

Office of the Information Commissioner

# Guidance Note

Freedom of Information Act 2014  
Section 36 – Commercially  
Sensitive Information

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## **Introduction**

The Information Commissioner has prepared this Guidance Note in relation to section 36 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 36 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 36: Commercially Sensitive Information - Overview**

1.1.1 This Note explains the Commissioner's approach to the application of section 36 of the FOI Act. Section 36 protects certain records containing commercially sensitive information.

### **Commercially Sensitive Information**

1.2.1 Section 36(1) provides a mandatory exemption for commercially sensitive information. It applies to a record containing:

- trade secrets
- financial, commercial, scientific, or technical or other information the disclosure of which
  - could reasonably be expected to result in a material financial loss or gain to the person to whom it relates or
  - could prejudice the competitive position of that person
- information the disclosure of which could prejudice the conduct or outcome of negotiations of that person.

### **Exceptions to the Exemption**

1.3.1 There are certain situations where, although section 36(1) relates to the request, the request shall still be granted. These situations are specified in section 36(2).

### **Public Interest**

1.4.1 Section 36(1) is subject to a public interest balancing test which is set out at section 36(3). Subject to section 38 (see further below), the exemption at section 36(1) does not apply where the public interest would, on balance, be better served by granting than by refusing to grant the FOI request.

1.4.2 Where an FOI body is relying on section 36(1) for the refusal of a record, it must go on to consider whether section 36(3) applies in relation the record concerned. See further below.

### **Third Parties**

1.5.1 Section 36 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. The other exemptions are section 35 (which relates to information obtained in confidence) and section 37 (which relates to personal information).

### **Section 38**

1.5.2 Any proposal to grant access pursuant to section 36(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.

1.5.3 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 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 website of the Department of Public Expenditure and Reform, FOI Central Policy Unit, at [www.foi.ie](http://www.foi.ie)

### **Commercially Sensitive Information and FOI Bodies**

1.6.1 As a general principle, the Commissioner takes the view that section 36 is primarily aimed at protecting the commercial interests of parties engaged in commercial activity. He has found that there is some uncertainty as to the position of FOI bodies under section 36. However, depending on the circumstances of the case, the Commissioner has accepted that the FOI Act does not prohibit an FOI body, either as a decision making body or as a third party applicant to his Office, from relying on the provisions of section 36.

Example # 1: In Case 080240 Limerick County Council relied on a number of exemptions, including section 36(1)(c)\* for its refusal to grant access to a number of records. Having considered the matter and having regard to the fact that there appeared to be some uncertainty as to the position of public bodies under section 36\*, the Commissioner accepted in the circumstances of the case that the FOI Act did not prohibit the Council from relying on section 36(1)(c)\*. However, the Commissioner stated that the FOI Act clearly set out to treat public bodies differently from private entities in relation to the level of protection from disclosure afforded to the records they held. She found that, of their nature, public bodies were different entities from individuals or commercial entities and the interests of the public which they serve might not always coincide with the interests of the management or staff of public bodies. She found that the FOI Act recognised, both in its long title and in its individual provisions that there was a significant public interest in government being open and accountable. She found that the public interest would be better served by granting the requested access.

Example # 2: In Case 140144 an application for review of a decision by an FOI body to grant access was made to the Commissioner by a third party, a Council, which was also an FOI body. The Council argued, amongst other things, that section 36\* of the Act applied. The Commissioner found that there was some uncertainty as to the position of public bodies under section 36. Nevertheless, he was prepared to accept in the circumstances of the case that the FOI Act did not prohibit the applicant from relying upon the provisions of section 36(1)(b)\* in circumstances where it was claiming that the disclosure of the management letters could reasonably be expected to result in it incurring a material financial loss. Having carried out a review, the Commissioner found that section 36\* did not apply.

## **Onus of Proof**

1.6.1 Section 22(12)(a) of the Act provides that, in a review by the Commissioner, a decision to grant a request to which section 38 applies shall be presumed to have been justified unless the person concerned to whom section 38(2) applies shows to the satisfaction of the Commissioner that the decision was not justified. Section 22(12)(b) provides that a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified.

1.6.2 In other words –

- where the decision of the FOI body was to grant access, that decision is presumed to have been justified unless the third party shows to the satisfaction of the Commissioner that the decision was not justified
- where the decision of the FOI body was to refuse access, that decision is presumed not to have been justified unless the FOI body shows to the satisfaction of the Commissioner that the decision was justified.

