significance of this particular area. He did not see how disclosure of the fact that the Department had a file titled with the area could reasonably be expected to adversely affect any of the matters listed in section 33(1)\*.

2.5.4 In addition, the circumstances in which the record was compiled and developments since the date it was created may be relevant.

Example: In Case 99279 the Commissioner found that the claim relating to the potential damage to the international relations of the State by the Department of Foreign Affairs to be entirely speculative. The record concerned was a letter from the Irish Vice-Consul in Edinburgh to the Department in which a report was given of discussions held at the Annual Conference of the Scottish Council for the European Movement. The Commissioner found that since the Vice-Consul apparently was in attendance at the conference in his official capacity, it was only to be expected by the other attendees that he would make a report of what occurred. While the report included comments which the Department viewed as critical of Ireland's non-participation in the Partnership for Peace (PfP), the Commissioner found that there was nothing to indicate that the comments were made in confidence. He also found that there was no basis for considering the criticism to be sensitive or embarrassing in nature given that Ireland had since joined the PfP.

2.5.5 Also, consideration may be given to information which is otherwise available or is in the public domain.

Example: In Case 99279 the Commissioner found from his examination of a particular record that it simply reflected concerns that existed among the Irish public, some of which were addressed in a publication by the Department of Foreign Affairs entitled *Ireland and the Partnership for Peace: An Explanatory Guide* and he found that section 33(1)(d)\* did not apply. However, he found that parts of certain other records candidly and descriptively discussed developments in Europe, many of which were touched upon in the Department's *Explanatory Guide*, but in a more general manner. He accepted that adequate grounds existed for concluding that section 33(1)(d) applied to some of the material in these other records.

2.5.6 The timing of granting access to a record may also be a relevant consideration in determining whether access to the record could reasonably be expected to affect adversely the matters specified.

Example: In Case 98036 the Commissioner found that access to record which related to an incident 23 years previously was unlikely to affect adversely the security or defence of the State.

### **Security of the State – Section 33(1)(a)**

2.6.1 An FOI body may refuse to grant access to a record if access could reasonably be expected to affect adversely the security of the State. An FOI body relying on section 33(1)(a) for its refusal to grant access to a record must satisfy the Commissioner that such a harm – harm to the security of the State - could reasonably be expected to occur as a result of disclosure of the record concerned.

2.6.2 In a number of cases the Commissioner has accepted that access to certain records relating to the interception of communications could reasonably be expected to affect adversely the security of the State and that section 33(1)(a)\* applied. (See Cases 110126 and 120118).

2.6.3 The Commissioner will consider whether the FOI body's expectation is reasonable.

Example: In Case 130140 the Commissioner found that the expectation of harm to the security of the State by the disclosure of expenses paid to individual judges in 2012 was not reasonable. He also found that the harm identified was merely possible or speculative in nature and not of a type for which real and substantial grounds existed. In making his decision, the Commissioner referred to a number of matters including: that the information at issue was historic; that the level of detail did not extend beyond describing the general nature of the expense and did not disclose information such as judges' itineraries, addresses or locations; that the identities of judges sitting in a number of the courts on any given day could usually be discerned from the Legal Diary published on the website of the Courts Service and this did not appear to have been considered an undue security risk; and that the expenses paid to High Court judges and above in the UK were published for each term.

2.6.4 As explained above – Section 1.7 Information Contained in an Exempt Record - the Commissioner may be constrained in the reasons he gives in his decisions or in the description he gives of the records at issue.

Example: In Case 120118 the Commissioner found that, given the nature of the records (which related to the interception of communications), he was satisfied that the Department of Communications, Energy and Natural Resources had in its submissions to his Office, met the requirements for the exemption in section 33(1)(a)\* to apply, in that it had identified the particular adverse affect and the expectation that such an affect will occur. The Commissioner referred to the requirement on his Office of section 25(3)\* to take all reasonable precautions in the course of a review to prevent disclosure of information contained in an exempt record. Given the particular exemption under consideration, he was satisfied that it was not appropriate to set out in detail a description of the records or of the potential consequences of the release of the records.

### **The Defence of the State – Section 33(1)(b)**

2.7.1 An FOI body may refuse to grant access to a record if access could reasonably be expected to affect the defence of the State adversely. An FOI body relying on section 33(1)(b) for its refusal to grant access to a record must satisfy the Commissioner that such a harm – harm to the defence of the State - could reasonably be expected to occur as a result of disclosure of the record concerned.

