



Oifig an Choimisinéara Faisnéise  
Office of the Information Commissioner

Annual Report 2009

Regulations  
€5.6m  
release  
exam  
Information  
secret files  
online  
Expenses  
salary  
€1.1m  
disclosure  
diversity  
developers  
claim  
Freedom of Information Act

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Oifig an Choimisinéara Faisnéise  
Office of the Information Commissioner

## Annual Report 2009

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## Foreword

I hereby submit my seventh Annual Report as Information Commissioner (the twelfth Annual Report of the Information Commissioner since the establishment of the Office in 1998) to the Dáil and Seanad pursuant to section 40(1)(c) of the Freedom of Information Acts 1997 and 2003.

A handwritten signature in black ink, reading "Emily O'Reilly". The signature is written in a cursive style with a long, sweeping underline.

**Emily O'Reilly**  
Information Commissioner  
April 2010

## Chapter I

Call for  
release of  
secret files  
on dumping

# Revealed

Leading developers earned  
millions from school land

**Revealed:  
a litany of  
neglect in  
our creches**

## Chapter I: The year in review

### Introduction

I am pleased to introduce my seventh Annual Report as Information Commissioner which covers the period from 1 January 2009 to 31 December 2009.

In this Report I highlight a number of significant cases and issues that were dealt with by my Office in 2009. One such issue is the trend of public bodies falling outside the FOI Act, which I am concerned is happening indirectly rather than by way of publicly stated policy. I commented on this in my Report of 2007 as some functions of public bodies previously subject to the FOI Act were removed from its scope due to the transfer of those functions to new public bodies. The removal of particular functions which were previously covered by the FOI Act is a particularly unwelcome development and I comment further on this issue in chapter 2.

I also look at the practices of public bodies, and highlight a number of issues which arose during contact my Office had with public bodies in conducting reviews. I am concerned about some instances where public bodies did not release records in line with formal decisions from my Office, as applicants have a legitimate expectation that if I find in their favour, the relevant records will be released in accordance with the statutory requirements. I draw attention to examples of cases where public bodies did not follow best practice in chapter 2.

In Part II of this Report, although there is no statutory requirement on me to do so, as I have done for the last two years, I report on my work as Commissioner for Environmental Information, which is legally separate to my role as Information Commissioner.

In the past year records released under FOI brought information into the public domain that would otherwise remain unknown. Examples of FOI based stories that appeared in published media reports include:

- In March 2009, the Irish Examiner reported that there were 31 cases of children suffering injuries in the care of the HSE, Dublin North East, with two staff facing possible sanctions.
- In August 2009, the Irish Independent reported that a litany of serious problems persist in the private nursing home industry four years after the Leas Cross scandal was exposed.
- In August 2009, the Sunday Independent reported that records released by the Department of Defence revealed that a council member of the Irish Red Cross resigned her position stating that it was failing to meet all proper standards of how it should be run. On 31 December 2009, the Irish Examiner reported that significant changes to the management of the Irish Red Cross had been proposed to address the concerns raised earlier in the year. It also reported that the Chairman had retired.
- In October 2009, the Irish Independent reported that students who failed FÁS courses had their results changed to make it look like they had passed their exams.

By far the most recurring subject of reports throughout the year was that of expenses paid by public bodies, particularly for travel by officials or board members of those bodies, or by public representatives. I welcome release of expenses records by public bodies at the first stage of request without requesters having to come to my Office for review. This FOI scrutiny allows the public to form its own view on the use of taxpayers' money and means that public bodies are accountable for decisions to approve expenses. It also allows for the examination of the standard of governance in those bodies. An exception to this is the RTÉ Executive Board case involving release of expenses incurred by the Board in 2007 and 2008, which refusal was appealed to my Office. I comment further on this case below in the context of statutory notices issued under section 37 of the FOI Act.

## Collation of Statistics

I appreciate that collation of statistics is a time consuming task for public bodies, and I acknowledge the continuing efforts made to produce accurate statistics for this Report.

## Level of Requests to Public Bodies

Some 14,290 requests were made to public bodies under the FOI Act in 2009. This is an increase of 13% (1,618) over the 2008 figure (12,672) and 34% over 2007 (10,704). It continues the most welcome reversal of the downward trend in request numbers I commented upon in last year's Report and may, as I also

commented last year, be at least partially driven by the number of high profile media stories emanating from records released under FOI, particularly with regard to expenses of public representatives and officials.

### **Number of requests to Public Bodies under the FOI Act 2000 - 2009**

<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
13,705	15,428	17,196	18,443	12,597	14,616	11,804	10,704	12,672	14,290

The following table shows the ten public bodies subject to the most requests during 2009 (the previous year's position is shown in brackets). A feature of the tables is the appearance for the first time since 2001 of the Department of Finance which had an increase of 51% (92) in the number of requests received. This means there has been an increase of 325% from the 64 cases received by the Department in 2007 to the 272 received in 2009, which brings it towards the level of 300 cases plus per annum it had received before the introduction of up-front fees in 2003. Although not in this table, it is interesting to note the increase of 118% (from 57 to 124) in the number of requests received by the Department of Enterprise, Trade & Employment over the same period. While I have no specific data on the reasons for these changes, I think it seems reasonable to surmise that they could be due to increased interest in accessing records relating to the financial crisis and the economic downturn.

<b>Rank</b>	<b>Public Body</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>
1	HSE South (1)	1,756	1,548	1,378
2	HSE West (2)	1,647	1,362	1,257
3	Dept. of Justice, Equality and Law Reform (3)	844	718	445
4	HSE Dublin North East (4)	694	631	627
5	Dept. of Education and Science (6)	569	457	470
6	Dept. of Social & Family Affairs (5)	556	485	370
7	HSE Dublin Mid Leinster (7)	427	453	590
8	Mercy Hospital Cork (-)	416	200	91
9	Dept. of Finance (-)	272	180	64
10	St James Hospital (8)	265	280	184

## Type of Request and Requester

Most of the increase of 1,618 requests has been for personal information (1,156). Most FOI requests continue to be made by ordinary members of the public or representative organisations (76%), while the proportions of requests submitted by journalists, businesses, staff of public bodies, and members of the Oireachtas are broadly similar to previous years.

## Release Rates

During 2009, 57% of requests dealt with by all public bodies were granted in full and a further 20% were part-granted, with 11% refused, which demonstrates a continuation of a gradual downward trend in refusal rates over the last number of years.

The differences between sectors in their rates of release is largely similar to previous years, with the highest release rate in the HSE (71%) and the lowest in the Civil Service (39%). The downward trend in release rates in third level institutions from 2006 (64%) has continued in 2009 (46%).

## Applications to my Office for Review

Where a requester is not satisfied with the decision of the public body on his/her FOI request, he/she may apply to my Office for a review of that decision. In most circumstances, this review will constitute the third analysis and decision in that case. The decision which follows my review is legally binding and can be appealed to the High Court, but only on a point of law.

The number of applications for review made to my Office during 2009 was 324, an increase of 20 cases, or 7%, on 2008. As presented in Chapter 4 (Table 13), 242 of these applications were accepted for review during 2009 which compares to 228 accepted in 2008. This appears to follow the increase in the number of requests received by public bodies in 2008 and 2009 on which I commented in my Report for 2008.

The proportion of applications to my Office relating exclusively to non-personal information at 51% continues to decrease from the high of 60% in 2007 towards the approximate 40% level of previous years.

The proportion of cases appealed to my Office, and accepted for review, as a percentage of the total number of requests received by public bodies was 1.7% compared to 1.8% in 2008 and 2.3% in 2007. A breakdown of the public bodies

concerned and the subject matter of review applications accepted are contained in Chapter 4 (Tables 15 and 17). The number of third party objections to the release of information, at 7%, compares to 5.3% in 2008 and 8.1% in 2007.

## Deemed Refusals

The FOI Act imposes time limits on public bodies for the various stages of an FOI request, i.e. a decision on a request should issue within four weeks and, in the event of an application for internal review, a decision following internal review should issue within three weeks. A breach of these time limits (whether by means of no decision or a late decision at internal review stage) means that the requester has the right to take it as a deemed refusal of access, and is entitled to apply to my Office for review of any such deemed refusal.

As stated in previous Reports, given that breaches of time limits by public bodies directly affect the public's right of access to records, this is an area that I intend to keep under scrutiny. It can be seen (in Table 20 in Chapter 4) that there has been an increase to 34 in the instances of public bodies not complying with the Act's requirements, as compared to 19 for 2007 and 17 for 2008. This is a most unwelcome development, particularly as public bodies are aware that such breaches will be highlighted in my Reports. Four bodies (HSE Dublin Mid-Leinster and North East, along with the Departments of Justice, Equality & Law Reform and Health & Children respectively) are listed for each of the three years that I have reported on this matter. Of particular concern is the jump to 7 in the number of breaches by the HSE Dublin Mid-Leinster, which by itself has been responsible for 14% of all recorded breaches since 2007 while receiving less than 4% of FOI requests. I will keep that public body's performance in this area under particular review.

## Fees received

Up-front application fees for certain FOI requests, internal reviews and applications for review by my Office came into effect on 7th July 2003. Where a request for information other than the personal information of the requester is made, the fees payable are:

- €15 for an FOI request (reduced to €10 for medical card holders and their dependants);
- €75 for a request for internal review of an FOI decision (reduced to €25 for medical card holders and their dependants);
- €150 for an application for review of an FOI decision by my Office (reduced to €50 for medical card holders and their dependants); and

- €50 for an application, by the third party to whom the records relate, for a review by my Office of an FOI decision to grant public interest access to records, following section 29 consultation procedures.

During 2009, my Office received 133 applications for review where a fee was paid. The total amount received in application fees by my Office in 2009 was €16,500, of which €7,200 was refunded for various reasons leaving a total received of €9,300. Refunds totalling €7,200 were issued for the following reasons:

- €5,500 because the applications in question were either rejected as invalid, withdrawn or settled;
- €1,700 because the public body had not issued a decision or internal review decision within the time limits and was therefore of 'deemed refusal' status (section 41 of the FOI Act refers) which does not attract an application fee.

In 41 instances in 2009, my Office wrote to the applicant to say that a fee would apply if the information requested was other than personal information relating only to themselves. Generally, the applicants concerned paid the prescribed fee. In some cases, applicants varied the scope of their application by confining it to the personal information relating only to themselves and thus removing the element of the application attracting a fee. Three applications were deemed invalid on the basis that the appropriate fee had not been paid.

## Reviews of Decisions

During 2009, I reviewed 235 decisions of public bodies compared with 259 for 2008 and 325 for 2007. This decrease is accounted for by a number of reasons, including staff resources, the complexity of some reviews and greater concentration by my Office on older and generally more time-consuming cases.

At the start of 2009, my Office had a total of 193 reviews on hand and a further 242 were accepted during 2009. Following the 235 reviews completed in 2009, a total of 200 reviews remained on hand at the end of the year.

## Time taken to Complete Reviews

My Office completed 235 reviews in 2009 which are broken down in the table below according to the year in which the case was received by my Office.

The FOI Act provides that reviews by my Office should be completed as soon as may be and, insofar as practicable, not later than four months after receipt of the

application. The table presents a breakdown in the number of reviews completed within different time periods. Of the 235 reviews completed in 2009, 71 or 30% of those reviews were completed within four months of acceptance, which compares to 34% for 2008. As this is the first year in which my Office has presented the level of detail in this table, comparison with previous statistics for closure periods other than four months is not possible. Such comparison will be possible in future years.

### Time Taken to Complete Reviews

	2009	%	2008	%
0-4 months	71	30.21	88	33.98
5-12 months	47	20.00		n/a
13-24 months	79	33.61		n/a
Over 24 months	38	16.17		n/a
<b>Reviews completed</b>	<b>235</b>	<b>100</b>	<b>259</b>	<b>100</b>

### Outcome of Reviews

Not all of the reviews completed resulted in the issuing of formal decisions; some were discontinued, some were withdrawn and a settlement was effected in others.

### Formal Decisions

During 2009, I issued 97 formal decisions, which accounts for 41% of all cases dealt with during the year. In 75 (77%) of the formal decisions, I affirmed the decision of the public body, whilst I varied 16 (16%) of the decisions and annulled the remaining 6 (6%). This compares with 72% of decisions affirmed in 2008 and 66% in 2007.

