

Office of the Information Commissioner

Guidance Note

Freedom of Information Act 2014
– Section 42: Restriction of Act

January 2021

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Introduction

The Information Commissioner has prepared this Guidance Note in relation to section 42 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 42 of the Act by the Commissioner. It is intended to provide a 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.

References

References to the Commissioner

The Information Commissioner and the Office of the Information Commissioner are referred to as 'we' or 'us' in this Note. Where the terms 'we', 'us' or 'our' appear, they refer to the Commissioner, his Office or the officer to whom the function of making a decision has been delegated by the Commissioner, as appropriate.

References to Decisions

Our decisions are referred to in this Note by Case Number.

- Cases up to 2019 had case reference numbers with the first two digits of the number indicating the year in which the application for review was made to our Office. Such cases typically had the format, for example, 080001 for the first case in 2008.
- During 2019 the case reference number system in the Office changed. The case numbers for these later cases typically have the format OIC-12345/6-A1B2C3. Where a decision with the later style of reference number is referred to in this Note, it is referred to by the five or six middle digits together with the prefix OIC-. Thus, Case OIC-123456-A1B2C3 is referred to in this Note as OIC-123456.

The Cases may be found on our website at www.oic.ie using the Case numbers used in this Note.

1.0 Section 42: Restriction of Act - Overview

What the Act states:

42. This Act does not apply to— ...

1.1.1 Section 42 provides that the FOI Act does not apply to the various categories of records described in the section. In other words, such records are excluded from the scope of the Act.

Public Interest

1.2.1 There is no public interest provision in section 42. If the record is captured by one or more of the categories of records described in section 42, that is the end of the matter.

The “Act Does not Apply”

1.3.1 Section 42 provides that the FOI Act does not apply to certain records. In the case of *Deely v The Information Commissioner* [2001] IEHC 91 McKechnie J in commenting on the equivalent provision in the FOI Act 1997 (section 46(1)) stated

“This can only mean that the provisions of the [FOI Act of 1997] ... have no application to the documents listed therein save only as to the qualification contained within such listing”.

1.3.2 Thus, the FOI Act does not apply to a record listed in section 42 unless the record falls within the exceptions or qualifications set out in the relevant provision in section 42.

1.3.3 Where an FOI body refuses access to a record on the basis of a number of sections, including section 42, it is generally appropriate to consider the application of section 42 first. This is because the effect of section 42, where it is found to apply, is to exclude the record from the scope of the FOI Act altogether.

‘Exempt’ Record

1.4.1 The definition of an “exempt record” in section 2 of the Act includes a record in relation to which the grant of an FOI request would be refused by virtue of Part 5 of the Act. Part 5 of the Act (which is entitled Restriction of Act) comprises section 42.

Exceptions to the Exclusions

1.5.1 Section 42, in providing that the Act does not apply to certain records, effectively excludes the record(s) concerned from the scope of the FOI Act. However, many paragraphs in section 42 also provide for certain exceptions to the exclusions. Where a record falls within an exception to the exclusion, the Act does apply.

1.5.2 For example, the Act does not apply to a record relating to an audit, inspection, investigation or examination carried out by the Comptroller and Auditor General

“other than –

- (i) such a record that was created before the commencement of the investigation, audit, inspection or examination aforesaid, or
- (ii) a record relating to the general administration of the Office of the Comptroller and Auditor General,”

Thus, there is an exception to the exclusion for records at (i) and (ii); or, in other words, the FOI Act does apply to records falling within (i) and (ii).

General Administration

1.6.1 A number of paragraphs in section 42 provide for an exception to the exclusion for records relating to “general administration”. Thus, the FOI Act does apply in such cases:

- section 42(a), which concerns a record held by the courts or a service tribunal, provides for an exception for a record “relating to the general administration” of the courts or a service tribunal or their offices;
- section 42(d), which concerns a record relating to an inquiry within the meaning of section 42 of the Garda Síochána Act 2005, provides for an exception for a record relating to “other matters concerning the general administration of an inquiry” under that section;
- section 42(e), which concerns certain records relating to an inquiry by a tribunal of inquiry or an investigation by a commission of investigation, provides for an exception for a record relating to “other matters concerning the general administration” of the tribunal or commission;
- section 42(ea) which concerns a record held by the CervicalCheck Tribunal, provides for an exception for a record relating to “other matters concerning the general administration of the Tribunal”
- section 42(f), which concerns a record held or created by the Attorney General, the Director of Public Prosecutions or their Offices, provides for an exception for a record “relating to general administration”;
- section 42(g), which concerns a record relating to an audit, inspection, investigation or examination by the Comptroller and Auditor General, provides for an exception for a record “relating to the general administration of the Office of the Comptroller and Auditor General”.

1.6.2 While the Act is silent on the meaning of general administration, we consider that it refers to records such as records relating to personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organisation, office procedures and the like.

1.6.3 We have considered the term “general administration” in a number of contexts, including in the context of a commission of investigation (section 42(e)) and in the context of the Offices of the Attorney General and the Director of Public Prosecutions (section 42(f)). While each case must be considered separately and on the basis of the relevant provision and the records at issue, our decisions in these cases may be helpful – see Sections on 42(e) and 42(f) below.

Section 42 and a Statement of Reasons under Section 10

1.7.1 Section 10 of the FOI Act provides that a person is entitled to a statement of reasons for an act of an FOI body where that person is affected by the act and has a material interest in a matter affected by the act or to which it relates. However, section 10(2) provides that nothing in section 10 shall be construed as requiring the giving to a person of information contained in a record which would fall to be refused as an exempt record.

1.7.2 If a record is exempt by virtue of section 42, then the FOI body is not required to include in a statement of reasons any information that is contained in that record. This may mean that, on occasion, a body must refuse to provide a statement of reasons altogether as to do so would require the disclosure of information contained in exempt records. On the other hand, if the body can provide a statement of reasons without disclosing information contained in exempt records then it must do so if the applicant has an entitlement to such a statement.

1.7.3 It is important to note that section 42 does not provide for the exemption of all records referred to in the provision. As stated above, many paragraphs in section 42 provide for certain exceptions to the exclusions. For example, section 42(a) includes a provision that the Act does not apply to a record held by the courts and relating to a court or to proceedings in a court other than “a record relating to the general administration of the courts or the offices of the courts”. Therefore, if the provision of a statement of reasons necessitated the disclosure of information contained in a record relating only to the general administration of the courts, the Courts Service could not refuse such a statement by virtue of section 10(2).

Appeal of Decisions to Refuse under Section 42

1.8.1 Section 22(1) of the FOI Act 2014 describes the various decisions taken by FOI bodies which the Commissioner may review. Pursuant to subsection (1)(a) we may review a decision to refuse to grant an FOI request on the ground that, by virtue of section 42, the Act does not apply to the record concerned. Thus, where a decision is made by an FOI body that, under section 42, the FOI Act does not apply to a record, an application for a review of that decision may be made to our Office.

No Requirement for Internal Review

1.8.2 There is no requirement to seek an internal review in cases where an FOI body has refused a request solely under section 42. As a result of section 22(1)(ii), we will not generally be entitled to review an original, first instance, decision taken by an FOI body, unless the decision was taken by the head of the body. However, this exclusion does not apply to a decision referred to in section 22(1)(a). The effect of this is that we may review first instance decisions taken by FOI bodies to refuse requests on the ground that, by virtue of section 42, the Act does not apply to the records concerned.

1.8.3 If we receive an application for a review of a first instance decision taken by an FOI body to refuse a request solely under section 42, such an application for review will be accepted subject to the other requirements for acceptance of an application for review being met.

Refusal under section 42 and other Provisions

1.8.4 In cases where only some of the records have been refused under section 42 and other reasons for refusal are given in relation to other records, requesters should seek an internal review before making an application for review to our Office.

FOI History and Warning regarding Commissioner's Decisions

1.9.1 Parts of section 42 are similar to parts of section 46 of the FOI Act 1997. Part of section 42(m) is also similar to section 23(1)(b) of the FOI Act 1997. This Guidance Note makes reference to our previous decisions where the application of the relevant part of section 46 or 23(1)(b) 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 sections 46 or 23(1)(b) in those decisions have been replaced by section 42 of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (*).

1.9.2 Reference may be made in this Note to provisions of the FOI Act 2014 other than section 42 which are relevant. Where reference is made to our previous decisions 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 (*).

1.9.3 Some paragraphs in section 42 are new provisions and there were no equivalent provisions in the FOI Acts 1997 & 2003. Also, many provisions which were previously included in section 46 of the FOI Acts 1997 & 2003 are not in section 42 of the 2014 Act. Some bodies which had previously been referred to in section 46 of the FOI Acts 1997 & 2003 are now referred to in Schedule 1 Part 1 of the 2014 Act.

1.9.4 While references in this Note are made to our previous decisions **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 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 42(a) - The Courts or a Service Tribunal

What the Act states:

42. This Act does not apply to —

(a) a record held by —

(i) the courts, or

(ii) a service tribunal within the meaning of section 161 of the Defence Act 1954, and relating to, or to proceedings in, a court or such a tribunal, other than —

(I) a record that relates to proceedings in a court or such a tribunal held in public but was not created by the court or tribunal and whose disclosure to the general public is not prohibited by the court or the tribunal, or

(II) a record relating to the general administration of the courts or the offices of the courts or such a tribunal or any offices of such a tribunal,

2.1.1 Section 42(a) provides that the FOI Act does not apply to certain records held by the courts or a service tribunal relating to a court or such a tribunal, or to proceedings in a court or such a tribunal. (The tribunal concerned is a service tribunal within the meaning of the section 161 of the Defence Act 1954).

2.1.2 For the provision to apply, it is not sufficient that the record is held by the courts or a service tribunal. It must also relate to a court or such a service tribunal, or to proceedings in a court or such a tribunal.

2.1.3 Section 42(a) may be relevant where a request is made to the courts or a service tribunal in relation to a record held by them. The provision does not extend to copies of such a record held by other public bodies, even if the original is held by the courts or a service tribunal.¹

2.1.4 The exclusion at section 42(a) does not apply (or, in other words, the Act does apply) where the record:

(I) relates to proceedings in a court or such a tribunal held in public, but the record was not created by the court or tribunal and disclosure of the record to the general public is not prohibited by the court or tribunal, or

(II) relates to the general administration of the courts, the offices of the courts, such a tribunal or any offices of such a tribunal.

(I) Records not Created by the Court / Tribunal the Disclosure of which is Not Prohibited

2.2.1 In the case of *The Minister for Justice, Equality and Law Reform v The Information Commissioner* [2001] IEHC 35 Finnegan J summarised the application of section 46(1)(a)(i)(I) of the FOI Act 1997 (now section 42(a)(i)(I) of the 2014 Act) to records held by the courts as follows:

“[T]he Act of 1997 does not apply to a record held by the courts relating to a court or to proceedings in a court. An exception to this however, arises and the Act ... will apply where the record :-

¹ Our understanding of this point is currently the subject of a court appeal.

