

Office of the Information Commissioner

Guidance Note

Freedom of Information Act
2014 – Section 39: Research
and Natural Resources

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Introduction

The Information Commissioner has prepared this Guidance Note in relation to section 39 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 39 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 39: Research and Natural Resources – Overview

1.1.1 This Note explains the Commissioner’s approach to the application of section 39 of the FOI Act. Section 39 protects certain records relating to research and natural resources.

1.1.2 Section 39 is a discretionary exemption.

Research – Section 39(1)(a)

1.2.1 Section 39(1)(a) applies to a record containing information in relation to research being or to be carried out by or on behalf of an FOI body where disclosure of the information would be likely to expose the body, any person who is or will be carrying out the research on behalf of the body or the subject matter of the research to serious disadvantage.

1.2.2 Section 39(1)(a) is subject to the public interest test in section 39(2).

Natural Resources – Section 39(1)(b)

1.3.1 Section 39(1)(b) applies where disclosure of information contained in a record could reasonably be expected to prejudice the well-being of a cultural, heritage or natural resource or a species, or the habitat of a species, of flora or fauna.

1.3.2 Section 39(1)(b) is also subject to the public interest test in section 39(2).

Public Interest – Section 39(2)

1.4.1 The exemption at section 39(1) does not apply if the public interest would, on balance, be better served by granting than by refusing to grant the FOI request concerned.

FOI History and Warning regarding Commissioner’s Decisions

1.5.1 Section 39 is similar to section 30 of the FOI Act 1997. This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 30 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 30 in those decisions have been replaced by section 39 of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (*).

1.5.2 Reference may also be made in this Note to other provisions of the FOI Act 2014 which are relevant. Where reference is made to previous decisions of the Commissioner relating to such provisions under the FOI Act 1997 (or the FOI Act 1997 as amended), those provisions are replaced with the relevant, equivalent provision in the 2014 Act. Again, where this occurs, such references are denoted by an asterisk (*).

1.5.3 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.

1.5.4 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

1.5.5 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 39(1)(a) – Research

What the Act states:

39(1) A head may refuse to grant an FOI request if, in the opinion of the head—

(a) the record concerned contains information in relation to research being or to be carried out by or on behalf of an FOI body and disclosure of the information or its disclosure before the completion of the research would be likely to expose the body, any person who is or will be carrying out the research on behalf of the body or the subject matter of the research to serious disadvantage, ...

2.1.1 Section 39(1)(a) is a discretionary exemption which provides that an FOI body may refuse to grant an FOI request if, in the opinion of the FOI body, the record concerned contains information in relation to research being or to be carried out by or on behalf of an FOI body and disclosure of the information or its disclosure before the completion of the research would be likely to expose the body, any person who is or will be carrying out the research on behalf of the body or the subject matter of the research, to serious disadvantage.

2.1.2 A claim for exemption under section 39(1)(a) must be made on its merits and in light of the contents of each particular record concerned and the relevant facts and circumstances of the case. A claim for exemption pursuant to section 39(1)(a) which is class-based is not sustainable, e.g. a claim for exemption for “any” draft report.

2.1.3 Where an FOI body is relying on section 39(1)(a) for the refusal to grant access to a record, it must go on and consider the public interest and whether section 39(2) applies in relation to the record concerned.

Information in relation to Research

2.2.1 In order for section 39(1)(a) to apply, the record must contain information in relation to research. The FOI Central Policy Unit of the Department of Public Expenditure and Reform refers in its Decision Maker’s Manual to the Oxford English Dictionary definition of research as “a search or investigation undertaken to discover facts and reach new conclusions by the critical study of a subject or by a course of scientific enquiry”.

Example # 1: In Case 150138 the Commissioner accepted that the records at issue related to an investigation and study in order to establish facts and arrive at conclusions on and possible solutions to flooding problems and that they contained information relating to research. The records comprised a Draft Final Hydrology Report, a Draft Hydromorphic Audit and Survey and a Draft Constraints Report which related to the Douglas Flood Relief Scheme.

Example # 2: On the other hand, in Case 140162 the Commissioner was not satisfied that the information could properly be said to relate to research. The Irish Greyhound Board sought to exempt an item in its Board minutes relating to a case on which it was awaiting opinion from industry experts before finalising.

