

Office of the Information Commissioner

Guidance Note

Freedom of Information Act
2014 – Section 15(1)(a): Record
Does not Exist or Cannot be
Found

May 2020

Contents

Introduction	1
References.....	1
1.0 Section 15(1)(a) – Overview & Background.....	2
Administrative Provision	2
Requests for Records	2
Some General Recommendations	2
- Records Management & Searching	2
- Section 15(1)(a) and FOI Decisions	3
FOI History and Warning regarding Commissioner’s Decisions.....	3
2.0 Section 15(1)(a) – The Commissioner’s Review.....	4
The Role of the Commissioner and the Review Process.....	4
Steps Taken by FOI Body to Find the Record(s)	5
- Relevant Searches in Particular Cases	5
- Ensuring the Searches were Actually Carried Out.....	6
- Misfiling/ Misplacing	7
- Limiting Searches	7
Records Management Practices of FOI Body	7
- Practice or Procedure of the FOI Body	8
- The FOI Body’s Records and Records Management Systems	8
The General Role of the FOI Body in relation to the Matter & Other Information	9
Consulting the Applicant	10
Seeking Information from the FOI Body	11
3.0 The Commissioner’s Decision	12
Reasonableness	12
Relying on Section 15(1)(a)	12
Section 15(1)(a) not Justified.....	12
Section 15(1)(a) Justified.....	14
- Record(s) Cannot be Found	14
- Records Do Not Exist / No Longer Exist	15
- Reasonable Searches	15
Implications of a Decision by the Commissioner that Section 15(1)(a) Applies	16
4.0 Section 15(1)(a) – Further Issues which may Arise.....	17
Records found during the Course of a Review	17
Scope of the Request	18
- Access to “Records”	18
- Records within Scope	18
- Clarifying the Request	19
Records which ‘Ought’ to Exist.....	20
Visiting the Premises of the FOI Body.....	21
Possible Deliberate Interference with Records.	22
Official Information in Non-Official Systems, Email Accounts and Devices	22
Records Held by Service Providers.....	23
Access in a Particular Form – Whether the Record Exists	23
Information in More than One Record – Extracting Information	23

Introduction

The Information Commissioner has prepared this Guidance Note in relation to section 15(1)(a) of the Freedom of Information (FOI) Act 2014.

The Note is a commentary on the interpretation and application of section 15(1)(a) 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 full case numbers for these later cases are somewhat lengthy and typically have the format OIC-12345-A1B2C3. Where a decision with the later style of reference number is referred to in this Note, it is referred to by **the middle five digits only**. Thus, Case OIC-12345-A1B2C3 would be referred to as Case 12345.

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

1.0 Section 15(1)(a) – Overview & Background

1.1.1 This Note explains our approach to section 15(1)(a) of the FOI Act. Section 15(1)(a) provides for the refusal on administrative grounds of a request for a record where the record does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken.

Administrative Provision

1.2.1 This is a discretionary administrative provision. It allows for the refusal to grant a request on administrative grounds, as opposed to providing for the refusal of a request on the grounds that the record is exempt.

Requests for Records

1.3.1 The FOI Act provides for a right of access to **records** held by an FOI body (section 11 refers). Requests for information or for answers to questions, as opposed to requests for records, are not valid requests under the Act, except to the extent that a request for information or for an answer to a question can reasonably be inferred to be a request for a record containing the information or answer sought.

1.3.2 . The FOI Act is concerned with the provision of access to records that are actually held. It does not provide for a right of access to a record which ought to exist. The Act does not require FOI bodies to create a record if none exists, apart from a specific requirement to extract records or existing information held on electronic devices.

Some General Recommendations

1.4.1 The Decision Maker's Manual issued by the FOI Central Policy Unit of the Department of Public Expenditure and Reform states that, in the event that an FOI body is refusing access to records on the basis of section 15(1)(a), it should be able to refer to or demonstrate a number of matters. These include:

- referring to (and providing) the FOI body's policies, guidelines and relevant documents relating to the records sought
- showing the areas that have been searched, who searched and how they searched
- demonstrating that it has considered other areas where the records could potentially be held
- showing that it has engaged with relevant staff who may have handled the records or who know the records management in the area.

Records Management & Searching

1.4.2 We take the view that good records management practices enhance FOI rights. We consider that FOI bodies need to have clear and well developed records management policies and practices.

1.4.3 In 2007 we made a number of recommendations arising out of an investigation into the operation of what was then section 10(1)(a) of the FOI Acts 1997 & 2003, now section 15(1)(a) of the FOI Act 2014 (available on our website www.oic.ie). The recommendations, which are still relevant, included the following –

- ✓ Every public body should draw up and implement a comprehensive records management policy as a priority.
- ✓ There should be consistency in searches for records by public bodies. A checklist should be used for this purpose. Templates of how/where searches are to be conducted should be prepared and made available to all staff, with steps taken to ensure that the procedures in the templates are adhered to. Details of searches conducted should be noted and retained on the FOI decision making file.

Section 15(1)(a) and FOI Decisions

1.4.4 Our recommendations arising out of the 2007 investigation into the operation of section 10(1)(a) (now section 15(1)(a)) included:

- Decision letters should always include detailed information relating to the nature of the searches carried out and of the locations searched.
The inclusion of additional background information and detail, as to the nature of the searches carried out or of the locations searched, presents a more complete picture to requesters of the efforts made to locate the requested records.
Decision letters should always explain the basis on which the FOI body concluded that the requested records did not exist or could not be found.
- Decision letters should always set out the requester's rights of review/appeal.
It is not correct to say that the request is being granted in full in cases where the decision is that requested records cannot be found or do not exist, although all other records (relevant to a request) in the possession of the body are being released.

FOI History and Warning regarding Commissioner's Decisions

1.5.1 Section 15(1)(a) is similar to section 10(1)(a) of the FOI Act 1997. This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 10(1)(a) was considered under the FOI Act 1997 (or under the FOI Act 1997 as amended) **in so far as they remain relevant**. To simplify matters for the reader, all references to section 10(1)(a) in those decisions have been replaced by section 15(1)(a) of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (*).

