

Report of the Information Commissioner to
the Joint Committee on Finance and the
Public Service under section 32(5) of the
Freedom of Information Act 1997

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I hereby furnish a report under section 32(5) of the Freedom of Information Act (FOI) 1997 giving my opinion and conclusions in relation to reports furnished to me by Ministers of the Government under section 32(4) of the Act.

General Observations

Before commenting on the reports furnished by individual departments I should like to explain my views generally on the question of separate secrecy provisions outside the FOI Act which prohibit disclosure or authorise non-disclosure of certain records or information.

The FOI Act confers important access rights on citizens in a manner which is consistent with the right to privacy and the public interest and subject to necessary exceptions, which are dealt with in considerable detail in the Act. The operation of a general access regime of this kind over a range of public bodies should, over time, lead to greater certainty both among public servants and the public as to what information should properly be released and what should not. The existence of separate secrecy provisions in legislation other than the FOI Act is not helpful to this process of achieving certainty. In some cases such secrecy provisions may themselves be subject to exceptions or qualifications which can create uncertainty or confusion. In other cases the secrecy provisions may, without good reason, be wider than corresponding exemptions permitted by the FOI Act. As a general point, I do not accept that merely because a secrecy provision in another statute broadly serves the same purpose as an exemption in the FOI Act, this is a good enough reason for leaving the secrecy provision outside the Third Schedule to the FOI Act.

In a number of the reports, Departments made reference to secrecy provisions of legislation and I commented that it was not clear to me that the provision did, in

fact, authorise or require the non-disclosure of records. If further investigation shows that these Departments are correct in their interpretations, I would generally recommend the addition of such provisions to the Third Schedule.

I note that a number of provisions contained in the reports of various Departments are designed to protect investigations where wrongdoing or breaches of the law are alleged or suspected. I accept that public bodies may not be fully confident that the exemptions in the FOI Act are sufficiently strong to protect investigations of this kind. Clearly, there is a significant public interest in ensuring that investigations are not impeded in any way. In my view these fears are misplaced and the exemptions in the FOI Act are sufficient to protect these records. In some cases, a public body's main function may be to carry out investigations. In so far as the Oireachtas concludes that there is a strong case for records of such a body to be exempt, the inclusion of specified records of the body in section 46 of the FOI Act may be the appropriate mechanism.

I also recognise that, in some cases, separate secrecy provisions are required to prevent unauthorised disclosure of information. In such cases repeal of the provision would not be appropriate. However, there is no reason why such provisions should not be included in the Third Schedule to the FOI Act. This would permit access to the records subject to all the safeguards in that Act.

I wish to refer at this point to the existence of secrecy provisions which are required as a result of the State's obligations under various EU treaties. It seems to me that it would not be permissible to include such provisions in the Third Schedule if the effect of so doing would be to breach the State's treaty obligations. At the same time, I believe that such provisions should not be wider than the requirements of EU directives and that due regard should be had to the spirit of the FOI Act in drafting them. I accept that, in some instances, EU directives may place greater restrictions on access to information held by public

bodies than the restrictions permitted by the FOI Act or, indeed, permitted by the access regimes contained in the national legislation of other States. I would express the hope that a more liberal approach to access to information will emerge at EU level over time, which will result in no curtailment of the rights afforded by the FOI Act.

Having made these general observations, I will now comment on the reports of each individual department.

Department of Agriculture and Food

The Department's report identified provisions of five enactments which authorise or require the non-disclosure of records which are already included in the Third Schedule to the FOI Act. It made no comment on whether any of these provisions should be amended or repealed, presumably because it feels that the matter is satisfactorily dealt with by the inclusion of these provisions in the Third Schedule. I see no reason, at this stage, to disagree with this approach.

The Department's report also identified section 18 of the Western Development Commission Act 1998 as a provision which authorises or requires the non-disclosure of records. I agree with its suggestion that the section may be included in the Third Schedule.

The report also identified the following Statutory Instruments which authorise or require the non-disclosure of records:

European Communities (Mutual Assistance as regards Correct Application of Legislation on Veterinary and Zootechnical Matters) Regulations, 1993 (S.I. No. 150 of 1993)

European Communities (Authorisation, Placing on the Market, Use and Control of Plant Protection Products) Regulations, 1994 (S.I. No. 139 of 1994)

S.I. No. 150 of 1993 is concerned with the release of information to other Member States or the Commission. I agree with the Department that there would be little practical purpose in including it in the Third Schedule.

S.I. No. 139 of 1994 concerns the treatment of information which an applicant for authorisation of a plant protection product considers involves industrial and commercial secrets. The relevant provision permits an applicant to request that such information be treated as confidential and it requires the competent authority to treat such information as confidential where it is accepted by the competent authority that such treatment is warranted. The Department states that the relevant Council Directive applies until it is amended and that this provision should not be included in the Third Schedule. To the extent that such a provision is required by a Council Directive, I agree that its inclusion in the Third Schedule is not permissible. I also note that this Council Directive is without prejudice to the Directive on Access to Information on the Environment (90/313/EEC).

Department of Defence

The Department has identified regulations made by the Minister for Defence which provide for confidentiality in regard to the findings and recommendations of military courts of inquiry. The Department does not consider that the FOI Act applies to such findings and recommendations by virtue of section 46(1)(a) of the FOI Act which provides that the Act does not apply to records held by "a service tribunal within the meaning of section 161 of the Defence Act 1954". It appears

that the Department is referring to Defence Force Regulations A.5, and, in particular, section 11(2), which provides that

"The findings and recommendations of all courts of inquiry shall be treated as confidential. They shall not be disclosed to interested parties except as provided in subsection 181(2) of the Defence Act 1954, Rules of Procedure (Defence Forces), 1954 and Defence Force Regulations A.8."