Thus, the onus is on the party opposing release to show to the satisfaction of the Commissioner that the decision to grant access was not justified or the decision to refuse access was justified, as the case may be.

## **Neither Confirm nor Deny**

1.7.1 Section 36(4) is a ‘neither confirm nor deny’ provision which operates in certain circumstances in relation to records to which section 36(1) applies.

1.7.2 Section 36(4) cannot be relied on where section 36(2) applies or where the public interest would, on balance, be better served by granting the request under section 36(3).

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

1.8.1 Section 36 is similar to section 27 of the FOI Act 1997. This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 27 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 27 in those decisions have been replaced by section 36 of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (\*).

1.8.2 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 (\*).

1.8.3 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.

1.8.4 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)

1.8.5 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 36(1) - Commercially Sensitive Information**

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

**36.** (1) Subject to *subsection (2)*, a head shall refuse to grant an FOI request if the record concerned contains—

- (a) trade secrets of a person other than the requester concerned,
- (b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or
- (c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

### **Subsection (1)(a) - Trade Secrets**

2.1.1 Section 36(1)(a) applies to a record containing trade secrets of someone other than the requester. The Commissioner has accepted that a trade secret is information used in the trade or business which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret and that the owner must limit the dissemination of it or at least not encourage or permit widespread publication.

2.1.2 The Commissioner also accepts that an exact definition of a trade secret is not possible and that some factors to be considered in determining whether information is a trade secret are:

- (1) the extent to which the information is known outside of the business concerned;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken by the business to guard the secrecy of the information;
- (4) the value of the information to the business and to its competitors;
- (5) the amount of effort or money expended by the business in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Example # 1: In Case 080260 the records included the source code of the Lion Intoxilyzer 6000IRL. The Commissioner found that the term "source code" referred to high level code, the disclosure of which would allow the development of competing products. She accepted that the source code qualified as a trade secret within the meaning of section 36(1)(a)\* of the FOI Act.

Example # 2: In Case 99314 the Commissioner found that information contained in invoices received by FOI bodies from a company did not constitute a trade secret. The information in the invoices listed the description, quantity and price of the goods or services delivered to the FOI bodies concerned. The Commissioner



found that, apart from any other consideration, such information was, by definition, available to the customers of the company concerned. In addition it did not appear to be of any significant value at that stage to the company's competitors. The Commissioner expressed the view that, in general, he would not expect information that would be called a 'trade secret' to appear in invoices.

2.1.3 The Commissioner expects that a party relying on section 36(1)(a) for the refusal of access to a record will show how the information concerned falls within the meaning of a trade secret.

Example: In Case 090149 the Commissioner found that, while the applicants' solicitors contended that the remuneration of a former CEO was a trade secret of a public service body, they had not provided any evidence of a clear link between that remuneration and what in her view could reasonably be considered as a trade secret within the meaning of section 36(1)(a)\*. She also did not accept that release of details on such remuneration was viewed in an Irish context as a trade secret.

2.1.4 Where an FOI body is relying on section 36(1)(a) for the refusal of a record, it must go on to consider the public interest and whether section 36(3) applies in relation the record concerned. See further below.

### **Subsection (1)(b) - Material Financial Loss / Gain or Prejudice to Competitive Position**

2.2.1 Section 36(1)(b) protects financial, commercial, scientific, technical or other information whose disclosure:

- could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates or
- could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation.

2.2.2 The essence of the test in section 36(1)(b) is not the nature of the information, but the nature of the harm which might be occasioned by its release.

#### **Material Financial Loss or Gain**

2.2.3 The harm test in the first part of subsection (1)(b) is whether disclosure of the information "*could reasonably be expected to result in material financial loss or gain*". The Commissioner takes the view that the test to be applied in this regard is not concerned with the question of probabilities or possibilities, but with whether the decision maker's expectation is reasonable.

2.2.4 The nature of the harm envisaged and a basis for a claim that such harm could reasonably be expected to result from disclosure of the particular information in the record(s) at issue should be shown by an FOI body or a third party relying on this provision.