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

1.5.3 While references in this Note are made to 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 Section 15(1)(a) – The Commissioner’s Review

What the Act states:

15 (1) A head to whom an FOI request is made may refuse to grant the request where —

- (a) the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken,

2.1.1 Section 15(1)(a) may apply where:

- the records sought never existed
- the records may have existed in the past, but do not currently exist or cannot now be found.

2.1.2 As cases in which section 15(1)(a) arises often concern the steps taken to search for and find records, such cases are frequently referred to as “search” cases.

The Role of the Commissioner and the Review Process

2.2.1 Our role in these cases is to review the decision to refuse the request for access to a record on the ground that the record sought does not exist or cannot be found after all reasonable steps have been taken to ascertain its whereabouts and to decide whether that decision was justified.

2.2.2 We will have regard to the relevant information available and assess the adequacy of the searches conducted by the FOI body. The relevant information in “search” cases generally consists of the steps actually taken to search for the records and information about the record management practices of the FOI body, insofar as those practices relate to the records in question. It may also include further information provided by the applicant for review and/or the FOI body.

2.2.3 In reviewing a decision to refuse access under section 15(1)(a), we will generally need to

- find out what steps were taken to search for the record(s) and
- find out what the records management practices of the FOI body are as they relate to the record(s) in question.

We will also generally consult the requester.

2.2.4 We may also seek further information which we deem relevant to the review. Occasionally, we may also visit the FOI body. We will consider all the relevant information and decide whether the decision that section 15(1)(a) applies was justified. It is not normally the function of the Commissioner to search for records when reviewing a decision under section 15(1)(a).

Steps Taken by FOI Body to Find the Record(s)

2.3.1 We will generally seek to establish in detail the steps taken by the FOI body to find the record(s) including, how and by whom searches were carried out and what records were actually searched for.

2.3.2 The information which we will seek regarding the steps taken will depend on the nature of the record(s) at issue and the circumstances of the case. FOI bodies may, for example, be asked to provide some or all of the following:

- an outline of the exact locations/areas which were searched for the records
- whether there are any other locations/ areas (other than those searched) where such records *might* be (as opposed to ought to be)
- a description of the searches which were conducted in such locations/ areas, including, for example, details of the files searched
- details of how the searches were carried out (manually, by computer, by name, by reference number, by key words etc.)
- whether relevant individuals were consulted and their records searched and, if so, details of the individuals concerned, the response(s) received, the searches carried out and the outcome of those searches
- whether it is possible that any relevant records were destroyed, in accordance with policy or otherwise.

2.3.3 Establishing the steps taken to find the records may include establishing that a general email or memorandum was circulated and has been responded to by all recipients. In some circumstances, this may not be sufficient. Depending on the circumstances, it may be necessary to know what the recipients of the email or memorandum did.

2.3.4 Sometimes all reasonable steps have been taken, but the FOI body did not properly record the steps. This situation is less likely to arise where, for example, the FOI body circulates a form (email or hard copy, as appropriate), which each recipient is obliged to return certifying that he/she has searched the areas under his/her control (and giving details of how the search was conducted) and that the file(s)/record(s) have not been found.

2.3.5 In considering whether all reasonable steps have been taken to search for the record(s), it may be useful to ask the question whether there are any additional steps the FOI body would take if it had to find the record(s) urgently for a senior official such as the Secretary General or CEO.

Relevant Searches in Particular Cases

2.3.6 The circumstances of the case are relevant. Specific search issues may arise in a particular case. For example, information available may suggest that particular locations or particular databases should have been searched or it may suggest that certain staff members should have been asked about the location of records.

Example # 1: In Case 53515 we found, amongst other things, that the Health Service Executive (HSE) took too narrow an interpretation of the applicant's request and should have consulted with a wider range of relevant staff in an effort to identify relevant records.

Example # 2: In Case 180013 we noted that certain parliamentary questions suggested that the the Department of Justice & Equality might hold relevant records that it had not identified when processing the request.

2.3.7 The applicant may provide information regarding the existence or location of records. We may ask FOI bodies to respond to particular contentions of an applicant regarding the creation of, or searches for, records.

Example: In Case 170356 the applicant challenged a decision by University College Cork (UCC) to refuse access to a certain agreement. He also provided reasons for believing that additional records should exist. He referred to the history of the agreement, the requirement to receive approval from the Higher Education Authority, and communications with the Department of Education, the Public Accounts Committee and others about the matter. UCC was asked to detail the steps taken to search for relevant records. In response, UCC indicated that it had misinterpreted the request. Following a fresh search for records, it identified further records as relevant to the request.

2.3.8 The search terms used by the FOI body in carrying out its searches are also important.

Example: In Case 55912 the applicant stated in his FOI request to the Department of Culture, Heritage and the Gaeltacht that he used three variations of his name; the English spelling, the Irish spelling and a combination of both. When we queried the search terms used by the Department, it confirmed that searches were carried out using the English spelling and the Irish/English combination spelling. It said it did not carry out searches using the Irish spelling of the applicant's name, as it had never communicated with the applicant using that spelling. However, we noted the use of the Irish spelling of the applicant's name in a number of the records that had been released. We found the Department's failure to search for records using the Irish spelling of his name to be an important omission. We found that it did not carry out all reasonable searches for relevant records.

Ensuring the Searches were Actually Carried Out

2.3.9 FOI bodies should ensure that the searches they describe to us are the searches which were actually carried out.

Example: In Case 150389 the submission of the Rotunda Hospital to our Office was made on the assumption that procedures for searching and retrieving boxes held in external archives had been complied with. However, during the course of our review, the Hospital informed us that the wrong box number had been given to the external archive company at the outset, and so the archive company checked the wrong box. Also, the Hospital had not retrieved the box concerned from the archive company (which was what it would normally do if the archive company did not find the file). Thus, despite the Hospital's comprehensive search policies, the searches actually carried out by the Hospital were not as described in its submission.