- (a) relates to proceedings in a court and
- (b) relates to proceedings held in public and
- (c) was not created by the court and
- (d) whose disclosure to the general public is not prohibited by the court.”

2.2.2 Thus, the FOI Act does not apply to a record held by the courts (or a service tribunal) and relating to (or to proceeding in) a court or service tribunal, unless -

- the record relates to proceedings in a court or service tribunal held in public and
- the record was not created by the court or service tribunal and
- disclosure of the record to the general public is not prohibited by the court or service tribunal.

All Requirements of the Exception to the Exclusion must be Met

2.2.3 While a record may meet some of the requirements of (l), all the requirements must be met for the record to fall within the exception to the exclusion from the Act.

Example: In Case 99021 we were satisfied that the Department of Justice, Equality and Law Reform was entitled to refuse access to certain records – affidavits filed in the High Court. (At the time of the request, the Courts Service had not been created and the correct way to seek access under the FOI Act to records held by the Courts was via the Department). In considering whether the records fell within the first exception to the exclusion provided for in section 42(a)*, while we found that all of the records related to proceedings in a court and were not created by the court, we found that disclosure of the affidavits was prohibited by the court and that the exception did not apply.

Proceedings Held in Public

2.2.4 In *The Minister for Justice, Equality and Law Reform v The Information Commissioner* (referred to above) Finnegan J was satisfied that, in the context of that case, the word “proceedings” was not used in the sense of an action, but rather that it meant any step in an action. He added that “For this step to come within the exception it must be a step taken in public.”

2.2.5 Finnegan J took the view that the phrase “held in public” referred to the word “proceedings” and not to the word “court”. He stated that, on the basis that proceedings means steps in an action, not every proceeding, whether in a civil or criminal matter the hearing of which is held in public, is itself a proceeding held in public.

2.2.6 Certain proceedings are not held in public.

Example: In Case OIC-92501 we found that the records sought were held by the courts and related to proceedings in a court. The Courts Service, in its submissions to our Office, outlined that the court proceedings in question were required by law under section 119 of the Succession Act 1965 to be held in camera i.e. in private or otherwise than in public. We were satisfied that the exception did not apply. We affirmed the decision of the Courts Service to refuse access to the records relating to specified court proceedings under section 42(a)(i) on the ground that the Act did not apply.

Not Created by the Court or Tribunal

2.2.7 A record created by the court or the tribunal does not fall within the exception to the exclusion.

Example: In Case 000384 the applicant sought access to records relating to an application made to a District Court for a court order disclosing information relating to a conviction against him. The Courts Service stated that the application for the Court Order was made orally in the District Court. The applicant did not submit a written application. The judge, having accepted that the party making the application had a bona fide interest in the matter, directed that the Court Order be issued. We found that the records relating to the court's proceedings were created by the court. In these circumstances, we were satisfied that the exception in section 42(a)(l)* did not apply.

Whether Disclosure to the General Public is Prohibited by the Court or Tribunal

2.2.8 In *The Minister for Justice, Equality and Law Reform v The Information Commissioner*, referred to above, Finnegan J considered the provision in what was section 46(1)(a)(l) of the 1997 Act (now section 42(a)(l) of the 2014 Act) regarding whether disclosure is prohibited by the court. He stated that:

[The Commissioner] was incorrect insofar as he held that s. 46(1)(a)(l) [now section 42(a)(l)] is concerned with a specific prohibition imposed by the court which has dealt with or is dealing with the matter to which the record relates. I am satisfied that the provision equally applies to the situation here where there is a general prohibition express or implied in the Rules of the Superior Courts, 1986, with specified exceptions and a discretion in the court where appropriate to relieve from that prohibition.

2.2.9 Finnegan J also remarked that, while not relevant in the case, as the courts are entitled to regulate the conduct of court business, a practice not having its origins in the Rules of the Superior Courts would likewise amount to a prohibition. He gave as an example of such a practice the practice of confining access to central office files to parties and their representatives.

2.2.10 Finnegan J also stated that, if a witness statement was not included in the book of evidence in the case but was nonetheless held by the court, then it was subject to section 65 of the Court Officers Act 1926 and was at the disposal of the judge. He took this provision to create a general prohibition on the disclosure of documents but from which the judge can dispense, stating that until there was such a dispensation there was a prohibition in place and the record was not within the exception.

2.2.11 Following the decision of Finnegan J, we accepted that, even if documents had been read out in open court, disclosure of the records may still be regarded as prohibited.

Example: In Case 99021 (referred to above) we were satisfied that disclosure of certain affidavits was prohibited by the court. The applicant had claimed that the affidavits were summarised in the media and that, if present in court, he might have been able to take down every word of the affidavits as they were read out. However, we accepted the evidence of the Department of Justice, Equality and Law Reform that there was a practice of restricting access to documents on court files to the solicitors representing the parties to the proceedings or to other

persons who have obtained the consent of those solicitors. We did not accept that the fact that the affidavits were read out in open court, or were subsequently reported in the media, as evidence that the court did not have a practice of restricting access to the documents.

2.2.12 It should be noted, however, that the law regarding the prohibition of disclosure of court documents or public access to court documents, particularly documents that have been “opened” (read in court) in open court and in respect of which there are no reporting restrictions, may be in a state of development.

(II) Records relating to the General Administration

2.3.1 The exclusion from the Act provided for at section 42(a) does not apply where the record concerned is a record relating to the general administration of the courts, the offices of the courts, the service tribunal or any offices of the service tribunal.

Example: In Case 000384 we were satisfied that records relating to an application made to a District Court for a Court Order disclosing information relating to a conviction against the applicant did not relate to the general administration of the courts.

2.3.2 We consider that “general administration” refers to records such as records relating to personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organisation, office procedures and the like. We consider that it does not refer to records relating to matters concerning the core business of the relevant body.

2.3.3 See reference to the term “general administration” at paragraphs 1.6.1 – 1.6.3 above.

3.0 42(b) - The Garda Síochána

What the Act states:

42. This Act does not apply to –

...

(b) a record held or created by the Garda Síochána that relates to any of the following:

- (i) the Emergency Response Unit;
- (ii) the Secret Service Fund maintained by it;
- (iii) the Special Detective Unit (SDU);
- (iv) the witness protection programme sponsored by it;
- (v) the Security and Intelligence Section;
- (vi) the management and use of covert intelligence operations;
- (vii) the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993;
- (viii) the Criminal Justice (Terrorist Offences) Act 2005;
- (ix) the Criminal Justice (Surveillance) Act 2009;
- (x) the Communications (Retention of Data) Act 2011,

3.1.1 Section 42(b) provides that the FOI Act does not apply to certain records held or created by the Garda Síochána relating to any of the units, section, legislation and other matters specified at (b)(i) to (x).

Schedule 1 Part 1(n)

3.1.2 Where the record is held by the Garda Síochána, before considering section 42(b), consideration should be given to Schedule 1, Part 1(n) of the Act which serves to restrict the scope of the Act to limited, defined categories of records held by the Garda Síochána. Section 6(2) of the Act states that an entity specified in Part 1 of Schedule 1 shall, subject to the provisions of that Part, be a public body for the purposes of the Act. Schedule 1, Part 1(n), states that section 6 does not include a reference to the Garda Síochána, other than insofar as it relates to administrative records relating to human resources, or finance or procurement matters.

3.1.3 We take the view that the purpose of Schedule 1 Part 1(n) is to restrict the right of access to those functions or processes of the Garda Síochána that relate to the administration or management of the organisation, and only in relation to matters concerning human resources, or finance or procurement matters. Records relating to the core functions of the Garda Síochána, such as the investigation of criminal activity, are excluded from the ambit of the Act.

Relating to any of the Specified Matters

3.1.4 As stated above, section 42(b) provides that the Act does not apply to a record held or created by the Garda Síochána that relates to any of ten specified matters at (i) to (x). If the records relate to any of the ten matters, then the Act does not apply to those records or parts of the records and no right of access exists, regardless of whether or not they are also administrative records relating to human resources, or finance or procurement matters.

3.1.5 In considering whether records relate to any of the specified matters, we consider it appropriate to ask whether there is a sufficiently substantial link between the specified matters and the records.

Example # 1: In Case OIC-53245 we did not accept that there was a sufficiently substantial link between the Special Detective Unit/the Security and Intelligence Section and certain records for section 42(b) to apply. The records related to internal promotion competitions. The Garda Síochána argued that the records related to personnel that might potentially be placed within Special Detective Unit (SDU). It also argued that other records related to personnel that might potentially be placed in the Armed Support Unit (ASU) and that ASU was governed by the Special Tactics and Operations Command which was headed up by the Assistant Commissioner for Security and Intelligence. We found that the records were of a type that one would expect to find in any such internal competition, regardless of where in the organisation the vacancies arose, namely candidate listings, interview time and date schedules, and listings of candidate results. We found that the disclosure of the records would disclose nothing of any significance relating to SDU or Security and Intelligence Section. They were created solely for the purpose of administering internal promotion competitions. The fact that the vacancies happened to arise in SDU and Security and Intelligence section did not mean that they related to those units.

Example # 2: In Case 160258 the Garda Síochána (AGS) argued that certain information in a record was restricted from release under section 42(b)(v), which provides that the FOI Act does not apply to "a record held or created by the Garda Síochána that relates to... the Security and Intelligence Section". The information was contained in a report of an audit of the management and control systems in place to manage procurement. We were satisfied that the redacted information did not relate to the Security and Intelligence Section. We found that it related to the description on the AGS accounting system of certain goods/services purchased. We found that section 42(b)(v) did not apply.

Example # 3: In Case 160549 the Garda Síochána (AGS) argued that the FOI Act did not apply to parts of a record relating to the Special Detective Unit (SDU) under section 42(b)(iii). The record was an internal audit report concerning the Regional Support Unit (RSU). AGS stated that when the report was compiled in 2015, the RSU was under the command of the Regional Assistant Commissioner, with the Regional Detective Superintendent having operational responsibility. It stated that, following organisational restructuring in 2016, the RSU Units still remained under the operational control of the Detective Superintendent in the respective regions, but training and equipment standardisation was under the remit of the Detective Superintendent of the Special Detective Unit (SDU). We found that the section of the report that concerned training and equipment could not be said to relate to the SDU, notwithstanding the fact that equipment standardisation was under the remit of the SDU at the time of our decision. We found that the section of the report was concerned with the equipment that was available within the RSU at a time when SDU had no responsibility for such matters. We found that section 42(b)(iii) did not apply.