The restriction of the FOI Act provided by section 46 applies to records held by the service tribunal, not to all copies of such records. I should point out that section 9(1) of the same regulations provides that, where the convening authority is in agreement with the findings, or is in partial agreement with the findings and does not consider that any useful purpose would be served by having the matter re-opened, the convening authority

"shall forward to the principal military branch of the Department of Defence concerned... one certified copy ..of the proceedings and findings (if any)..."

It is clear from this section that findings and recommendations of a court of inquiry may sometimes be held by the Department, which would not be entitled to rely on section 46 to refuse access.

In my opinion, it would be appropriate to include the relevant regulation in the Third Schedule to the FOI Act. I would point out that there are other exemptions in the FOI Act which may permit the refusal of access in certain circumstances but the current blanket restriction on access is not compatible with the purpose of the FOI Act as expressed in the long title of the Act.

Department of Education and Science

The Department's report identified a single provision that authorises or requires the non-disclosure of records, viz. section 53 of the Education Act 1998 which allows the Minister to refuse access to information which would enable the compilation of information in relation to the comparative performance of schools in respect of the academic achievement of students.

I recently completed a review of a series of decisions of the Department of Education and Science to refuse access to the 1998 Leaving Certificate results of schools. I decided that the results should be released in a format which does not reveal personal information.

I attach a copy of that decision for the Committee's information. I should explain that the actual decision is of no relevance as far as future requests for examination results is concerned. Nevertheless, it may prove useful to the Committee in coming to a view on whether section 53 of the Education Act 1998 should be added to the Third Schedule of the FOI Act. In particular, I would point to my summary of the public interest factors both in favour and against the release of this kind of information, which is set out on the last two pages of the decision.

In contrast to most of the secrecy provisions on which my comments are required, section 53 was enacted after the Freedom of Information Act and, apparently, with a view to restricting its use in the future. In the circumstances, I am somewhat reluctant to take a position which appears to be at odds with the express wish of the Oireachtas. However, lest the degree of tension between my decision and section 53 be overstated, I should emphasise that my decision was concerned solely with the release of factual information. It was not concerned with the creation of league tables and it did not suggest that the creation of league tables was in the public interest.

Nevertheless, I have to say that, in my view, section 53 gives rise to two difficulties. The first is that on a general level it appears to be based on the assumption that parents cannot be trusted to evaluate information about the academic performance of schools. Such an assumption is difficult to reconcile with the purpose of the FOI Act, as contained in its long title, and which provides for a right of access for members of the public to information in the possession of public bodies "to the greatest extent possible consistent with the public interest and the right to privacy".

Neither the long title nor the particular exemptions in the Act appear to assume that access should be determined by reference to the ability of the public to understand or evaluate the information.

The second difficulty has to do with the practical application of section 53. Some of the opponents of league tables seem to accept that parents may be entitled to some information about results of individual schools. Indeed, I would have some doubts whether anyone could seriously suggest the contrary, given the constitutional role which parents enjoy in relation to the education of their children. However, on a practical level, I would suggest that if information is given to individual parents then it may prove impossible to prevent that information being shared with others - leading perhaps to the creation of unofficial league tables covering certain schools.

Therefore, my view is that section 53 represents a significant and unfortunate departure from the purposes and spirit of the FOI Act, and one that may not even prove successful in the long term. In my view, it would be preferable to either repeal the provision or include a reference to it in the Third Schedule.

Department of Enterprise, Trade and Employment

The Department's report identified the following statutes which authorise or require the non-disclosure of records:

Industrial Development (Enterprise Ireland) Act, 1998

National Standards Authority of Ireland Act, 1996

Industrial and Commercial Property (Protection) Act, 1927

Industrial Property Rules, 1927 (S.I. No. 78 of 1927)

Industrial Property (Amendment) Rules, 1927 (S.I. No. 190 of 1969)

Patents Act, 1992

Patents Rules, 1992

Trademarks Act, 1996

Companies Act, 1990

Consumer Credit Act, 1995

Competition Act, 1991

Prices Act, 1958

S.I. No. 359 of 1994 European Communities (Non-Life Insurance) Framework Regulations, 1994

S.I. No. 360 of 1994 European Communities (Life Assurance) Framework Regulations, 1994.

Industrial Development (Enterprise Ireland) Act, 1998

National Standards Authority of Ireland Act, 1996

I agree with the Department that the relevant sections of the above Acts should be included in the Third Schedule.

Industrial and Commercial Property (Protection) Act, 1927

Industrial Property Rules, 1927 (S.I. No. 78 of 1927)

Industrial Property (Amendment) Rules, 1927 (S.I. No. 190 of 1969)

Patents Act, 1992

Patents Rules, 1992

Trademarks Act, 1996

All these provisions deal with the area of intellectual and industrial property. It appears that the provisions which the Department has mentioned form part of a framework for the protection of intellectual property in the State. That framework clearly envisages that many of the records which come within its ambit must be released after a specified period of time or in detailed specified circumstances. It seems to me that it would not be practicable to include such provisions in the Third Schedule without making some separate provision to preserve wholly or in part the current arrangements whereby access is granted in certain circumstances or is deferred for a period of time. I agree with the

Department that the relevant sections of the above Acts and S.I.s should not be included in the Third Schedule.