Misfiling/ Misplacing

2.3.10 Consideration may need to be given to whether a search has been conducted of locations where the record might be as opposed to should be. The misfiling or misplacing of records is a common enough occurrence. Thus, if the FOI body has confined its search to the places where the records ought to be, then it can hardly be said to have taken all reasonable steps. The following two examples refer to whole files, but similar steps could be devised for individual records, depending on the type of records being sought.

- Consider whether the file was misfiled (i.e. placed in the wrong order in a series of files which are ordered by name or number). Misfilings are common but experienced record keepers have techniques for finding such files e.g. where filed by numbers, look at half a dozen files either side of the number, look at transposed numbers, dropped digits etc. It may be necessary to obtain evidence from the record keeper.
- Consider whether the file was misplaced (i.e. associated with another unrelated file or filed in the wrong series altogether). Once again, if there is someone who has overall responsibility for the files, they will know the common causes of files "going missing" and may be able to suggest further ways of locating such files.

Limiting Searches

2.3.11 We accept that generally the FOI body is best placed to determine which of its areas, sections or divisions etc. might hold the records sought. However, we expect the FOI body to be in a position to justify any decision to limit its searches to particular areas.

Example: In Case 180013 (referred to above) we found that the searches undertaken by the Department of Justice and Equality fell short of the requirements of section 15(1)(a). We considered that this view was supported by the fact that the Crime Division in the Department was not requested to conduct a search, but had been found to hold relevant records. We found that the Department had not adequately explained the basis on which it limited its searches when processing the requests in the case.

Records Management Practices of FOI Body

2.4.1 We will generally look for information about the records management practices of the FOI body insofar as those practices are relevant to the record(s) at issue. The degree of detail which will be required will vary according to the type of records being sought. An exhaustive description of the FOI body's records management practices will not normally be needed, nor in many cases would it be useful.

2.4.2 The information we seek will depend on the nature of the record(s) at issue and the circumstances of the case. For example, FOI bodies may be asked to provide some of the following information:

- a description of the records, or kind of records, at issue
- a description of the relevant filing systems
- how and when such records are typically created or received
- how such records are (or were) used
- what sections within the FOI body would normally consult such records

- where such records are (or were) kept while in active use
- in the case of "dormant" files (i.e. files no longer in active use), who is responsible for them
- whether there is a register of files and, if so, what it discloses about the records at issue
- details of the records management policy for such records, including the retention policy and the policy and practice for the destruction of such records.

Practice or Procedure of the FOI Body

2.4.3 We may have regard to the general practice and procedures of the FOI body.

Example: In Case 98079/98080, amongst other things, the applicant sought access to all personnel records made available to an interview board. The Department of Agriculture and Food claimed that the only information made available to boards consisted of the application form submitted by the applicant together with an assessment from the candidate's reviewing/superior officer. It also stated that its personnel division did not, as a matter of course, make any input into the selection of candidates and that the placings of candidates in competitions were entirely a matter for the interviewing board. Having considered all of the circumstances surrounding the applicant's interview and having considered the practices of the Department in relation to interview boards generally and the board in this case in particular, we found no evidence had come to light which would suggest that the applicant's personnel file was made available to the board or that any other records were created for the purposes of the interview.

2.4.4 We may look for details of the records management practices of the FOI body, including guidelines for the archiving and destruction of records. We may seek copies of any relevant documentation, including, for example, the FOI body's Record Retention Schedule and any authorisation necessary under the National Archives Act for the destruction of records. We may have regard to such matters in our decision.

Example: In Case 99046 the Department of Social, Community and Family Affairs outlined its policy on the storage and destruction of records. It provided us with the authorisations given by the Acting Director of the National Archives and the Departmental Circular regarding the destruction of documents. In the circumstances of the case, we were satisfied that the Department's then current archival policy was as outlined to us and that authorisation had been obtained from the Director of National Archives for the destruction of records of the nature at issue. We were satisfied that the Department was justified in concluding that certain records were once held by it, but that they no longer existed, having been destroyed in accordance with the Department's normal practice.

The FOI Body's Records and Records Management Systems

2.4.5 FOI bodies should be aware that generally we will be unfamiliar with their systems and processes. We rely on FOI bodies to provide a clear and sufficiently detailed explanation of their systems and processes in order to allow us to reach informed conclusions as to whether all relevant records have been considered for release.

2.4.6 Where FOI bodies provide the full and detailed explanations sought by us, it avoids prolonged engagements with our Office. Such explanations should be provided by the FOI body when sought by us.

Example: In Case 53286 we considered that the Health Service Executive (HSE) did not provide a sufficiently detailed explanation of its systems and processes. We found that many of the HSE's response to specific queries raised by us were quite limited, to the extent that further clarifications were deemed necessary on several occasions. We found some of the responses given were contradictory, thus also resulting in the need to seek further clarifications. We were of the view that, had the HSE provided the full and detailed explanations that were sought from the outset, the prolonged engagements would not have been necessary.

2.4.7 A clear understanding on the part of the FOI body regarding the nature of the records and files which it holds is very important in identifying records that exist and which are captured by the FOI request.

Example: In Case 160384 the Property Registration Authority (PRA) stated that at first it was understood that an Ordinance Survey Ireland (OSi) update received from the OSi was an automated "system to system" process and that no files relating to the process were held by the PRA. On foot of our enquiries, it became evident that a file was held on the PRA systems relating to each OSi update. The PRA clarified that the process was not in fact system to system; an electronic file was sent to the PRA from OSi and uploaded onto its system for processing under the PRA's OSi Update Module. The PRA accepted that its handling of the applicant's request fell short of the standards required. It committed to reviewing its decision-making process as a result of issues raised during the review.

The General Role of the FOI Body in relation to the Matter & Other Information

2.5.1 In addition to the information concerning the records management practices of the FOI body and its searches, other background information may also be relevant to our review. For example, the role of the FOI body in the subject matter concerned and the history of its involvement with the applicant may be relevant.