### **Matters Relating to Northern Ireland – Section 33(1)(c)**

2.8.1 An FOI body may refuse to grant access to a record if access could reasonably be expected to affect adversely matters relating to Northern Ireland. An FOI body relying on section 33(1)(c) for its refusal to grant access to a record must satisfy the Commissioner that such a harm – harm to matters relating to Northern Ireland - could reasonably be expected to occur as a result of disclosure of the record concerned.

2.8.2 The Commissioner has accepted that the possibility of political consequences in Northern Ireland which might be inimical to the interests of this State could be taken into account in considering whether access to a record could reasonably be expected to affect adversely matters relating to Northern Ireland.

Example: In Case 98190 the Commissioner found that the Department of Foreign Affairs had identified consequences that, if they came to pass, would constitute an adverse effect on matters relating to Northern Ireland. He found that such an effect could reasonably be expected to occur as a consequence of release of the records. The Department had argued that release of the records could be used by certain interested parties to undermine the political process in Northern Ireland. The Commissioner stated that, in general, the political consequences domestically of release of records were not matters which he could properly take into account in conducting a review under the FOI Act. However, he found that the political consequences in another State were a different matter. He accepted that the possibility of political consequences in Northern Ireland which might be inimical to

the interests of this State arising from release, was something which could properly be taken into account.

2.8.3 The fact that records relate to an all-island matter does not necessarily mean that the exemption at section 33(1)(c) applies.

Example: In Case 050338 the Commissioner did not accept that all records pertaining to Waterways Ireland warranted protection, merely because it was an all-island Implementation Body established under the British-Irish agreement. She found that the record at issue (a report) was focused on matters internal to Waterways Ireland and did not touch on any activities with which Waterways Ireland might be charged under the British-Irish agreement. In light of matters which were of public record, she was not satisfied that release of the report under FOI could further reveal the nature, or level of interactions, between the two departments in relation to Waterways Ireland. The Commissioner also found that, given that the report dealt with matters internal to Waterways Ireland, it could not be described as directly "relating to a matter referred to in subsection (1)", specifically, "matters relating to Northern Ireland", nor had it been shown to her satisfaction that its release could reasonably be expected to have an indirect adverse effect on matters relating to Northern Ireland.

### **International Relations of the State – Section 33(1)(d)**

2.9.1 An FOI body may refuse to grant access to a record if access could reasonably be expected to affect adversely the international relations of the State. An FOI body relying on section 33(1)(d) for its refusal to grant access to a record must satisfy the Commissioner that such a harm – harm to the international relations of the State - could reasonably be expected to occur as a result of disclosure of the record concerned.

2.9.2 An FOI body should show how access to the record(s) could reasonably be expected to affect adversely the international relations of the State.

Example # 1: In Case 98060 the Commissioner found that it had not been shown how the international relations of the State could be affected adversely by release of certain records. He accepted, as a broad proposition, that the release of records containing sensitive or embarrassing material or material which another State had expressly requested be kept confidential or material the release of which could be detrimental to the interests of another State could reasonably be expected to affect adversely the international relations of the State. However, he found that no insight had been given into the reasons for a conclusion, which had been offered in support of the FOI body's decision, that certain Member States of the EU would be unhappy at release. He found that the records were not in any way sensitive and they did not contain any indication that their release would be the subject of a specific objection by another state. He also found it noteworthy that the Council of the EU had itself granted access to some of the records.

Example # 2: In Case 98040 a record contained the Taoiseach's programme of foreign engagements. The Commissioner considered visits/meetings which were due to take place but which did not occur. He stated that, where there may be sensitive issues involved in the reasons why the visit or meeting did not take

place, it was conceivable that the release of such information could adversely affect the international relations of the State. However, he found that the Department of the Taoiseach had not produced or attempted to produce any evidence of how release of the information concerning the visits could adversely affect international relations. In relation to visits/meetings which were provisional and had not yet been confirmed, he accepted that it was possible under 33(1)(d)\* to argue that there is a need to gain the agreement of other Governments to proposals at developmental stage and that premature release of the information would adversely affect the conduct of international relations. However, he found that no evidence was produced to him of the possible damage which would be caused to international relations by release.

2.9.3 The Commissioner has accepted that a loss of trust or confidence in Ireland could be damaging to the international relations of the State.

Example: In Case 99279 the Commissioner was satisfied that a record had implications for the physical security of a particular building in Brussels and that its release could reasonably be expected to result in a loss of trust or confidence in Ireland and thus be damaging to the international relations of the State. The record included a report of a confidential conversation between an Embassy official and an official at NATO Headquarters that gave details about the office configurations at the building. The Commissioner found that section 33(1)(d)\* applied.