Example : In Case 99309 the Commissioner found that section 36(1)(b)\* did not apply. The charity, GOAL, claimed that the record (a report) contained information which could reasonably be expected to result in a material financial loss to GOAL. The Commissioner found that the harm envisaged by GOAL in its

submission was founded in the fear that the losses to its income and reputation, which it claimed occurred following adverse publicity in 1997, would be repeated and that its subsequent financial recovery would be reversed. He found that GOAL was not so much concerned with the release of the actual information in the report as with the possibility that any further airing in public of the GOAL/Department of Foreign Affairs relationship would have an adverse effect on its funding. However, having carefully perused the contents of the report, he did not accept that disclosure of the information in the record could have reasonably been expected to result in a material financial loss to GOAL. He added that he had no function in restricting or controlling the way in which information, once released, is subsequently used.

### Could Prejudice the Competitive Position

2.2.5 The harm test in the second part of subsection (1)(b) is whether disclosure of the information "*could prejudice the competitive position*" of the person in the conduct of his or her profession or business or otherwise in his or her occupation.

Example # 1: In Case 98100 the records were lists detailing companies in which jobs were at risk. The Commissioner accepted that financial and commercial information such as losses incurred or trading and financial difficulties, which were not already in the public domain, were matters which, if disclosed, could prejudice a company in the conduct of its business and that section 36(1)(b)\* applied. He also found that the mere disclosure that a company was on such a list would disclose commercial information - that it was considering reducing its workforce - which could prejudice its competitive position as envisaged in section 36(1)(b)\*.

Example # 2: In Case 140225 the Commissioner found that release of certain information, which was not otherwise available to the public, could have negative commercial consequences for the third party, thereby prejudicing its competitive position. The information concerned included: details of the third party's clients and contracts performed for them by the third party; the third party's methodology of delivery of the contract, including specifications of the equipment which the third party proposed to use; the third party's analysis of what the contract required; and the means by which the third party proposed to meet the requirements, including innovations in relation to the delivery of the contract.

2.2.6 The only requirement which has to be met in the second part of section 36(1)(b) is that disclosure "*could prejudice the competitive position*" of the person concerned. The standard of proof necessary to meet this test is considerably lower than the standard required to meet the test of "could reasonably be expected to" in the first part of section 36(1)(b).

Example # 1: In Case 98114 the Commissioner considered the application of the first part of section 36(1)(b)\* in relation to certain invoices paid to Telecom Eireann by a number of public bodies. He accepted that a competitor of Telecom Eireann could learn information from the invoices which it might find useful. He also accepted that the loss of a substantial part of its current business with public bodies would result in a material financial loss to Telecom Eireann. However, the Commissioner was not satisfied that the information was of such crucial importance to Telecom Eireann's competitors as to enable it to be said that an outcome which could reasonably be expected to result from its release would be

the loss of a substantial part of the business which Telecom Eireann then did with public bodies.

Example # 2: On the other hand, the Commissioner also considered the application of the second part of section 36(1)(b)\* in relation to the invoices and he found that, at that time, Telecom Eireann enjoyed a certain competitive advantage in dealing with public bodies - the advantage which a provider of services normally enjoys, of knowing more precisely than potential competitors what the customer's needs are and of being able to anticipate those needs. The Commissioner found that the information contained in the invoices could prejudice (in the sense of injure or potentially injure) that advantage and could be said to prejudice the competitive position which Telecom Eireann enjoyed in the conduct of its business with public bodies. He was satisfied that this was sufficient to enable section 36(1)(b)\* to apply

2.2.7 While the degree of harm required to meet the harm test in the second part of this provision ("could prejudice") is lower than that required to meet the test in the first part, the Commissioner takes the view that, in invoking the phrase "prejudice", the damage which could occur as a result of disclosure of the information must be specified with a reasonable degree of clarity .

2.2.8 In the High Court case of *Westwood Club v The Information Commissioner* [2014] IEHC 375 Cross J held that the explanation, as finally given by the FOI body to the Commissioner, did little more than repeat the requirements of what is now section 36(1)(b) and referred to the nature of the documents held. Cross J stated: It does not in any sense engage with the proper question ... as to why these particular documents, if disclosed, could prejudice the financial position.... In particular, the point properly made ... as to the antiquity of the documents was not dealt with at all by the email [from the FOI body].

2.2.9 The High Court decision in *Westwood Club* makes it clear that it is not sufficient for the party relying on section 36(1)(b) to merely restate the provisions of the section, list the documents and say that they are commercially sensitive. The FOI body or the third party opposing release should explain why disclosure of the particular records could prejudice the competitive position of the third party.