Example: In Case 160402 the applicant argued that further records should exist documenting the involvement of the Department of Agriculture, Food and the Marine in the movement of his cattle. The Department provided an explanation of its role in relation to the movement of cattle to us. It stated that it did not authorise the movement of the animals in this case. In addition to the other information it provided, it gave details of its contact with the National Beef Assurance Section regarding compliance certificates. Essentially, the Department's position was that no further relevant records existed as it had no role in authorising the movement of the animals, and that the movement of the animals was not processed in the normal way through compliance certificates. Given the circumstances under which the cattle were moved and given also the Department's explanation as to its role in the matter, we were satisfied that the Department has conducted reasonable searches to locate relevant records in the case.

Consulting the Applicant

2.6.1 Section 12(1)(b) of the FOI Act obliges requesters wishing to exercise their right of access to provide sufficient particulars in relation to the information concerned to enable the relevant records to be identified by the taking of reasonable steps. It is helpful if requesters provide the FOI body with as much information as they can in order to assist the FOI body in ensuring that any searches it undertakes for relevant records are comprehensive. If there are specific records that a requester wishes to access, s/he should say so.

2.6.2 We will generally consult the applicant during the review process. In doing so, we may provide the applicant with the relevant information received from the FOI body such as, for example, details of the searches it carried out or relevant details of its records management practices relating to the record(s) concerned as provided by the FOI body.

2.6.3 In some cases, we may consider it appropriate to consult the applicant in relation to a particular issue in the review. For example, we could ask an applicant why precisely s/he thinks records exist or for a history of his/her dealings with the FOI body or any other evidence such as reference numbers, dates etc. which might help in the search. The purpose of such questions is to facilitate us in pursuing the matter of whether the FOI body has taken all reasonable steps to ascertain the whereabouts of relevant records.

2.6.4 The applicant may be satisfied that all reasonable steps have been taken to search for the records and that the record(s) do not exist or cannot be found. Where the applicant is not satisfied, s/he would then have the opportunity of providing the Commissioner with further information or evidence. For example:

- the applicant might provide information that suggests that further searches or enquiries would be reasonable - such information could, for example, include details of the applicant's interactions with particular staff or sections of the FOI body in relation to the subject matter of the records where the staff or sections concerned have not already been contacted or searched
- where an FOI body claims that a record did not exist, the applicant might provide information or evidence to suggest that the record did, in fact, exist – this could, for example, include documents which indicate the existence of the record.

Example: In Case 150014 the applicant sought access to a copy of his personal medical records. The Defence Forces indicated that the provision of details of specific records by the applicant at internal review and during our review allowed them to locate records which were not kept on his medical file.

2.6.5 We consider that, while the FOI Act demands that FOI bodies meet very high standards in dealing with requests, the corollary is that the legislation assumes reasonable behaviour on the part of requesters. In consulting with an applicant, we consider that it is not unreasonable for us to expect to receive the applicant's cooperation in securing a thorough and efficient review. Where an applicant has information which would assist us in pursuing the matter with the FOI body and would assist the FOI body in ascertaining the whereabouts of records, we expect the applicant to provide such information to us at an early stage.

Seeking Information from the FOI Body

2.7.1 We will generally look for information from the FOI body at an early stage relating to the steps it has taken to find the records and its records management practices. Depending on the circumstances, we may also seek further relevant information from the FOI body – this may occur, for example, following receipt of particular information from the applicant.

2.7.2 Further information or clarification may be sought when certain gaps should be addressed in order to remove an element of uncertainty or confusion.

2.7.3 While we may seek information from the FOI body, we do not require the FOI body to carry out further searches. The purpose of seeking the information concerned is to enable us to reach a conclusion as to whether all reasonable steps have been taken to find the record(s).

3.0 The Commissioner's Decision

3.1.1 We will review the decision to refuse the request for access to a record on the ground that the record does not exist or cannot be found after all reasonable steps have been taken to ascertain its whereabouts. We will decide whether the decision was justified. This requires the exercise of judgement and each case will be considered on its merits.

3.1.2 Section 22(12)(b) provides that, in a review by the Commissioner, a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the FOI body shows to the satisfaction of the Commissioner that the decision was justified.

Reasonableness

3.2.1 The test in section 15(1)(a) is whether searches have been reasonable. We take the view that the FOI Act does not require absolute certainty as to the existence or location of records, as situations arise where records are lost or simply cannot be found. What section 15(1)(a) requires is that the FOI body takes all reasonable steps to locate relevant records.

Relying on Section 15(1)(a)

3.3.1 Occasionally, an FOI body's decision may effectively be a refusal under section 15(1)(a), even where this has not been explicitly stated or expressly relied on by the FOI body in its decision. For example, a requester may argue that records, or further records exist, but the FOI body's position may be that no records relating to the applicant's request exist, or no further/additional records sought by the applicant exist. In such circumstances, we may take the view that the FOI body's decision is effectively a refusal under section 15(1)(a).

Section 15(1)(a) not Justified

3.4.1 We may find that a decision to refuse access under section 15(1)(a) was not justified. This may occur in a number of circumstances. For example, we may conclude that we have not been provided with sufficient information regarding the searches undertaken or we may not be satisfied that all reasonable steps have been taken to locate the relevant record(s).

Example # 1 In Case 120179 we found it very difficult to accept that no further records existed relating to arrangements for and amounts of payments to certain companies by the Irish Greyhound Board (IGB) given their role in a particular project and the sums of money involved. The IGB stated that it had access to the emails of the former CEO. However, it had not provided any information as to the searches, if any, conducted for the information or the outcome of the searches. This was despite the issue being raised by us with the IGB and it being made absolutely clear that it must be addressed. In these circumstances, we stated that it was not possible to make a finding that all reasonable searches had been conducted and that section 15(1)(a)* applied. We annulled these elements of the IGB's decision and remitted them to the IGB directing it to make a fresh consideration and decision.

Example # 2: In Case 150306 we found that, while comprehensive details of the searches undertaken by the Health Service Executive (HSE) to locate all relevant records coming within the scope of the applicant's request had been sought by us, there was no real and substantive engagement by the HSE with us on those matters. Furthermore, the HSE did not adequately explain to us why certain records did not exist, if this was, indeed, the case. We found that the HSE was not justified in refusing to consider further relevant records for release.