2.9.4 The Commissioner accepts that the expectation of the international community with regard to the information at issue is a relevant factor for consideration in determining whether access to the record could reasonably be expected to affect adversely the international relations of the State. He will have regard to this and to issues such as the sensitivity or confidentiality of the records in determining whether the harm test in subsection (1) has been met.

Example # 1: In Case 110023 the Commissioner found that the release of certain records could reasonably be expected to result in a loss of trust or confidence in Ireland among the international community and thus be damaging to the international relations of the State. He accepted that the records contained sensitive information relating to EU foreign policy and international relations more generally. He also accepted that the international community, particularly the EU, expected information of this nature to remain confidential. He found that section 33(1)(d)\* applied.

Example # 2: In Case 98060 the Commissioner did not accept that there was some common understanding between the Member States of the EU which forbade release of the records and the breach of which would adversely affect the international relations of the State. The records related to the signing of the Brussels II Convention. The Commissioner found that the records were not sensitive, did not contain any indication that their release would be the subject of specific objection by another State and the Council of the EU had granted access to copies of some of them. The Commissioner made clear that, if the Council of the EU or some other institution of the Union were to express strong opposition to the release of certain records, he would take its views into account in his assessment of the possible harm that release might bring about.

## European Union Access Regimes

2.9.5 European citizens and residents have the right to access documents of the EU institutions. However, this right of access is separate to, and does not eliminate, the right of access under the FOI Act.

Example: In Case 98060 the Commissioner did not accept that access to certain records received by the Department of Justice, Equality & Law Reform from the EU could only be granted in accordance with EU procedures concerning access to documents. He did not accept that the EU provisions then in place prevented the release of documents in the hands of Irish public bodies.

## Records falling within Subsection (2)

2.10.1 Section 33(2) includes specific examples of the types of records which may be covered by the exemption at section 33(1).

2.10.2 As stated above, records listed in section 33(2) may qualify for exemption as follows:

- records falling within section 33(2), with the exception of those referred to at subsection (2)(b)(i) and (ii), may be refused under subsection (1) provided that the harm test at subsection (1) is met – this is a discretionary exemption
- records falling within subsection (2)(b)(i) must be refused and there is no harm test (see further below) – this is a mandatory exemption
- records falling within subsection (2)(b)(ii) must be refused where they meet the harm test within that provision, i.e. release could reasonably be expected to affect adversely the international relations of the State – this is a mandatory exemption.

## The Government or a Minister of the Government

2.10.4 It should be noted that there is a difference in wording between section 33 of the 2014 Act and section 24 of the 1997 Act. In particular, there is a significant difference between section 33(2)(b) and the wording of the equivalent part of this section in section 24(2) of the 1997 Act.

2.10.5 Section 24(2) of the FOI Act 1997 (and the FOI Acts 1997 & 2003) referred to a record containing a communication between a Minister of the Government and a diplomatic mission or consular post in the State (section 24(2)(b)) or of the State (section 24(2)(c)). However, the reference to “a Minister of the Government” in the earlier legislation has been changed to “a Minister of the Government or his or her Department or Office” in section 33(2)(b) of the 2014 Act.

2.10.6 Section 24(2) of the FOI Act 1997 (and the FOI Acts 1997 & 2003) also referred to a record containing a communication between the Government or a person acting on behalf of the Government and another government or a person acting on behalf of another government. However, the reference to “the Government or a person acting on behalf of the Government” in the earlier legislation has been changed to “the Government or an officer of a Minister of the Government or another person acting on behalf of such a Minister” in section 33(2) of the 2014 Act.

### **3.0 Section 33(3) : Mandatory Exemption**

**33 (3)** A head shall refuse to grant an FOI request if the record concerned—

(a) contains information that was obtained or prepared for the purpose of intelligence in respect of the security or defence of the State,

(b) contains information that relates to the detection, prevention or suppression of activities calculated or tending to undermine the public order or the authority of the State (which expression has the same meaning as in section 2 of the Offences Against the State Act 1939), or

(c) contains information communicated in confidence—

(i) to any person in or outside the State from any person in or outside the State (including any law enforcement agency) and relating to a matter referred to in *subsection (1)*, or to the protection of human rights and expressed by the latter person to be confidential or to be communicated in confidence,

(ii) from, to, or within an international organisation of states or a subsidiary organ of such an organisation or an institution or body of the European Union, or relates to negotiations between the State and such an organisation, organ, institution or within or in relation to such an organisation, organ, institution or body, or is a record of such a body containing information the disclosure of which is prohibited by the organisation, organ, institution or body, or

(iii) (whether generated in the State or elsewhere) in the possession of a public body in relation to planning for, or responses to, threats or incidents in respect of network and information security.