3.1.6 It is noteworthy that section 42(b) can apply to records that were created by the Garda Síochána, but are held by other bodies. As such, we take the view that the

provision serves to protect records relating to the functional or operational matters of the Garda Síochána where they relate to one or more of the ten matters listed in section 42(b).

Example: In Case 170050 access to a number of records had been refused by the Department of Justice & Equality under various exemptions in the FOI Act. Included in the records refused were threads of email correspondence between the Office for the Protection of Migrant Integration and members of the Special Detective Unit (SDU) within AGS in relation to selection missions to Beirut to interview Syrian refugees for resettlement in Ireland. We found that it was a matter of public record that the selection missions referenced in the records took place. While not invoked by the Department, we found that the parts of these records that comprised emails created and sent to the Department by AGS were excluded from the FOI Act by virtue of section 42(b). On the other hand, we found that those parts of the records comprising emails created and sent by the Department were clearly covered by the Act and we considered the exemptions cited by the Department in respect of those parts. In addition, we found that a number of the records involved communications with the Security and Intelligence section of AGS. We found that section 42(b)(v) was relevant in this regard and that, in so far as the records contained emails that were created and sent by the Security and Intelligence section of AGS, the FOI Act did not apply to those emails.

3.1.7 Where the record sought is held by the Garda Síochána, it is only where the restriction in Schedule 1, Part 1(n) is deemed not to apply that it should be necessary to proceed to consider if section 42(b) applies. In other words, if the records held by the Garda Síochána are not administrative records relating to human resources, or finance or procurement, then that is the end of the matter. However if they are, then it may be necessary to proceed to consider if section 42(b) applies.

4.0 42(c) - Criminal Assets Bureau, the Defence Forces, the Independent Commission for the Location of Victims' Remains, the Independent Monitoring Commission and the Independent Reporting Commission

What the Act states:

42. This Act does not apply to –

...

(c) a record held by —

- (i) the Criminal Assets Bureau,
- (ii) the Defence Forces relating to —
 - (I) the Offences against the State Acts 1939 to 1998,
 - (II) section 170 of the Defence Act 1954,
 - (III) the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993,
 - (IV) the Criminal Justice (Terrorist Offences) Act 2005,
 - (V) the Criminal Justice (Surveillance) Act 2009,
 - (VI) the Communications (Retention of Data) Act 2011, or
 - (VII) the Data Protection Acts 1988 and 2003 in respect of the statutory powers of an officer under section 8 of the Data Protection Act 1988,
- (iii) the Independent Commission for the Location of Victims' Remains (within the meaning of the Criminal Justice (Location of Victims' Remains) Act 1999),
- (iv) the Independent Monitoring Commission (within the meaning of the Independent Monitoring Commission Act 2003), and
- (v) the Independent Reporting Commission established by the Agreement (within the meaning of the Independent Reporting Commission Act 2017),

4.1.1 Section 42(c) provides that the FOI Act does not apply to:

- a record held by the Criminal Assets Bureau
- a record held by the Defence Forces relating to the matters specified at (I) to (VII)
- a record held by the Independent Commission for the Location of Victims' Remains
- a record held by the Independent Monitoring Commission
- a record held by the Independent Reporting Commission.

4.1.2 All records held by the Criminal Assets Bureau, the Independent Commission for the Location of Victims' Remains, the Independent Monitoring Commission and the Independent Reporting Commission are captured by the provision. However, the only records held by the Defence Forces that are captured are those that relate to any of the matters specified at (I) to (VII).

4.1.3 Sub-paragraph (v), which relates to the Independent Reporting Commission, was inserted in section 42(c) by section 9 of the Independent Reporting Commission Act 2017.

Records Held by the Defence Forces 'Relating to' (I) to (VII)

4.2.1 Section 42(c)(ii)(II) provides that the Act does not apply to a record held by the Defence Forces relating to section 170 of the Defence Act 1954.

Example: In Case 150243 we found that, in determining whether a record could be described as "relating to" section 170 of the Defence Act 1954, it was appropriate to examine whether there was a sufficiently substantial link between the record and the purpose of that section. Section 170 describes the purpose of appointing a provost marshal. However, we found that, having regard to the plain and ordinary meaning of the language used, the purpose of the section itself was to provide the statutory authority for the appointment of a provost marshal. Thus, we found that any records relating to the appointment of a provost marshal were excluded from the FOI Act. However, we did not agree with the argument of the Defence Forces that records relating to the provost marshal's functions were also excluded.

5.0 42(d) - An Inquiry under Section 42 of the Garda Síochána Act 2005

What the Act states:

42. This Act does not apply to –

...

(d) a record relating to —

(i) an inquiry within the meaning of section 42 of the Garda Síochána Act 2005, whether the record concerned is held by —

(I) persons conducting the inquiry, or

(II) on the dissolution of the inquiry, any other body having custody of such a record,

other than —

(A) a record relating to the appointment of a person to conduct an inquiry under section 42 of the Garda Síochána Act 2005, or

(B) a record relating to the expenses or other matters concerning the general administration of an inquiry under that section,

5.1.1 Section 42(d) provides that the FOI Act does not apply to certain records relating to an inquiry within the meaning of section 42 of the Garda Síochána Act 2005 whether the record is held by the persons conducting the inquiry or, on the dissolution of the inquiry, by any other person having custody of the record.

5.1.2 Section 42 of the Garda Síochána Act 2005 empowers the Minister for Justice to appoint a person to inquire into any aspect of the administration, practice or procedure of the Garda Síochána.

5.1.3 The exclusion at section 42(d) applies to records relating to such an inquiry apart from records relating to:

- the appointment of a person to conduct an inquiry or
- the expenses or other matters concerning the general administration of an inquiry.

5.1.4 See reference to the term “general administration” at paragraphs 1.6.1 – 1.6.3 above and the reference to the Garda Síochána at section 3.0 above.

6.0 42(e) - Tribunal of Inquiry or Commission of Investigation

What the Act states:

42. This Act does not apply to —

...
(e) a record relating to —

(i) an inquiry into any matter by a tribunal to which the Tribunals of Inquiry (Evidence) Act 1921, is applied, whether the record concerned —

(I) is held by the tribunal of inquiry, or

(II) is deposited with a person, or at a place, in compliance with the requirements of a notice under section 46(1) of the Civil Law (Miscellaneous Provisions) Act 2011 given to the chairman or former chairman, as the case may be, of the tribunal of inquiry,

or

(ii) an investigation by a commission of investigation within the meaning of the Commissions of Investigation Act 2004, whether the record concerned is held by-

(I) the commission of investigation,

(II) the specified Minister after being deposited with him or her under section 43(2) of the Commissions of Investigation Act 2004,

(III) a tribunal of inquiry after being made available to it under section 45 of that Act,

or

(IV) a body after being transferred to it on the dissolution of a tribunal of inquiry to which the record was made available under section 45 of that Act,

other than —

(A) a record created before the appointment of the tribunal or the making of the order establishing the commission, or

(B) a record relating to the expenses of the tribunal or commission or other matters concerning the general administration of the tribunal or commission,

(C) a record relating to the appointment of persons under section 7 or 8 of the Commissions of Investigation Act 2004,

6.1.1 Section 42(e) provides that the FOI Act does not apply to certain records relating to

- an inquiry by a tribunal under the Tribunals of Inquiry (Evidence) Act 1921 or
- an investigation by a commission of investigation within the meaning of the Commissions of Investigation Act 2004.

6.1.2 The Oireachtas may decide that any tribunal that it sets up shall be invested with the powers set out in the Tribunals of Inquiry (Evidence) Act 1921 to 2004. This Act provides that a tribunal can make orders to force witnesses to attend and give evidence.

6.1.3 The Commissions of Investigations Act 2004 provides for the establishment of commissions to investigate into and report on matters considered to be of significant public concern and to provide for the powers of such commissions.

- 6.1.4 There are exceptions to this exclusion. The exclusion does not apply where:
- the record was created before the appointment of the tribunal or the making of the order establishing the commission
 - the record relates to the expenses of the tribunal or commission or other matters concerning the general administration of the tribunal or commission
 - the record relates to the appointment of persons under sections 7 or 8 of the Commissions of Investigation Act 2004.

General Administration

6.2.1 As stated above, the exclusion from the Act provided for at section 42(e) does not apply where the record relates to the expenses of the tribunal or commission or other matters concerning the general administration of the tribunal or commission.

Example: In Case 090315 we considered the term “general administration” in section 40 of the Commissions of Investigation Act 2004 (which was somewhat similar to what is now section 42(e) of the FOI Act 2014). We found that, in order to construe the meaning of “general administration” in the context of the 2004 Act, it was necessary to identify the other term or process to which it was intended to be in opposition. We found that, in taking this approach, it was clear that the term “general administration” was intended to be understood as in opposition to the substantive investigative work of the particular commission. We found that, taking the Commissions of Investigation Act 2004 in its entirety, it was clear that the legislature intended that a high level of confidentiality would apply to the collection and assessment of evidence and to the thought processes of a commission generally. On this approach, the term “general administration” excluded anything which served to disclose details of the collection and assessment of evidence or the thought processes of the commission more generally. We found that in the context of that review the term “general administration” included matters of accommodation, provision of facilities, staffing, expenses, accounting and other practical aspects of how a commission undertakes its business.

6.2.2 While the Act is silent on the meaning of general administration, we consider that it refers to records such as records relating to personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organisation and office procedures and the like. We consider that the term does not refer to records relating to matters concerning the core business of a Tribunal of Inquiry or commission of investigation.

Example: In Case 190047 we were satisfied that the record sought did not relate to general administration. It concerned payments made to a specific individual (Mr Y) and/or his legal representatives, relating to meetings with or attendance at the Smithwick Tribunal (the Tribunal) which was established in 2005 further to the Tribunals of Inquiry (Evidence) Act 1921-2004. The record was prepared and submitted by Mr Y’s solicitors further to Judge Smithwick’s orders for legal costs. It detailed how Mr Y’s legal costs were incurred by reference to the workings of the Tribunal. We found that, while the record contained financial information, it did not reflect payments for matters such as services provided to the Tribunal. Rather, it was concerned with the State’s payment of legal costs of a third party who had been granted representation on foot of orders made by Judge Smithwick. We

were satisfied that it also went into much detail about the conduct of the Tribunal. We accepted that it came within section 42(e)(i) and was not subject to the Act.

6.2.3 See reference to the term “general administration” at paragraphs 1.6.1 – 1.6.3 above.

Section 31(2)

6.3.1 In considering records in the context of section 42(e), it may be useful to bear the provisions at section 31(2) in mind. Section 31(2) provides that an FOI body may refuse to grant an FOI request if the record concerned relates to the appointment, proposed appointment or the business or proceedings of a tribunal to which the Tribunals of Inquiry (Evidence) Act 1921 applies or of certain other tribunals, bodies or individuals appointed to inquire into specified matters. Section 31 is dealt with in a separate Guidance Note.