3.4.2 Other circumstances in which we may decide that a decision to refuse access under section 15(1)(a) was not justified include circumstances where a record, initially refused by the FOI body on the basis that it did not exist or could not be found, is subsequently found by the FOI body during the course of our review. See further below – *'Records Found During the Course of a Review'*.

3.4.3 Where we are not satisfied that a decision to refuse access under section 15(1)(a) was justified, we may decide to annul the FOI body's decision and remit the matter for fresh consideration and decision by the FOI body.

Example: In Case 180013, following receipt of the responses of the Department of Justice and Equality to our request for further details, we were of the view that Department had not justified its refusal of the applicant's requests under section 15(1)(a). We found that the Department had not adequately explained the basis on which it limited its searches, that it had not explained how a record was subsequently located within a Division (in circumstances where that Division had previously stated that no relevant records existed) and that certain searches appeared to suggest that relevant records might exist. We annulled the decisions and directed it to conduct a fresh decision-making process in respect of each of the applicant's requests.

3.4.4 Where we are not satisfied that all reasonable steps have been taken to search for the record(s), we may identify the parts of the FOI body's searches which were not satisfactory or we may direct further steps to be undertaken when annulling its decision.

Example: In Case 170287 Louth County Council granted access to the applicant's housing file, but the file released did not include the applicant's 2004 housing application. It was not disputed that the housing application should have been available but was missing. It seemed that the Council closed the application file from 2004. We noted that the Council said that it had searched the filing cabinets where similar files which were not closed were stored, but it had not stated whether any search had been undertaken of the filing cabinets or other relevant storage facilities where the closed files were kept. We also noted that the decision maker had not received requested search details from the relevant staff members who may have had further knowledge of the application. In the circumstances, we were not satisfied that all reasonable steps had been taken to search for the missing application. We annulled the Council's decision and directed that further steps be undertaken to search for the missing record, such steps to include consulting further with the relevant staff members and carrying out a search of any storage facilities where closed housing applications may be kept.

Section 15(1)(a) Justified

Record(s) Cannot be Found

3.5.1 It is possible - and it is clearly envisaged by the Act - that records may exist, but still may not be found after all reasonable steps have been taken to ascertain their whereabouts.

3.5.2 In certain cases and depending on the circumstances, an FOI body may not be in a position to state definitively what happened to the records or why they cannot be found. However, we take the view that, in acknowledgement of the fact that situations can arise where records cannot be found, the FOI Act does not require such certainty. Rather, it requires the body to take all reasonable steps to ascertain their whereabouts.

3.5.3 The FOI Act does not require an FOI body to continue searching indefinitely for records that cannot be found. We may conclude that an FOI body has conducted reasonable searches even where records were known to have existed but cannot be found.

Example: In Case 160095 we had in 2004 previously affirmed a decision of St James's Hospital to refuse access to the applicant's medical records relating to the period 1989 to 1992 on the ground that the records sought could not be found. The applicant made a new request to the Hospital in 2015 seeking records held relating to the same period. We provided the applicant with details of the recent searches provided by the Hospital, including details of its manual searches and its searches in relation to files on microfilm. The Hospital said that the possibility of the original chart still being in existence was unlikely. It was not clear to us that any further examination of the issue would assist the Hospital in locating the records sought, given the significant passage of time since the details were recorded on the Hospital's Patient Administration system

3.5.4 We do not generally expect FOI bodies to carry out extensive or indefinite general searches for records simply because an applicant asserts that more records should or might exist, or rejects an FOI body's explanation of why a record does not exist. The test in section 15(1)(a) is whether searches have been reasonable.

Example # 1: In Case 170399, following receipt of details of the searches by the Department of Social Protection for records he sought, the applicant narrowed the scope of his review to one specific letter which he stated that he received from the Department in October 2015. The Department located a letter dated 20 October 2015 that the Deciding Officer in Illness Benefit Section sent to the applicant. The applicant believed that this letter was not the letter that he was seeking. Having examined the letter, we noted that it accurately fitted the description of the letter the applicant was seeking. However, based on the possibility that another, similar letter might exist, we sought further details from the Department as to the searches undertaken and further details were provided. Having regard to the searches undertaken by the Department, and to the contents of the record that the Department found and released during the course of the review, we found that the Department had taken all reasonable steps to ascertain the whereabouts of further relevant records.

Records Do Not Exist / No Longer Exist

3.5.5 An FOI body may claim that a record never existed. In some cases, it may be more the circumstances of the case, rather than the searches carried out, that are most relevant.

Example: In Case 160417 we found that a decision by St James's Hospital to refuse the applicant's request was justified on the basis that no relevant records existed. The applicant had been informed by the Hospital that access to medical treatment by a doctor in the UK (Dr X) was not possible as Dr X no longer worked for the NHS. The applicant sought access to records relating to a telephone conversation which he believed took place between Dr X/his secretary and a staff member of the Hospital. The Hospital informed us that it had written to Dr X requesting an assessment of the applicant and as no reply was received, the Hospital's Medical Director conducted an internet search and concluded from the result of the search that Dr X no longer worked for the NHS. The Hospital maintained that there was no telephone call and, accordingly, no records within the scope of the applicant's request. It stated that the applicant's file had been searched and that there was no record relating to contact with Dr X by the Hospital other than the letter to Dr X which had already been released to him. We affirmed the decision of the Hospital.

3.5.6 An FOI body may claim that a record existed in the past, but no longer exists. This may be relatively straightforward, depending on the circumstances. For example, where a record may have existed at one stage but the FOI body claims that it has been destroyed, a contemporaneous note that particular records (of which the requested record was one) had been destroyed would normally be acceptable as evidence. Our decision will depend on the facts and circumstances of the case.