3.1.1 A record falling within any class or category of records described in subsection (3) is subject to a mandatory exemption and access must be refused.

3.1.2 Thus, the relevant test to apply in considering whether subsection (3) applies is whether the record meets the description of any of the classes or categories of records set out in subsection (3). Unlike subsection (1), the FOI body does not have to identify a potential harm that might arise from disclosure of the record. In addition, there is no public interest override which would allow for the consideration of whether the public interest would be served by release.

**Example:** In Case 100030 the Commissioner found that the record at issue was communicated in confidence to the EU Commission and was therefore exempt under a provision which is now incorporated in section 33(3)(c)(ii) of the 2014 Act. The record was communicated by the Permanent Representative of Ireland on behalf of the Government to the European Commission and set out the Government's response to the alleged failure of Ireland to correctly transpose a Directive. The FOI body did not have to identify the potential harm that might arise from disclosure; rather the pertinent test to apply was whether the Government's response contained information that was communicated in confidence to the EU Commission.

3.1.3 While factors which may be relevant to the harm test do not arise, the FOI body must show to the satisfaction of the Commissioner that the record meets the requirements of the description of the category of records concerned.

Example: In Case 120102 the Department of Finance had argued that it was the intention of the European Central Bank (ECB) when sending certain letters that they be treated as confidential and that this was clearly indicated by the fact that one record was marked "strictly confidential" and another was marked "secret". It also referred to a letter from the ECB in which it described the records as "strictly confidential communications concerning the then extraordinarily severe and difficult situation" and to a number of other statements by the ECB. Having had regard to the records at issue and the Department's submissions, the Commissioner accepted that the records contained information communicated in confidence from an institution or body of the European Union.

#### **(a) Intelligence Information**

3.2.1 An FOI body relying on section 33(3)(a) for its refusal to grant access to record should satisfy the Commissioner that the record concerned contains information that was obtained or prepared for the purpose of intelligence in respect of the security or defence of the State.

#### **(b) Information relating to Certain Matters Calculated or Tending to Undermine Public Order or the Authority of the State**

3.3.1 Subsection (3)(b) provides for a mandatory exemption for a record containing information that relates to the detection, prevention or suppression of activities calculated or tending to undermine the public order or the authority of the State.

Example: In Case 110009 access was sought to certain records relating to the number of applications for the authorisation of phone taps and the number of authorisations of phone taps that were granted. The Commissioner found that, for the provision (now incorporated in section 33(3)(b)) to apply, all that was necessary was that the information being sought "relates" to the detection, prevention or suppression of the particular activities mentioned in the provision. He found that, if this test was met, then the exemption applied whether or not release of the information would cause harm and, indeed, even whether or not one might believe that the information ought to be released in the public interest. He found as a matter of fact that the information being sought by the applicant related to the "detection, prevention, or suppression of activities calculated or tending to undermine the public order or the authority of the State (which expression has the same meaning as in section 2 of the Offences against the State Act, 1939)..." and the relevant records were exempt.

**(c) Certain information relating to security, defence, international relations, human rights, international organisations and other matters**

3.4.1 Subsection (3)(c) details a number of categories of records which are subject to the mandatory exemption. They are records containing information communicated in confidence:

- relating to a matter referred to in subsection (1) or to the protection of human rights and expressed by the person from whom it was communicated to be confidential or to be communicated in confidence (sub-paragraph (i))
- from, to or within an international organisation of states (or its subsidiary organ) or an institution or body of the EU (sub-paragraph (ii))
- relating to negotiations between the State and such an organisation, organ or institution or within or in relation to such an organisation, organ, institution or body (sub-paragraph (ii))
- being a record of such a body (an international organisation of states (or its subsidiary) or an institution or body of the EU containing information the disclosure of which is prohibited by it (sub-paragraph (ii))
- relating to planning for, responses to, threats or incidents in respect of network and information security (sub-paragraph (iii)).

**Communicated in Confidence**

3.4.2 In order for subsection (3)(c) to apply, the record concerned must contain information communicated in confidence.

Example: In Case 090077 the Commissioner considered whether a record was a record that "contains information communicated in confidence from, to or within ... an institution or body of the European Union ... ". The records comprised communications between the Department of Transport, Tourism and Sport and the EU Commission concerning a Commission investigation. The Commissioner considered that the fundamental question was whether or not the relevant information in the records at issue was communicated in confidence. Having had regard to their contents and the circumstances of their creation, the Commissioner found that the communications were "in confidence" and that the records were exempt.

3.4.3 In showing that the record contains information "communicated in confidence", the issue is whether it was communicated in confidence at the time of the communication.