7.0 42(ea) –The CervicalCheck Tribunal

What the Act states:

42. This Act does not apply to –

...

(ea) a record held by the CervicalCheck Tribunal (in this paragraph referred to as 'the Tribunal') or, after the Tribunal has been dissolved, the Minister for Health, relating to the Tribunal, other than a record relating to the expenses of the Tribunal or other matters concerning the general administration of the Tribunal,

7.1.1 Section 40 of the CervicalCheck Tribunal Act 2019 inserted paragraph (ea) in section 42. It provides that the Act does not apply to a record held by the CervicalCheck Tribunal (the Tribunal) or, after the Tribunal is dissolved, by the Minister for Health, relating to the Tribunal. This exclusion at paragraph (ea) does not apply to records relating to the expenses of the Tribunal or other matters concerning the general administration of the Tribunal.

8.0 42(f) - The Attorney General or the Director of Public Prosecutions

What the Act states:

42. This Act does not apply to —

(f) a record held or created by the Attorney General or the Director of Public Prosecutions or the Office of the Attorney General or the Office of Director of Public Prosecutions, other than a record relating to general administration,

8.1.1 Section 42(f) provides that, with the exception of a record relating to general administration, the FOI Act does not apply to a record held or created by the Attorney General (AG) or the Director of Public Prosecutions (DPP) or either of their Offices. (Note: the Chief State Solicitor's Office and the Office of the Parliamentary Counsel are constituent parts of the Office of the Attorney General; thus, section 42(f) also applies to such a record held or created by those Offices.)

Held or Created By

8.2.1 Section 42(f) may be relevant where a request is made to the AG or the DPP or their Offices for access to records held by them.

8.2.2 Section 42(f) may also be relevant where a request has been made to another FOI body which holds a record which was created by the AG, the DPP or their Offices.

Example: In Case 050381 the Commissioner found that two records held by the Department of the Taoiseach were copies of records created by the AG and his Office. One record was an opinion given by the AG to the Department of the Taoiseach and the other record was a submission by a staff member of the AG's office to the latter, on foot of a request from the Department for legal advice. The Commissioner found that the records did not relate to the administration of the Office of the AG and that they were outside the scope of the FOI Act.

8.2.3 However, the fact that a record held by another FOI body might relate to communications with the AG, DPP or their Offices does not, of itself, mean that section 42(f) applies. Where the record held by the other FOI body was not created by the AG, DPP or their Offices, we have not accepted that it is covered by section 42(f), even where it is a copy of a record which is held by the AG, DPP or their Offices.²

Example : In Case 030414 we found that certain records, being file copies of original records that were sent to the AG, did not satisfy the conditions governing section 42(f)* and that they should be released.

8.2.4 In *The Minister for Justice, Equality and Law Reform v The Information Commissioner* referred to above, Finnegan J addressed the issue of records held by

² Our understanding of this point is currently the subject of a court appeal.

the DPP and section 46(1)(b) of the 1997 Act (now section 42(f) of the 2014 Act) stating:

“Insofar as the Director of Public Prosecutions or his office has control of the original statements and other documents which were the source of documents compiled in the book of evidence then clearly these are documents held by the Director of Public Prosecutions having regard to the definition of “hold” in section 2(5) of the Act of 1997 and are likewise affected by the provisions of s.46(1)(b).”

However, such documents, if also held by another FOI body, would not fall within the exclusion at section 42(f). Finnegan J stated:

“Such documents if also held by another public body subject to other provisions of the Act of 1997, may be accessible on application to that body.”

8.2.5 We have found that annotations to records were not covered by section 42(f), where the annotations were not made by the AG or the DPP or their Offices.

Example: In Case 030414 (referred to above) one of the records at issue was a copy of an AG record made and annotated by an official of the Department. We found that the annotations were not created or held by the AG or by that Office and that section 42(f)* did not apply to the annotations.

8.2.6 We have also found that a record created by someone acting in his/her capacity as a member of staff of the Office of the AG is a record created by the Office of the AG. We have also found section 42 to apply where the record was prepared by legal counsel nominated by the Office of the AG and instructed by the Chief State Solicitor’s Office.

Example # 1: In Case 070266 we considered a record which had been created by the Legal Attaché to the Permanent Representation of Ireland in Brussels. We noted that the Legal Attaché was acting in her capacity as a member of staff of the Office of the Attorney General while based in the Permanent Representation in Brussels at the time. We also noted that one of the functions of the post of legal attaché was to provide legal advice to the various departmental officials on issues arising at meetings and on documents drafted by European Institutions. We were satisfied that the record created by the Legal Attaché was created by the Office of the Attorney General and related to matters other than the general administration of that Office and therefore that it was excluded from the scope of the FOI Act under section 42(f)*.

Example # 2: In Case 180457 the records included correspondence and legal documents, including draft affidavits, created by staff members of the CSSO or legal counsel instructed by the CSSO and nominated by the Office of the AG. We were satisfied that these records were created by or on behalf of the CSSO and that they did not relate to general administration. We found that section 42(f) applied.

Example # 3: On the other hand, however, in Case 150087 certain records held by the Department of Jobs, Enterprise and Innovation were created by its legal adviser, who was on secondment from the Attorney General's Office to the Department. While we considered the status of the legal adviser under section 31(1)(a)*, we stated that it was clear from the records that they were not created

or held by the Attorney General's Office. Accordingly, we found that section 42(f)* did not apply.

8.2.7 The issue of whether the record was created by the Attorney General, the DPP or either of their offices may require some consideration.

Example: In Case 170494 we considered a contract of sale which had been made between the Department of Education & Skills and the Trustees of a school. We did not accept that the record, a contract of sale between the Department and the vendor, could be deemed to have been created by the Office of the Attorney General, although we accepted that it may have been created with considerable assistance from that Office.

General Administration

8.3.1 The exclusion from the application of the Act provided for in section 42(f) does not apply to a record relating to general administration. In other words, the Act does apply to records relating to general administration. (See also paragraphs 1.6.1-1.6.3)

8.3.2 While the Act is silent on the meaning of general administration, we consider that it refers to records which have to do with the management of the Offices of the AG or DPP, such as records relating to personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organisation, office procedures and the like. We are satisfied that it does not refer to records relating to matters concerning the core business of the Offices, such as advising on legislation or litigation.

8.3.3 In many cases determining whether the record relates to general administration may be relatively straightforward.

Example # 1: In Case 98079/ 98080 the request to the Department of Agriculture and Food sought "the unabridged advice received by Personnel D.A.F. from the Office of the A.G. (Attorney General) ...". The reference to advice from the AG arose from a letter from the Department to the requester in which it was indicated that the Department had received advice from the Office of the AG in relation to issues which the requester had raised. Having examined the record concerned, we were satisfied that it was a record created by the Office of the AG and that it was created in response to a request for advice from the Department. We were also satisfied that it was not a record relating to the general administration of the Office of the AG.

Example # 2: In Case 000101 we considered section 42(f)* in the context of an application to the DPP for a statement of reasons for a decision under section 10*. We found that the information required to provide the reasons requested was contained on a specific file created in connection with the decision on whether or not to prosecute. We were satisfied that the records were exempt records by virtue of section 42*.

8.3.4 In some cases, the issue may be less straightforward. For example, information concerning expenditure will not necessarily relate to general administration in every case.

Example: In Case OIC-96507 we found that certain invoices or fee notes held by the Chief State Solicitor's Office (CSSO) did not relate to general administration. The applicant sought access to copies of invoices or fee notes submitted by certain named individuals for work undertaken on the Apple tax case in certain years. It was the applicant's position that the data sought fell under the categories of "pay matters" and/or "accounts". We found that the "pay matters" and "accounts" that form part of the general administration of the Attorney General's Office were those that related to the general or routine management of the Office and its constituent offices, not the legal fees and other expenses incurred in connection with specific cases such the Apple tax case. Such costs would be based on the particular circumstances arising in the case, including the complexity of the issues concerned and the amount of work involved. We found that section 42(f) applied.

8.3.5 We are satisfied that the reference to general administration is to the general administration of the Offices of the AG or DPP.

Example: In Case 150445 the applicant argued that section 42(f) could not apply as the records related to the administration of the courts or court offices. However, we were satisfied that for the exception in section 42(f) concerning records relating to general administration to apply, the records must relate to the general administration of the Offices of the AG or DPP. We found that the records did not relate to the general administration of the Offices of the AG or DPP. We found that section 42(f) applied to those records and parts of records that were created by the Office of the AG.

Legal Professional Privilege - Overlap with section 31(1)(a)

8.4.1 In considering records in the context of section 42(f) it may be useful to bear the provisions at section 31(1)(a) in mind. Section 31(1)(a) provides that an FOI body shall refuse to grant an FOI request if the record concerned would be exempt from production in proceedings in a court on the ground of legal professional privilege.

Example: In Case 98102 certain records held by the Revenue Commissioners related to the prosecution of the applicant by the Office of the DPP. They contained correspondence to and from that Office. We decided that all such correspondence was created in contemplation of legal proceedings and that the Revenue Commissioners were required to refuse access under section 31(1)(a)*. We stated that it was also clear that some of the records were created by the Office of the DPP. They were not concerned with the general administration of that Office but rather with the prosecution of the applicant. We stated that it was clear that by virtue of section 42(f)*, the FOI Act did not apply to such records.

8.4.2 Section 31 is dealt with in a separate Guidance Note.

9.0 42(g) - Comptroller and Auditor General

What the Act states:

42. This Act does not apply to —

...

(g) a record relating to an audit, inspection, investigation or examination carried out by the Comptroller and Auditor General under the Comptroller and Auditor General Acts 1923 to 1993, the Exchequer and Audit Department Acts 1866 and 1921, or any other enactment, other than —

- (i) such a record that was created before the commencement of the investigation, audit, inspection or examination aforesaid, or
- (ii) a record relating to the general administration of the Office of the Comptroller and Auditor General,

9.1.1 Section 42(g) provides that the FOI Act does not apply to a record relating to an audit, inspection, investigation or examination carried out by the Comptroller and Auditor General (C&AG) under the Comptroller and Auditor General Acts 1923 to 1993, the Exchequer and Audit Department Acts 1866 and 1921, or any other enactment.

9.1.2 However, the Act will apply to such a record where:

- the record was created before the commencement of the investigation, audit, inspection or examination or
- the record relates to the general administration of the Office of the C&AG.

Example # 1: In Case 120202 we considered an Irish Prisons Service Capital Construction Work Audit report. The Department of Justice and Equality provided confirmation from the C&AG that it carried out the audit as a joint audit with the Department's Internal Audit Unit. Having examined the record, we were satisfied that it related to an audit, inspection or examination carried out by the C&AG and that section 42(g)* applied.