Companies Act, 1990

Section 21 of this Act prohibits the disclosure of records unless this is required for specific purposes. I note that the Department is considering extending the list of "competent authorities" to whom information may be disclosed under this Act. The concerns of the Department relate to the possibility of unwarranted public intrusion into the private affairs of a company which was the subject of an investigation under section 19 and the possibility that public disclosure could compromise a criminal investigation. The first concern is addressed by the exemption in section 27 of the FOI Act and the second concern is addressed by section 23. I do not consider the Department's contention that a provision which allows disclosure of information obtained under the Companies Act would inevitably give rise to a large number of judicial review proceedings is a proper reason for the omission of the relevant sections of this Act, or any other secrecy provisions of other Acts, from the Third Schedule.

Consumer Credit Act, 1995

Section 8 of this Act prohibits the unauthorised disclosure of information. In effect, this is equivalent to the Official Secrets Act which applies to the Civil Service. I do not agree with the Department that this section should not be included in the Third Schedule. The concerns of the Department relate to the possibility that release would undermine the ability of authorised officers to obtain information and would undermine the effectiveness of these officers. These concerns are addressed by the exemption in section 26 of the FOI Act.

In my view, section 150 of the Consumer Credit Act is different from the normal provisions relating to non-disclosure. It relates to disclosure of information by the Director, whether during his/her term of office or afterwards. I consider that this provision should not be included in the Third Schedule.

Competition Act, 1991

The provision listed in the Department's report deals with the publication of reports furnished to the Minister by the Competition Authority and provides that the Minister must have due regard to commercial confidentiality. It appears to me that this provision does no more than govern the content of certain reports published by the Minister. It does not authorise the non-disclosure of this information as a result of a Freedom of Information request and I would not consider it appropriate to include it in the Third Schedule. I note, in passing, that the Competition Authority is a public body for the purposes of the FOI Act and that paragraph 9 of the schedule to the Competition Act, 1991, which provides for non-disclosure of records, is included in the Third Schedule of the FOI Act.

Prices Act, 1958

Section 25 of this Act prohibits the disclosure of information obtained by a person by virtue of the powers conferred by the Act. The Department states that section 25 of this Act should not be included in the Third Schedule. The concerns of the Department relate to the possibility that release under the FOI Act would undermine the ability of authorised officers to obtain information which may be sensitive and may be given on the understanding that it will remain confidential. I note that both section 26 and section 27 of the Freedom of Information Act contain appropriate safeguards which would apply to such situations. In my view, this provision should be included in the Third Schedule.

S.I. No. 359 and 360 of 1994

These S.I.s deal with the secrecy of confidential information received, either from individual companies or the supervisory authorities of other States, in the performance of duties relating to the supervision of insurance undertakings and are based on EU directives. The Department states that these provisions should not be amended or repealed or included in the Third Schedule because they are compulsory due to the State's obligations under the EU treaties and they are vitally important to ensure that the Department's right of access to such confidential information is not challenged by companies or by other member States.

It seems to me that since the S.I.s are concerned only with confidential information, the provisions of sections 26 and 27 of the Act would give whatever protection is needed in these cases. However, I note that these confidentiality requirements are not a matter for the State alone - regard must be had to the obligations imposed by EU directives. In the circumstances, I accept that the provisions should not be included in the Third Schedule.

Department of Arts, Heritage, Gaeltacht and the Islands

The Department has identified two provisions which authorise or require the non-disclosure of records:- section 18 of the Irish Film Board Act 1980 and section 15 of Údarás Na Gaeltachta Act 1979. Both provisions are included in the Third Schedule of the FOI Act and the Department sees no reason to change this. I agree with the Department.

Department of Finance

The Department's report identified the following statutes which authorise or require the non-disclosure of records:

Ombudsman Act, 1980

Ethics in Public Office Act, 1995

Committee of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997

Public Service Management Act, 1997

Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act, 1998

Central Bank Act, 1989

Trustee Savings Banks Act, 1989

Ombudsman Act, 1980

I agree with the Department that section 9(1) of the Ombudsman Act, 1980 should not be amended, nor should it be included in the Third Schedule. Its existence is consistent with the provisions of section 46 of the FOI Act which excludes from the scope of the Act records relating to an investigation or examination by the Ombudsman. The Department considers that section 9(2) should be amended because it prevents the disclosure of information in a manner that is not compatible with the FOI Act i.e. on foot of a notice from a Minister or the Revenue Commissioners that such disclosure would be prejudicial to the public interest without any right to independent review. I agree that section 9(2) should be amended as proposed by the Department.

Ethics in Public Office Act, 1995

I agree with the Department that the relevant provisions of the Ethics in Public Office Act, 1995 should not be amended, nor should they be included in the Third Schedule.

Committee of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997

I have noted the Department's statements about the reasons why these restrictions were imposed in this statute. Neither provision actually prevents the release of information in general; they deal with the conduct of Committees of the Houses of the Oireachtas. In my opinion, there is no need to include these provisions in the Third Schedule.

Public Service Management Act, 1997 (PSMA)

I agree with the Department's opinion that section 5(3) of this Act (which applies to draft strategy statements and Ministerial directions in relation to such statements) is a time bound provision and accept its statement that there are considerable sensitivities involved in the preparation of statements of strategy. I am cognisant of the fact that this Act was passed by the Houses of the Oireachtas after the FOI Act but before the FOI Act had commenced. Nevertheless, I have been specifically asked by the Committee for my opinion on these reports, so I would point to the anomaly that a Minister's directions to a Secretary General on any other subject may be accessible under the FOI Act but directions relating to strategy statements are excluded for a period of five years. In my opinion there is no reason why such directions, and indeed, the draft strategy statements themselves, should not be accessible under the FOI Act subject to the exemption in section 20 of the FOI Act which relates to the deliberations of public bodies and

any other appropriate exemptions. This would shed more light on the development of strategy in the public service and would lead to greater openness and accountability.

Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act, 1998

Section 13 of this Act relates to disclosure of information to the Comptroller and Auditor General and his staff and, in my opinion, is not directly relevant to the FOI Act. Section 16 relates to a meeting of a committee held other than in public and at which no evidence is given and I accept that in order to allow a committee to function effectively, this should not be included in the Third Schedule. Section 22 provides for an extension of the protection of section 46(1)(c) of the FOI Act to include examinations or investigations carried out under the Special Provisions Act. As this is no more than a technical provision required to cover an aspect of the work of the Comptroller and Auditor General which did not exist at the time of the passing of the FOI Act, I agree that it should not be included in the Third Schedule.

Central Bank Act, 1989

Section 16 of this Act, as amended, provides that a Governor, Director, officer or servant of the Bank or any person employed by the Bank shall not disclose information except in certain circumstances. I agree with the Department's opinion that the relevant provisions should not be amended or repealed, nor should they appear in the Third Schedule of the FOI Act. I should point out, in passing, that the Central Bank is not prescribed as a public body for the purposes of the Freedom of Information Act but that such records from the Central Bank as

are held by prescribed public bodies would be subject to the Freedom of Information Act.

I note the commitment to further consider the issue of appropriate confidentiality arrangements when legislation is being prepared for the establishment of a single regulatory authority for the financial services sector. I note that, in order to comply with EU requirements in this area, a certain minimum level of protection against unwarranted disclosure of certain information held by the Central Bank already exists. I would hope that the confidentiality arrangements proposed by the Department will not go beyond the minimum required to comply with EU requirements, and will be fully in accord with the spirit of the FOI Act.

Trustee Savings Banks Act, 1989

The Second Schedule of this Act provides that officers and the trustees of the bank are prohibited from disclosing any information regarding the affairs or business of the bank or its depositors or borrowers except in certain circumstances. Again, I should point out that the Trustee Savings Banks are not prescribed as public bodies for the purposes of the Freedom of Information Act but that such records from the Banks as are held by prescribed public bodies would be subject to the Freedom of Information Act. I agree with the Department's opinion that the relevant provisions should not be amended or repealed, nor should they be included in the Third Schedule of the FOI Act.

Department of Foreign Affairs

The Department has reported that it is not responsible for any legislation which authorises or requires the non-disclosure of records.

Department of the Marine and Natural Resources

The Department has identified two provisions which authorise or require the non disclosure of records as follows:

- Fisheries (Amendment) Act, 1997
- European Communities (Minimum Safety and Health Requirements for Improved Medical Treatment on Board Vessels) Regulations 1997 (S.I. No. 506 of 1997)

Fisheries (Amendment) Act, 1997

The relevant provision of this Act makes it an offence to disclose confidential information obtained by a person in his or her capacity as Chairperson or other member of the Aquaculture Licences Appeal Board, secretary of the Board or consultant or adviser engaged by the Board. Confidential information includes information expressed by the Board to be confidential.

The Department considers that the section should be included in the Third Schedule of the FOI Act and I agree with this proposed inclusion. I consider that the Aquaculture Licences Appeal Board should be included in the First Schedule of the FOI Act as it provides an appeal function from a decision of a public body, similar to that provided by my Office and other bodies named in Paragraph 1(2) of the First Schedule.

European Communities (Minimum Safety and Health Requirements for Improved Medical

Treatment on Board Vessels) Regulations 1997 (S.I. No. 506 of 1997)

Section 9 of this statutory instrument provides that, where the Minister for the Marine and Natural Resources designates a radio medical consultation centre, the centre shall ensure the confidentiality of any personal medical records kept with the agreement of the person concerned. The Department recommends that this provision should continue in force and considers that this provision is "entirely in keeping with section 28 of the FOI Act".

While the confidentiality of patient records is provided for in section 28 of the FOI Act, the confidentiality of such records is not absolute. Section 28(5) provides that a request for access to personal information about an individual may be granted to a third party where the public interest that the request be granted outweighs the public interest that the right to privacy of the individual be upheld or the grant of the request would benefit the individual concerned. The Freedom of Information Act 1997 (Section 28(6)) Regulations, 1999, (S.I. No. 47 of 1999) give a right of access to a parent or guardian of certain classes of individual and to certain classes of individual where the individual to whom the information relates is dead. I can see no reason why such a right of access should not apply to records of the kind contemplated by section 9 of the regulations and, in my opinion, this provision should be included in the Third Schedule.

Department of Tourism, Sport and Recreation

The Department's report referred to section 21 of the Irish Sports Council Act, 1999 which provides that a person shall not, without the consent of the Council, disclose information obtained as a result of the performance of their duties, except as otherwise provided by law. As the report points out, this provision does

not prevent the disclosure of records under the FOI Act. I note that the Irish Sports Council has now been prescribed as a public body for the purposes of the FOI Act.

Department of Social, Community and Family Affairs

The Department reports that there are no provisions in the Social Welfare Acts or Statutory Instruments which restrict access to information held within the Department. Regarding public bodies in relation to which functions are vested in the Minister for Social, Community and Family Affairs, the Department reports that there are no provisions in legislation that authorise or require the non-disclosure of records held by the Social Welfare Appeals Office.