Example # 1: In Case 98197 the third party, the ESB, suggested that the release of certain material and certain allegations would damage the commercial position of the ESB. The Commissioner stated that it had not been explained to him how the fact that allegations were made could prejudice ESB's competitive position or could result in a financial loss to the ESB. The Commissioner found that, while it might possibly result in unwelcome publicity for the ESB, he did not accept that it could result in the harm envisaged in section 36(1)(b)\*.

Example # 2: In Case 090191, in relation to certain non-financial records, neither the HSE nor the third party linked the specific content of emails etc. to any harm such as material financial loss or prejudice to the competitive position of the company. The Commissioner failed to see how release of information of the type she had examined could reasonably be expected to result in material financial loss for the third party or how it could prejudice the competitive position of that company, even taking account of any current or proposed competitive tendering.

Example # 3: In Case 98042 the Commissioner found that the release of a record held by the Revenue Commissioners containing the name of a charity would not, of itself, result in the kind of harm envisaged in section 36(1)(b)\* and that section 36(1)(b)\* did not therefore apply. He accepted that it was possible that the release of the name might result in requests being made to the charity for donations. However, he found that an argument that the number of such requests and the necessity to deal with media attention would be such as to lead to a potential winding up of the company was an overstatement of the potential effects of release. The existence of this particular charity was already a matter of public record. When an entity had allowed its name to come into the public domain and that name identified it as a charity, he found it impossible to see how disclosing that it had claimed charitable exemption for tax purposes could operate to its detriment.

Example # 4: In Case 080288 the Department of Communications, Energy and Natural Resources claimed that certain individual maps related to wireless and broadband coverage were confidential and commercially sensitive. According to the Department, the individual maps provided more detailed and specific coverage information than what was publicly available and could have been used to reverse engineer some of the technical information that was provided in certain spreadsheets. The Commissioner found that the individual maps were more detailed and specific than the coverage maps that were generally available on the websites of the service providers. She accepted that they were produced by the ESRI based on information that had been given by the service providers on an understanding of confidence, though the information was subject to verification by the Department. She also accepted that such coverage information was key to competition between service providers. Moreover, the maps revealed specific areas that the companies concerned could reasonably be expected to target in order to upgrade their networks. The Commissioner found that certain maps were commercially sensitive within the meaning of section 36(1)(b)\*.

### Relevant Factors

2.2.10 Factors that have been taken into account by the Commissioner and that may be relevant in considering the application of section 36(1)(b) include, for example: the availability otherwise of the information and whether it is in the public domain; the passage of time; and the broader context and rate of change in the relevant industry.

Example # 1: In Case 130092 the records related to a company's ASR Hip Replacement Systems and the ASR Resurfacing Systems and the company's voluntary recall of the products. The Commissioner found that the recall of the applicant's ASR products was already in the public domain and any commercial loss that might have arisen would have occurred when this information became public. Accordingly, she did not see how release of the records could cause further damage.

Example # 2: In Case 99314 the Commissioner found that section 36(1)(b)\* did not apply in relation to certain invoices received by a number of FOI bodies from a company. The information in the invoices listed the prices and quantities of a number of computer related parts purchased by the FOI bodies concerned. The invoices also gave a brief, general description of some consultancy services

provided by the company. The Commissioner accepted that a competitor could learn some information from the invoices. However, he found that the information in the invoices was of limited use mainly because of its generality and brevity and was also 18 months old or older in most cases. Given the rate of change in the communications/IT industry and other factors such as changes in costs and increased competition, the Commissioner was not satisfied that such dated information would be of anything other than very limited use to a competitor.

2.2.11 The level of detail contained in the records may be relevant to the usefulness of the information to a third party's competitors and to the issue of prejudice to the third party's competitive position.

Example: In Case 090191 certain records did not disclose any invoices, unit prices or pricing structure. The records showed the total paid to an ambulance service for each year in respect of each Health Service Executive (HSE) area. The Commissioner found that such historic payments, in the absence of a breakdown of such variables as number of trips/patients, mileage and staffing details disclosed little of any use to competitors. The figures withheld related to monies paid by the HSE to a contractor who was, it was presumed, awarded the contract after a tender process. The Commissioner did not see how the competitive position of the company would be damaged by disclosure of the amount of money paid to it in respect of services provided.

2.2.12 The Commissioner may have regard to the historic nature of the information contained in the records in considering the effect of its disclosure and whether the harm test has been met. In *Westwood Club v The Information Commissioner*, referred to above, Cross J accepted the submission that the Commissioner was "under an obligation to consider whether the release of the historic commercial information could result in the detriment as stated."