Example # 2: In Case 180222 we found that section 42(g) applied to a record which concerned a letter to the President of Dundalk Institute of Technology (DKIT) from the C&AG dated 25 January 2018 concerning an audit the C&AG was undertaking of DKIT's financial statements for year ended 31 August 2016. The applicant argued that section 42(g) could not apply as the record was created before the audit of DKIT began. She contended that while the correspondence was dated 25 January 2018, DKIT did not submit its accounts to the C&AG until 17 April 2018, which, she argued, meant the audit could not have begun until after that date. However, we stated that, having examined the record, it was clear that it concerned an audit that was already ongoing. We noted that the correspondence referred to issues that the audit identified. We were satisfied that the record related to an audit carried out by the C&AG.

9.1.3 See also the reference to the term 'general administration' at paragraphs 1.6.1 – 1.6.3 above.

10.0 42(h) - The President

What the Act states:

42. This Act does not apply to –
...
(h) a record relating to the President,

10.1.1 Section 42(h) provides that the FOI Act does not apply to a record relating to the President. There are no exceptions to this exclusion.

'Relating' to the President

10.1.2 In considering whether records are records “relating to” the President, we have adopted the reasoning in the case of *EH v The Information Commissioner* [2001] IEHC 182. In *EH v The Information Commissioner* the High Court considered the question of whether records related to the requester’s personal information. The Court found that the test to be applied to determine whether a record “relates to” the personal information was “whether there is a sufficiently substantial link” between the requester’s personal information and the record in question. We have found it useful to adopt this reasoning in examining whether records are records “relating to” the President, given the use of the phrase “relating to”.

Example: In Case OIC-53494 the applicant said that the records sought were held by a department which was “FOI-able” (the Department of the Taoiseach). We found that, while an FOI body held the records, this did not negate the possibility that section 42(h) might operate so as to exclude those records from the ambit of the FOI Act. We found that certain records were records relating to the President - the records concerned the Audit Committee of the President’s Establishment and/or the Office of the Secretary General to the President. We considered that there was a sufficiently substantial link between those records and the President. However, this finding excluded one record - a letter of appointment to the audit committee of the Department. We were not satisfied that it was a record relating to the President. It related to the audit committee of the Department and we did not consider that there was a sufficiently substantial link between it and the President.

11.0 42(i) - The Central Bank

What the Act states:

42. This Act does not apply to –

...

- (i) a record held by the Central Bank of Ireland, the disclosure of which is prohibited by —
- (i) the Rome Treaty,
 - (ii) the ESCB Statute, or
 - (iii) any of the Supervisory Directives,
- within the meaning of the Central Bank Act 1942,

11.1.1 Section 42(i) provides that the FOI Act does not apply to certain records held by the Central Bank, namely, where disclosure of the records concerned is prohibited by the Rome Treaty, the ESCB statute or any of the Supervisory Directives within the meaning of the Central Bank Act 1942. There are no exceptions to this exclusion.

11.1.2 While the FOI Act does not apply to a record held by the Central Bank which is specified in section 42(i), it should be noted that the Central Bank is also referred to in Schedule 1 Part 1 of the FOI Act. Section 6(2) of the Act states that an entity specified in Part 1 of Schedule 1 shall, subject to the provisions of that Part, be a public body for the purposes of the Act. Schedule 1, Part 1(b), states that section 6 does not include a reference to the Central Bank of Ireland, insofar as it relates to –

- (i) records held by it containing—
 - (I) confidential personal information relating to the financial or business affairs of any individual, or
 - (II) confidential financial, commercial or regulatory information relating to the business affairs of any person who holds or has held or who has applied for a licence, authorisation, approval or registration from the Central Bank of Ireland, or is otherwise regulated by the Central Bank of Ireland, that the Central Bank of Ireland has received for the purposes of performing, or in the discharge of, any of its statutory functions (other than when that information is contained in records in summary or aggregate form, such that persons cannot be identified from the record), and
- (ii) records—
 - (I) held by the Central Bank of Ireland on the Central Credit Register established by it under section 5(1), or
 - (II) produced by the Central Bank of Ireland under section 30(1), of the Credit Reporting Act 2013 (No. 45 of 2013);

Example: In Case 160474 we found that certain information in records held by the Central Bank fell within the ambit of Schedule 1, Part 1(b)(i). The records related to complaints against the Bank and certain of its officials arising from an inspection carried out by the Bank. The complaints had been forwarded to the Bank for investigation because of the Central Bank's statutory role in the matter as the financial regulator of Ireland. For the sake of completeness we noted that the information would also have been excluded from the remit of the Act by virtue of section 42(i) of the Act in light of the prohibition on the disclosure of confidential

information provided for in the relevant Supervisory Directives. We considered that it was readily apparent that the Oireachtas wished to observe the professional secrecy obligations arising under EU law by ensuring that any confidential information held by the Central Bank relating to the entities it regulates was excluded from the ambit of the FOI Act.

12.0 42(j) – Member of the Government or Minister of State

What the Act states:

42. This Act does not apply to —

...

(j) a record given by an FOI body to a member of the Government or a Minister of State for use by him or her for the purposes of any proceedings in either House of the Oireachtas or any committee of either or both of such Houses or any subcommittee of such a committee (including such proceedings in relation to questions put by members of either such House to members of the Government or Ministers of State (whether answered orally or in writing)),

12.1.1 The Act does not apply to a record:

- given by an FOI body to a member of the Government or a Minister of State
- for use by him/her for the purposes of any proceedings in either House of the Oireachtas (or any committee of either or both such Houses or any subcommittee of such a committee).

12.1.2 Proceedings include proceedings in relation to questions by members of either House of the Oireachtas to members of the Government or Ministers of State.

Given by an FOI Body to a Member of the Government or a Minister of State

12.2.1 In order for section 42(j) to apply, the record must have been given by an FOI body to a member of the Government or a Minister of State.

Example: In Case 160157 we found that, while a record related to the preparation of a reply for a Parliamentary Question (PQ) put to the Minister for Justice and Equality, it did not, on its face, appear to be a record that was, or would have been, actually "given" by the Department of Justice and Equality to the Minister in response to that PQ.

For Use for the Purposes of any Proceedings

12.3.1 Section 42(j) also requires that the record was given to the relevant person for the purposes of particular proceedings as specified in paragraph (j).

Example: In Case 040025 we did not accept an interpretation of section 42(j)* which would exclude from the scope of the FOI Act briefing material merely given to a member of the Government or a Minister of State in the event that he or she may, at some time in the future, require such information for a PQ or for any proceedings in either House of the Oireachtas. The Department of Agriculture and Food had stated in its internal review decision that the record "consists of briefing material for the Minister for a Parliamentary Question". However, when we sought details from the Department as to the particular Parliamentary Question (PQ) that the record related to, it emerged that it was not in fact given to the Minister in relation to any specific PQ or particular proceedings in either House of the Oireachtas. The Department clarified that the record was prepared as a

contingency in order to enable the Minister to give up to date information about a particular case in the Houses of the Oireachtas "should he be called upon to do so". We found that section 42(j)*could not apply.

Section 31(1)(c)(ii)

12.4.1 In this context, it may be useful to bear in mind the provision at section 31(1)(c)(ii). Section 31(1)(c)(ii) provides:

31. (1) A head shall refuse to grant an FOI request if the record concerned —

...

(c) consists of —

...

(ii) opinions, advice, recommendations, or the results of consultations, considered by —

(I) either House of the Oireachtas or the Chairman or Deputy Chairman or any other member of either such House or a member of the staff of the Houses of the Oireachtas Service for the purposes of the proceedings at a sitting of either such House, or

(II) a committee appointed by either such House or jointly by both such Houses and consisting of members of either or both of such Houses or a member of such a committee or a member of the staff of the Houses of the Oireachtas Service for the purposes of the proceedings at a meeting of such a committee.

12.4.2 Section 31 is dealt with in a separate Guidance Note.

13.0 42(k) - Private Papers of a Member or Official Document of the Houses of the Oireachtas

What the Act states:

42. This Act does not apply to –

...

(k) a record relating to any of the private papers (within the meaning of Article 15.10 of the Constitution) of a member of either House of the Oireachtas or an official document of either or both of such Houses that is required by the rules or standing orders of either or both of such Houses to be treated as confidential,

13.1.1 Section 42(k) provides that the Act does not apply to a record relating to:

- any of the private papers (within the meaning of Article 15.10 of the Constitution) of a member of either House of the Oireachtas or
- an official document of either or both Houses that is required by the rules or standing orders of either or both Houses to be treated as confidential.

13.1.2 Article 15.10 of the Constitution provides as follows:

Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.

13.1.3 The Standing Orders of Dáil Éireann and Seanad Éireann include Orders relating to Official Documents, Private Papers and Confidential Communications. (See Dáil Éireann Standing Orders relative to Public Business 2020 (Standing Orders 152 to 156) and Seanad Éireann Standing Orders relative to Public Business 2020 (Standing Orders 133 to 137). The Standing Orders of each House are in similar terms.)

Private Papers

13.2.1 Order 154 of the Standing Orders of Dáil Éireann states:

- (1) This Standing Order is made for the purposes of giving effect to Article 15.10 of the Constitution in so far as it provides for the protection of the private papers of members.
- (2) For the purpose of this Standing Order, the private papers of a member are all documents concerning which the member has a reasonable expectation of privacy, and:
 - (a) which are prepared for the purposes of, or purposes incidental to:
 - (i) transacting any business of the Dáil or any Committee of the Dáil; or
 - (ii) the member's role as public representative; but
 - (b) which are not:
 - (i) where the member is an office-holder, documents relating to the member's functions as office-holder (whether those documents are held by the member, by the office-holder's Department or Office, by any of his or her special advisers, or by some other person); or
 - (ii) lawfully in the public domain.
- (3) A reference to a member in this Standing Order includes:
 - (a) where the context admits, a former member in his or her capacity as a former member, and

(b) where the context requires, a deceased member, as well as his or her executors or administrators in their capacity as executors or administrators.

[Standing Order 154(4) and (5) contain further provisions relating to private papers including provisions concerning access to or disclosure of such documents.]

13.2.2 The Standing Orders of the Seanad contain provisions in similar terms relating to private papers of members of the Seanad. (See Seanad Éireann Standing Orders relative to Public Business 2020, Order 135.)

13.2.3 A distinction may be drawn between records which relate to a Minister's functions as Minister (office-holder) and those relating to his/her functions as a public representative (member). It should also be noted, however, that a Minister continues to have a role as a public representative in tandem with that of an office holder.