The Department lists three public bodies under its aegis, the Combat Poverty Agency, the National Social Services Board and the Pensions Board, whose establishing legislation has prohibitions on the disclosure of information but states that the relevant sections of the various Acts are included in the Third Schedule to the FOI Act. I should point out that the Pension Board is prescribed as a public body for the purposes of the FOI Act but the National Social Services Board and the Combat Poverty Agency have not yet been so prescribed. I note that the Government has indicated that that they will be prescribed next year. The inclusion of the provision of the relevant Acts in the Third Schedule means that their prescription does not have to be accompanied by an addition to the Third Schedule. I do not consider that these provisions should be amended or repealed and I am satisfied with their inclusion in the Third Schedule.

Department of the Taoiseach

The Department's report identified provisions of two Acts that authorise or require the non-disclosure of records, viz. section 8(4) of the National Archives Act, 1986 and sections 32-35 of the Statistics Act, 1993.

National Archives Act, 1986

This Act provides that all archives more than thirty years old in the custody of the National Archives or held elsewhere be available for public inspection, except archives which were formerly Departmental records and in respect of which a certificate has been granted in accordance with section 8 (4).

Section 8(4) provides that

"An officer of a Department of State authorised for the purpose of this subsection may, with the consent of an officer of the Department of the Taoiseach so authorised (except in relation to records of the Department of the Taoiseach), certify, in relation to particular Departmental records, or a particular class or classes of Departmental records prescribed in accordance with subsection (11), which are more than 30 years old and are specified in the certificate, that to make them available for inspection by the public—

(a) would be contrary to the public interest, or

(b) would or might constitute a breach of statutory duty, or a breach of good faith on the ground that they contain information supplied in confidence, or

(c) would or might cause distress or danger to living persons on the ground that they contain information about individuals, or would or might be likely to lead to an action for damages for defamation."

The Department considers that it seems preferable that Freedom of Information requests for access to such records should be refused only if this refusal can be

justified on the basis of one of the exemptions of the Freedom of Information Act, other than section 32, and recommends that this section be added to the Third Schedule. I agree with this recommendation.

Statistics Act, 1993

Sections 32-35 of this Act provide for the protection of information which can be related to an identifiable person or undertaking furnished to the Central Statistics Office by a person, undertaking or public authority. I accept the Department's statement that this provision underpins the data collection operations of the Central Statistics Office and that respondents would be reluctant to provide confidential and market sensitive information required for the compilation of official statistics without this statutory assurance. I note that the Central Statistics Office has the power to direct any person to provide information but accept that there may be a reluctance to do so if a possibility of release to competitors exists. Therefore, I agree with the Department that the provisions should not be included in the Third Schedule, nor should they be amended or repealed.

Department of Public Enterprise

The Department's report identified the following statutes which authorise or require the non-disclosure of records:

- Air Navigation (Notification and Investigation of Accidents and Incidents) Regulations, 1997 (S.I. 205 of 1997)
- Air Navigation and Transport (Amendment) Act, 1998
- Postal and Telecommunications Services Act, 1983 as amended by the Interception of Postal Packets and

- Telecommunications Messages (Regulation) Act, 1993 and the Postal and Telecommunications Services (Amendment) Act, 1999
- Post Office Savings Bank Act, 1861
- Wireless Telegraphy Act, 1926
- Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993
- Turf Development Act, 1998

Air Navigation (Notification and Investigation of Accidents and Incidents) Regulations, 1997

The Department identifies sections 13(4), (8) and (11), 15(1), 18(1) and (6), 20(3), 21(2), 22(7)(b), 23(3), 24(1) and (2), 25(13), 26(1), 27, 29 and 30(4) as the provisions of these Regulations which authorise or require the non-disclosure of records.

These provisions concern investigations, re-examinations and public inquiries and re-hearings into occurrences. An occurrence means "an accident, serious incident or incident to which these Regulations apply" and incident means "an occurrence other than an accident, associated with the operation of an aircraft which affects or is likely to threaten the safety of the aircraft or its operation." The Department considers that the relevant provisions should not be amended or repealed and should not be included in the Third Schedule.

The concerns of the Department relate to the possibility that release under the Freedom of Information Act would undermine the ability of inspectors to obtain information; the fact that sensitive and personal information may form part of an investigation; the possibility that an incomplete report may not give fair balance;

the possibility of prejudicing a criminal investigation; the possibility that release of the identity of persons involved may reduce the level of reporting thus adversely affecting air safety; the need to give persons involved the opportunity to respond to findings; the desirability of retaining the Ministerial discretion to make public the findings of a public enquiry and reservations or dissent of assessors; and the possibility of affecting adversely future investigations.

This is one of the situations to which I referred in the introduction to my report. In my view special secrecy provisions are not needed to deal with investigations, examinations and inquiries which are the subject of this legislation.

Having said that, it seems to me that some of the provisions identified by the Department are concerned with the procedures for the conduct of such investigations and inquiries and would not, of themselves, prevent the disclosure of information. In my view there may be no necessity to add such provisions to the Third Schedule. I deal with each of the provisions in turn below.

Section 13(4) provides that an investigation into an occurrence shall be held in private. In my view such a provision is not incompatible with the FOI Act and there is no need to include it in the Third Schedule. The Department seems to assume that the fact that an investigation is held in private means that any records relating to the conduct of the investigation would not be accessible under FOI by virtue of section 32. For the avoidance of doubt, I should state that I do not accept this to be the case, although there is a number of exemptions in the FOI Act which might apply to such records depending on the facts of the case. I should also clarify that if the Department's assumption is correct then my view is that the provision should be included in the Third Schedule.