### Settlements and Withdrawals

The FOI Act provides that at any stage during a review, I may try to effect a settlement between the parties on the records to be released. In some cases, requesters may agree to narrow the focus of the review by agreeing to exclude records which will add little or no value to the information they seek. In others, it might be agreed that additional records outside the scope of the original request be released without the need for me to arrive at a formal decision in the case. As always, I would encourage public bodies, in the course of dealing with requests, to engage directly with requesters with a view to achieving settlements in those cases where a full granting of the request is unlikely. In most cases in which the application is withdrawn, this comes about following detailed discussions between

the applicant and a member of my staff, and can often result in release of records by the public body at different stages of the review.

During 2009, 49 cases were settled by my Office. This represents almost 21% of all reviews completed during the year compared with the same figure in 2008, 17% in 2007, and 9% in 2006. In 2009, 36% of all reviews completed were withdrawn by the applicants. This compares to 33% in 2008 and 35% in 2007 and 23% in 2006. Therefore, the rate of informal resolution of cases through settlement or withdrawal has increased from 52% to 57% for the period 2007-2009. I welcome this increase, as informal resolution of reviews in most cases leads to quicker access to records for applicants.

### **Cases Discontinued and General Queries**

Cases that were discontinued during 2009 accounted for 2.1% of reviews completed, compared to 2.7% in 2008 and 2.2% in 2007.

There were 857 general queries made to the Office during 2009, of which 13 were made in person, 224 were made in writing, and 620 were made by telephone. These general queries do not relate to any particular review and typically involve requests for information about my Office or about the operation of the FOI Act, as well as matters outside of my remit as Information Commissioner.

### **Statutory Notices**

The majority of public bodies cooperate fully with my Office in relation to the provision of records which are the subject of review, statements of reasons for decisions etc. I value this level of cooperation. There are specific provisions in the FOI Act concerning the production of records and information to my Office. These include:

- section 37 of the Act which empowers me to require the production of information and/or records, and to enter premises occupied by a public body for the purpose of acquiring any information which is required for the purpose of conducting a review, and
- section 35 of the Act which empowers me to direct the head of a public body, where I consider that the reasons given in support of a decision are not adequate, to direct that a full statement of reasons for the decision be provided to the requester concerned and to my Office.

In 2009, under section 37, I served three notices on public bodies which had not cooperated with my Office following the normal issuing of correspondence. These notices were served on the Department of Justice, Equality and Law Reform, RTÉ and Cavan Town Council.

### **The Department of Justice, Equality and Law Reform**

The Department was requested on 26 January 2009 to forward records concerning a named individual which were the subject of the review under investigation. As the Department failed to provide the records after two reminders were sent, a section 37 notice was issued on 3 March 2009 and the records were received the following day. It is difficult to understand why it took over five weeks to forward these records, and why they could not have been provided initially when first requested by my Office.

### **RTÉ**

In this case, RTÉ failed to provide records of credit card expenditure and receipts incurred by members of the RTÉ Executive Board for the years 2007 and 2008. The records were first requested on 19 October 2009 and, following many reminders and two extensions of the time provided for receipt of the records, a section 37 notice issued on 17 December 2009. While RTÉ provided a summary of total amounts of expenses paid to Board members, this was not acceptable to the applicant who exercised their right to seek access to the source records. The records in this case are similar to those that have been habitually released by many other public bodies throughout 2009 without requiring applicants to go through the further process of review to my Office, with the resource implications that has for all parties. I do not accept that RTÉ was not aware that the records fell to be released under FOI, and in taking the stance that it did, RTÉ caused many hours of unnecessary work to be undertaken, both by my officials and its own administrative staff, and also unnecessarily delayed receipt by the applicants of records they were fully entitled to get. Following many hours of work on this case by my officials, RTÉ released the records administratively which means it accepted that it was not necessary for me to make a binding decision requiring such release.

I am concerned that RTÉ did not release these records until very late in the investigation and I would expect that any similar future requests would be granted by RTÉ without the need for intervention by my Office.

### Cavan Town Council

In this case, on 23 December 2008, my Office sought copies of the applicant's original and internal review requests for records relating to vacant properties owned by the Council, and the original and internal review decisions taken by the Council. These basic records are normally furnished within 5 working days. As no response was received from the Council, it was not possible for my Office to make a decision on whether the application could be accepted for review. A section 37 notice was issued on 21 January 2009 after two reminders were sent. When the records were received on 3 February 2009, it transpired that the original request was invalid as the statutory fee had not been paid and, accordingly, the application for review was not accepted. This straightforward decision could have been taken 4 weeks earlier if the Council had not delayed provision of the necessary records to my Office.

It was not necessary for me to issue any notices under section 35 during 2009.

### Statutory Notices Issued to Public Bodies (2009)

Public Body	Section 35 Notices Issued	Section 37 Notices Issued
Department of Justice, Equality and Law Reform	0	1
RTÉ	0	1
Cavan Town Council	0	1
<b>Total: 2009</b>	<b>0</b>	<b>3</b>
<b>Total: 2008</b>	<b>0</b>	<b>4</b>
<b>Total: 2007</b>	<b>0</b>	<b>1</b>

### Statutory Certificates issued by Ministers/Secretaries General

The FOI Amendment Act of 2003 introduced provisions whereby certain records could be removed from the scope of the FOI Act by means of certification by a Minister of the Government or by a Secretary General of a Department. The relevant provisions are contained in section 19, 20 and 25 of the FOI Act which also provide that a report specifying the number of such certificates issued must be forwarded to my Office.

### Section 19

Section 19 is a mandatory exemption which provides protection for records relating to the Government or Cabinet. The definition of Government was amended by the 2003 Act to include a committee of officials appointed by the Government to report directly to it and certified as such by the written certification of the Secretary General to the Government.

I have been informed by the Secretary General to the Government that no section 19 certificates were issued by him in 2009.

### Section 20

Section 20 of the Act is a discretionary exemption which may protect certain records relating to the deliberative processes of a public body. In the case of a Department of State, the Secretary General will issue written certification to the effect that a particular record contains matter relating to the deliberative processes of that Department. Where such a certificate is issued, the record specified cannot be released under the FOI Act. In effect the exemption becomes mandatory. Any such certificate is revoked in due course by the issue of written certification by the Secretary General.

Having consulted with each Secretary General, my Office has been informed that one new certificate was issued by the Secretary General of the Department of Defence on 4th March 2009. I attach a copy of the notification at Appendix I to this Report.

I have been further informed that the certificate under section 20 issued by the Secretary General of the Department of Justice, Equality and Law Reform on 11th August 2006 and referred to in previous Reports has not been revoked in line with the provisions of section 20(1A)(b). Therefore it remains in force. I attach a copy of the notification at Appendix I to this Report.

### Section 25

Where a Minister of the Government is satisfied that a record is an exempt record either by virtue of section 23 (law enforcement and public safety) or section 24 (security, defence and international relations) and the record is of sufficient sensitivity or seriousness to justify doing so, that Minister, by issuing a certificate under section 25(1), may declare the record to be exempt from the application of the FOI Act. Each year the Minister(s) in question must provide my Office with a report on the number of certificates issued and the provisions of section 23 or section 24 of the FOI Act which applied to the exempted record(s). I must append a copy of any such report to my Annual Report for the year in question.

Having consulted with each Secretary General, my Office has been informed that three new certificates were issued in 2009, two on 10 June 2009 and 22 June 2009, respectively, by the Minister for Justice, Equality and Law Reform ("the Minister"), and a third on 17 November 2009 by the Minister for Foreign Affairs. The two certificates renewed by the Minister on 20 February 2008 and 14 March 2008, as referred to in my Annual Report for 2008, remain in force. Additionally, I have been informed that the Minister has, on 25 June 2009, renewed an existing section 25 certificate for a further two years. I attach a copy of the notification from the Secretary General at Appendix I to this Report. The certificate issued by the Minister for Foreign Affairs will fall for review under section 25(7) in 2010.

I was notified by letter dated 16 September 2009 that, pursuant to section 25(7) of the FOI Act, the Taoiseach, the Tánaiste and Minister for Enterprise, Trade and Employment and the Minister for Finance, having reviewed the five certificates (two issued in 2009, one renewed in 2009 and two renewed in 2008) that were in operation for the year ended August 2009, were satisfied that it was not necessary to request the revocation of any of the five certificates in question. I attach a copy of the notification at Appendix II to this Report.

## Appeals to the High Court

A party to a review, or any other person who is affected by a decision of my Office, may appeal to the High Court on a point of law. Following the amendment of the FOI Act in 2003, the decision of the High Court can be appealed to the Supreme Court.

During 2009, the High Court delivered judgments in three appeals taken against decisions of my Office. Two decisions were upheld and one was remitted to my Office by the Court and is currently under review. Summaries of these three appeals can be found in Chapter 2 of this Report.

In one other case, an applicant attempted to initiate proceedings but the appeal was rejected by the Courts for procedural reasons.

## Enactments Relating to Non-disclosure of Records

The FOI Act provides, in section 32, that access shall be refused to any record whose disclosure is prohibited, or whose non-disclosure is authorised in certain circumstances, by statute. An example of such statute is the Adoption Act. Where a statute is listed in the Third Schedule to the FOI Act it is excluded from the section 32 exemption but subject to the other provisions of the Act. I consider

section 32 to be a vitally important provision. It maintains coherence so that the widest and most informed perspective is taken on all provisions of enactments which prohibit the disclosure, or authorise the non-disclosure, of records by holding these records up to scrutiny against the central purpose of the FOI Act which is "to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies...".

Section 32 requires that a Joint Committee of both Houses of the Oireachtas, in this case, the Joint Committee on Finance and the Public Service, must review the non-disclosure provisions in all statutes to ascertain if any of them should be amended or repealed or included in the Third Schedule to the FOI Act. As part of this review, Ministers must report to the Joint Committee on all non-disclosure provisions in the legislation within their areas of authority. The Ministers must state their view on whether the non-disclosure provisions should be amended, repealed or allowed to continue in force and, additionally, whether a reference to any of those provisions should be included in the Third Schedule to the FOI Act. Each Minister must lay a copy of his or her report before each House of the Oireachtas and also forward it to the Information Commissioner. The Joint Committee is obliged to prepare and furnish to each House, a report of the operational review.

Such reports fall due every five years since April 1999 (the date of the first report) and in accordance with section 32(5) of the FOI Act, I presented my [opinions and conclusions](#) relating to the 2004 reports to the Joint Committee in December 2005. In appearing before the Joint Committee, I felt that my detailed arguments that certain non-disclosure provisions should be changed were understood and, broadly speaking, accepted. However, when the Joint Committee presented its Report to the Oireachtas, its recommendation, in the case of those non-disclosure provisions on which I disagreed with the relevant Minister, was to support the Minister in each case. Subsequently, it became clear that the whip was applied so that the Committee's vote divided along party political lines. I have commented several times that I found this outcome deeply depressing.

A further round of reports fell due in 2009 and although I have no role until the reports are forwarded, I understand that some reports have been completed and others are still outstanding. Those copies which I receive will be examined with a view to reporting to the Joint Committee when required. Nevertheless, I am concerned lest there be any further delay in completing this further round of reports. In the light of previous experience, I also hope that this time round,

the Joint Committee will find the means to take a more considered view of my submissions.

### **Staffing Matters**

I would like to thank my staff and colleagues in the Office for their support during 2009. In particular, I wish to thank the Director General, Pat Whelan and the Senior Investigators, Seán Garvey and Elizabeth Dolan for their contribution and also Alison McCulloch, Phyllis Flynn, the staff of my Office and the staff of the Communications and IT Units for their help in compiling this Report.

There were a number of staffing changes in the Office during 2009. Ciara Burns, Investigator, David Stone and Roseanne Browne, Clerical Officers, have moved on to new challenges in the Office of the Ombudsman and Des O'Neill, Investigator, has moved to the Standards in Public Office Commission. I welcome Anne O'Reilly, Investigator, and Iris Kilbey, Clerical Officer, who joined the Office during the year.