Example # 1: In Case 190083 we were satisfied that the withheld records were documents concerning which the member of the Oireachtas (the Minister of State for European Affairs) had a reasonable expectation of privacy and which were prepared for the purposes of, or purposes incidental to, the Minister's role as public representative. The records comprised correspondence between the Minister and a communications company in relation to the Minister's constituency work. They related to matters in the Minister's constituency such as the provision of public services and other local matters. We found that the records related to the private papers of a member of a House of the Oireachtas. We also noted that section 2 of the FOI Act defines "exempt record" as meaning, amongst other things, a record that is created or held by an office holder and relates to the functions or activities of the office holder as a member of the Oireachtas or a political party.

Example # 2: In Case OIC-59124 we found that the records sought were of a type that, if held by the Minister for Transport, Tourism and Sport and/or his Special Adviser, were the Minister's private papers and that section 42(k) applied. The records related to the re-opening of Stepside Garda Station. The applicant essentially argued that any interactions the Minister had in relation to the re-opening of the Station were in his capacity as Minister and not as a TD. However, we accepted the Department's position that the matter did not form part of its functions. We found that it was not surprising that, as a TD, in whose constituency the Station was based, the Minister would have an interest in the matter. We accepted that any records that might relate to the Minister's interactions in relation to the re-opening of the Station would relate to his role as TD and were captured by the definition of private papers as set out in what was then Order 135 (now Order 154) of the Dáil Éireann Standing Orders.

13.2.4 Where section 42(k) applies to records, the provision does not distinguish between the records concerned.

Example: In Case 180450 the applicant's submission sought to distinguish between "day to day routine correspondence" and more sensitive material. However, we found that, if records were deemed to fall within the parameters of section 42(k) then no right of access exists under the FOI Act.

13.2.5 In certain circumstances, information may comprise personal information about members of the Oireachtas.

Example: In Case OIC-55129 we were satisfied that disclosure of the records at issue would involve the disclosure of personal information relating to members of the Oireachtas and that section 37(1) applied. The records at issue contained details of members for whom reconciliations of records of attendance at Leinster House were made, the dates for which the reconciliations were made, and where the reason for the reconciliation was recorded as “Medical Cert Presented” or “Extra Ordinary Circumstances”. The Houses of the Oireachtas Service stated that requests for reconciliations due to extraordinary circumstances tended to involve family bereavements, family illnesses and absences normally contemplated under force majeure leave for employees. We found that release of the information would disclose the fact that the reconciliations had been carried out for reasons relating to aspects of the private lives of the relevant members.

Official Documents

13.3.1 Standing Order 152(4) of the Dáil states:

(4) A document which is an official document for the purposes of Standing Order 153 or a private paper for the purposes of Standing Order 154, must be treated as confidential, and is required by these Standing Orders to be kept confidential.

Standing Order 133(4) of the Seanad is similar.

13.3.2 Order 153 of the Dáil Standing Orders states as follows:

(1) This Standing Order is made for the purposes of giving effect to Article 15.10 of the Constitution in so far as it provides for the protection of the official documents of the Dáil.

(2) For the purpose of this Standing Order, official documents are all documents in the custody of, or belonging to, the Dáil or a Committee of the Dáil, or over which the Dáil or Committee exercises control, and which:

- (a) are or have been prepared for the purposes of, or purposes incidental to, transacting any business of the Dáil or of such a Committee,
- (b) are or have been created by or pursuant to these Standing Orders, or to an Order or direction of the Dáil or of such a Committee,
- (c) are or have been given in evidence to the Dáil or to such a Committee, or
- (d) are or have been presented or submitted to the Dáil or to such a Committee:

unless the document has been, or is presently to be, laid before the Dáil or has been, or is presently to be, otherwise lawfully placed in the public domain.

(3) (a) The categories of documents in Schedule 1 to these Standing Orders are, subject to subparagraph (d) of this paragraph, to be treated as falling within the scope of paragraph (2)(a) or (2)(b).

(b) The Committee on Procedure may, subject to this Standing Order, designate other categories of documents that are to be treated as falling within paragraph (2)(a) or (2)(b), and may at any time vary or revoke that designation.

(c) Any designation, variation, or revocation referred to in subparagraph (b) of this paragraph must be published as soon as practicable after it is made.

(d) Documents proffered to the clerk of a Committee of the Dáil but which the Committee declines to receive, and documents given to such a Committee but which have ceased by decision of the Committee in accordance with statute to be documents of that Committee, are not, and are to be treated as never having been, official documents, unless they qualify on some other ground.

[The remainder of Standing Order 153 contains further provisions relating to official documents, including access to or disclosure of such documents in certain circumstances.]

13.3.3 The Standing Orders of the Seanad contain provisions in similar terms relating to official documents of the Seanad.

13.3.4 Schedule 1 of the Dáil Standing Orders (referred to in Order 153(3)(a) above), lists the following categories of documents as designated for the purposes of Standing Order 153(2)(a) and (b):

- (a) Imeachtaí Dháil Éireann (“clerk sheets”).
- (b) Briefings regarding legislation or other proceedings before the Dáil.
- (c) Working papers of the Dáil or any of its Committees.
- (d) The following documents in respect of Dáil Committee meetings –
 - (i) agendas,
 - (ii) briefings,
 - (iii) minutes, and
 - (iv) transcripts.
- (e) Research papers prepared by the Library and Research Service, or any replacement for that facility, at the instance of the Dáil or a Committee of the Dáil.
- (f) Advices to members from officers of the Dáil or members of the joint staff.
- (g) Opinions, advice, recommendations, or the results of consultations, considered by the Dáil or a Committee of the Dáil, or prepared for that consideration.
- (h) Documents constituting or evidencing communications between members and officers of the Dáil, or communications between officers of the Dáil.
- (i) Documents constituting or evidencing communications between officers of the Dáil or members of the joint staff, on the one hand, and any office-holder or his or her Department or Office, and any officers, staff, or agencies of the Government, on the other, in direct relation to any of the business referred to in Standing Order 153(2)(a).
- (j) Documents constituting or evidencing communications from a Committee of the Dáil that solicit information for the purposes of Committee business and any response (not being one the Committee has declined to receive, or one the documents constituting which have ceased by decision of the Committee in accordance with statute to be documents of the Committee) forwarded to and accepted by the Committee.
- (k) Documents created in relation to how parliamentary business is regulated between parties or groups as provided for in these Standing Orders including with regard to the appointment of members to a Committee.
- (l) Documents concerning disciplinary issues relevant to the Dáil or its Committees.
- (m) Without limiting the next preceding category, documents constituting or evidencing communications pursuant to statute between an officer of the Dáil or a member of either House of the Oireachtas, on the one hand, and a Committee of the Dáil, on the other, in relation to the conduct or alleged conduct of a member of the Dáil.
- (n) A response by a non-member to matter in the nature of being defamatory received by or on behalf of the Committee on Procedure in accordance with these Standing Orders until that Committee decides that the terms of the response are such that it should be published or laid before the Dáil.
- (o) Drafts not intended for publication of official documents.
- (p) In respect of a document falling outside Standing Order 153(2) solely because it is in the public domain or has been laid before the Dáil or is presently to be published or so laid, drafts not intended for publication or not intended to be so laid.
- (q) Documents relating to an assent referred to in Article 15.8.2° of the Constitution and to any sitting of the Dáil pursuant to that assent.
- (r) Documents relating to the election of the Ceann Comhairle or Leas-Cheann Comhairle.

13.3.5 The Schedule of the Standing Orders of the Seanad is in similar terms and mirrors most, but not all, of the categories above.

Both Houses or Joint Committee

13.3.6 Standing Order 153(9) of the Dáil and 134(9) of the Seanad concern documents of both Houses of the Oireachtas or of a Joint Committee. Standing Order 153(9) of the Dáil states:

- (9) (a) This Standing Order's protection extends to documents in the custody of, or belonging to, both Houses of the Oireachtas or a Joint Committee, or over which both Houses or a Joint Committee exercise control, provided that the terms of this Standing Order affording that protection have a counterpart in the Standing Orders of the Seanad.
- (b) The grant of access to, or disclosure of, an official document described in subparagraph (a) may be allowed or afforded where:
- (i) the provision in this Standing Order for affording that access or allowing that disclosure has a counterpart in the Standing Orders of the Seanad; and
 - (ii) if consent provided for in or under paragraph (5) or otherwise in or under these Standing Orders is required for that access or disclosure, concurring consents are granted by both Houses

Standing Order 134(9) of the Seanad is in similar terms.

Example: In Case 170501 the applicant sought access to certain records of Private Sessions and other information relating to the Joint Oireachtas Committee on the Future Funding of Domestic Water Services. We found that the Joint Oireachtas Committee on the Future Funding of Domestic Water Services was created on 24 November 2016 by a motion of Dáil Éireann. Under its terms of appointment, it was described as 'a Special Committee ... appointed, to be joined with a Special Committee to be appointed by Seanad Éireann, to form the joint Committee on the Future Funding of Domestic Water Services'. We were satisfied that the Committee was a committee of both Dáil and Seanad Éireann within the meaning of the relevant Standing Orders of both Houses. Having regard to the Standing Orders, we found that the records were official documents under the Standing Orders of both Houses of the Oireachtas which were required to be treated as confidential.

Other Provisions

13.4.1 In considering records in the context of section 42(k), it may also be useful to bear a number of other provisions in mind:

- section 31(1)(c)(ii) - see above under section 42(j)
- section 42(l) - see below
- section 2 of the FOI Act which defines "exempt record" as meaning, amongst other things, a record that is created for or held by an office holder and relates to the functions or activities of:
 - the officer holder as a member of the Oireachtas or a political party
 - a political party
 (and "office holder" is defined as meaning (a) a person who is a Minister of the Government or a Minister of State, or (b) a member of either House of the Oireachtas who holds the office of Attorney General.)

- section 127 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 which states:

- (1) Without prejudice to the exemption for official documents and private papers, the Freedom of Information Acts 1997 and 2003 shall not apply to a record relating to a Part 2 inquiry or other committee business unless —
- (a) the record was created before the inquiry or other committee business, as the case may be, commenced, or
 - (b) the record relates to the expenses of the committee or other matters concerning the general administration of the committee.

- (2) Subsection (1) applies whether the record concerned is held by —
- (a) the committee,
 - (b) the Oireachtas Commission,
 - (c) a tribunal or commission after being made available to it under section 29(3), or
 - (d) any other House or committee after being transferred to it on the dissolution of a tribunal or commission to which the record was made available under section 29(3).
- (3) In this section “record” has the same meaning as in the Freedom of Information Acts 1997 and 2003.

14.0 42(l) - Private Paper, Confidential Communication or Official Document – Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013

What the Act states:

42. This Act does not apply to –

...

(l) unless consent has been lawfully given for its disclosure, a record relating to any private paper or confidential communication, within the meaning of Part 10 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013, or official document, within the meaning of Part 11 of that Act, or

14.1.1 Section 42(l) provides that, unless consent has lawfully been given for its disclosure, the FOI Act does not apply to a record relating to any private paper or confidential communication, within the meaning of Part 10 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013, or official document, within the meaning of Part 11 of the 2013 Act.