Example: In Case 170041 we found that the Defence Forces were justified in the decision to refuse the applicant's request for a copy of an original draft investigation report on the ground that the record no longer existed. The Defence Forces stated that the document sought by the applicant was a printed copy of an Investigating Officer's report which was used to brief the applicant about the investigation. They stated that the electronic copy of the report was progressed in a digital format until the final report was completed and that the particular hard copy of the report sought by the applicant was shredded as it was out-of-date and no longer required. They said there was no policy to retain drafts of documents unless a specific requirement applied to the circumstances and that, in this instance, the document was not required to be retained. We affirmed the decision of the Defence Forces.

Reasonable Searches

3.5.7 As stated above, the test in section 15(1)(a) is whether the searches have been reasonable. Where we consider that an FOI body has conducted all reasonable searches, we will generally affirm the decision on that basis, even where records an applicant believes to exist have not been located.

Example # 1: In Case 160007 Our Lady's Hospice confirmed that, with regard to the retention of records in backup digital storage, it maintained a backup drive on site. However, it stated that the drive was placed into "dormant" mode in February 2016 and that its reactivation would involve repairs and a significant amount of work to search through backup files for the records sought. Furthermore, the

Hospice stated that significant costs would be involved in carrying out such works. In the circumstances, we did not consider it reasonable to expect the Hospice to undertake these steps in relation to the applicant's request.

Example # 2: In Case 180050 the applicant stated that he did not receive copies of certain, specific emails between the Irish Greyhound Board (IGB) and the Department of Agriculture, Food and the Marine on certain dates in 2013 that he believed to exist. The IGB stated that its email systems were updated in November 2013, which involved "back-up" of its system, transferring from a tape based system to a "cloud" environment. It stated that, as a result, only the electronic records of staff working with the IGB at that time migrated to the new system and therefore its records prior to November 2013 were incomplete. It stated that back up tapes existed containing the records of former staff. However, it submitted that external assistance would be required to access material on the tapes. According to the IGB, the likely cost of doing so on a per tape basis would have been prohibitive, notwithstanding subsequent issues surrounding identification of any relevant information held on the tapes. It seemed to us that there was no way of knowing definitively whether relevant information would be identified if such measures were taken. In the circumstances of this case, we found that it was not reasonable to require the IGB to access information held on the tapes.

Implications of a Decision by the Commissioner that Section 15(1)(a) Applies

3.6.1 A decision by the Commissioner that an FOI body was justified in its decision to refuse a request under section 15(1)(a) is a decision that the FOI body was justified, at the time of our decision, in coming to the conclusion that the records concerned do not exist or cannot be found after all reasonable steps have been taken to ascertain their whereabouts. Thus, a decision that section 15(1)(a) was justified does not rule out the possibility that further records may come to light at a later stage. Neither does the subsequent discovery of an additional record undermine an earlier decision on section 15(1)(a).

3.6.2 In the event that further records falling within the terms of the request are located by the FOI body at some point in the future, we would expect the FOI body to make those available to the applicant. If, for any reason, the FOI body were to decide that such records could not be made available, we would expect it to deal with the matter on the basis of a new FOI request from the applicant as this would guarantee the applicant's right of appeal to our Office, should s/he wish to appeal.

4.0 Section 15(1)(a) – Further Issues which may Arise

4.1.1 A number of issues may arise during the course of our review of a decision relating to section 15(1)(a) of the Act. Some of these are discussed below.

Records found during the Course of a Review

4.2.1 As a general rule, where an FOI body locates additional records during the course of a review, we will bring the review to a close without a determination on the question of access to those records. The FOI body should then make a new decision under section 13 of the FOI Act on the question of access to the records concerned (which in turn will be subject to a right of review). Where access is refused, no application fees will apply for internal review or, where necessary, a further review by the Commissioner on the matter, since any such review would indirectly relate to a decision that was untimely in the first instance.

Example: In Case 180433, during the course of the review, we put a number of detailed questions to the Health Service Executive (HSE) about the searches carried out for particular records covered by the applicant's request. The HSE told us that searches had resulted in four further files of records being found. Because the HSE had not decided on these records on foot of the applicant's request, we decided that it had effectively refused access to them. In order to enable the HSE to make a fresh decision on the records and to preserve the applicant's various rights of appeal, we annulled the HSE's effective refusal of the records and directed it to make a fresh decision on them under the FOI Act.

4.2.2 It is important to note, however, that we have a discretion to include additional records located during a review in the review already underway where consideration of the additional records would not unduly delay the completion of the review. This may be appropriate where the additional records are few in number, third party notification would not be necessary, and the question of whether or not to release is otherwise straightforward.

4.2.3 Where the FOI body finds records during the course of a review and releases those records to the applicant, we will have regard to this in our consideration of the case.

Example: In Case 170153, during the early stages of the review, Dublin City Council informed us that it had located 25 additional records relevant to the applicant's request and had forwarded copies of those to the applicant. (The Council had also granted access to 44 further records when it issued its internal review decision.) We stated that it was unfortunate that the Council did not conduct full and proper searches in the first instance. However, we were satisfied, having regard to the details of the totality of the searches conducted that it had, at that stage, taken all reasonable steps to locate the records sought by the applicant.

Scope of the Request

4.3.1 The scope of the request is always important. FOI bodies should carefully consider the scope of the request and the extent of the records captured by it.

Access to “Records”

4.3.2 While the purpose of the FOI Act is to enable members of the public to obtain access to information held by public bodies, the mechanism for doing so is by accessing records held by those bodies. In other words, a person wishing to obtain information from a public body must make a request for records that contain the information sought.

4.3.3 Requests for information or for answers to questions, as opposed to requests for records, are not valid requests under the Act, except to the extent that a request for information or for an answer to a question can reasonably be inferred to be a request for a record containing the information or answer sought.

Records within Scope

4.3.4 Our decision may relate to the interpretation of the scope of the request. We may decide that the application of section 15(1)(a) was not justified where we conclude that the FOI body has not taken all reasonable steps to locate all the relevant records coming within the scope of the request.