Section 13(8) provides that the Chief Inspector may determine that an investigation should be discontinued and that no report on the investigation shall

be made to the Minister in that event. The Department pointed to the possibility that an incomplete report may not give fair balance. I do not consider that this provision authorises or requires the non-disclosure of records; rather it reduces the requirement for a formal report to the Minister. In my view, there is no need to include section 13(8) in the Third Schedule.

Section 13(11) provides that an investigator-in-charge shall immediately initiate action to ensure that the aviation security authorities in concerned states are informed immediately it becomes known or suspected that an act of unlawful interference was involved in an occurrence. The Department states that the release of this information may prejudice a criminal investigation. I note that section 23 of the Freedom of Information Act contains appropriate safeguards which would apply to such situations. In any event I do not consider that this provision authorises or requires the non-disclosure of records. In my view there is no need to include it in the Third Schedule.

Section 15(1) requires that an incident report shall not reveal the identity of any persons involved in the incident. The Department states that the failure to ensure anonymity may prevent the reporting of incidents from which useful air safety lessons would be learned which would, in turn compromise safety. I note that section 28 of the Freedom of Information Act contains appropriate safeguards which would apply to such situations. In my view, this provision should be included in the Third Schedule.

Section 18(1) provides that no report may be made to the Minister or made public without interested parties being given an opportunity to respond. The Department consider that this provision should not be amended or repealed and that it should not be included in the Third Schedule, in order to ensure fairness. I do not accept that this provision authorises the non-disclosure of records, rather it delays disclosure until interested parties have had the opportunity to respond. I

note that section 11 of the Freedom of Information Act which provides for the deferral of access contains appropriate safeguards which could apply to such situations. This provision appears to be a procedural one. In practice, it does not seem to me that it is likely to have any significant effect on access rights under the FOI Act. Nevertheless it seems to me that there is no reason not to include it in the Third Schedule.

Section 18(6) provides that no person shall disclose or permit to be disclosed any information contained in a notice of finding, or a report served on him or her without first obtaining the permission in writing of the Chief Inspector. This provision is aimed at people who are given information as interested parties, and I do not consider that it would require the non-disclosure of records in the hands of public bodies. However, the Department appears to hold the contrary view. If the Department's view is correct then I recommend that this provision be included in the Third Schedule.

Section 20(3) provides that a re-examination by a Review Board shall be held in private. (Section 19 provides that written notice may be served on the Minister that the findings and conclusions of a report be re-examined and section 20(1) provides that the Minister may appoint a Review Board to conduct the re-examination requested.) The Department considers that section 20(3) should not be amended or repealed and should not be included in the Third Schedule. It states that evidence given in private to the original investigation would constitute a significant portion of the evidence before the review. My comments in relation to section 13(4) are appropriate.

Section 21(2) provides that a re-opened investigation shall be subject to and conducted in accordance with the Regulations as if it were an investigation. This provision does not authorise or require the non-disclosure of records, rather it imposes the same rules on a re-opened investigation as apply to an investigation.

On the face of it, there would not appear to be any need to include this provision in the Third Schedule unless it is thought necessary for the purposes of giving full effect to my recommendations in relation to investigations.

Section 22(7)(b) provides that the Minister shall, unless in his or her opinion there are good reasons for not so doing, cause reports and reservations or dissent and reasons therefor to be made public in such a manner as the Minister thinks fit. This provision requires disclosure unless the Minister is of the opinion that there are good reasons for not disclosing the information but does not specifically authorise or require non-disclosure of information under the FOI Act. It is not clear to me that this provision is one of the kind referred to in section 32 of the FOI Act. However, the Department appears to hold the contrary view. If the Department's view is correct then I recommend that this provision be included in the Third Schedule. The Department states that the Minister may have good cause not to make public the report of a public enquiry or reservations or dissent by assessors. It seems to me that any good reasons which the Minister might have for non-publication would be covered by appropriate exemptions of the FOI Act.

Section 23(3)(b) provides that a rehearing should be subject to and conducted in accordance with the provisions of the Regulations relating to the holding of public enquiries. This provision does not authorise or require the non-disclosure of records, rather it imposes the same rules on a rehearing that apply to a public enquiry. On the face of it, there would not appear to be any need to include this provision in the Third Schedule unless it is thought necessary for the purposes of giving full effect to my recommendations in relation to investigations.

Section 24(1) provides that certain types of records shall not be made available to any person for purposes other than an investigation unless the appropriate authority for the administration of justice in the state of occurrence determines that the benefits resulting from disclosure of the records outweigh the adverse

domestic and international impact the disclosure may have on that or any future investigation. The Department states that the listed information should not be disclosed as this may adversely affect future investigations. I note that section 23 of the Freedom of Information Act contains appropriate safeguards which would apply to such situations. The Department has not indicated whether this section or other provisions of this Act were enacted on foot of international obligations of some kind. Unless they were and unless addition of the provision to the Third Schedule would be in breach of any such obligations, I recommend that this provision should be included in the Third Schedule.

Section 24(2) provides that the records listed in section 24(1) shall only be included in reports when pertinent to the analysis of the occurrence and that parts not relevant to the analysis shall not be included in any reports. This section governs the contents of reports and does not authorise or require the non-disclosure of records.

Section 25(13) provides that access to a draft report of an investigation conducted by another state shall not be granted without the express consent of that state unless the report has already been published or released. In principle, I believe that this provision should be included in the Third Schedule. In practice, and depending on the basis on which such reports are made available to the Department, it may be that access would not be granted under the FOI Act without the consent of the other state.