Example: In Case 110146 the Department of the Environment, Community and Local Government argued that records of communications from and to the European Commission concerning the State's infringements of EU law were confidential. The Commissioner found that the key issue was whether or not the communications concerned were understood to have been confidential at the time thereof. He also found that the information did not, of itself, have to retain a quality of confidence for the relevant exemption (now incorporated into section 33(3)(c)(ii)) to continue to apply. He found that the important point was not the merits of the process by which the communications had come to be treated as confidential, but rather was simply that the communications were so treated by the parties involved.

## **4.0 Section 33(4) - Neither Confirm nor Deny**

**33** (4) Where an FOI request relates to a record to which *subsection (1)* applies, or would, if the record existed, apply, and the head concerned is satisfied that the disclosure of the existence or non-existence of the record would prejudice a matter referred to in that subsection, he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists.

4.1.1 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.

4.1.2 This provision is relevant where, in the opinion of the FOI body, disclosing whether or not the record sought exists or does not exist would prejudice a matter referred to in subsection (1). The provision 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 that effect.

4.1.3 The disclosure of the existence or non-existence of a record only acknowledges the fact that the FOI body does or does not hold such a record. Where such an acknowledgement indicates the existence of a record, it would not necessarily disclose details of the contents of the record or the circumstances surrounding its creation.

Example: In Case 99580 the Commissioner found that he had not been presented with any evidence that satisfied him that disclosure of the fact that records relating to the Church of Scientology existed or did not exist could possibly result in the international relations of the state being adversely affected. He also found that he had not been presented with any evidence that satisfied him that such disclosure could give rise to any of the other harms identified in section 33(1)\*. He decided to annul the decision of the Department of Foreign Affairs to refuse the request in accordance with section 33(4)\* of the FOI Act.

## **5.0 Important Amendments to this Exemption**

5.1.1 Section 33 of the FOI Act 2014 is similar to section 24 of the 1997 Act. However, there are some significant differences between section 33 of the 2014 Act and section 24 of the FOI Act 1997 (both before and after it was amended in 2003). There were also significant differences between section 24 as it was before and as it was after it was amended in 2003. It is very important to be aware of the differences, particularly when considering any decision of the Commissioner under the earlier Acts. As stated above, it is possible that that some decisions or parts of decisions by the Commissioner under the earlier Acts no longer represent the current position.

### **Subsection (1)(c) and (1)(d)**

5.1.2 Section 33(1)(c) of the 2014 Act refers to matters relating to Northern Ireland and section 33(1)(d) refers to the international relations of the State. However, under the 1997 Act section 24(1)(c) referred to the international relations of the State and section 24(1)(d) referred to matters relating to Northern Ireland. Thus, these paragraphs have been swapped under the 2014 Act.

### **Subsection (2)**

5.1.3 As stated above, subsection (2) of the 2014 Act is part mandatory and part discretionary and part harm-based and part class-based. However, under the original 1997 Act, any record to which subsection (2) applied also had to meet the requirements of the harm test set out in subsection (1). Under the 1997 Act after it was amended in 2003, any record to which subsection (2) applied was exempt without reference to subsection (1) – and the exemption became mandatory.

5.1.4 Some of the records described in subsection (2) of the 1997 Act (both before and after it was amended) have been removed from subsection (2) in section 33 and are provided for in a new subsection (3) of the 2014 Act.

### **Subsection (3)**

5.1.5 The 2014 introduced a new subsection, subsection (3), which is a mandatory exemption. Many of the records falling within subsection (3) were previously included in subsection (2) of the 1997 Act.

5.1.6 Subsection (3)(c)(iii) refers to a record containing information communicated in confidence (whether generated in the State or elsewhere) in the possession of a public body in relation to planning for, or responses to, threats or incidents in respect of network and information security. This is a new provision not previously included in the 1997 Act.

### **The Government or a Minister of the Government**

5.1.7 As stated above, section 24(2) of the 1997 Act (both before and after it was amended) referred to a record containing a communication between a Minister of the Government and a diplomatic mission or consular post in the State (section 24(2)(b)) or of the State (section 24(2)(c)). The reference to “a Minister of the Government” in the earlier legislation has been changed to “a Minister of the Government or his or her Department or Office” in section 33(2)(b) of the 2014 Act.

5.1.8 In addition, section 24(2) of the FOI Act 1997 (both before and after it was amended) referred to a record containing a communication between the Government or a person acting on behalf of the Government and another government or a person acting on behalf of another government. The reference to “the Government or a person acting on behalf of the Government” in the earlier legislation has been changed to “the Government or an officer of a Minister of the Government or another person acting on behalf of such a Minister” in section 33(2) of the 2014 Act.