14.1.2 Thus, if a record is found to be, or to relate to, such a private paper, confidential communication or official document as defined by the 2013 Act and consent has not been lawfully given for its disclosure, the FOI Act does not apply.

14.1.3 Section 42(l) is an entirely new provision in the FOI Act 2014. There was no equivalent provision contained in the FOI Acts 1997 & 2003. The Commissioner considers that it is quite broad in nature and affords a more significant protection for private papers of members of the Houses than previously existed.

Private Paper

14.2.1 Section 104(1) of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 defines “private paper”; it states that a “private paper”:

in relation to a member, means whichever of the following as applies to the member (other than a paper that has already been lawfully put into the public domain):

(a) in relation to a member who is not a holder of ministerial office, any paper in the possession or control of the member in relation to his or her political (including party political) role or in his or her capacity as a member;

(b) in relation to a member who is the holder of ministerial office, any paper in the possession or control of the member in relation to his or her political (including party political) role or in his or her capacity as a member, but does not include any paper (whether or not held by his or her Department or Office, by the member, or by any special adviser in his or her Department or Office) which relates to the member’s own functions in relation to his or her ministerial office;

(c) in relation to a member who is the Attorney General, any paper in the possession or control of the member in relation to his or her political (including party political) role or in his or her capacity as a member, but does not include any paper (whether or not held by his or her Office, by the member, or by any special adviser) which relates to the member’s own functions in relation to the office of the Attorney General;

14.2.2 In considering whether the record falls within paragraph (a) of the definition of private paper in Section 104(1), we will consider whether the record is in the possession or control of the member in relation to his or her political role or in his or her capacity as a member.

Example # 1: In Case 150073 the records sought were receipts/invoices in relation to the 2013 audit of expenses of the members of the Houses of the Oireachtas. We found that the records were private papers within the meaning of Part 10 of the 2013 Act. We accepted that the receipts and invoices (which related to expenses for which an allowance may have been payable) were held by the members. We also accepted that the members held such records in their capacity as members. In doing so, we had regard to the nature of the procedures that applied to the payment of the Parliamentary Representation Allowance (PRA) for specified office and communications expenses. Under the PRA, members were paid a vouched allowance for the relevant period. Not less than 10% of members in receipt of the PRA might be selected for audit. All members who received vouched amounts were required to hold their own receipts and supporting documents for inspection under audit for a period of five years.

Example # 2: On the other hand, in Case 150142 the records sought were held by the Office of the Ceann Comhairle. We found that it was a mandatory component of the definition of "private paper" in the 2013 Act, both under paragraph (a) and paragraph (b), that the paper be "in the possession or control of the member". We found that the records were clearly not in the possession or control of the relevant Dáil deputies, as they were held by the Office of the Ceann Comhairle. We did not consider that it was sufficient for a member merely to hold a copy or version of a document to render it a private paper. We took the view that, in order to meet the requirements of the definition in the 2013 Act, the document itself must be within the control of the member. Furthermore, we did not consider that the records could be properly classified as "private papers" of the Ceann Comhairle as he, although a member of the Dáil, held the documents not in his capacity as a member, but in his capacity as Ceann Comhairle.

"Relating to" any private paper

14.2.3 Section 42(l) of the FOI Act applies where the records sought **relate to** private papers within the meaning of Part 10 of the 2013 Act. For the exemption to apply, it is necessary to establish the relationship between the record and the relevant private papers.

Example # 1: In Case 150073 some records (receipts and invoices) in relation to the audit of expenses of members of the Houses of the Oireachtas were held by Mazars, the company that had conducted an audit of the expenses. We found that the expenses records held by the members were private papers within the meaning of Part 10 of the 2013 Act. We found that the records held by Mazars, being copies of records which we accepted to be private papers, clearly related to such private papers.

Example # 2: In Case 170135 we accepted that a record related to private papers within the meaning of Part 10 of the 2013 Act where it concerned or had a sufficiently substantial connection with such private papers. The records sought were correspondence between the Houses of the Oireachtas and/or Mazars with

members with regard to repayment of expenses that had been incorrectly claimed in the period covered by the audit report on the Public Representation Allowance 2014. We found that the purpose of the correspondence, other than the receipts and invoices involved, was to address issues arising from the receipts and invoices in the possession or control of the members. We were satisfied that such correspondence also related to private papers within the meaning of Part 10 of the 2013 Act and was therefore also subject to refusal under section 42(l) of the Act.

Not in the Public Domain

14.2.4 A record must not have already been lawfully put into the public domain in order to be a private paper within the meaning of section 104(1) of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013.

Example: In Case 150040 we considered whether or not the record could be said to have already been “lawfully put into the public domain”. The applicant submitted an extract from the Village magazine as part of his submissions. The extract was heavily redacted and stated at various points that pages had been removed for reasons of space. The applicant stated that the magazine was being threatened with legal action if it did not publish a retraction. We stated that we had no knowledge of the source used by the Village magazine, or how it came into possession of the record it published in part. Given the heavy redactions which were present and the removal of various pages, we could not conclude that the extract in the magazine was one and the same as the record requested, nor were we in a position to conclude that it had been lawfully put into the public domain if it was, indeed, the same record. In the absence of evidence that a complete copy of the report that was at issue in the case had been lawfully put into the public domain, we found as a matter of fact that it had not.

Confidential Communication

14.3.1 Section 104(1) of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 defines “confidential communication” as follows:

“confidential communication”, in relation to a member, means a communication (not being a private paper), by any means (whether in writing or not), of information to and from the member, in the course of his or her capacity as a member, on an understanding (whether express or implied) that its source or content, or both, would be treated as confidential, and includes any document evidencing such a communication;

14.3.2 We take the view that, for a record to come within the definition of a “confidential communication” and, therefore, be excluded from the FOI Act by virtue of section 42(l) the following conditions must be met:

- it consists of a communication of information to or from a member of a House of the Oireachtas
- it is made in the course of his or her capacity as a member.
- it is made on the understanding, explicit or implicit, that its source and/or content would be treated as confidential.
- consent has not been granted for its disclosure.

Example: In Case 150142 we were satisfied that records comprising correspondence to the Ceann Comhairle relating to a particular parliamentary procedure (SO 40A) met the first two requirements, as they were communications

from Dáil members, and made in their capacity as such. However, we did not accept that they met the third requirement, i.e. that they were made on the understanding that they would be treated as confidential. This was because the communications were made in relation to responses to parliamentary questions. We found that parliamentary questions, and the replies given to them, were a matter of public record and that they could not be said to be confidential. We found that the SO 40A procedure was a part of the parliamentary question regime and we did not believe that communications under that procedure were made on an understanding, whether explicit or implicit, of confidentiality. We found that the correspondences were not "confidential communications" and consequently were not excluded from the FOI Act by virtue of section 42(l).

Official Document

14.4.1 Part 11, section 112 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 defines "official document" as follows:

"official document", in relation to a House, means a document that has not been lawfully put into the public domain and is designated as an official document by or on behalf of the House in accordance with directions under section 113 issued by —

- (a) in the case of a document held by Dáil Éireann, the Part 11 committee,
- (b) in the case of a document held by Seanad Éireann, the Part 11 committee,
- (c) in the case of a document held by both Houses, both Part 11 committees;

14.4.2 Section 112 also defines a Part 11 committee as follows:

"Part 11 committee", in relation to a House, means the committee appointed by the House to perform the functions conferred on Part 11 committees by this Part.

Other Provisions

14.5.1 In considering records in the context of section 42(l), it may also be useful to bear a number of other provisions in mind:

- section 31(1)(c)(ii) of the FOI Act - see above under section 42(j)
- section 42(k) of the FOI Act – see above
- section 2 of the FOI Act which defines "exempt record" – see section under 42(j) above
- section 127 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 – see under section 42(j) above.

15.0 42(m) – Identity of Person who Provided Information in Confidence or Source of Such Information

What the Act states:

42. This Act does not apply to — ...

(m) a record relating to information whose disclosure could reasonably be expected to reveal, or lead to the revelation of —

- (i) the identity of a person who has provided information in confidence in relation to the enforcement or administration of the law to an FOI body, or where such information is otherwise in its possession, or
- (ii) any other source of such information provided in confidence to an FOI body, or where such information is otherwise in its possession.

15.1.1 Section 42(m) provides that the Act does not apply to a record relating to information whose disclosure could reasonably be expected to reveal, or lead to the revelation of:

- (i) the identity of a person who has provided information in confidence in relation to the enforcement or administration of the law to an FOI body (or where such information is otherwise in its possession) or
- (ii) any other source of such information provided in confidence to an FOI body (or where such information is otherwise in its possession)

15.1.2 Section 42(m) is similar to (although not the same as) certain provisions of the FOI Act 1997. Section 23(1)(b) of the 1997 Act provided that a public body may refuse to grant a request if access to the record could reasonably be expected to:

“reveal or lead to the revelation of the identity of a person who has given information to a public body in confidence in relation to the enforcement or administration of the civil law or any other source of such information given in confidence”

Section 46(1)(f) of the 1997 Act provided that the Act did not apply to a record relating to information whose disclosure could reasonably be expected to

“reveal or lead to the revelation of—

- (i) the identity of a person who has provided information to a public body in confidence in relation to the enforcement of the criminal law, or
- (ii) any other source of such information provided in confidence to a public body.”

15.1.3 However, a number of features of these provisions should be noted, including:

- Section 23(1)(b) of the 1997 Act was an exemption and section 46(1)(f) was a restriction. Section 42(m) is a restriction.
- While section 23(1)(b) of the 1997 Act was subject to a somewhat limited public interest test, there was no public interest test in section 46(1)(f) and there is no public interest test in section 42(m).
- The wording of section 42(m) is different from the wording of sections 23(1)(b) and 46(1)(f) of the 1997 Act.
- Section 23(1)(b) of the FOI Act 1997 referred to the enforcement or administration of the civil law and section 46(1)(f) of that Act referred to the enforcement of the criminal law. Section 42(m) of the 2014 Act refers to the enforcement or administration “of the law”.

15.1.4 We have considered the application of section 42(m)(i) (and of aspects of the similar provisions of the FOI Acts 1997 and 2003) in a number of cases. However, we have not considered the application of section 42(m)(ii) in any detail. Thus, this Guidance Note addresses the provisions of section 42(m)(i) only.

Section 42(m)(i)

15.2.1 In essence, section 42(m)(i) provides for the protection of the identity of persons who have given information in confidence in relation to the enforcement or administration of the law. We take the view that it is aimed at ensuring that members of the public are not discouraged from co-operating with bodies or agencies in the enforcement or administration of the law.