Section 26(1) provides that the Chief Inspector shall conduct investigations delegated to him by other states in accordance with the Regulations. This provision does not authorise or require the non-disclosure of records, rather it imposes the same rules on an investigation being conducted on behalf of another state as apply to an investigation into an occurrence in the state. On the face of it, there would not appear to be any need to include this provision in the Third

Schedule unless it is thought necessary for the purposes of giving full effect to my recommendations in relation to investigations.

Section 27 concerns occurrences involving a state aircraft or facilities and provides that the Regulations apply to such occurrences. This provision does not authorise or require the non-disclosure of records, rather it imposes the same rules on an investigation being conducted into occurrences involving a state aircraft or facilities that apply to other investigations. On the face of it, there would not appear to be any need to include this provision in the Third Schedule unless it is thought necessary for the purposes of giving full effect to my recommendations in relation to investigations.

Section 29 provides that the Minister or an inspector shall not be required to hold records beyond such time as is necessary for the completion of the associated investigation or public enquiry and any related statutory reports. While this provision does not authorise or require the non-disclosure of records, it permits the disposal of records which has the effect of preventing future access. I would be concerned that the inclusion of the other provisions in the Third Schedule may be nugatory if this provision continues in force and disposal of the records may occur before access is granted under the Freedom of Information Act. I would like to see the section amended to reflect that concern.

Section 30(4) provides that if a person objects to answering a question asked of him or her as a witness on the grounds that the answer might tend to incriminate the person or make them liable to a penalty and is informed of his or her obligation to answer that question, the person shall not refuse to answer the question but the answer given on that occasion shall not be admissible as evidence in criminal proceedings other than criminal proceedings in respect of the falsity of the answer or failure to answer the question. I consider that this provision does not authorise or require the non-disclosure of records but deals

with admissibility of evidence in criminal proceedings. In my view there is no need to include it in the Third Schedule.

Air Navigation and Transport (Amendment) Act, 1998

Section 36 prohibits the unauthorised disclosure of confidential information by Aer Rianta's directors, staff, consultants or advisers. In effect, this is equivalent to the Official Secrets Act which applies to the Civil Service. The Department is neutral as to whether the provision should be included in the Third Schedule and does not comment on whether it should be amended or repealed.

I do not consider that the relevant provision should be amended or repealed, nor need it appear in the Third Schedule of the FOI Act at this stage. I should point out, in passing, that Aer Rianta is not prescribed as a public body for the purposes of the Freedom of Information Act but that such records from the Aer Rianta as are held by prescribed public bodies would be subject to the Freedom of Information Act. The Department accepts that this provision should be included in the Third Schedule if it potentially restricts the operation of the FOI Act. This situation will arise should Aer Rianta be prescribed as a public body.

Postal and Telecommunications Services Act, 1983 (as amended)

Section 84(1)(b) prohibits the disclosure of the existence or contents of a postal packet, which has been opened or attempted to be opened by a person other than the addressee, without the agreement of the addressee, except in specified circumstances. It appears to me that this provision is concerned only with the protection of the security of the postal system. I agree that this provision should

not be amended or repealed and that it should not be included in the Third Schedule.

Section 98 as amended by Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993, European Communities (Telecommunications Services Monitoring) Regulations, 1997 (S.I. 284 of 1997) and Postal and Telecommunications Services (Amendment) Act, 1999 prohibits the interception of telecommunications messages and the disclosure of the existence, substance or purport of intercepted messages, except in certain circumstances. Section 98(2A) provides that a person employed by Telecom Éireann or a licensed operator shall be guilty of an offence if he or she discloses any information concerning the use made of telecommunications services provided for any person unless the disclosure is made in particular circumstances. I agree with the Department that section 98 should not be amended or repealed. I have considered the matter in more detail with regard to the Department of Justice, Equality and Law Reform and the Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993 below. I consider that section 98 should be included in the Third Schedule for the reasons given there.

Post Office Savings Bank Act, 1861

Section 107 of the Postal and Telecommunications Services Act, 1983 provides that section 4 of the Post Office Savings Bank Act 1861 which restricts the disclosure of information relating to deposits shall not apply to the disclosure of information required for the purpose of proceedings in respect of an offence. This provision of the 1983 Act authorises the disclosure of information in certain circumstances and does not authorise or require the non-disclosure of records. I agree with the Department that section 4 of the Post Office Savings Bank Act,

1861 should not be further amended or repealed nor should it be included in the Third Schedule.

Wireless Telegraphy Act, 1926

Section 11(2) provides that no person shall improperly divulge the purport of any message, communication or signal sent or proposed to be sent by wireless telegraphy. I do not consider that the release under the Freedom of Information Act of such purport would comprise improper divulgence. I agree that it is not necessary to add this provision to the Third Schedule.

Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993

Although this Act deals with areas of responsibility of the Department of Public Enterprise, it confers functions upon the Minister for Justice, Equality and Law Reform and I will consider it with that Department's report.

Turf Development Act, 1998

Section 32 prohibits the unauthorised disclosure of confidential information by directors, staff, consultants or advisers of Bord na Móna or its subsidiaries. In effect, this is equivalent to the Official Secrets Act which applies to the Civil Service. Disclosure is prohibited unless the person is duly authorised or required by law to disclose the information. As Bord na Móna is not prescribed as a public body for the purposes of the Act, I agree with the Department's opinion that the relevant provision need not be amended or repealed, nor should it appear in the Third Schedule of the FOI Act at this stage.