## Chapter 2

Top academics  
under pressure  
over salary scales

Medical student sought  
copies of examination

Rotunda says  
age disclosure  
would have  
implications

## Chapter 2: Issues Arising

Over the past year a number of issues arose in relation to the operation of the Freedom of Information Act to which I would like to draw attention. Some of the more significant issues are discussed in this chapter as follows:

- Regulations under section 28(6) of the FOI Act
- expenses of public bodies
- public bodies falling outside the FOI Act
- managing expectations of sections 17 and 18
- practices of public bodies
- issues of consent
- judgments delivered by the High Court during 2009.

### Regulations under section 28(6) of the FOI Act

In my Annual Report for 2006, I raised the issue of difficulties in the 1999 Regulations under section 28(6) as drafted, which provide for a potential access to deceased persons' records. As detailed in that Report, the Regulations as drafted resulted in my being left in the position of having to find that the Regulations provided that the next of kin of deceased persons would get access to the records of those persons regardless of any other factors, including any opinion on the matter expressed by the deceased person while living. At a conference on FOI ("Freedom of Information: A 2008 Update", TCD, 8th March 2008), the Department of Finance gave a commitment that the Regulations would be revised by the end of 2008. While the timeframe committed to by the Department was not met, I am happy to say that revised Regulations were finally introduced on 23 September 2009. As a result of the Freedom of Information Act, 1997 (section 28(6)) Regulations, 2009, S. I. No 387 of 2009, decision makers can now take account of factors other than the relationship between the applicant and the person to whom the requested records relate when making decisions on deceased persons' records.

## Expenses of Public Bodies

The issue of FOI access to records of expenses of TDs and Senators was dealt with by my predecessor in case [99168](#) from 1999. In that case, my predecessor found that the expenses records should be released in the public interest, and in doing so, established FOI case law on the matter. Since release of the travel expenses in FÁS, following an FOI request in 2008, many media stories based on records sourced through FOI requests appeared in 2009 commenting on expenses incurred by various public bodies. I welcome the development where details of expenses are generally released as a matter of course in reply to FOI requests without the need for the case to be referred to my Office for review. An exception to this is the RTÉ expenses case considered in chapter 1. In that case, despite repeated warnings that they were necessary for the review to proceed, relevant records were not provided to my Office. This resulted in my officials finding it necessary to issue a formal notification under section 37 of the FOI Act requiring production of the records, which were eventually provided.

## Public Bodies falling outside the FOI Act

I have placed on the public record on a number of occasions my concerns regarding public bodies or functions of public bodies being removed from the scope of the Freedom of Information (FOI) Act without me or my Office being informed of such removal. This is a fundamental issue of accountability and I am concerned that it is happening indirectly rather than by way of publicly stated policy.

Earlier this year, in an address to a conference on governance hosted by the Institute of Public Administration & Chartered Institute of Public Finance and Accounting (text available on [oic.gov.ie](http://oic.gov.ie)), I highlighted a number of key public bodies remaining outside the scope of the FOI Act, among them An Garda Síochána, the Vocational Educational Committees, the National Treasury Management Agency and the newly established National Assets Management Agency.

I also highlighted the practice in recent years of removing public bodies or functions of public bodies that had been under FOI from the scope of the FOI Acts, including the enforcement functions of the Health and Safety Authority, the road safety functions now carried out by the Road Safety Authority, the functions of the Land Registry and the Registry of Deeds now performed by the Property Registration Authority, and the proposed removal of the enforcement function of the National Employment Rights Authority.

I am very concerned about these developments. I intend to keep this under review and continue to place on record my views about these and any other bodies falling outside of the FOI Act.

### **Managing expectations of sections 17 and 18**

As well as providing for a public right of access to records held by public bodies, the FOI Act also obliges public bodies to amend personal information that is incomplete, incorrect, or misleading (section 17), and to provide reasons for acts affecting a person, including a decision (section 18). This has understandably led requesters to believe that public bodies are generally obliged to explain their decisions under section 18 and, where relevant, to amend personal information upon request in all circumstances. However, just as the exemption provisions of the FOI Act restrict the right of access to records, so too does the FOI Act restrict the circumstances in which public bodies are, obliged to amend personal information or to provide a statement of reasons. I set out below my views on the limitations of sections 17 and 18.

#### **Section 17**

In many cases that come before my Office, the applicant seeks to challenge a public body's refusal to amend a view or opinion with which the applicant disagrees. It is generally accepted that the right of amendment of personal information includes the right of amendment of views or opinions of another person about the individual concerned that are shown to be incomplete, incorrect, or misleading (Case [98158](#)). However, it is also well settled that section 17 puts the onus on the applicant to prove that the information which is the subject of the application is, on the balance of probabilities, incomplete, incorrect, or misleading; the onus is not on the public body to demonstrate the completeness, correctness, or accuracy of the information.

Consequently, in the absence of sufficient evidence, I am not in a position to direct the amendment of a record simply because the person to whom that record relates strongly maintains that the information concerned is incomplete, incorrect, or misleading. It is also the case that section 17, in common with the other provisions of the FOI Act, does not authorise me, as Information Commissioner, to adjudicate on how public bodies carry out their functions generally. This means that, for example, section 17 does not permit me to substitute the applicant's opinion on a matter (such as an employee reference or a job performance review) for that of the author of the record, the amendment of which has been requested. Moreover, in a recent review involving a university student, I found

that I did not have the authority under section 17 to consider challenges to the academic assessment procedures of universities and other third level institutions notwithstanding evidence to suggest that the applicant's recheck and appeal processes relating to his examination script had been handled in an unusual manner (see Cases [080002](#) and [080003](#)).

### Section 18

The relevant limitations on section 18 are two-fold: (1) an applicant's eligibility for a statement in the first instance, and (2) the adequacy of the statement provided where eligibility has been established.

In order for a requester to be eligible for a statement of reasons, s/he must have a "material interest" in the matter in relation to which a statement of reasons was sought. Section 18(5) provides that, in order for a requester to have such a "material interest" in an issue, the decision in question must not apply to "a class of persons of significant size" of which the requester is a member as well as to him/her individually. Therefore, if a public body can demonstrate that its decision(s) for which reasons were requested applied to "a class of persons of significant size", then the requester does not have a material interest in the matter and the public body is not obliged to provide a statement of reasons under section 18. I describe the relevance of this issue in particular circumstances in chapter 3 (see Cases [090131](#), [090132](#) and [080258](#)).

Once a requester has established that they have a material interest in the matter, the adequacy of any statement of reasons provided to them then becomes relevant. In this regard, I have found that a public body is not required to provide a statement of reasons in relation to each and every action it may have taken in reaching its decision on an issue, rather it is required to provide a statement as to why it acted as it did in taking the decision that it did (see Case [031099](#)). I have also found that section 18, while requiring public bodies to explain decisions, does not provide an avenue of appeal of such decisions such as a review of marks awarded or interview board conclusions.

I stress again that it is not within my remit as Information Commissioner to adjudicate on how public bodies carry out their functions generally. Section 17 provides no exception to this rule nor does my remit extend, under section 18, to examining the correctness or otherwise of any particular act for which reasons are sought.

## Practices of Public Bodies

Under the FOI Act a public body is obliged to engage with my Office in carrying out reviews. The FOI Act also provides that my decisions are legally binding, so, if there is no High Court appeal, the public body is legally obliged to implement my decision. The following examples of these and other issues are a cause of concern to me.

### Failure to Implement Decision

A requester sought records on procurement of consulting services from Donegal County Council. The Council did not release the records after the 8 week High Court appeal period had passed. My Office contacted the Council which then released some of the records but it required further intervention by my Office to ensure the Council fully implemented my decision by releasing all records to the applicant. Applicants for review have a legitimate expectation that if I find in their favour, the relevant records will be released in accordance with the statutory requirements and I am concerned that this did not happen in this instance.

### Records “inadvertently omitted”

The Sunday Times requested access, from Dublin City Council, to a “concession contract” and related records concerning the provision of outdoor advertising and public amenity services in Dublin by JC Decaux. At a very late stage, the Council forwarded additional records to my Office which were within the scope of the review. The records comprised correspondence between the Council and JC Decaux and there had been no previous indication from either party that these records were held. When asked for an explanation the Council said the documents were “inadvertently omitted” due to an oversight. This decision is discussed in more detail in Chapter 3.

### Improper Decisions

A number of the exemption provisions in the FOI Act are subject to a public interest balancing test. This means that a decision to refuse access to a record is not justified unless the public body can demonstrate that the public interest would not be better served by granting than by refusing to grant access to the record concerned. My Office dealt with several cases in 2009 in which public bodies did not include any reference to the public interest test in its decision making process. As a sample please see Cases [080025](#), [080232](#), [080240](#) and [090202](#). These decisions cannot be regarded as having been properly taken in accordance with the FOI Act. This omission is a regular occurrence in decisions by public bodies and should not occur.

### Identification of records

Following the narrowing of the scope of a request by an applicant, the Department of Enterprise, Trade and Employment agreed that the records the subject of this review would be sourced from its computer system. However, during the course of the review, it became clear that not all relevant information was captured on the system and some information in reports generated from that system were inaccurate. When this came to light the Department advised my Office that the computer system is an old one which is being replaced and that there were “limitations as to the ability of the system to manipulate and extract data specific to the request”. Given the inaccuracies identified, examination of the source files was required, my Office had to make six separate requests to the Department before all the relevant records were provided. The issue of the accuracy of the records was first noticed in October 2008, and it took protracted correspondence with the Department until May 2009 before the issue was resolved. This delayed my Office’s processing of the review by seven months, Case [080099](#).

### Misleading Information

In a case which was ultimately settled, the University of Limerick provided what appeared to be, at best, misleading information to my Office during the course of the review. The applicant had sought access to copies of all documents relating to his request for a recheck of his Revenue Law examination script and the processing of his appeal of the recheck result.

The University initially made detailed submissions to this Office in which it purported to describe the manner in which examination recheck requests and appeals are normally handled under its administrative procedures. It identified four specified faculty members as being involved in the recheck and appeal of the applicant's Revenue Law examination script, and also stated: "All relevant personnel confirmed that no further records had been generated other than what was made available to the requester.....While [the applicant] notes that it is clear to him that documents must have been created by the Internal and External Examiners prior to 16 October 2007, this is simply not the case." Apparently for the avoidance of any doubt, the University added: "In this particular case, the University wishes to state for the record that a number of records requested by [the applicant] simply never existed due to the administrative processes in place, outlined clearly in this document, and confirmed by the Decision Maker in her consultations and discussions with relevant faculty and staff members in the department."

The applicant, however, also made detailed submissions which provided a very different account of the handling of his recheck request and appeal in relation to his

examination script than that described by the University. Eventually, the University confirmed that a fifth faculty member, a senior lecturer referred to as Mr.Y, had in fact been involved in the recheck process in his capacity as the coordinator for the 4th year BA in Applied Taxation. The University's belated acknowledgement of Mr.Y's involvement led to the discovery of an annotated grading scheme that had been created (and at some point amended) by the Internal Examiner during the recheck process, notwithstanding the fact that the Internal Examiner was supposedly one of the faculty members who had previously confirmed that "no further records had been generated". Two other highly significant records were also later discovered: an email from the External Examiner to the Course Director dated 3 September 2007, which was virtually identical in content to the External Examiner's report on applicant's appeal dated 16 October 2007; and an email from a PricewaterhouseCoopers expert to the External Examiner, which was also dated 3 September 2007 and was also virtually identical in content to the report dated 16 October 2007.

It is difficult to reconcile the discovery of the annotated grading scheme and the emails dated 3 September 2007 with the statement in the University's initial submissions that further records "simply never existed due to the administrative processes in place, outlined clearly in this document, and confirmed by the Decision Maker in her consultations and discussions with relevant faculty and staff members in the department". It could reasonably be inferred from the nature of the discrepancies between the University's initial submissions and the later discoveries that the University initially provided what may be described as, at best, misleading information to this Office regarding the adequacy of its search for relevant records. I consider such conduct to be unusual for a public body and I have made my views on how this case was handled known to the University in decisions 080002 and 080003 on the amendment of marks awarded to the applicant. I generally trust public bodies to act in good faith in their dealings with my Office, and I am concerned that this trust was misplaced in this case.

