

LIST OF ISSUES ARISING FROM REVIEW OF THE OPERATION OF THE FOI ACT 2014

This is a list of issues, mainly technical, identified by the Commissioner in his ongoing review of the operation of the FOI Act. Some of these issues are particularly technical in nature and further discussion may assist in understanding them fully.

Immediately below are details of issues, listed by section of the Act. Further below are some issues of a general nature and issues relating to some FOI Regulations.

Section 2

Definition of “personal information”

The definition of “personal information” includes, at sub-paragraph (xiv), the views or opinions of another person about the individual. However, the definition of personal information does not include the views or opinions of the individual about another person.

Definition of “service provider”

The definition of “service provider” includes the words “at the time the request was made”. This may suggest that a person who was not providing a service at the time the request was made cannot be deemed to be a service provider for the purposes of section 11(9) of the Act. If the provision of the service concluded before the request was made, then a right of access may not exist to those records held by the service provider which relate to the service provided.

It may also raise questions in the context of section 35(2) where a duty of confidence is owed to a person who was previously providing a service for an FOI body under a contract for services but is no longer providing such services at the time the request is made and where a record was prepared by a service provider in the course of the performance of their function but who is no longer providing the service for the FOI body at the time the request was made.

Section 11(7)

Section 11(7) provides that nothing in section 11 shall be construed as applying the right of access to an exempt record where the exemption is mandatory or, in the case of a discretionary exemption which has a public interest test, where the factors in favour of refusal outweigh those in favour of release. It is not clear what this provision achieves. It is also unclear why the reference to discretionary exemptions is only to those discretionary exemptions which have a public interest test – a number of discretionary exemptions do not have a public interest test (e.g. sections: 28(1); 31(2); 33(1); and, those parts of 33(2) not falling within (i) or (ii)).

Section 21(5)

Section 21(5) provides that some internal review decisions to refuse access are not required to include certain details. The decisions referred to are, with one exception, decisions to refuse pursuant to ‘neither confirm nor deny’ provisions. Section 21(5) includes decisions to refuse access under section 15(1)(c) in the decisions which are not required to contain these details. There is no apparent reason for including section 15(1)(c) in section 21(5).

Section 22

Sections 22(5) and 22(6)

Sections 22(5) and (6) set out the procedures to be followed by the Commissioner's Office on the withdrawal of an application for review (subsection (5)) and on receipt of an application for review (subsection 6).

- Subsection (5) states that the Commissioner shall cause a copy of any notice of withdrawal to be given to "the relevant person" or the head of the FOI body concerned, as may be appropriate.
- Subsection (6) states that after receipt of an application for review, the Commissioner shall cause a copy of the application to be given to the head of the FOI body and, as may be appropriate, "to the relevant person" concerned.

("relevant person" is defined in subsection (16))

The words "as may be appropriate" may possibly be interpreted to mean that, where there is a relevant person, it is appropriate for the copy of the notice to be given to that person. However, this would result in revealing the identity of the requester to the third party or vice versa. In most cases in which there is a third party it would be very inappropriate to do so. It should also be noted that section 22(6)(b) allows the Commissioner to remove personal information from the copy of the application being forwarded to the FOI body. However, this does not allow for the removal of personal information from the copy being provided to the relevant person or from the notice of withdrawal under subsection (5).

Section 22(9)(a)(v)

This provides for the discontinuance of a case where there is no longer an issue requiring adjudication on the ground that access to the records sought has been granted during the review. However, the review may be concerned with matters other than access to records. As it stands, section 22(9)(a)(v) does not appear to cater for cases such as, for example, where a fee issue has been resolved, a requested amendment made, a desired statement of reasons given, etc.

Section 22(9)(a)(vii)

This provides for certain situations where "accepting the application" would cause a substantial and unreasonable interference with or disruption of the work of the Commissioner's Office. However, it is often the case that the amount of work and interference/disruption in conducting a review only becomes clear *after* the application has been accepted the review.

Section 27

This provision which relates to fees is complicated and our experience is that FOI bodies have difficulties complying with all the requirements of the section.

Interaction between section 27(5) and 27(12)

Difficulties have arisen in operating the interaction between section 27(5) and 27(12) and the requirements on FOI bodies in cases where section 27(12) is relevant – while the CPU Guidance Note No. 6 sought to address these issues, the interaction between the two provisions is complex and FOI bodies still encounter difficulties in operating the provisions.

Interaction of section 27(5) and section 38 – Time Periods

Where the request is one to which section 38 applies, the FOI body is required to notify the relevant third parties not later than two weeks after receipt of the request. Section 27(5)(b) states that the process of search and retrieval “shall not be commenced” until the deposit is paid. However, the FOI body is unlikely to be in a position to identify the relevant third parties until the records are retrieved. There does not appear to be express provision for extending the period within which the third parties are to be consulted in cases where a deposit is sought.