2.2.13 While the age of the records and whether they are historic in nature may be a relevant consideration, each case will be considered on the basis of its particular facts and circumstances.

Example # 1: In Case 040219 the Commissioner did not accept that the release, in 2007, of details of prices contained in a seven year old tender, in a situation where the period in which those prices would have "held" expired at least two years previously, and in which fluctuating exchange rates were likely to have impacted on those prices in the guaranteed period, could result in the disclosure of commercially sensitive information or could impact on the third party's existing business relationships. She did not accept that such information amounted to the trade secrets of the companies concerned, or was information whose disclosure could have any negative impact on contractual or other negotiations of the person to whom the information related.

Example # 2: On the other hand, in Case 050319 the Commissioner found that, although the information in the records dated back approximately three or four years, it was a reasonable proposition that the third parties' competitors *could* use the information in the records at issue to their advantage. The records contained the results of the inspections of certain hotels as contained in inspection reports and correspondence from the hotels that referred to such inspections. She

accepted that the hotels operated in a highly competitive environment, in which the reputation of each hotel was of immense importance. The Commissioner accepted that, despite their age, the release of the records could still impact on the hotels' reputations as of the date of her decision. She accepted that section 36(1)(b)\* applied.

Example # 3: In Case 130264 the Commissioner accepted that, even where the information was several years old, there was an inherent competitive advantage in knowing the plans of competitors in a market such as energy generation, where planning and regulatory frameworks can contribute to long lead in times for projects.

2.2.14 Each record must be considered and, while some records may be exempt, other records sought in the same request may not be.

Example: In Case 140319 the Commissioner found that some records contained commercially sensitive information and she was satisfied that the Department of Arts, Heritage and the Gaeltacht had demonstrated that a potential prejudice to the position of the third party could accrue if the records were released. However, she was also satisfied that other records did not contain commercially sensitive information and therefore these should be released. She found that the other records did little more than reveal relatively routine communications, including acknowledgements, that passed between the Department and the third party, and they did not contain any of the type of material that the third party had submitted was commercially sensitive. Consequently, she found that those records did not come within the section 36\* exemption, and should be released.

2.2.15 Where an FOI body is relying on section 36(1)(b) for the refusal of a record, it must go on to consider the public interest and whether section 36(3) applies in relation the record concerned. See further below.

### **Subsection (1)(c) - Prejudice the Conduct or Outcome of Negotiations**

2.3.1 Pursuant to section 36(1)(c), access to a record must be refused where the disclosure of information contained in the record could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

Example # 1: In Case 98078 the Commissioner accepted that the release of information relating to proposed actions being contemplated by voluntary hospitals might cause difficulties in the provision of the service itself (e.g. through industrial relations difficulties or difficulties in other negotiations). He found that such release would fall within section 36(1)(c)\*. (However, before deciding to refuse access to such information, the public interest in the release of the information must be considered under section 36(3)\*.)

Example # 2: In Case 98100 the records consisted of lists detailing companies in which jobs were at risk. The Commissioner accepted that section 36(1)(c)\* applied to certain information in relation the companies such as future purchases, sales of assets or future development plans.

2.3.2 The standard of proof required to meet this exemption is relatively low in the sense that the test is not whether prejudice or harm is certain to materialise but whether it might do so. Having said that, the Commissioner expects that a person seeking to rely on this exemption would be able to:

- show that contractual or other negotiations were in train or were reasonably foreseen which might be affected by the disclosure and
- explain how exactly the disclosure could prejudice the conduct or the outcome of such negotiations.

Example # 1: In Case 090169 the Commissioner was not satisfied that certain records concerned negotiations. The Department of Justice and Law Reform had argued that the records should be withheld as "disclosure could prejudice the conduct or outcome of contractual or other negotiations with the Garda Representative Associations". However, no attempt had been made to explain how the release of the details could have any impact on negotiations with the Associations that might be taking place at the present or in the near future. Thus, the Commissioner found no reason for section 36(1)(c)\* to apply under the circumstances.