### Issues of consent

A requester was refused access to his son's records by the HSE as it found, having consulted with various third parties involved in the care of the child, that the granting of the request would not be in the best interests of his son and that the public interest in protecting the child's privacy rights outweighed the public interest in the requester having access to the records.

The requester's son had reached eighteen years of age before this review was considered by my Office. Given these changes in circumstances, my staff

considered it prudent to seek to establish whether the applicant's son understood what was at issue and whether he wished to consent to the release of the records to his father at this time. Therefore, members of my staff met with the applicant's son and explained to him the background to the application and the purpose of this review. Having examined the records at issue, he indicated, verbally and in writing, that he consented to his father being granted access to his personal information as it appeared in the records. I should say here that my Office generally does not contact or meet with affected persons in relation to consent issues arising out of requests for access to personal information; the procedures followed were deemed necessary due to the particular circumstances of this case and the HSE was made aware of them.

There is no provision in the FOI Act for me to disregard the consent obtained nor to consider whether release of these records were in the best interests of a third party who is an adult and who has consented to the granting of the applicant's request. However, I consider that I am entitled to take steps necessary, where appropriate, to satisfy myself that the consent is informed and voluntary. I found that consent in writing dis-applies the exemption in section 28(1) of the Act by virtue of section 28(2)(b).

## High Court Cases

During 2009, the High Court delivered judgements in three appeals taken against decisions of my Office in 2009. A fourth appeal was rejected by the Courts as proper procedures were not followed. My decisions were upheld in two cases and the remaining case was remitted to my Office by the High Court and is currently under review. In the case involving records held by the Rotunda Hospital, the Hospital appealed to the Supreme Court and, at the time of writing, a hearing date is awaited.

The full text of the judgments is available on [www.oic.gov.ie](http://www.oic.gov.ie). What follows is a summary of the main points in these cases.

### **I. The Governors and the Guardians of the Hospital for the Relief of Poor Lying - In Women, Dublin and the Information Commissioner [2009] IEHC 315 Judgment of Mr Justice Patrick McCarthy, 2 July 2009**

**Background:** A woman sought access under FOI on behalf of her father, to a record of her grandmother's age when she gave birth to him in 1922. The Hospital refused access to the records which it held - an extract from the Labour Ward Book and Porter's Lodge

Book and the woman applied to my Office for a review of that decision. My Office's decision (Case Number: [050148](#)) to annul the Hospital's decision and to direct the release of the records was issued on 14 December 2007.

**Issue:** The Hospital appealed my decision on a number of points of law. Although it had not made this point in the course of the review, it claimed that the FOI Act did not apply at all since the records came into existence prior to its commencement. It submitted that my Office had erroneously held that the prohibition on release to persons other than the applicant of personal information under section 28(1) of the FOI Act did not apply in the circumstances of this case. The Hospital contended that the age of the applicant's grandmother was information given to it in confidence.

**Court's Finding:** Mr Justice McCarthy upheld the finding that the age of a person is personal information of a kind that is available to the public via the General Registration Office (GRO) and by virtue of section 28(2)(c) of the FOI Act, the provisions of section 28(1) do not apply to it. He found that the test as regards availability to the public of information of the same kind as in the records is an objective one and should be assessed by reference to whether the information is available in principle.

Although the Court held that the Hospital was entitled to argue a new issue of law not put before me in a review, it did not accept the Hospital's contention that the FOI Act did not apply to the records as it found that they contained personal information relating to the applicant. It was satisfied on the balance of probabilities that the applicant's father was the son of the woman whose age is contained in the Hospital's records.

Mr Justice McCarthy found that, because the age is publicly available information, it cannot be concerned with private or secret matters and so, cannot have the necessary quality of confidence required for the operation of the confidentiality exemption in section 26 of the Act.

It was also held, as a probability, that the subject of the records was deceased and that the question of the next of kin's rights

to the information had been addressed in the decision. The issue of the public interest was discussed by McCarthy J. in his decision and he made observations on this which, he said, may be of assistance to the parties in other similar cases which arise. He dismissed the Hospital's appeal.

The Hospital has appealed to the Supreme Court against the findings and through the legal mechanism of a Notice to Vary I have also raised certain other questions for determination in that Appeal.

## **2. Michael Kruse and the Information Commissioner [2009] IEHC 286 Judgment of Mr Garrett Sheehan 24 June 2009**

**Background:** Mr Kruse, a medical student, sought access under FOI to records, including computer scripts, relating to multiple choice examinations which he sat in 2006. University College Dublin (UCD) refused access to the records. My Office's decision (Case [070155](#)) to affirm UCD's decision was issued on 13 December 2007.

**Issue:** Mr Kruse contended in his appeal that my Office had erred in finding that section 21(1) of the FOI Act applied to exempt the records on the basis that their release would prejudice the effectiveness of the examinations conducted by UCD. He further argued that there was no evidence to support the findings that the public interest in favour of refusing his request outweighed those in favour of release of the records.

**Court's Finding:** Mr Justice Sheehan found that my Office had sufficient evidence to conclude that UCD had identified a potential harm to its functions i.e. that release of the questions from a finite pool of questions which would be used again in further assessments would increase the risk of candidates gaining prior access to correct answers and thus undermine UCD's ability to assess the knowledge of the candidates. He also found that my Office had sufficient evidence to enable it to be satisfied as to the reasonableness of UCD's expectation of that harm occurring and that there was ample evidence to conclude that, on balance, the public interest favoured not releasing the records. The Court dismissed the appeal.

### 3. P. and the Information Commissioner [2009] IEHC 574 Judgment of Ms Justice Maureen H. Clark 13 July 2009

**Background:** P. sought access under FOI to records pertaining to allegations of child sexual abuse made against him, in two requests made to the former Eastern Health Board (the Board) and a further request to Our Lady's Hospital for Sick Children (the Hospital). Both bodies released some records to him and withheld the remainder, largely on the grounds that they contained information given in confidence (section 26), and personal information of third parties (section 28). My Office's decision on Cases [000478 & 000549](#) (which concerned the requests made to the Board) issued on 17 November 2005, while that on Case Number 0000479 (which concerned the request to the Hospital) issued on 28 November 2005. Both affirmed the refusal of access to records relating to the applicant and the child the alleged subject of abuse. As it was not practicable to separate the information relating to the applicant from that of the child, the grounds for refusal relied on section 28 of the FOI Act - that release of the records would have disclosed the personal information of both the applicant and the child and that, on balance, the public interest in safeguarding the child's privacy outweighed the public interest in granting the request.

**Issue:** P's appeal contended that I had erred in law in the manner in which I directed myself as to the application of the public interest test set out in section 28 of the FOI Act, and, in particular, in finding that the report made to the Board was not (i) an allegation and further (ii) was not a false or malicious allegation.

**Court's Finding:** Ms Justice Harding Clark found that my decisions were erroneous on a point of law insofar as I found that a notice party to the appeal did not make any allegation and insofar as I found that there was an absence of evidence of malice in the making of that allegation, and that I thus misdirected myself as to the application of the public interest test as set out in section 28(5)(a) of the FOI Act. In order to better understand the complexity of the issues involved in the context of the

review and of Ms Justice Harding Clark’s judgment, readers should refer to the decisions and judgment which are available on my website [www.oic.gov.ie](http://www.oic.gov.ie)

As this case was remitted by the High Court to my Office for fresh consideration and is still under review, it would not be appropriate for me to comment further on the issues in this case.

## Chapter 3

**Drinking water  
'was not tested  
enough' prior to  
Crypto outbreak**

standards

**T.D.s and Senators  
Expenses Top €1.1m**

Expenses  
bonanza as  
senators  
claim €5.6m

## Chapter 3: Decisions

This Chapter, drawing on material contained in a small number of decisions issued during 2009, is intended to highlight points of interest to public bodies and FOI users alike. The full text of these and other decisions of interest, with the parties identifying details removed where necessary, is available on my Office website ([www.oic.gov.ie](http://www.oic.gov.ie)).

### **Prejudice to a competitive position of a person in the conduct of a profession or business**

Public bodies hold commercially sensitive information, some of which may have been supplied by third parties in order to compete for public sector projects or supplied to comply with regulatory requirements. Section 27 of the FOI Act, which is subject to a public interest test, protects commercially sensitive information. This exemption is subject to a public interest test as illustrated in the case summaries below. The second case also deals with information in respect of which it is claimed that a confidentiality clause prohibits release of the records as provided for in section 26 of the FOI Act.

### **Irish Independent and Department of Enterprise, Trade and Employment - Case 080099**

#### **Background and Records Sought**

In this case the Irish Independent sought access from the Department to the entire and unedited file on each detection of a failure by an employer to pay employees the minimum wage for the years 2005 - 2007. In accordance with usual procedures, my Office requested copies of the records sought by the applicant. The Department advised that there was a large volume of records held by Labour Inspectors in various regional locations attached to the National Employment Rights Authority (NERA). Following discussions between the applicant, my Office and the Department, the applicant agreed to restrict her request to the names and addresses of employers who accepted that they had underpaid 10 or more

employees (as provided for in the National Minimum Wage Act) and had paid arrears to those employees accordingly for the year 2007 only.

### **Identification of records relevant to the review**

I dealt with this issue in chapter 2 and the only purpose in referring to it again is to emphasise that the issue of accuracy was first noticed in October 2008 and it took protracted correspondence with the Department until May 2009 before the issue was resolved. This served to delay my Office's processing of the review by seven months.

### **The Department's Decision**

The Department refused access to the records under various sections of the FOI Act but mainly sections 21(1)(a) [prejudice to the performance by a public body of its functions], and 27(1)(b) [material financial loss or prejudice to a competitive position of a person in the conduct of a profession or business].

### **The Investigation**

In line with my Office's normal procedures, both the Department and the employers were invited to make submissions to my Office. The Department and all the relevant employers made submissions. While I accept that the employers involved may have been concerned that they would suffer some harm if their identities were disclosed, no details of, for example, the wage structure, hourly rates paid to employees, etc was being considered for release. Only the name and business address of the employers who accepted that they had underpaid 10 or more employees and had paid arrears to those employees accordingly. The Department contended that its main concern about releasing the records related to the voluntary cooperation of the employers in correcting an identified breach, including the payment of arrears due to the affected workers. Another concern was that employees were more likely to obtain arrears owed as a consequence of how NERA conducts its business, and that release of employer identities under FOI would diminish employer co-operation with NERA and compromise its ability to resolve cases without having to resort to legal proceedings. My officials informed the Department of their view that release of employer identities under FOI would be more likely to encourage, rather than discourage, greater future proactive compliance with the National Minimum Wage Act as employers would be anxious to avoid negative publicity through public confirmation of their underpayment of employees. However, having considered the records and the particular circumstances of each of the employers, I found that section 27(1)(b) applied to the information relating to four of the employers, in that, in my view, the release of the information could prejudice the competitive position of the employer.

### **The Public Interest**

Having accepted that section 27(1)(b) applies, it is capable of being set aside where the public interest is found to support release of the records. The public interest factors I considered in favour of granting access to the records included openness and transparency as to how public bodies conduct their business, in that it demonstrates that a public body had carried out its functions, had addressed instances where employees had been underpaid and that redress had been provided for the employees concerned. The employers in this case represent only a small number of NERA inspections in any year. In previous decisions, I found that nursing home inspection reports reflected the views, opinions and findings of the members of the inspection team at the time of the visit to the home. Similarly, in this case, the inspection reports reflect the findings of an inspection team at a point in time. I considered the circumstances of this particular case and found that the public interest arguments in favour of releasing the records were particularly strong and concluded that the public interest was better served by granting access to the records.

### **Review Decision**

I annulled the decision of the Department and directed the release of the names and addresses of the relevant employers.

## **Sunday Times and Dublin City Council - 080232**

### **Background and Records Sought**

In August 2008, The Sunday Times sought access to records concerning JCDecaux and Dublin City Council in relation to the so-called “bikes for billboards” scheme.