Example # 1: In Case 58152 the applicant’s request to Westmeath County Council sought access to any correspondence relating to submissions for expressions of interest for social housing between 2016-2018 at a named site. Following queries raised by us, it appeared that the Council had taken an unduly narrow view of the scope of the request by treating it as a request for copies of expressions of interest as opposed to a request for correspondence relating to expressions of interest. The Council agreed that upon reflection, its response to another request (a copy of which had been provided to us by the applicant) suggested that records coming within the scope of the applicant’s request did, indeed, exist. It was clear to us that the Council had not taken all reasonable steps to ascertain the whereabouts of relevant records coming within the scope of the applicant’s request and that it was not justified in refusing the request. We annulled the Council’s decision.

Example # 2: In Case 160072 we considered whether the Department of Justice & Equality was justified in refusing to release certain information on the grounds that the records sought did not exist in the format requested. It seemed to us that the Department had interpreted the applicant’s clarification of his request (which related to legal aid claim forms) as confirmation that he was not seeking access to individual forms. We found that the applicant had not stated that he was not seeking access to individual forms. We found that records containing the information sought by the applicant were, indeed, held by the Department. Accordingly, we found that the Department was not justified in refusing the request under section 15(1)(a).

Example # 3: In Case 170444 a number of separate but similar requests were submitted by the International Transport Workers Federation (the ITF) to the Department of Justice & Equality on behalf of a number of individuals, including the applicant. The Department explained that as the FOI requests it received, including that relating to the applicant, were submitted by the ITF who represented

sea fishers, it was considered that the requests related only to the Atypical Sea Fisher applications. However, it was clear from the wording of the request that the applicant was, in fact, seeking access to all records held relating to him, and not just those relating to his application under the scheme in question. We found that the Department had not taken all reasonable steps to ascertain the whereabouts of all of the records sought. While the Department indicated its willingness to expand the search for records beyond the confines of its original decision, our view was that its decision should be annulled.

Clarifying the Request

4.3.5 Section 11(2) of the FOI Act requires an FOI body to give reasonable assistance to a person who is seeking a record under the Act in relation to the making of the FOI request for access to the record. It is open to the FOI body to clarify the request with the requester where the wording of the request is not clear.

Example # 1: In Case 150306 we found that the FOI request was somewhat complex or, at least, some issues arose as a result of the applicant's description of a medical procedure to which the request related. We stated that, if there was any concern or lack of clarity as to the precise information sought, it was open to the Health Service Executive (HSE) to clarify the matter with the requester. We found that no such clarification was sought. We also found that there was no real and substantive engagement by the HSE with our Office regarding the searches undertaken to locate relevant records and that it did not adequately explain why certain records did not exist, if this was, indeed, the case. We annulled the HSE's decision and directed it to undertake a fresh decision making process in relation to the request. In doing so, we suggested that the HSE contact the applicant to clarify exactly what records and information she was seeking, if this was not clear from the wording of the FOI request.

Example # 2: In Case 53306 we were of the view that the applicant had submitted an extremely broad request, having regard to the period for which records were sought and to the apparent breadth and variety of engagements with the Department of Agriculture, Food and the Marine. While the parties exchanged a considerable amount of correspondence before the Department issued its decisions on the applicant's request, it seemed that those engagements might have proven to be more beneficial had the Department given the applicant more specific information on the types of records it might expect to hold and had the applicant been more specific in relation to the information she was hoping to access. We annulled the decision of the Department and directed it to consider the applicant's request afresh. We commented that it seemed that, as a first step in processing the request afresh, it would be beneficial for both parties to agree, in the first instance, on the precise nature of the records sought.

4.3.6 We take the view that, when proper clarification of a request has been sought by an FOI body and not provided by requester, the FOI body should tell the requester, in writing, what it considers the request to have sought and make it clear that it will proceed on that basis unless the requester indicates otherwise. Not only does this give the requester a further chance to clarify the matter and possibly correct careless wording, but it provides a stronger basis for an FOI body to stand over the reasonableness of its understanding of a request should it not get the requested clarification. It is worth noting that requests for "all information relating to"

a particular matter run the risk of being interpreted differently by the requester and the FOI body.

4.3.7 Further to section 12(1)(b) of the FOI Act, a person who wishes to exercise the right of access must ensure that the request contains sufficient particulars in relation to the information concerned to enable the record to be identified by the taking of reasonable steps.

4.3.8 Section 15(1)(b) of the FOI Act enables an FOI body to refuse a request that does not comply with section 12(1)(b). Such a refusal is, however, subject to section 15(4). Section 15(4) provides that the FOI body shall not refuse to grant an FOI request under section 15(1)(b) unless it has assisted, or offered to assist, the requester.

4.3.9 We consider that there is an onus on requesters to provide sufficient information to allow the FOI body to identify the records sought by the taking of reasonable steps (section 12(1)(b) mentioned above refers).

Records which 'Ought' to Exist

4.4.1 The FOI Act provides for a right of access to records held by FOI bodies. We take the view that the FOI Act does not require FOI bodies to create records if none exist, apart from a specific requirement, in certain circumstances, to extract records or existing information held on electronic devices.

4.4.2 Thus, a review by us is not concerned with the question of what records should exist. If a record does not exist, that is the end of the matter, regardless of the applicant's views as to the appropriateness or otherwise of the absence of certain records.

Example # 1: In Case 99025 we noted that the failure to make and retain certain notes of local interviews might indicate poor record-keeping practice. However, we were satisfied that enquiries and searches were made in relation to the possible existence of such records and that no such records were found. The Defence Forces confirmed to us that the local interview board kept no notes at all of the candidates interviewed and no records were kept of the selection criteria used (apart from the general directions which were supplied to the applicant). While we noted that the failure to record the guidelines used by the local interview board in selecting candidates could not be considered good administrative practice, we decided that section 15(1)(a)* applied.

Example # 2: In Case 170551 the records sought related to a service agreement between the applicant and the Health Service Executive (HSE) and the applicant queried why there were no records of phone calls between him and representatives of the HSE. The HSE stated that no recordings of telephone calls existed in relation to the applicant's FOI request. It said there was no formal policy in relation to documenting phone calls; that calls were not logged or recorded and no notes of calls were located during its searches. We noted that while the applicant clearly felt that the HSE should have recorded more details of its interactions in relation to the creation of the service agreement, the FOI Act was concerned with the provision of access to records actually held. We also

explained that our Office has no role in examining the administrative actions of public bodies.