Example # 2: In Case 98078 it was argued in general terms that some of the information in the records, if released, would prejudice the negotiating position of hospitals. The Commissioner stated that he would expect that a public body seeking to rely on this particular exemption would be able to show that information of this kind is likely to be of real relevance in future negotiations, that the affected party would normally seek to conceal such information from the other side in any negotiations and that release of the information would somehow act to the detriment of the party concerned. He found that no such evidence had been produced to him and that, on the contrary, it was clear that much of the information was made available to the public already by health boards. This confirmed the Commissioner in his finding that no prejudice of the kind envisaged in section 36(1)(c)\* would occur.

2.3.3 Given the provisions of section 22(12), referred to above, the onus of proof rests with the person relying on this exemption to show to the Commissioner that the decision to refuse access was justified or the decision to grant access was not justified, as the case may be. The Commissioner will consider the arguments made, the relevant circumstances of the case and the contents of the records.

Example # 1: In Case 130264 the Commissioner accepted that the conduct or outcome of contractual or other negotiations could be prejudiced if certain information on a project related to the development of an electricity connection between Ireland and Britain was released. While the project did not proceed at that time, the Commission for Energy Regulation informed the Commissioner that it understood that the project remained "live" for the company involved. It said that release of the records would reveal information on the company's plans and views on relevant matters and could put the company at a disadvantage in future contractual negotiations in this context, where it would be competing for access and funding. Having considered the content of the records, the Commissioner accepted this.

Example # 2: In Case 020245 An Post, a third party, argued that if the weakness of its legal position in relation to the erection of post boxes was known then it would be easier for local authorities to impose onerous conditions and financial cost on An Post in return for permission to erect post boxes. However, the Commissioner found that local authorities could only have regard to the relevant legislative provisions in considering the question of the erection and/or location of post boxes and that the weakness, or otherwise, of An Post's legal position in this matter was not a relevant consideration. He did not accept that local authorities might impose onerous conditions and financial cost on An Post in return for permission to erect post boxes if they are not authorised to do so, regardless of An Post's legal position.

Example # 3: In Case 080208 the Commissioner found that section 36(1)(c)\* applied. The records related to the resolution of an industrial relations dispute between a company and a trade union. The records showed how the parties conducted themselves during the process and the lengths to which they, particularly the company, were willing to go to settle the dispute. The Commissioner was of the view that, although economic conditions had changed since the time of the signing of the agreement, industrial relations disputes remained a feature of the then current climate. She accepted that disclosure of the information in the records concerned could be damaging to one or both of the parties if they were to engage in similar such negotiations in the future.

#### 2.3.4 The conduct and the outcome of negotiations are separate matters.

Example: In Case 98114 the Commissioner was not satisfied that release of records could prejudice the conduct of future negotiations for the provision of certain telecommunications services by Telecom Eireann. However, he was satisfied that release *could* prejudice the *outcome* of any such negotiations, as far as the company was concerned. He was satisfied on the basis that the better informed its competitors were, the more likely they were to succeed at Telecom Eireann's expense

2.3.5 Where an FOI body is relying on section 36(1)(c) for the refusal of a record, it must go on to consider the public interest and whether section 36(3) applies in relation the record concerned. See further below.



## **Tenders and Commercially Sensitive Information**

2.4.1 In the case of records relating to tenders, claims of commercial sensitivity may be closely connected to claims of confidentiality. Thus, in addition to section 36, section 35 (information obtained in confidence) may also be relevant to the consideration of tender-related records. Tender-related records are not exempt under section 35 or section 36 as a class.

2.4.2 In an early decision (98188) the Commissioner summarised his views with regard to the release of records relating to a tender competition. This general summary is as follows:

1. FOI bodies are obliged to treat all tenders as confidential at least until the time that the contract is awarded.
2. Tender prices may be trade secrets during the currency of a tender competition, but only in exceptional circumstances would historic prices remain trade secrets. As a general proposition, however, he accepted that tender documents which would reveal detailed information about a company's current pricing strategy or about otherwise unavailable product information could fall within the scope of section 36(1)(a) of the FOI Act even following the conclusion of a tender competition.
3. Tender prices generally qualify as commercially sensitive information for the purposes of sections 36(1)(b) and (c) of the FOI Act. Depending upon the circumstances, product information can also be considered commercially sensitive under section 36(1)(b).
4. When a contract is awarded, successful tender information loses confidentiality with respect to price and the type and quantity of the goods supplied. The public interest also favours the release of such information, but exceptions may arise.
5. 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. Disclosure in the public interest ordinarily would not be required, unless it were necessary to explain the nature of the goods or services purchased by the public body.
6. Unsuccessful tender information which is commercially sensitive generally remains confidential after the award of a contract, and the public interest lies in protecting that information from disclosure.