In the course of the review, the applicant limited the scope of the request to cover only the concession contract itself i.e. the agreement and relevant schedules. However, at a very late stage in the review the Council notified my Office that it held further, previously unidentified records concerning the terms of the contract and I deemed those to also come within the scope of the review.

### **The Council's Decision**

The Council refused access, citing section 27(1) of the FOI Act and claiming that the records contained commercially sensitive information. The Council did not consider the public interest as required by the FOI Act.

### **The Investigation**

My Office sought and received submissions from JCDecaux who objected to the release of some but not all of the records. JCDecaux argued that the Council

had entered into an express duty of confidence which must be enforced. Both the Council and JCDcaux claimed that the records contained financial or other information whose disclosure could reasonably be expected to result in a material loss and that release of certain details could prejudice the conduct or outcome of contractual or other negotiations. My investigators put it to the Council that it had not justified its refusal of the request as required by section 34(12)(b) of the FOI Act.

### **Analysis and Findings**

In relation to confidentiality, although the Council made no mention of this in its decision, it argued in submissions to my Office that the contract contained confidentiality clauses and that it could not release it without the express consent of JCDcaux. The company identified particular clauses which, it said, expressly prohibited release of confidential information. I examined section 26(2) of the Act which provides that the section 26(1) exemption on confidentiality is not intended to protect the interests of a public body or persons who are contractors to a public body. The contract was prepared by the Council and its lawyers and thus, I did not accept that the Council owed a duty of confidence to its contractor in the particular circumstances of this case. I considered that my position was supported by the decision of the High Court in *The Health Service Executive and the Information Commissioner and BK* [2008] IEHC 298. I also had regard to my previous decision involving confidentiality agreements in the *Sunday Times* and the HSE (Case [000528](#)).

I went on to consider whether the parties could have had an expectation and understanding that the contract would not be disclosed. Given the importance of openness and accountability in the public service and the fact that the FOI Act has been in force for well over 10 years, I was satisfied that the Council and its contractor were well aware of the FOI Act's implications. The invitation to tender itself drew attention to the FOI Act and asked bidders to identify any sensitive information. It added "Please note, it is not sufficient to include a statement of confidentiality encompassing all the information provided in your bid". I also examined the clauses involved and concluded that the Council would not breach the confidentiality clause if required to disclose the information by law. I noted that the terms of the clauses were so broad and general that it was difficult to see how they could be enforceable where one of the parties is a public body. While I accept that the Council was not paying money to the company on foot of this contract, the same principles would apply where a successful tenderer stands to gain from concessions awarded and benefits in kind received. I found that the records did not qualify for exemption under section 26(1).

As regards commercial sensitivity and the section 27 exemption, I found that some of the information was such that knowledge by competitors of the terms offered could prejudice the company's competitive position. Other parts of the information were not exempt under any of the provisions of section 27(1).

I found that the public interest arguments in favour of release were very strong. These included the fact that the agreement afforded the company certain rights over sites in public ownership. I considered that the contract cannot be treated as if it was a private or secret arrangement when the public body involved is charged with management of our capital city. There is a strong public interest in the proper administration of public contracts and ensuring that value is obtained. The weight I accorded to the possible harm to the company arising from disclosure was reduced, in my view, by a number of factors including the fact that the information involves specific sites and what would be disclosed would not necessarily apply to other future concessions in different areas. Also, the contract did not disclose how the calculations, pricing and projections were arrived at. The records disclosed little about the design, technical features or installation of structures. I further took account of the fact that some of the sites proposed had already been brought into the public domain through planning applications and appeals. My finding in relation to the records which were exempt was that, with one exception, the public interest in granting the request outweighed the public interest in refusing it.

### **Review Decision**

I directed the release of the records with the exception of one part of the documentation containing unit prices for structural elements of the scheme.

## Chapter 4

claim

Council expenses to go online

Elderly patients abused in  
new nursing home scandal

Commissioner criticises  
Department of Environment

## Chapter 4: Statistics

The Civil Service, with a rate at 39%, continues to have a lower release rate than the other sectors.

### Section I - Public Bodies - 2009

- Table 1: Overview of FOI requests dealt with by Public Bodies
- Table 2: FOI requests dealt with by Public Bodies and subsequently appealed
- Table 3: FOI requests received - by requester type
- Table 4: Overview of FOI requests dealt with by Public Bodies
- Table 5: Analysis of FOI requests dealt with by Public Service Sector
- Table 6: FOI requests received by Civil Service Departments/Offices
- Table 7: FOI requests received by Local Authorities
- Table 8: FOI requests received by the HSE
- Table 9: FOI requests received by Voluntary Hospitals, Mental Health Services and Related Agencies
- Table 10: FOI requests received by Third Level Education Institutions
- Table 11: FOI requests received by Other Bodies
- Table 12: Fees charged

*(Note: Figures for the above tables are supplied by the Civil Service Users Network, the HSE, the Local Authorities FOI Liaison Group, the Department of Health and Children, the National Federation of Voluntary Bodies and the Liaison Group for the Higher Education Sector, and collated by the Office of the Information Commissioner.)*

### Section II - Office of the Information Commissioner - 2009

- Table 13: Analysis of Applications for Review received
- Table 14: Analysis of Review Cases
- Table 15: Applications for Review Accepted in 2009
- Table 16: Outcome of Completed Reviews - 3 Year Comparison
- Table 17: Subject matter of Review Applications Accepted - 3 Year Comparison
- Table 18: Applications Accepted by Type - 3 Year Comparison
- Table 19: General Enquiries
- Table 20: Deemed Refusals due to Non-Reply by Public Bodies

## Section I - Public Bodies - 2009

**Table 1: Overview of FOI Requests Dealt with by Public Bodies**

Requests on hand - 01/01/2009		2,165*
Requests received in 2009		
	Personal	9,385
	Non-personal	4,799
	Mixed	106
<b>Total</b>		<b>14,290</b>
Total requests on hand during 2009		16,455
Requests dealt with in 2009		14,316
Requests on hand - 31/12/2009		2,139

\* A small number of bodies adjusted their figures for live cases on hand at the end of 2008, in particular: the Department of Agriculture, Fisheries and Food adjusted their figure for live cases carried forward down by 101 due to returns being cumulatively recorded over a number of years in error; the Department of Transport where revised monthly returns resulted in a reduction of 15 live cases at end 2008; The Department of the Environment, Heritage & Local Government where adjustments reduced the figure by 8 and miscellaneous other smaller bodies whose figures were reduced by less than 4 each.

**Table 2: FOI requests dealt with by Public Bodies and subsequently appealed**

	Number	Percentage
FOI requests dealt with by public bodies	14,316	100%
Internal reviews received by public bodies	609	4%
Applications accepted by the Commissioner	202	1%

**Table 3: FOI requests received - by requester type**

Requester Type	Number	Percentage
Journalists	2,163	15%
Business	791	5%
Oireachtas Members	110	1%
Staff of Public Bodies	438	3%
Clients	8,358	59%
Others	2,430	17%
<b>Total</b>	<b>14,290</b>	<b>100%</b>

**Table 4: Overview of FOI requests dealt with by Public Bodies**

<b>Request Type</b>	<b>Number</b>	<b>Percentage</b>
Requests granted	8,162	57%
Requests part-granted	2,797	20%
Requests refused	1,573	11%
Requests transferred to appropriate body	215	2%
Requests withdrawn or handled outside FOI	1,569	11%
<b>Total</b>	<b>14,316</b>	<b>100%</b>

**Table 5: Analysis of FOI requests dealt with by Public Service Sector**

	<b>% granted</b>	<b>% part -granted</b>	<b>% refused</b>	<b>% transferred</b>	<b>% withdrawn/ handled outside FOI</b>	<b>Total</b>
Civil Service Departments	39	27	15	2	17	100
Local Authorities	56	24	15	0	5	100
HSE	71	16	8	1	4	100
Voluntary Hospitals, Mental Health Services and Related Agencies	68	6	6	3	17	100
Third Level Institutions	46	38	1	1	14	100
Other Bodies	52	29	8	0	11	100

**Table 6: FOI requests received by Civil Service Departments/Offices**

Civil Service Department/Office	Personal	Non-personal	Mixed	Total
Department of Justice, Equality and Law Reform	707	137	0	844
Department of Education and Science	415	149	5	569
Department of Social and Family Affairs	508	47	1	556
Department of Finance	10	262	0	272
Department of Agriculture, Fisheries and Food	93	140	0	233
Department of Health and Children	26	173	0	199
Office of the Revenue Commissioners	53	76	0	129
Department of the Environment, Heritage and Local Government	9	118	0	127
Department of Enterprise, Trade and Employment	20	104	0	124
Department of Transport	10	107	0	117
Department of the Taoiseach	3	93	1	97
Defence Forces	75	19	0	94
Department of Foreign Affairs	8	78	0	86
Office of Houses of Oireachtas	1	82	1	84
Department of Arts, Sport and Tourism	0	68	0	68
Department of Defence	9	51	1	61
Office of Public Works	0	56	0	56
Department of Communications, Marine and Natural Resources	3	49	0	52
Department of Community, Rural and Gaeltacht Affairs	1	37	0	38
Office of the Information Commissioner	7	8	6	21
Public Appointments Service	9	5	3	17
Office of Director of Public Prosecutions	4	10	0	14
National Consumer Agency	0	13	0	13
Office of Chief State Solicitor	1	9	0	10
Office of the Attorney General	2	5	0	7
Office of the Comptroller and Auditor General	0	6	0	6
Valuation Office	0	3	0	3
Office of the Director of Corporate Enforcement	0	3	0	3
Office of the Ombudsman	3	0	0	3
Office of the Appeal Commissioners for the Tax Acts	0	2	0	2
Ordnance Survey Ireland	0	2	0	2
Central Statistics Office	0	1	0	1
Office of the Registrar of Friendly Societies	0	0	0	0
<b>Totals</b>	<b>1,977</b>	<b>1,913</b>	<b>18</b>	<b>3,908</b>

**Table 7: FOI requests received by Local Authorities\***

<b>Local Authority</b>	<b>Personal</b>	<b>Non-personal</b>	<b>Mixed</b>	<b>Total</b>
Dublin City Council	119	98	4	221
Cork County Council	25	147	0	172
Mayo County Council	13	95	3	111
Cork City Council	25	63	0	88
Galway County Council	10	75	0	85
Clare County Council	2	74	1	77
Fingal County Council	15	57	0	72
Dún Laoghaire-Rathdown County Council	18	41	1	60
South Dublin County Council	12	47	0	59
Kerry County Council	5	33	14	52
Donegal County Council	2	49	0	51
Galway City Council	6	34	0	40
Sligo County Council	8	32	0	40
Limerick County Council	3	34	0	37
Limerick City Council	20	16	0	36
Louth County Council	8	21	6	35
Kildare County Council	2	32	0	34
Laois County Council	11	22	0	33
Meath County Council	2	29	1	32
Wexford County Council	1	22	7	30
Offaly County Council	2	27	0	29
Kilkenny County Council	4	24	0	28
Carlow County Council	1	26	0	27
Roscommon County Council	4	21	1	26
Waterford County Council	4	18	2	24
North Tipperary County Council	3	21	0	24
Waterford City Council	5	17	0	22
Westmeath County Council	6	16	0	22
Longford County Council	8	13	0	21
South Tipperary County Council	3	13	0	16
Leitrim County Council	2	14	0	16
Cavan County Council	3	13	0	16
Wicklow County Council	1	11	0	12
Monaghan County Council	0	9	0	9
<b>Totals</b>	<b>353</b>	<b>1,264</b>	<b>40</b>	<b>1,657</b>
Regional Authorities	0	2	0	2
Regional Assemblies	0	2	0	2

\*County Council figures include any FOI requests received by Town and Borough Councils

**Table 8: FOI requests received by the HSE**

HSE Area*	Personal	Non-personal	Mixed	Total
HSE South	1,689	65	2	1,756
HSE West	1,570	77	0	1,647
HSE Dublin North East	647	47	0	694
HSE Dublin Mid-Leinster	391	35	1	427
HSE National Requests - Corporate [includes ERHA & EHSS]	1	262	0	263
HSE National Requests (to Areas)	0	1	0	1
<b>Totals</b>	<b>4,298</b>	<b>487</b>	<b>3</b>	<b>4,788</b>