Visiting the Premises of the FOI Body

4.5.1 FOI bodies should be aware that it is open to our staff to visit their Departments or Offices. As stated above, it is not normally our function to search for records when reviewing a decision under section 15(1)(a). We do not, as a matter of course, visit FOI bodies to inspect or check the searches they say they carried out. However, occasionally and depending on the particular circumstances of the case, we may visit the premises of an FOI body. We may wish, for example, to establish the nature and extent of the searches carried out, to examine their records management practices or to carry out further enquiries.

Example: In Case 150389 we were very concerned that, despite the very comprehensive search policies of the Rotunda Hospital, the searches it actually carried out were not as described in its submission. In the circumstances of the particular case, an investigator from our Office met with the Hospital to discuss what had happened. She conducted spot checks of some of the records that the Hospital's submission said were searched.

4.5.2 Section 45 of the FOI Act provides the Commissioner with certain powers. Section 45(2) provides that the Commissioner may for the purposes of a review or investigation enter any premises occupied by an FOI body and there –

- (a) require any person found on the premises to furnish him or her with such information in the possession of the person as he or she may reasonably require for the purposes aforesaid and to make available to him or her any record in his or her power or control that, in the opinion of the Commissioner, is relevant to those purposes, and
- (b) examine and take copies of, or of extracts from, any record made available to him or her as aforesaid or found on the premises.

4.5.3 If we are of the view that the circumstances of the case warrant it, we may exercise the powers under this provision.

Example: In Case 120179 it was some six months before the Irish Greyhound Board (IGB) provided us with a copy of the records relevant to the review in a manner that appeared to relate to the original request. It was subsequently evident that the records provided by the IGB were not sufficient to allow the review to progress. We determined that not all relevant records had been provided to us by the IGB and that there should have been considerably more records falling within the scope of the request. Our investigator actively engaged with the IGB but no real progress was made. In view of the seriousness of the matter and the resources which had already been devoted to this review, the Commissioner then used his powers under section 45(2)* of the FOI Act. Consequently, our investigators visited the IGB offices, by arrangement and with the cooperation of the IGB.

Possible Deliberate Interference with Records.

4.6.1 Section 52 of the FOI Act states:

Where an FOI request has been made in respect of a record, a person who without lawful excuse and with intention to deceive destroys or materially alters a record shall be guilty of an offence and be liable on summary conviction to a class B fine.

4.6.2 Where there is the possibility that records which were the subject of an FOI request were deliberately removed or interfered with, we consider this to be a very serious matter. We also take the view that, if the circumstances of the case are such that it appears to be a situation of possible wilful removal of records, then what constitutes reasonable steps to locate records is substantially different from the steps which might be taken in the normal course of events.

Example: In Case 130242 the records the subject of the review were created by staff at a Community Hospital (managed by the Health Service Executive (HSE)) in the normal way and placed on the patient's file. At some point, the records went missing. The records which were missing related to a period during which the patient's family had concerns regarding his care. It appeared to us that the situation was one of possible wilful removal of records from a patient's file. Given the timing of the records' apparent removal, we considered the possibility that records which were the subject of an FOI request were deliberately removed to be a very serious matter. We considered that what constituted reasonable steps to locate the records in this case was substantially different. Our enquiries were extensive and included, amongst other things, asking the HSE if any investigations or enquiries had been conducted or if the matter had been referred to An Garda Síochána. We also asked the HSE to provide signed statements from the staff who attended certain meetings with the applicant regarding what they remembered in relation to the missing notes. While not applicable to this particular case (as it was a review under the FOI Acts 1997 – 2003), we noted that the FOI Act 2014 provided at section 52 that a person who destroys a record with intention to deceive shall be guilty of an offence and be liable on summary conviction to a fine.

Official Information in Non-Official Systems, Email Accounts and Devices

4.7.1 The Central Policy Unit of the Department of Public Expenditure and Reform has published a Guidance Note on the FOI Act implications for any official information held in non-official systems, email accounts and devices – see CPU Guidance Note 24. The Note states that, if records relate to official functions and/or business activities of a public body and if the public body has a legal right to procure the records regardless of whether they are held in official or non-official systems (including web-based email such as Gmail or Hotmail), these records are subject of the FOI Act.

4.7.2 The issue of official information in non-official systems, email accounts and devices will be dealt with in a separate Guidance Note (Guidance Note on Records Held by an FOI Body) which will be available in due course.

Records Held by Service Providers

4.8.1 FOI bodies should bear in mind that records in the possession of independent contractors employed by them are covered by the FOI Act to the extent that they relate to the service being provided to the FOI body. Section 11(9) of the Act makes it clear that records in the possession of the service provider are deemed to be held by the FOI body and the FOI body has a right to have these provided to it for FOI purposes.

4.8.2 The issue of records in the possession of service providers will be dealt with in a separate Guidance Note (Guidance Note on Records Held by an FOI Body) which will be available in due course.

Access in a Particular Form – Whether the Record Exists

4.9.1 An FOI body may argue that records do not exist in the particular format sought and therefore the relevant records do not exist. Insofar as we consider whether section 15(1)(a) applies in such circumstances, our Guidance Note on section 17 of the Act, which will be available in due course, will be relevant (Guidance Note on Section 17: Manner of Access to Records,).

Information in More than One Record – Extracting Information

4.10.1 A request may seek information which is, or may be, contained in more than one record. In such circumstances, a number of considerations may arise.

4.10.2 Where the information is held electronically, section 17(4) may be relevant.

4.10.3 Where the information may be contained in hard copy records and obtaining the information requires the examination of a number of hard copy files or records and the extraction of the information from the records, then a number of matters may be relevant for consideration. Generally speaking, the specific circumstances and the context in which the request falls to be considered are relevant. A number of provisions of the FOI Act may also be relevant, such as, sections 2, 18 and 15(1)(c).

See separate Guidance Notes on Section 17 and Records Held by FOI Bodies which will be available in due course.