2.4.3 The Commissioner stressed, however, that no tender-related records are subject to either release or exemption as a class; therefore, each record must be examined on its own merits in light of the relevant circumstances.

2.4.4 FOI bodies may also wish to consult the FOI Central Policy Unit Notice No.5 on FOI & Public Procurement. The Notice states that the FOI Act 2014 means that FOI bodies are not in a position to give guarantees of confidentiality. It suggests instead that FOI bodies should be proactive in taking measures to enable them to effectively manage the tendering process in an FOI context.

### **3.0 Section 36(2): Exceptions to the Exemption**

**What the Act states:**

- (2) A head shall grant an FOI request to which *subsection (1)* relates if—
- (a) the person to whom the record concerned relates consents, in writing or in such other form as may be determined, to access to the record being granted to the requester concerned,
  - (b) information of the same kind as that contained in the record in respect of persons generally or a class of persons that is, having regard to all the circumstances, of significant size, is available to the general public,
  - (c) the record relates only to the requester,
  - (d) information contained in the record was given to the FOI body concerned by the person to whom it relates and the person was informed on behalf of the body, before its being so given, that the information belongs to a class of information that would or might be made available to the general public, or
  - (e) disclosure of the information concerned is necessary in order to avoid a serious and imminent danger to the life or health of an individual or to the environment,

but, in a case falling within *paragraph (a)* or *(c)*, the head shall ensure that, before granting the request, the identity of the requester or, as the case may be, the consent of the person is established to the satisfaction of the head.

3.1.1 Where any of the circumstances specified in subsection (2) occur, the FOI request shall be granted. Thus, access shall be granted where:

- The record relates to a person who has consented to access being granted to the requester (paragraph (a)).

Example: In Case 080287 the Commissioner found that this provision applied to certain records. She found that that the legal person whose interests were sought to be protected was a consortium of General Practitioners (GPs) who were represented by Alpha Healthcare Ltd. An investigator in the Office of the Information Commissioner wrote to Alpha Healthcare seeking its views, on behalf of the GPs, on release of the withheld records. In a letter, Alpha Healthcare stated that it had no objection to the release of the records. The Commissioner found that section 36(2)\* applied to the withheld records insofar as the person to whom the records related, Alpha Healthcare representing the consortium of GPs, consented to the release of the records.

Before granting the request, the FOI body should ensure that the identity of the requester and the consent of the person to whom the information relates has been established to its satisfaction.

- Information of the same kind as the information in the record in respect of persons generally or in respect of a class of persons of a significant size is available to the general public (paragraph (b)).

- The record relates only to the requester (paragraph (c)). Before granting the request, the FOI body should ensure that the identity of the requester has been established to its satisfaction.
- The person to whom the information relates gave the information to the FOI body and was informed, before giving the information, that it belonged to a class of information which would or might be made available to the general public (paragraph (d)).

Example: In Case 030897 the Commissioner found that, section 36(2)(d)\* applied. In its standard tender forms issued to prospective tenderers OPW clearly stated that certain information, such as the name of the successful contractor and the contract price, would be disclosed on request. The Commissioner was satisfied that provisions in the Notes to Tenderers which were supplied to Ford were such that it was clear to all tenderers prior to submitting a tender that information relating to the contract price would be made publicly available.

- Disclosure of the information in the record is necessary to avoid serious and imminent danger to the life or health of an individual or to the environment (paragraph (e)).

## **4.0 Section 36(3): Public Interest**

**What the Act states:**

(3) Subject to *section 38, subsection (1)* does 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.

4.1.1 The exemption provided for at section 36(1) does not apply where, on balance, the public interest would be better served by granting the request than by refusing it. Thus, where an FOI body is relying on section 36(1) for the refusal to grant access to a record, it must go on to consider the public interest test under section 36(3).

4.1.2 It is also important to note that consideration of the public interest under section 36(3) is “[s]ubject to section 38”. Thus, the requirements of section 38 must also be met. See further below.

4.1.3 The public interest will be dealt with in a separate Guidance Note which will be available in due course. However, matter relating to the public interest test in the particular context of section 36 is addressed below.

### **Section 38 - Third Parties and the Public Interest**

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

4.2.2 Any proposal to grant access pursuant to section 36(3), to records which would otherwise be exempt under section 36(1), 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.