\*Figures represent the regional structure of the HSE

**Table 9: FOI requests received by Voluntary Hospitals, Mental Health Services and Related Agencies**

Hospital/Service/Agency	Personal	Non-personal	Mixed	Total
Mercy University Hospital, Cork	415	1	0	416
St James's Hospital	243	18	4	265
Mater Misericordiae Hospital	228	10	0	238
Rotunda Hospital	182	5	2	189
St Vincent's University Hospital	158	6	0	164
Beaumont Hospital	143	12	0	155
Tallaght Hospital (Adelaide and Meath Hospital, Incorporating the National Children's Hospital)	111	8	0	119
South Infirmary - Victoria Hospital, Cork	115	2	0	117
Our Lady's Hospital for Sick Children, Crumlin	96	14	1	111
Coombe Women's Hospital	85	6	0	91
Children's Hospital, Temple Street	78	4	0	82
National Maternity Hospital, Holles Street	65	9	0	74
St John's Hospital, Limerick	67	3	0	70
Royal Victoria Eye and Ear Hospital	69	1	0	70
National Rehabilitation Hospital, Dún Laoghaire	25	3	0	28
Cappagh National Orthopaedic Hospital, Dublin	25	2	0	27
Hospitaller Order of St John of God	20	0	0	20
St Vincent's Hospital, Fairview	17	0	0	17
Mental Health Commission	12	4	1	17
Brothers of Charity, Galway	14	2	0	16
Brothers of Charity, Cork	15	1	0	16
Medical Council	4	12	0	16

**Table 9: FOI requests received by Voluntary Hospitals, Mental Health Services and Related Agencies (Continued)**

Hospital/Service/Agency	Personal	Non-personal	Mixed	Total
Health Information and Quality Authority (HIQA)	5	10	0	15
St Michael's Hospital, Dún Laoghaire	11	2	0	13
Sunbeam House Services	12	0	0	12
St. Michael's House	4	8	0	12
Central Remedial Clinic	10	0	0	10
Dublin Dental School & Hospital	8	1	0	9
Brothers of Charity, Waterford	4	3	0	7
COPE Foundation	5	2	0	7
Office of Tobacco Control	0	7	0	7
Daughters of Charity Services	5	1	0	6
National Treatment Purchase Fund	2	4	0	6
Ability West (formerly Galway Assoc.)	3	2	1	6
Health Insurance Authority	0	6	0	6
St Luke's Hospital, Rathgar	4	1	0	5
Pharmaceutical Society of Ireland	1	4	0	5
Stewarts Hospital	3	1	0	4
Our Lady's Hospice, Harold's Cross	3	1	0	4
Brothers of Charity, Limerick	4	0	0	4
The Royal Hospital, Donnybrook	2	2	0	4
Others (51 bodies with less than 4 requests each)	21	11	4	36
<b>Totals</b>	<b>2,294</b>	<b>189</b>	<b>13</b>	<b>2,496</b>

**Table 10: FOI requests received by Third Level Education Institutions**

Third Level Education Body	Personal	Non-personal	Mixed	Total
University of Dublin (Trinity College)	65	30	9	104
University College, Dublin	51	25	0	76
Waterford Institute of Technology	8	53	1	62
National University of Ireland, Galway	14	12	0	26
University College Cork	3	22	0	25
University of Limerick	9	13	1	23
Dublin Institute of Technology	14	7	0	21
Dublin City University	2	16	0	18
National University of Ireland Maynooth	5	10	0	15
Limerick Institute of Technology	5	5	0	10
Dundalk Institute of Technology	2	8	0	10
Higher Education Authority	1	7	0	8

**Table 10: FOI requests received by Third Level Education Institutions (Continued)**

Third Level Education Body	Personal	Non-personal	Mixed	Total
Athlone Institute of Technology	0	8	0	8
Galway-Mayo Institute of Technology	5	3	0	8
Dún Laoghaire Institute of Art, Design and Technology	0	7	1	8
Tralee Institute of Technology	3	4	0	7
St Patrick's College, Drumcondra	3	3	0	6
Tallaght Institute of Technology	0	6	0	6
Cork Institute of Technology	0	6	0	6
Letterkenny Institute of Technology	0	6	0	6
Carlow Institute of Technology	1	5	0	6
Royal College of Surgeons in Ireland	3	2	0	5
Froebel College of Education, Blackrock	1	3	0	4
Others (10 institutions with less than 4 requests each)	2	24	0	26
<b>Totals</b>	<b>197</b>	<b>285</b>	<b>12</b>	<b>494</b>

**Table 11: FOI requests received by Other Bodies**

Public Body	Personal	Non-personal	Mixed	Total
RTÉ	7	93	0	100
Social Welfare Appeals Office	81	0	0	81
FÁS	17	54	4	75
National Roads Authority	0	38	0	38
Courts Service	13	24	0	37
Probation and Welfare Service	33	0	0	33
Dublin Docklands Development Authority	0	28	0	28
Chief Medical Officer for the Civil Service	26	0	0	26
Enterprise Ireland	0	25	0	25
Health and Safety Authority	3	13	7	23
Railway Procurement Agency	0	23	0	23
Arts Council	5	17	0	22
Commission for Communications Regulation	13	7	0	20
Irish Medicines Board	1	17	0	18
Broadcasting Commission of Ireland	0	17	0	17
IDA Ireland	0	16	0	16
Environmental Protection Agency	0	16	0	16
An Bord Pleanála	0	16	0	16

**Table 11: FOI requests received by Other Bodies (Continued)**

<b>Public Body</b>	<b>Personal</b>	<b>Non-personal</b>	<b>Mixed</b>	<b>Total</b>
Commission for Taxi Regulation	5	11	0	16
Legal Aid Board	7	7	1	15
Food Safety Authority	0	14	0	14
Irish Sports Council	2	9	2	13
National Council for Special Education	11	1	0	12
Fáilte Ireland	1	11	0	12
Irish Film Board	1	10	0	11
Shannon Development	0	11	0	11
Horse Racing Ireland	1	10	0	11
National Museum of Ireland	4	6	0	10
Teagasc	5	3	1	9
Údarás na Gaeltachta	0	9	0	9
Commission for Energy Regulation	1	8	0	9
Forfás	0	9	0	9
Standards in Public Office Commission	0	8	1	9
Blood Transfusion Service Board	5	3	0	8
Bord Bia	0	8	0	8
National Educational Welfare Board	4	3	0	7
Equality Authority	2	5	0	7
Central Fisheries Board	0	6	0	6
Criminal Injuries Compensation Tribunal	1	5	0	6
Pobal	1	4	0	5
National Library of Ireland	0	4	1	5
North Western Regional Fisheries Board	0	5	0	5
Family Support Agency	0	5	0	5
Irish Film Classification Office	0	5	0	5
Shannon Regional Fisheries Board	0	4	0	4
Competition Authority	0	4	0	4
Companies Registration Office	0	4	0	4
National Archives	1	3	0	4
National Gallery of Ireland	0	4	0	4
Others (134 bodies with less than 4 requests each)	15	54	3	72
<b>Totals</b>	<b>266</b>	<b>657</b>	<b>20</b>	<b>943</b>

**Table 12: Fees charged**

	<b>Original Request</b>	<b>Search &amp; Retrieval</b>	<b>Internal Review</b>	<b>Refunds</b>	<b>Net Fees</b>
	€	€	€	€	€
Government Departments and State Bodies	36,220.40	26,327.17	7,997.17	2,306.30	68,238.44
Local Authorities	19,340.00	3,726.21	5,775.00	565.00	28,276.21
Health Service Executive	5,830.00	3,277.70	1,125.00	300.00	9,932.70
Voluntary Hospitals, Mental Health Services and Related Agencies	2,045.00	4,953.95	300.00	1,740.60	5,558.35
Third Level Institutions	4,065.00	1,241.94	950.00	580.00	5,676.94
Other Bodies	60.00	0.00	0.00	0.00	60.00
<b>Total</b>	<b>67,560.40</b>	<b>39,526.97</b>	<b>16,147.17</b>	<b>5,491.90</b>	<b>117,742.64</b>

## Section II - Office of the Information Commissioner - 2009

### Table 13: Analysis of Applications for Review received

Applications for Review on hand - 1/1/2009	10
Applications for Review received in 2009	324
<b>Total applications for review on hand in 2009</b>	<b>334</b>
Discontinued	4
Invalid applications	51
Applications withdrawn	11
Applications rejected	10
Applications accepted for review in 2009	242
<b>Total applications for review considered in 2009</b>	<b>318</b>
Applications for Review on hand - 31/12/2009	16

### Table 14: Analysis of Review cases

Reviews on hand 1/1/2009	193
Reviews accepted in 2009	242
Total reviews on hand in 2009	435
Reviews completed in 2009	235
Reviews carried forward to 2010	200

### Table 15: Applications for Review Accepted

Health Service Executive	61
HSE West	19
HSE South	18
HSE Dublin Mid-Leinster	15
HSE Dublin North East	7
HSE National Requests - Corporate	2
HSE National Requests (to Areas)	0
Department of Justice, Equality and Law Reform	15
Department of Agriculture, Fisheries & Food	9
Office of the Revenue Commissioners	9
Dublin City Council	6
Dun Laoghaire - Rathdown County Council	6
Kerry County Council	6
Department of Finance	5
Department of Social & Family Affairs	5
Department of Health & Children	5

**Table 15: Applications for Review Accepted (Continued)**

Department of Transport	4
National Museum of Ireland	4
Clare County Council	4
Others (70 bodies with less than 4 applications each)	103
<b>Total</b>	<b>242</b>

**Table 16: Outcome of Completed Reviews - 3 Year Comparison**

	2009	%	2008	%	2007	%
Decision Affirmed	75	31.91	82	31.66	98	30.15
Decision Annulled	6	2.55	10	3.86	21	6.46
Decision Varied	16	6.80	21	8.11	30	9.23
Discontinued	5	2.12	7	2.70	7	2.15
Settlement Reached	49	20.85	54	20.85	55	16.92
Withdrawn	84	35.74	85	32.82	114	35.08
Reviews completed	235	100	259	100	325	100

**Table 17: Subject matter of Review Applications Accepted - 3 Year Comparison**

	2009	%	2008	%	2007	%
Refusal of access	201	83.06	195	85.52	201	81.05
Objections by third parties to release of information about them or supplied by them	17	7.03	12	5.26	20	8.06
Amendment of records under section 17	7	2.89	7	3.07	5	2.02
Statement of reasons under section 18	11	4.54	13	5.70	14	5.65
Decision to charge a fee	6	2.48	1	0.45	8	3.23
Applications Accepted	242	100	228	100	248	100

**Table 18: Applications Accepted by Type - 3 Year Comparison**

	2009	%	2008	%	2007	%
Personal	63	26.03	71	31.14	61	24.60
Non-personal	123	50.83	127	55.70	149	60.08
Mixed	56	23.14	30	13.16	38	15.32
<b>Total</b>	<b>242</b>	<b>100</b>	<b>228</b>	<b>100</b>	<b>248</b>	<b>100</b>

**Table 19: General Enquiries**

<b>Year</b>	<b>Number</b>
2009	857
2008	1,100
2007	1,315
2006	1,551
2005	1,396
2004	1,306
2003	1,090
2002	1,047
2001	1,136
2000	799
<b>Total</b>	<b>11,597</b>

**Table 20: Deemed Refusals due to Non-Reply by Public Bodies**

<b>Public Body</b>	<b>No Original or Internal Review Decision</b>		
	<b>2009</b>	<b>2008</b>	<b>2007</b>
HSE Dublin Mid-Leinster	7	2	1
HSE South	4	3	-
Department of Justice, Equality & Law Reform	3	3	1
HSE West	3	-	1
Department of Health & Children	2	1	1
HSE Dublin North East	2	1	1
Department of Social & Family Affairs	2	-	1
Fingal County Council	1	1	-
HSE National	1	-	-
Cavan Town Council	1	-	-
Daughters of Charity of St. Vincent De Paul	1	-	-
Department of Finance	1	-	-
Galway-Mayo Institute of Technology	1	-	-
National University of Ireland Galway	1	-	-
Office of the Revenue Commissioners	1	-	-
Royal Victoria Eye and Ear Hospital	1	-	-
St Vincent's University Hospital	1	-	-
University College Cork	1	-	-
<b>Total 2009</b>	<b>34</b>		



Oifig an Choimisinéara um Faisnéise Comhshaoil  
Office of the Commissioner for Environmental Information

**Part II - Commissioner for  
Environmental Information**

# Chapter I

Waste  
**energy**

legislation  
health  
landscape  
Regulations

diversity  
Environment

## Chapter I: Introduction

My role, which is additional to those roles I have as Ombudsman and Information Commissioner, is to decide on appeals by members of the public who are not satisfied with the outcome of their requests to public authorities for environmental information. My functions are defined in the Access to Information on the Environment Regulations 2007 (S.I. No. 133 of 2007).