Section 30(1)(a)

The wording of section 30(1)(a) indicates that there are two potential types of prejudice provided for in the provision; prejudice to either:

- the **effectiveness** of tests, examinations, investigations, inquiries or audits or
- the procedures or methods employed for their conduct

In other words, in the case of tests etc, the prejudice is to the effectiveness of such tests etc. and, in the case of procedures or methods, the prejudice is to the procedures or methods themselves. It is unclear why such a distinction is made.

Section 33

Section 33 relates to security, defence and international relations. Section 33 of the 2014 Act is more extensive than the original section 24 of the 1997 Act. The wording of section 33 is also complex and is not set out as clearly as the original section 24. The wording of section 33(2)(b), in particular, is complicated by including both discretionary and mandatory elements within the one provision.

Section 35

Section 35(5)

The purpose of section 35(5) and what it achieves is unclear. Insofar as it may have related to the operation of section 35(2), it does not appear to have achieved that purpose.

Section 35(2)

In addition to the point raised above about how the definition of ‘service provider’ may operate in this provision, quite technical issues arise from the current wording. In general terms, we understand that the purpose of section 35(2) is to ensure that section 35(1) will not apply to records prepared by FOI bodies, service providers and directors and members of staff of these bodies in the performance of their functions unless a duty of confidence is owed to someone other than an FOI body, service provider or director and member of staff of those bodies in the performance of their functions. The current wording, including the use and placement of particular words and the punctuation, may be open to interpretation.

Section 37(1)

Section 37 concerns personal information. It applies where access to the record “would involve the disclosure of personal information”. The standard to be met is “would”.

Section 38

Section 38 is a particularly complicated provision and FOI bodies can encounter significant problems in complying with all its requirements, including time limits. Despite the advice offered in the CPU Notice (*Requests involving third parties – A step by step guide*) and our own *Guidance Note on Section 38*, FOI bodies continue to have problems in operating the section correctly and meeting the time limits imposed by the section.

Section 38 and 'internal' time limits on FOI bodies.

Section 38 imposes very strict time limits on the processing of requests to which section 38 applies. Consideration might be given to alleviating the pressure on FOI bodies, without disadvantaging the requester or third party, particularly in relation to the two 'internal' two-week time limits within s38 which apply to them.

Section 38 and Consultation at Internal Review

Section 38 makes no provision for consultation at internal review stage and it does not provide for a third party appeal to the Commissioner at that stage. However, an internal reviewer should be free to decide to release such information if s/he deems it appropriate, while the affected third party should also have the right of appeal against that decision.

Section 42

Section 42(c)(ii)(II)

Section 42(c)(ii)(II) provides that the Act does not apply to a record held by the Defence Forces relating to Section 170 of the Defence Act 1954. Section 170 refers to the appointment of a provost marshal. It appears that, as currently drafted, the provision may not achieve its intended purpose.

Section 42(d) and (e)

Arguably section 42(d) could be interpreted as meaning that, either-

- a) all records that do not relate to the appointment of a person to conduct an enquiry and do not relate to general administration of an enquiry under s42 of the Garda Síochána Act are excluded, even where the records are held by the persons conducting the inquiry (sub-paragraph (I) refers) or, on dissolution of the inquiry, where they are held by another body (sub-paragraph (II) refers),

or

- b) such records are excluded only in two scenarios, namely (I) where they are held by persons conducting the inquiry, during the enquiry, and (II) where they are held by any other body on the dissolution of the inquiry. If this is the case, then records held by any other body during the inquiry are not captured.

Similar issues arise in respect of section 42(e). Arguably, section 42(e) could be interpreted as meaning that, either –

- a) other than those records specified at (A), (B) and (C), records relating to an inquiry by a tribunal or relating to an investigation by a commission of investigation are excluded, even where records come within sub-paragraphs (I) or (II) in the case of records relating to an inquiry by a tribunal and even where the records comes within sub-paragraphs (I) to (IV) in the case of records relating to an investigation by a commission of investigation

or

- b) such records are only excluded where they fall within sub-paragraphs (I) and (II) in the case of tribunal records and (I) to (IV) in the case of commission of inquiry records.

We assume that the meaning set out at a) in each case above is what is intended.

Section 42(m)

The purpose of section 42(m) is to protect the identity of a source of confidential information. The provision refers to a record “**relating to information**” whose disclosure could reasonably be expected to reveal the identity of a person who provided information in confidence or any other source of such information. Arguably, a record whose disclosure would not reveal the identity or source of the information in any way, but *relates to* information whose disclosure could reveal the source is protected under section 42(m). This does not appear to be what was intended as it may mean that records which do not reveal the source of information could be withheld. Insofar, as including the words “relating to information” seeks to protect the identity of the informant/source of information which could be disclosed indirectly – i.e. where the informant/source is not directly identified by the record itself – the words “lead to the revelation of” should be sufficient.

Section 45

The Commissioner has been challenged regarding the extent of his powers in cases where the records were refused under section 42 and Schedule 1 Part 1 (particularly where the Commissioner has asked the bodies to provide our Office with copies of the records which are the subject of the review).

Section 47

This requires the Commissioner, among other things, to publish his decisions. We publish all decisions on the Office’s website in an anonymised format. The Commissioner must have discretion with regard to the redactions or anonymisation as he considers appropriate.