Research Being or to be Carried Out

2.3.1 The record must contain information relating to research which is “being or to be carried out”. The Commissioner accepts that there will be cases where the release of incomplete research may, legitimately, be denied by an FOI body. An FOI body relying on section 39(1)(a) should show that the research concerned is being or is to be carried out and identify the research which remains incomplete.

Example: In Case 150138 the Commissioner accepted that the records – three draft reports (see above at 2.2.1) - contained information in relation to research being carried out on behalf of Cork County Council. The applicant had argued that, although the Council might commission further investigations or carry out further modelling in the future, the research carried out at that time had been completed and a map produced and placed in the public domain. The applicant had argued that production of the map was a discrete piece of research that had already been carried out and was, therefore, outside the scope of section 39, which refers to research being carried or to be carried out. The map (a flood map) produced by the engineers was described as a preliminary map and the three reports were marked "draft". The Commissioner was satisfied that the map and reports might be subject to amendment and that there was no doubt that research on the subject matter of the reports was ongoing. The Commissioner commented that there was some doubt as to whether the specific research leading to the production of the map and the reports in their (then) current form was still being or to be carried out. She understood that the intention was to put the reports into the public domain once the research was complete, but the Council was unable to say when this would be. While not ultimately affirming the decision, the Commissioner was prepared to accept that at that point in time the records contained information in relation to research being carried out on behalf of an FOI body as required by section 39(1)(a).

2.3.2 The Commissioner is unlikely to accept that research would be protected indefinitely by this exemption. However, depending on the circumstances, research may be considered ongoing even where it has not proceeded at one point in time, for example, where funding has been refused.

Example: In Case 130124 the Commissioner found that research could still be considered to be ongoing as it was reasonable to assume that the research proposal could be submitted for funding in the future. The records consisted of a research proposal, an evaluation by the European Commission of that proposal and a follow up proposal which was derived from the first proposal. UCC argued that a research proposal does not usually succeed on the first, second or third occasion. It stated that evaluations are fed back to the proposers, the research leaders use the feedback to develop and fine tune their thinking and, in the next funding cycle, the research team who have been working on their projects in the meantime, submit a revised proposal, or a new proposal, underpinned by their previous research work. It stated that the professor in the relevant Department and his team of collaborators were still in place, they continued to collaborate and they were actively working on developing and refining new research proposals. The Commissioner accepted that research was or would be carried out by University College Cork (UCC) if it succeeded in receiving funding.

By or on Behalf of an FOI Body

2.4.1 The research must be research being or to be carried out “by or on behalf of an FOI body”.

2.4.2 Where the FOI body is not conducting or commissioning its own research for the purpose of reaching a conclusion, but is relying on findings from existing research or on the opinions of recognised experts, the records concerned may not contain information in relation to research for the purposes of section 39(1)(a).

Serious Disadvantage

2.5.1 Section 39(1)(a) applies where disclosure of the information, or its disclosure before the completion of the research, would be likely to expose any of the following to “serious disadvantage”:

- the FOI body,
- any person who is or will be carrying out the research on behalf of the FOI body, or
- the subject matter of the research.

2.5.2 The Commissioner takes the view that the standard provided for in section 39(1)(a) requires a higher degree of harm than the "prejudice" standard provided for in other provisions of the FOI Act such as, for example, section 30(1)(a) and section 36(1)(b).

Example: In Case 150138 the Commissioner was not satisfied that it had been shown that Cork County Council and/or the engineers (who it had commissioned) would be likely to be exposed to serious disadvantage by release of the records. The Council had argued that disclosure of the information requested by the applicant - who, the Council said was a competitor of the Council's engineers - would cause them to be seriously disadvantaged in future tenders. It had argued that, if items which were not "deliverables" under its contract with its engineers were released, the engineers would be disadvantaged as the applicant would be able to strengthen future tender submissions based on this information. The Council's engineers had argued, amongst other things, that release of a draft report would provide their competitors with knowledge that was currently exclusive to them and that this could disadvantage them in tendering for associated works until such time as the Report was finalised and put in the public domain. They had claimed that release of the draft report would damage them commercially. However, given the nature of the research and the project for which the Council was the client and the extent to which parts of the records were already in the public domain, the Commissioner was not satisfied that the submissions demonstrated sufficient links between release of the records at that time and the harms that could result in order to justify the position that the Council and/or its engineers would be likely to be exposed to serious disadvantage. She did not consider that section 13(4) allowed her to consider as relevant the identity or motivation of the applicant as implied by the Council.