### The Directive and the Regulations

The regime of access to environmental information is based on Directive 2003/4/EC. The Directive has, as its key provision, the establishment of a right of access to environmental information held by public authorities. Implementation of the Directive in Ireland was brought about on 1st May 2007 when the Regulations, made by the Minister for the Environment, Heritage and Local Government, came into effect.

### What is Environmental Information?

The definition of “environmental information” in the Directive and in the Regulations is broad. It covers information “in written, visual, aural, electronic or any other material form”. It identifies six separate categories:

- the state of the elements of the environment (e.g. air, water, soil, land, landscape, biological diversity)
- factors affecting, or likely to affect, the elements of the environment (e.g. energy, noise, radiation, waste, other releases into the environment)
- measures designed to protect the elements of the environment (e.g. policies, legislation, plans, programmes, environmental agreements)
- reports on the implementation of environmental legislation
- analyses and assumptions used within the framework of measures designed to protect the environment, and
- the state of human health and safety, the food chain, cultural sites and built structures in as much as they may be affected by the elements of the environment.

## Promoting Access to Information

The expectation is that access requests will generally be granted. There is also a requirement that public authorities should organise information on the environment which they hold “with a view to its active and systematic dissemination to the public”. The outcome of the independent, external review - which under the 2007 Regulations is carried out by my Office - is binding on the public authority.

## Public Authorities

Unlike the situation under the FOI Act, the Regulations do not identify the specific public authorities which are subject to the Access to Information on the Environment (AIE) regime. Rather, the Regulations provide a broad definition of what constitutes a public authority; they refer to:

- Government or other public administration bodies (including public advisory bodies) at national, regional or local level
- any natural or legal person performing public administrative functions under national law and in relation to the environment and
- any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person encompassed by either of the first two categories.

Some commercial State bodies not already subject to either the FOI Act or to the Ombudsman Act are potentially covered by these Regulations. Where there is a dispute as to whether a body is a public authority, the person seeking the information has a right of appeal to my Office.

## Charges

Unlike access under FOI, there is no upfront fee required to make a request. Neither is there any charge for the internal review application. However, there is a fee for appeal to my Office. This is set at €150 with a reduced fee of €50 for medical card holders and their dependants and third parties affected by the disclosure of the environmental information concerned.

A public authority may charge a fee where it makes information available. However, any such fee must be “reasonable having regard to the Directive”. Where a public authority proposes to charge fees, it is obliged to make a list of fees chargeable available to the public. There is a right of appeal (internal and external) on the

grounds that the fee charged is excessive. - see my decision in Sligo County Council Case [CEI/07/06](#) on [www.ocei.gov.ie](http://www.ocei.gov.ie).

## Refusal Grounds

The Regulations provide that a request may be refused in order to protect:

- the confidentiality of personal information
- the interests of a person who has voluntarily given information
- the environment to which the information relates
- the confidentiality of the proceedings of public authorities
- Cabinet discussions
- international relations, national defence or public security
- the course of justice
- commercial or industrial confidentiality and intellectual property rights.

There is also provision for a public authority to notify an applicant that it does not hold the information sought. All of the exemption grounds are subject to restrictions under Article 10 of the Regulations. For instance, requests relating to emissions into the environment cannot, in most cases, be refused. In all cases, a potential exemption is subject to a public interest test and grounds for refusal must be “interpreted on a restrictive basis”.

Where no decision is notified by the public authority, there is provision for a right of appeal based on a deemed refusal.

## Guidance

The Department of the Environment, Heritage and Local Government (the Department) has published a set of Guidance Notes, which includes the text of the Regulations and Directive. These are available on the Department’s website at [www.environ.ie](http://www.environ.ie) and on my Office’s website [www.ocei.gov.ie](http://www.ocei.gov.ie). The guidance gives useful detail to which public authorities are obliged to have regard; it does not purport to be a legal interpretation of the Regulations.

## Appeals received

During 2009, 18 appeals were received by my Office (12 in 2008). Two formal decisions were issued - summaries of these can be found at the end of this chapter. Two cases were deemed to have been withdrawn as settled once the records were released following my Office’s intervention. One case was withdrawn and a further 6 appeals were deemed invalid on the grounds that internal review had

not been requested or the statutory appeal fee was not paid. Thirteen cases were on hands at the end of the year. My staff recorded 23 general enquiries about the Regulations.

While most of the appeals arose from requests to local authorities and Government Departments, An Bord Pleanála, the Environmental Protection Agency, the Attorney General's Office and RTÉ were among the public authorities whose decisions were appealed. It is fair to say that most of the appeals arose from disputes as to whether any or further environmental information within the scope of a request was held, the format in which it was available or whether the body was a public authority for the purposes of the Regulations as opposed to cases where my Office had to decide whether or not the exceptions provided for in the Regulations had been properly applied.

### Issues arising in 2009

As discussed in my report for 2008, the level of activity in appeals and in applications under the Regulations has been low. I identified two main reasons for this - the level of the fee for making of an appeal to my Office is discouraging appellants and there is a lack of awareness generally regarding the rights of members of the public under the Regulations. There have been some recent indications that the level of appeals is on the rise.

#### High Court case

My decision in case [CEI/07/0005](#) - Mr Gary Fitzgerald and the Department of the Taoiseach - was appealed to the High Court in December 2008. The appeal was heard in July 2009 and, at the time of writing, judgment is still awaited.

#### Website

My Office's website [www.ocei.gov.ie](http://www.ocei.gov.ie) was launched in April 2009. Appeal decisions are available there with links to the Regulations, Directive and Guidelines.

#### Report to The European Commission by the Department

During the year, the Department of the Environment, Heritage and Local Government made Ireland's first report to the European Commission on the operation of the Directive. This reporting is mandatory on Member States under Article 9 of the Directive. Review of Implementation of EU Directive 2003/4/EC on Public Access to the Information on the Environment. Report by Ireland. Monitoring period: 1 May 2007 - 31 December 2008 is available on the Department's website [www.environ.ie](http://www.environ.ie).

I provided statistics and comments on my Office's experience of the Regulations and my staff met with officials of the Department. My comments included suggestions for improved awareness and I indicated my Office's willingness to provide, where possible, input into any awareness/training sessions organised by the Department for staff of public authorities. Among the issues discussed was the fact that the appeal fee is seen as a deterrent to applicants particularly in cases where responses to requests are so inadequate as to constitute "non-reply" or a deemed refusal under the Regulations where no decision is issued within the statutory timeframes.

## Chapter 2

Waste  
**energy**

health  
landscapes

Regulations

diversity  
Environment

## Chapter 2: Decisions

What follows is a summary of the decisions made in 2009. The full text of these can be found on our website [www.ocei.gov.ie](http://www.ocei.gov.ie)

### **Councillor Tommy Cullen & the Department of Environment, Heritage and Local Government CEI/08/0012 Decision of 27 October 2009**

**- Whether the Department was justified in its refusal of access to environmental information concerning illegal dumping in Wicklow**

#### **Background**

The applicant sought access to:

- correspondence, reports, minutes of meetings and memos and internal communications between the Department and Wicklow County Council, the Environmental Protection Agency (EPA) and all other parties on the issue of illegal dumping 2001 to 2008
- records, including those of the Local Government Audit Service (LGAS) on the issue of a waste licence at Ballybeg, Co. Wicklow, and
- communications concerning the making of the Baltinglass Town Plan.

The Department identified several files relating to the request and advised that it was granting access to them with the exception of some documents withheld on the grounds of exceptions provided for in the Regulations. It invited the applicant to inspect the files and mark those pages he wished to have copied. The applicant did this and then appealed the decision. Four additional records were released in the Department's internal review decision. The appellant appealed that decision to my Office on the basis that he believed further information was held.

### **The Department's handling of the matter**

My staff engaged in much correspondence and met with officials of the Department in an effort to clarify the extent of information held and the Department's approach to identifying and providing that information. In response to queries from my Office, three further sets of relevant records came to light. This called into question the efforts made by the Department to fully identify all relevant information at the outset. Irrespective of whether a request to the Department fell to be processed under FOI legislation or under the Regulations on Access to Environmental Information, the systems it had in place to identify information held in various sections failed in this case.

The Department advised that one relevant audit file had not been found. It said that a search was not carried out at the time of the original request because it presumed that audit matters were exempt. Clearly, this presumption should not have been made without an examination of the information and a proper consideration of the public interest in releasing it. The file related to the LGAS examination of the issuing of a waste permit for lands at Ballybeg. My staff pointed out to the Department that the definition of "environmental information" includes electronic records and that, if any part of this file existed electronically, it would fall within the scope of the appeal. A draft version of the LGAS report was located and provided to my Office. The Department claimed that this draft report was exempt from release.

A further concern related to the level of consideration given by the Department's decision makers to the request under the Regulations. In particular, the original decision and the internal review decision failed to comply with the Regulations and with the Department's own published Guidelines on the Regulations because it omitted the mandatory consideration of the public interest when refusing access to information.

## **Findings**

### **Was all information held released?**

Article 7(5) of the Regulations requires a public body to notify an applicant if it does not hold the information sought. There is no requirement that records be created if they do not exist or cannot be found. I concluded after a lengthy appeal process that, on the balance of probabilities, adequate searches had been carried out across various sections of the Department and that officials had not given misleading information to my staff about the existence of additional records. While the applicant was clearly of the view that further information should exist, this did not necessarily mean that such records were actually held.

### Legal Professional Privilege

I found that some of the records for which the Department claimed exemption would qualify for legal professional privilege. However, it was necessary to consider the public interest under Article 10 of the Regulations. The applicant argued that the public interest favoured release of the information. Against this I had to weigh the strong and long established public interest in upholding legal professional privilege as interpreted by the Courts. Public authorities need to be reasonably certain that they can seek and obtain full and frank legal advice in confidence. While I cannot describe in any detail the advice involved, I can say that the records were concerned primarily with legal powers of the Minister, advice from the Attorney General's Office and confidential communications between the Department and its legal advisers obtaining and/or giving legal advice. I did not consider that the public interest in release, though considerable, was of sufficient strength to justify the setting aside of legal professional privilege. I decided that the information in certain records was properly exempt from disclosure in accordance with Article 8(a)(iv) of the Regulations.

Some other records comprised internal memos, the authors of which were not professional legal advisers and not all of which disclosed legal advice. There was no indication that these were prepared with the dominant purpose of preparing for litigation and I found that some did not qualify for legal professional privilege. Further, the Department claimed privilege for correspondence with the EC Commission and, after a detailed examination of the circumstances of the creation of these and the ECJ cases cited by the Department, I was not satisfied that preparation for litigation was the dominant purpose in their creation.

### Confidentiality of proceedings

Some of the withheld material contained information which the Department said had been given in confidence. I considered that the identities of the persons named in the records and the nature of their allegations were already in the public domain. The Department did not provide sufficient justification for its position to enable me to find that the providers of the information did so in the expectation of confidence or in circumstances imposing an obligation of confidence. Furthermore, Article 10(3) provides for a restrictive interpretation of the grounds for refusal to be applied. I concluded that making available the information would not adversely affect the confidentiality of the proceedings of public authorities where such confidentiality is otherwise protected by law nor would it adversely affect the interests of any persons who supplied the information. I found that the exceptions at Articles 8(a)(ii) and 8(a)(iv) did not apply.