Schedule 1 Part 1

The structure of Schedule 1 Part 1 is difficult. Also, particular issues arise such as, for example:

- the wording that section 6 does not include a reference to an entity insofar as it relates to records “**containing**” ..., which gives rise to arguments as to whether the entire record containing the specified information is excluded or only the specified information is excluded
- the status of staff members of the entity concerned; whether they are staff of an FOI body for purposes of personal information and for the purposes section 35(2).

Paragraph (b)(i)

This provision excludes records containing two specific type of information received by the Central Bank. Arguably, it is unclear whether “received” refers to the records or the information. Records held or sent by the Central Bank could in turn refer to information received.

RPSI

The Offices of the Information Commissioner and Commissioner for Environmental Information are included in Schedule 1 Part 1. Specific provision does not appear to have been made regarding the Information Commissioner in the performance of functions under the European Communities (Open Data and Re-use of Public Sector Information) Regulations 2021.

Protected Disclosure Office

When established, provision for the Protected Disclosure Office and its functions within the Office of the Ombudsman may need to be considered.

General Issues

Consistency and Clarity.

The wording of some provisions of the Act are not entirely consistent with the wording of other provisions when referring to similar matters. In some provisions, the wording can be cumbersome or not entirely clear. This can lead to confusion. For example,

- In some provisions of the Act reference is made to “public body” where it may be more appropriate to refer to “FOI body”; for example, section 24(4), 33(3), 40(2).
- The wording in section 7(4), section 6(2)(a), section 42 and Schedule 1 Part 1 and SI 115 / 2000 is somewhat cumbersome and is not always entirely clear.

“Relating to records concerning”

Many provisions in Schedule 1 Part 1 refer to entities “insofar as it relates to records concerning...”. The words “relating to” here may be relatively broad in effect and, depending on the circumstances, may give rise to arguments that it extends the scope of the records covered further than intended.

In other provisions, the words “relating to” may also give rise to arguments that they extend the scope of records covered further than was intended. For example, section 42(k) refers to a “a record relating to the private papers” of a member of the Houses of the Oireachtas and section 42(m) (referred to above) refers to “a record relating to information whose disclosure could reasonably be expected to reveal...”.

Amendments to the Act

The FOI Act 2014 has been amended on a number of occasions and our Office has not been notified of the amendments.

Regulations

Section 37(8) Regulations

Regulation 5(a) of the Freedom of Information Act 2014 (Section 37(8) Regulations 2016 (SI 218/2016) provides for a right of access by the parents or guardians to personal information of individuals who have not attained full age “on the date of the request”. An individual may attain full age during the processing of the FOI request or by the time our Office reviews the case. The express reference to not having attained full age “at the date of the request” means that the Regulations must be considered in such cases.

Similarly, Regulation 5(b) of the same Regulations provides for a right of access by the parents or guardians to personal information of individuals who are subject to a psychiatric condition, mental incapacity or severe physical disability “at the time of the request”. An individual may no longer be subject to such a condition, incapacity or disability at the time of the FOI decision.

Section 9(6) and 10(6) Regulations

A number of Regulations have been made relating to section 9(6), 10(6) and 37(8) – (SI 218 of 2016, SI 558 of 2016 and SI 53 of 2017) some of which revoke or amend earlier Regulations in whole or in part. The manner in which the Regulations do this is complicated.

Ministerial Guidelines and applications under sections 9(6) and 10(6).

Section 9(6) and 10(6) of the Act and SI No. 53 of 2017 (the Freedom of Information Act 2014 (Sections 9(6), 10(6) and 37(8)) Regulations 2017) relate to the classes of individuals who may make applications for the amendment of records or for a statement of reasons under sections 9 and 10 where the individual to whom the application relates is a minor, incapacitated or dead. Section 48 of the Act provides for the making of Ministerial codes and guidelines to which FOI bodies must have regard in the performance of their functions. The Minister has published guidelines in relation to access to records by parents/guardians and in relation to access to records of deceased persons under section 37(8). However, there does not appear to be any published guidelines relating similar applications under sections 9(6) or 10(6).

NOTE: While the Explanatory Notes of the Regulations relating to section 37(8), 9(6) and 10(6) (i.e. SI 218 of 2016, SI 558 of 2016 and SI 53 of 2017) refer to guidelines published by the Minister, the Regulations themselves do not refer to such guidelines. The Ministerial guidelines state that they are produced “pursuant to S.I. 218 of 2016”.

Rules of the Superior Courts

The Rules of the Superior Courts (No. 3) (Freedom of Information Act, 1997) 1998, [SI 325 of 1998] as amended by Rules of the Superior Courts (Order 130 (Amendment) Rules), 2004 [SI 471 of 2004] refer to the period of eight weeks for the issuing of the Notice of Motion bringing an appeal.

However, this appeal period was changed in section 24 of the FOI Act 2014, except in the case of an appeal by an applicant where the Commissioner decides that access should be granted to some, but not all, records.