15.2.2 For section 42(m)(i) to apply three requirements must be met:

- disclosure of the withheld information could reasonably be expected to reveal, or lead to the revelation of, the identity of the supplier of information
- the information supplied must have been given in confidence and
- the information supplied must relate to the enforcement or administration of the law.

Reveal the Identity of the Supplier of Information

15.3.1 Section 42(m)(i) applies where disclosure of the record could reasonably be expected to reveal, or lead to the revelation of, the identity of the supplier of information.

15.3.2 Information may reveal, or lead to the revelation of, a person's identity without necessarily naming the person. For example, the level of detail in the record or, where a record is handwritten, the handwriting may lead to the revelation of the identity of the person concerned.

Example: In Case 98103 the requester sought access to an anonymous letter which alleged that he was working while in receipt of benefit from the Department of Social, Community and Family Affairs. The Department argued that the handwriting and the contents of the letter would be likely to reveal the identity of the author. We accepted this to be the case and found that section 42(m)* applied.

Information Provided in Confidence

15.4.1 The second requirement for section 42(m)(i) to apply is that the information supplied must have been provided in confidence. In determining whether the information was given in confidence, we will consider the facts and circumstances of the case.

15.4.2 Where FOI bodies receive information in relation to the enforcement or administration of the law, they may be expected to act on foot of the information they receive. However, we take the view that the fact that FOI bodies act on foot of the information provided does not mean that the information was not given in confidence.

15.4.3 In many cases some or all of the information provided will subsequently be revealed by the FOI body in order to perform its functions properly. We consider that

the issue in the context of section 42(m)(i) is whether the FOI body may act in such a way that it will reveal or lead to the revelation of the identity of the informant. That issue will be determined by reference to the facts of the case including, for example, any express or implied understanding between the informant and the body.

15.4.4 Factors which we may take into account include the practice generally with regard to the information provided and the policy of the FOI body with regard to the receipt and handling of such information (and of the information relating to the identity of the informant, in particular). Depending on the action which the FOI body will be required to take on foot of the information provided, it may or may not be reasonable for the source of the information and the FOI body to expect to maintain the confidentiality of the information including the identity of the source.

Example: In Case 99524 the person who provided the information (the complainant) to the Censorship of Publications Board did not point to any explicit assurance of confidentiality given by the Board, but said that confidentiality was implied. The complainant pointed out that a complainant's identity was absolutely irrelevant to the validity of the complaint, that in making the complaint he/she did not expect to hear further from the Board (except to hear the final outcome) and, indeed, was told this by the person who accepted delivery of the complaint. We accepted the complainant's evidence on these points. The complainant also pointed out that in the event of prosecution by the Board, the complainant had no further role in the matter, so that his/her identity could not be ascertained as a result of court proceedings. We accepted that the information as to the complainant's identity was given in confidence.

15.4.5 Factors which we consider relevant also include: the relationship between the source of the information and the FOI body, the relationship between the source of the information and any person(s) about whom information has been given, the procedures or enforcement process which are likely to arise, the nature or content of the information given and the likely consequences of disclosing the information. Determining whether or not the information was provided in confidence will also depend on the time at which such determination must be made. It is possible that the confidentiality will be lost over time depending on the factors above.

Example # 1: In Case 120211 we noted that a report was made by an informant following a verbal communication with the Passport Office. We were satisfied that the statement was made in writing at the request of the Passport Office in order to provide a basis for an investigation into whether a passport in a certain person's name had been lawfully issued and whether it was in that person's possession. We were satisfied based on the information before us that the statement was made on an understanding of confidence and that the informant wished for his/her identity to remain confidential.

Example # 2: In Case 130155 the record was a note on the applicant's GP record which documented that a call had been received from a named individual who expressed concern about the applicant's behaviour. The part of the record withheld was the caller's name. It was not clear if the person who contacted the General Practitioner specifically requested that information be treated as confidential. Nevertheless, we accepted, on balance, that the individual concerned would have expected that his/her identity would not be disclosed to the

applicant. We found that it was important to the HSE that channels of information from the public remain open and it was possible that disclosure of information revealing the identity of the person who has given information could, in certain cases, compromise the supply of such information into the future. We found that the information was given to the GP in confidence.

Example # 3: On the other hand, in Case 150331 Westmeath County Council identified a number of people and companies in certain records which it said gave information to it in confidence. The records concerned the development of a marina. We did not accept that the information was given in confidence. We did not accept that the people acting in their professional capacity in relation to the marina development (statutory bodies, advisors, consultants etc.) gave information to the Council in confidence for the purposes of section 42(m)(i). Nor did we accept that the parties connected with the marina gave information to the Council in confidence for the purposes of section 42(m)(i). In relation to complainants who may have been said to be protected under section 42(m)(i), we noted that submissions objecting to the marina's planning application were published on the Council's website. We could see nothing in the records of the communications with the Council that indicated any understanding that the information was being provided in confidence.

15.4.6 Whereas an FOI body would take all necessary steps to protect the identity of the source of the information given in confidence, we accept that it may not be possible to give a total or absolute guarantee that protection will be maintained. We take the view that it is possible that, depending on the eventual outcome of the case, the identity of the provider(s) might be revealed. However, we take the view that, unless and until that occurs, the understanding underpinning the giving of the information remains.

Malicious Complaints

15.4.7 We take the view that the purpose of section 42(m)(i) is to protect the flow of information from the public which FOI bodies require to carry out their functions relating to the enforcement or administration of the law. Thus, section 42(m)(i) may apply where information was given in confidence, but is subsequently found to be mistaken or unfounded.

15.4.8 It may be argued that information is untruthful or was provided maliciously and cannot, therefore be regarded as information provided in confidence. Our view in this regard was clarified in May 2012 (Case 110158 below). We give significant weight to safeguarding the flow of information to FOI bodies. We accept that the disclosure of the identity of complainants, even where the evidence suggests that the complaint was maliciously motivated, could prejudice the flow of information from the public.

15.4.9 In many situations the FOI body acts on the information provided in good faith. We have expressed the view that when the situation of the person who, in good faith, supplies information which is subsequently found on investigation to be inaccurate or mistaken is considered, the difficulty for the FOI body in handling such information in any other manner becomes apparent. We will have regard to the nature of the information at issue and the position of the FOI body on the matter.

Example : In Case 110158 the information at issue related to individual(s) who had contacted the Health Service Executive regarding the applicants' children. We accepted that some circumstantial evidence existed to suggest that the report to the HSE may have been maliciously motivated, although we were not convinced that sufficient evidence existed to state categorically that this was the case. In any event, we accepted that the HSE acted upon every report such as the type at issue in the case in good faith. We accepted that the disclosure of the identity of complainants, even where the evidence suggested that the complaint was maliciously motivated, could prejudice the flow of information from the public and that the HSE relied upon such information to carry out its functions. We gave significant weight to safeguarding the inherent importance in protecting the free flow of information to the HSE and accepted the HSE's position that the information was given in confidence in the case, notwithstanding the fact that the allegations were subsequently regarded as unfounded.

The Information in the Record

15.4.10 Section 42(m)(i) may apply to a record even though the information contained in that particular record was not given in confidence. It applies where release of the information could lead to the disclosure of information in *other* records which could then reasonably be expected to reveal or lead to the revelation of, the identity of a person who has given information in confidence in relation to the enforcement or administration of the law or of any other source of such information.

Example: In Case 99079 we found that the release of particular records could lead to the disclosure of information contained in other records which we found to be exempt. Although we did not find that the information in the particular records had been given to the FOI body in confidence, we found that their release could lead to the revelation of the identity of persons who had given information to a public body in confidence in relation to the enforcement or administration of the civil law. This meant that the 42(m)* applied to the particular records even though we had not found that the information contained in them was given to the FOI body in confidence.

Information Relating to the Enforcement or Administration of the Law

15.4.11 In order for section 42(m)(i) to apply, the information supplied must relate to the enforcement or administration of the law (which includes both the civil law and the criminal law). We have accepted that information related to the enforcement or administration of the law in a variety of scenarios. These have included, for example, the enforcement or administration of:

- the Water Pollution Acts 1977-1990
- the Child Care Act 1991 and the Child and Family Agency Act 2013
- the Planning and Development Acts 2000 to 2017
- the Censorship of Publications Acts
- the Safety, Health & Welfare at Work Act, 1989
- the European Communities (Official Control of Foodstuffs) Regulations 1998 and the Food Safety Authority of Ireland Act 1998
- the Health Act 2007
- the Housing Acts 1966 - 2009
- the Housing (Miscellaneous Provisions) Act 1997.
- the Passport Act 2008

- the Waste Management Acts 1996 and 2013.

Section 42(m)(i) and Other Provisions of the FOI Act

15.5.1 Where a record is being considered in the context of section 42(m)(i), it may be useful to bear other provisions of the FOI Act in mind.

15.5.2 A number of other provisions in the Act may be relevant in relation to records concerning the administration or enforcement of the law, for example, section 32 (Law Enforcement and Public Safety) and section 33 (Security, Defence and International Relations).

15.5.3 Section 35(1) relates to information given to an FOI body in confidence or to information the disclosure of which would constitute a breach of a duty of confidence. There may be a degree of overlap between section 42(m)(i) and section 35(1). Where only the identity of the person who has provided information in confidence is at issue, section 42(m)(i) may be the more appropriate section to be considered. Section 37 which relates to personal information may also be relevant.

15.5.4 Depending on the circumstances, we may take the view that section 42(m)(i) is the more appropriate provision to consider or that it is the provision of greater relevance in a case. We are cognisant that section 42(m)(i) provides for the exclusion of certain information from the provisions of the FOI Act. We are also cognisant of the fact that section 42(m)(i) is concerned with protecting third party information. Accordingly, we may consider it appropriate in certain cases to consider the applicability of section 42(m)(i) even where the FOI body has not done so.

Example # 1: In Case 140289 Wexford County Council relied on section 35(1)(a)* of the FOI Act to withhold the name of an individual who made a complaint to the Council. However, we took the view that section 42(m)* was the more relevant provision to consider. We stated that section 35(1)(a)* was more concerned with the protection of information given in confidence, whereas section 42(m)* was concerned with the protection of the source of certain information.

Example # 2 In Case 150228 the Department of Education & Skills refused access to certain records including details that might reveal the identity of a complainant and details of specific allegations made against the applicant. It relied upon sections 29(1)(a), 30(1)(a), 30(1)(b), and 35(1)(a) of the FOI Act in support of its decision. However, we found that sections 37(1) and 42(m) were of greater relevance. While neither section was cited by the Department, we were cognisant that section 37(1) was a mandatory exemption and that section 42(m) provided for the exclusion of certain information from the provisions of the FOI Act. We were also cognisant of the fact that both sections were concerned with protecting third party information. Accordingly, we considered it appropriate to consider the applicability of each section to the information at issue.