### **Local Government Audit Service (LGAS)**

I rejected the Department's claim that the audit report was not environmental information. I should not have had to remind the Department of the definition of "environmental information" set out in the Directive and the Regulations. There can be no doubt but that matters relating to a waste licence come within the definition. The LGAS claimed on behalf of the Department that its report was exempt from release under Articles 8(a)(iv) and 9(2)(c) of the Regulations.

The LGAS referred to provisions of the Local Government Act 2001 in relation to the independence of the audit function. However, I considered that the draft report disclosed nothing about the independence of the audit service or about its methodology in carrying out value for money audits or other investigative functions which would prejudice or interfere in any tangible way with the fundamental principle of "auditor independence". Similarly, the Department failed to convince me that the principle of the auditors having their own discretion in relation to how an audit is carried out would be undermined in any way by allowing access to the information.

The Department also claimed that the draft LGAS report was information still in the course of completion or an unfinished document. Given that the draft report was prepared in 2005, the file apparently lost and a letter sent to the Minister in 2005 setting out the opinion of the LGAS on the matter, I did not see how the draft report could be considered to be in the course of completion. There was no suggestion of any further activity on the part of the LGAS in this matter since 2005. I found that the Article 9(2)(c) exception did not apply.

I commented that there is a strong public interest in the public being aware of how allegations about waste management, the administration and regulation of permits and the overall issue of pollution and dumping of waste are handled. I considered that the fact that the LGAS file had, apparently, disappeared without explanation, strengthened the public interest in as much information as possible about this environmental controversy being released so that the public is aware of measures taken to investigate the allegations made.

### **Appeal Decision**

I varied the decision of the Department and directed it to make specified items of environmental information available.

## **Mr P. Geoghegan & the Environmental Protection Agency (EPA) CEI/09/0004 Decision of 28 October 2009**

### **- Whether the EPA was justified in its refusal of access to environmental information concerning complaints made about Aughinish Alumina**

#### **Background**

The applicant sought access to a report carried out by an EPA inspector following a visit to his lands in March 2008 together with information on and assessment of various complaints made by him about emissions from Aughinish Alumina. The decision of the EPA was to part refuse the request under Article 4(1) of the Regulations on the basis that the Regulations do not apply to information already required to be made available to the public for inspection or otherwise under any statutory position. It advised the applicant to view the relevant public files and it also granted access to 21 records which were not on the public files. Following internal review, the applicant appealed to my Office in respect of the information refused.

#### **EPA position**

The EPA said that it was obliged to give access to its licensing files under the Environmental Protection Agency (Licensing) Regulations 1994 (S.I. No. 85 of 1994) as amended by S.I. 76 of 1995. My Investigator pointed out that the material specified in those Regulations related to licence applications only. The EPA accepted this and clarified that information on complaints was on the public file as an administrative arrangement rather than on foot of a statutory requirement.

My Office was satisfied that Article 4(1) of the Regulations did not apply. The EPA then submitted that the relevant provision was Article 7(3) which deals with the form of access to information. It identified and scheduled the information within the scope of the request which was available for inspection in the public files. It clarified that no records were held in relation to some parts of the request and that all information held about the complaints had been made available.

#### **Findings**

I found that Article 7(3)(a) of the Regulations allowed the EPA not to give the applicant access to copies of the information where it is already available in an easily accessible form. I further found that Article 7(5) applied to the information which the EPA did not hold. I commented that the handling of the request had caused confusion in that the EPA's published procedures for viewing of its files give

the impression that complaints relating to a facility, including all correspondence on enforcement of licences, are available. However, the 21 records released to the applicant in this case included correspondence and internal memoranda relating to a complaint and were not on the public file. I did not consider that this was evidence of any intent to conceal information but that it pointed to a need to clarify for the public the circumstances in which records relating to complaints are not always available on the EPA's public files.

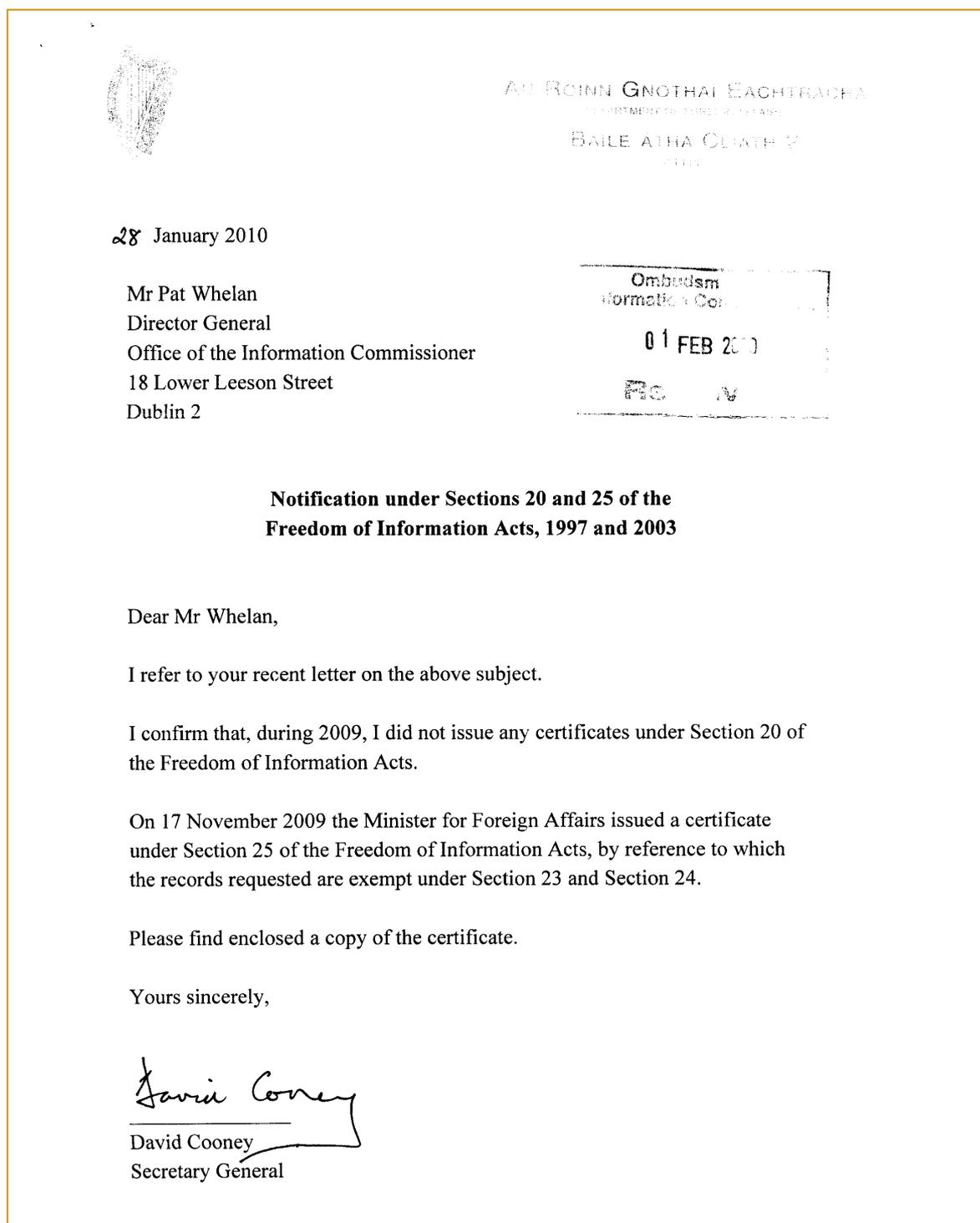
### **Appeal Decision**

I found that the EPA was justified in its part refusal of the request; I varied the basis for the decision to reflect the correct provisions of the Regulations.

# Appendices

## Appendix I

### Certificates Issued under Section 20 and Section 25

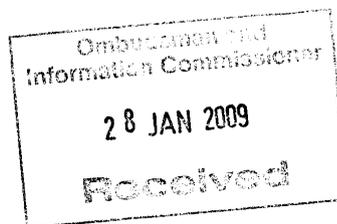




**Department of Defence**  
An Roinn Cosanta

Mr. Pat Whelan,  
Director General,  
Office of the Information Commissioner,  
18 Lower Leeson Street  
Dublin 2.

27<sup>th</sup> January 2010



**Notification under Section 20 and Section 25 of the  
Freedom of Information Acts 1997 & 2003**

Dear Mr. Whelan,

With reference to your letter of 14<sup>th</sup> January 2010 regarding the above, I wish to confirm that in 2009 the Secretary General of this Department, Mr. Michael Howard, issued one certificate under Section 20 of the Act in respect of an Freedom of Information request from the Irish Examiner for a copy of the Department's Risk Register for 2008. As requested a copy of the certificate is attached.

I also wish to confirm that no certificate was issued by the Minister for Defence under Section 25(1)(a) of the Freedom of Information Acts, 1997 and 2003.

Yours sincerely,

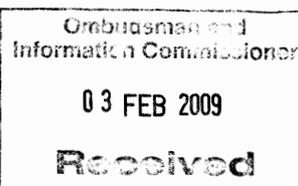
  
Deirdre Creaney  
Freedom of Information Officer  
Department of Defence

Ph. 804 2108  
[foi@defence.irlgov.ie](mailto:foi@defence.irlgov.ie)



OIFIG AN ARD-RÚNAÍ, AN ROINN DLÍ AGUS CIRT, COMHIONANNAIS AGUS ATHCHÓIRITHE DLÍ  
OFFICE OF THE SECRETARY GENERAL, DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM

Mr Pat Whelan  
Director General  
Office of the Information Commissioner  
18 Lower Lesson Street  
Dublin 2



**Notification under Section 20 and Section 25 of the  
Freedom of Information Acts, 1997 and 2003**

Dear Mr Whelan,

I refer to your letter dated 14 January 2010 in relation to certificates issued by Secretaries General and Ministers under Sections 20 and 25 of the Freedom of Information Acts, 1997 and 2003.

Section 20 Certificates

Please note that a certificate under Section 20 was issued by myself on 11 August, 2006 in relation to Risk Registers.

Section 25 Certificates

There were two new certificates issued under Section 25 during 2009, by the Minister. One certificate was renewed by the Minister in 2009 in relation to Phone Tapping. I enclose copies of same for your information.

Yours sincerely,

Seán Aylward  
Secretary General

19 January 2010

## Appendix II

### Review under Section 25(7) of Ministerial Certificates Issued



16th September 2009

Roinn an Taoisigh  
Department of the Taoiseach

Ms. Emily O'Reilly  
Information Commissioner  
18 Lower Leeson Street  
Dublin 2



**Re Review of Section 25 of the Freedom of Information Act 1997.**

Dear Commissioner,

I would like to inform you that pursuant to section 25 (7) of the Act, the Taoiseach, the Tánaiste and Minister for Enterprise, Trade and Employment, and the Minister for Finance on 16th September 2009, carried out a review of the operation of the Act, for the period ended August 2009. The five certificates in question are those issued by the Minister for Justice, Equality and Law Reform on 20 February 2008, 14 March 2008, 10 June 2009, 22 June 2009 and 25 June 2009.

Having completed the review, the Taoiseach, the Tánaiste and Minister for Enterprise, Trade and Employment, and the Minister for Finance are satisfied that it is not necessary to request revocation of any of the five certificates which were the subject of the review – copies of the forms signed by the reviewers to that effect are attached.

Yours sincerely,

A handwritten signature in black ink, appearing to read "PW".

Patricia Williams  
Freedom of Information Liaison Officer

c.c. Ms. Aisling Brennan, FOI Unit, Department of Justice, Equality and Law Reform; Mr. Joe Langan, Central Policy Unit, Department of Finance; Ms. Orla O'Brien, FOI Officer, Department of Enterprise, Trade and Employment

## Organisation Chart

### Director General



Pat Whelan

### Senior Investigators



Elizabeth Dolan



Seán Garvey

### Investigators

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Brenda Lynch  
Brian Murnane  
Alison McCulloch  
Anne Moran  
Marie O'Brien  
Ciarán O'Donohoe  
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Bernie Kelly  
Robert Cullen-Jones  
Iris Kilbey