Example #2: On the other hand, in Case 130124 the Commissioner accepted that disclosure of the information at that time would be likely to expose University College Cork and its fellow researchers on a project to serious disadvantage. The

records consisted of a research proposal, an evaluation by the European Commission and a follow up proposal which UCC stated contained detailed information about a collaborative piece of research, which would be managed by the Department of Sociology in UCC. UCC also stated that the proposal outlined in detail what the research project proposed to investigate, how the research teams planned to carry it out, who would be involved and a breakdown of the estimated costs of the research. UCC argued that externally funded research was one of the main ways in which universities generate income. It also stated that, for Irish universities to have a chance of success in the international funding market, they need to become part of international consortia of several universities in other countries. According to UCC, all of these partner institutions have a stake in protecting their core financial assets too, so that the disclosure of details by one impacts not only on the interests of that research professor and his/her institution, but on all of the other stakeholders too. The Commissioner accepted that the withheld details constituted research and that section 39(1)(a)* applied.

2.5.3 It is noteworthy that, in addition to protecting the interests of the FOI body and the subject matter of the research, section 39(1)(a) also protects the interests of the person who is or will be carrying out the research on behalf of the FOI body.

Example: In Case 150138, while not ultimately affirming the decision of Cork County Council, the Commissioner had regard to submissions made by the engineers who prepared a number of draft reports for or on behalf of the Council.

2.5.4 It should be noted that there may be a degree of overlap between the 'serious disadvantage' under section 39(1)(a) and the harm envisaged in section 36(1)(b) of the Act. Section 36(1)(b) concerns the disclosure of information which 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. However, if an FOI body is of the view that section 36(1)(b) applies to protect the interests of the person who is or will be carrying out the research on behalf of the FOI body, it should expressly address this.

3.0 Section 39(1)(b) – Natural Resources

What the Act states:

39(1) A head may refuse to grant an FOI request if, in the opinion of the head — ...

(b) disclosure of information contained in the record could reasonably be expected to prejudice the well-being of a cultural, heritage or natural resource or a species, or the habitat of a species, of flora or fauna.

3.1.1 Section 39(1)(b) is a discretionary exemption which applies where, in the opinion of the FOI body, disclosure of information in the record could reasonably be expected to prejudice the well-being of:

- a cultural, heritage or natural resource or
- a species, or habitat of a species, of flora or fauna.

3.1.2 Where an FOI body relies on section 39(1)(b) it should :

- identify the potential harm in relation to the well-being of the relevant resource, species or habitat and
- having identified that harm, consider the reasonableness of any expectation that the harm will occur.

3.1.3 Where an FOI body is relying on section 39(1)(b) for the refusal to grant access to a record, it must go on and consider the public interest and whether section 39(2) applies in relation to the record concerned.

Natural Resource

3.2.1 An FOI body relying on this exemption should identify the relevant resource, species or habitat , i.e.

- the relevant cultural, heritage or natural resource or
- the relevant species, or habitat of a species, of flora or fauna.

Prejudice the Well-Being

3.3.1 The FOI body should explain how and why, in its opinion, release of the record(s) could reasonably be expected to give rise to the harm envisaged, i.e. how and why disclosure could reasonably be expected to prejudice the well-being of the resource, species or habitat concerned.

Could Reasonably be Expected

3.4.1 The Commissioner does not have to be satisfied that such a prejudice will definitely occur. It is sufficient for the FOI body to show that it expects the outcome and that its expectations are justifiable in the sense that there are adequate grounds for the expectations.

4.0 Public Interest

What the Act states:

39(2) 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 concerned.

4.1.1 The exemption provided for at section 39(1) does not apply where, on balance, the public interest would be better served by granting the request than by refusing it. Where an FOI body is relying on section 39(1) for the refusal of a record, it should go on to consider the public interest test under section 39(2).

4.1.2 The public interest will be dealt with in a separate Guidance Note which will be available in due course.

4.1.3 The Commissioner has accepted that there is a public interest in the protection of the integrity and confidentiality of research.

Example: In Case 130124 the Commissioner accepted that, while there was a public interest in upholding the applicant's right of access under the FOI Act to the withheld details, this was outweighed by the public interest in protecting the integrity and confidentiality of the research proposal concerned in order to avoid unfair and serious disadvantage to the researchers involved and to University College Cork. She found that, on balance, the public interest was better served by refusing these records than by their being released.