4.2.3 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 [www.foi.ie](http://www.foi.ie)

4.2.4 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”), 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 of the 2014 Act – 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.”

### **The Public Interest and Commercially Sensitive Information**

4.3.1 Section 36(1) itself reflects the public interest in the protection of commercially sensitive information. The Commissioner recognises that there is a public interest in protecting the commercially sensitive information of third parties. He also accepts that there is a legitimate public interest in persons being able to conduct commercial transactions with public bodies without fear of suffering commercially as a result.

4.3.2 On the other hand, the Act recognises, both in its long title and in its individual provisions that there is a significant public interest in government being open and accountable. Section 11(3) of the Act provides that FOI bodies shall, in performing any function under the Act, have regard to a number of matters including the need to achieve greater openness in the activities of FOI bodies and to promote adherence by them to the principles of transparency in government and public affairs.

4.3.3 The Commissioner takes the view that, in attempting to strike the balance between openness on the one hand and the need to protect commercially sensitive information on the other, it is legitimate to consider two things:

- the first is the positive public interest which is served by disclosure and
- the second is the harm that might be caused by disclosure.

Example: In Case 98100 the records consisted of lists of companies in which jobs were at risk which had been prepared by a number of State agencies in the course of the ongoing operation by the Department of Enterprise, Trade & Employment of an early warning system in relation to firms where job losses might occur. The Commissioner accepted that, with one exception, section 36(1)\* applied. He considered the public interest factors in favour of release of the records, including what he found to be a strong public interest in the public being aware of how public bodies are carrying out their functions, particularly in circumstances that could involve the expenditure of public monies. In considering the public interest in withholding the information, he accepted that there was a strong public interest in the Department and the agencies being in a position to intervene on behalf of the State to minimise job losses in private industry. He found that the premature release of the information could significantly damage the operation of the early warning system and limit the opportunities available to the State to take action and prevent job losses. He also considered that the harm that could result to vulnerable companies by the premature release of the information was a significant factor to be taken into account in considering the balance of the public interest. He found that the public interest would be better served by the withholding of the information.

4.3.4 FOI bodies may hold commercially sensitive information for a variety of reasons. They may hold such information as a result of their expenditure of public

money, their administration of public contracts or their management of public tender competitions, public property or assets. They may also hold such information as a consequence of their regulatory role.

4.3.5 Where records relate to the expenditure of public money, the Commissioner takes the view that there is a strong public interest in openness and accountability in the use of public funds.

4.3.6 The public interest in openness and accountability is not limited to the expenditure of public funds. The Commissioner has also recognised that there is a public interest in transparency and accountability in the use of public property and public assets.

Example: In Case 080232 the records related to a concession contract concerning the provision of outdoor advertising and public amenity services in Dublin by JC Decaux, sometimes referred to as the 'bikes for billboards' scheme. The parties stressed that there was no money being paid by the Council to JCDecaux. However, the Commissioner found that there was a compelling public interest in openness and transparency in transactions or agreements involving the finances and assets of public bodies whether or not expenditure or revenue is involved. She found that there was a strong public interest in the proper administration of public contracts and ensuring that value, in the broadest sense of that term, was obtained.

4.3.7 The Commissioner has distinguished between the public interest in disclosing information which relates purely to the financial business of the third party and information which relates to the activities of the FOI body, e.g. the exercise of its regulatory function.

Example # 1: In Case 98198 the Commissioner found that there was a significant public interest in the public knowing how the Department of Agriculture and Food carried out its regulatory functions in the area of hygiene and food safety and the control of disease. He considered that the public, as the ultimate consumers of food products, had a legitimate interest in knowing information of this nature.

Example # 2: In Case 99347 the Commissioner found that a record contained information which related to negotiations between a nursing home and third parties which came within the provisions of section 36(1)(c)\* as disclosure could prejudice the outcome of other negotiations. He also found that the public interest, on balance, would not be better served by the disclosure of the information as it related purely to the financial business of the nursing home and had no bearing on the regulatory function of the health board in relation to nursing homes.

4.3.8 The Commissioner takes the view that the FOI Act was designed to increase openness and transparency in the way in which FOI bodies conduct their operations and, in general terms, it was not designed as a means by which the operations of private enterprises were to be opened up to scrutiny.

## **5.0 Section 36(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 *subsections (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 nonexistence 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.

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

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

5.1.3 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 have an effect specified in subsection (1).

5.1.4 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.