Department of Health and Children

The Department identified the following statutes which authorise or require the non-disclosure of records:

Health Services Regulations, 1971 (S.I. 105 of 1971)

Irish Medicines Board Act, 1995

Voluntary Health Insurance (Amendment) Act, 1996

Child Care Act, 1991

Adoption Act, 1952

Adoption Act, 1976

Medical Practitioners Act, 1978

Dentists Act, 1985

Nurses Act, 1985

European Communities (Active Implantable Medical Devices) Regulations, 1994 (S.I. 253 of 1994)

European Communities (Cosmetic Products) Regulations, 1997 (S.I. 87 of 1997)

European Communities (Recognition of Medical Qualifications) Regulations, 1976 (S.I. 288 of 1976)

European Communities (Recognition of General Nursing Qualifications) Regulations, 1980 (S.I. 237 of 1980)

European Communities (Recognition of Midwifery Nursing Qualifications) Regulations, 1983 (S.I. 20 of 1983)

European Communities (Health Act, 1947, Amendment of Sections 54 and 61) Regulations, 1991. (S.I. 333 of 1991)

European Communities (Official Control of Foodstuffs) Regulations, 1998 (S.I. 85 of 1998)

Vital Statistics, Births, Deaths and Marriages Registration Act, 1952

Births, Deaths and Marriages Registration Act, 1972

Health Insurance Act, 1994

Stillbirths Registration Act, 1994

Food Safety Authority of Ireland Act, 1998

National Social Work Qualifications Board (Establishment) Order 1997 (S.I. 97 of 1997)

National Health Council on Ageing and Older People (Establishment) Order, 1997 (S.I. 120 of 1997)

Women's Health Council (Establishment) Order, 1997 (S.I. 278 of 1997)

Nursing Homes (Care and Welfare) Regulations, 1993 (S.I. 226 of 1993)

Health Services Regulations, 1971 (S.I. 105 of 1971)

Irish Medicines Board Act, 1995

Voluntary Health Insurance (Amendment) Act, 1996

The relevant provisions are already included in the Third Schedule. The Department made no comment on whether any of these provisions should be amended or repealed, presumably because it feels that the matter is satisfactorily dealt with by the inclusion of these provisions in the Third Schedule. I see no reason, at this stage, to disagree with this approach.

Child Care Act, 1991

As the Department points out, section 31 deals with publication of information which is likely to lead members of the public to identify a child who has been

subject of proceedings. The Department correctly states that this does not hinder access under the FOI Act and I see no reason to include it in the Third Schedule.

Adoption Act, 1952 and Adoption Act, 1976

I note that the Department states that it is in the process of bringing forward legislation to address the issue of the release of birth information to adopted children and is currently in a consultation process to get the views of all interested parties and it considers that it would be inappropriate to include the relevant measures in the Third Schedule. I note from the Government Legislative Programme that Heads of this Bill are currently being prepared in the Department. In the circumstances, and pending the introduction of such legislation, I accept that it would not be appropriate to include these provisions in the Third Schedule.

Medical Practitioners Act, 1978, Dentists Act, 1985 and Nurses Act, 1985

The restrictions in these Acts all refer to the findings of the relevant Fitness to Practise Committees and decisions of the Medical Council which may not be made public without the consent of the person who has been the subject of the inquiry unless the person has been found guilty of professional misconduct or found to be unfit to engage in practice because of physical or mental disability. I note that the bodies in question are not prescribed as public bodies for the purposes of the Freedom of Information Act and the Department's statement that the inclusion of these provisions will be considered if the bodies are to be so prescribed.

However, it is possible that such findings may come into the possession of a public body such as the Department or a Health Board and be the subject of a

Freedom of Information request to that public body. I note that sections 26, 27 and 28 of the Freedom of Information Act provide protection for such records in the hands of public bodies and I consider that the relevant sections of these Acts should be included in the Third Schedule.

The Department's report refers to section 44 of both the Dentists Act, 1985 and the Nurses Act, 1985. These provisions deal with High Court applications which are to be heard otherwise than in public but do not, in my opinion, authorise or require the non-disclosure of records held by public bodies.

European Communities (Active Implantable Medical Devices) Regulations, 1994 (S.I. 253 of 1994)

European Communities (Cosmetic Products) Regulations, 1997 (S.I. 87 of 1997)

European Communities (Recognition of Medical Qualifications) Regulations, 1976 (S.I. 288 of 1976)

European Communities (Recognition of General Nursing Qualifications) Regulations, 1980 (S.I. 237 of 1980)

European Communities (Recognition of General Midwifery Nursing Qualifications) Regulations, 1983 (S.I. 20 of 1983)

The Department's report identifies these instruments which implement EU directives as ones which restrict disclosure of information. I would refer to my comments in relation to such directives contained in the introduction to this report.

To the extent that such provisions are required by EU directives, I agree that they should not be included in the Third Schedule.

European Communities (Health Act, 1947, Amendment of Sections 54 and 61) Regulations, 1991 (S.I. 333 of 1991) and European Communities (Official Control of Foodstuffs) Regulations, 1998 (S.I. 85 of 1998)

The secrecy provisions in paragraph 3 of S.I. 333 of 1991 and paragraph 20 of S.I. 85 of 1998 are similar and read as follows:

"A person who has gained access to information by virtue of inspections made in the enforcement of Regulations made under this section shall not disclose such information unless it is necessary to do so for the purpose of the enforcement of these Regulations."

For convenience, I will deal with these two provisions together. The purpose of these statutory instruments was to give effect to Council directives 89/387/EEC

and 93/99/EEC on the Official Control of Foodstuffs. I note that the requirements of the relevant directive in relation to secrecy are simply that member states "shall prescribe that inspectors shall be bound by professional secrecy". This requirement appears to be reflected in paragraph 20 of S.I. 85 of 1998 and paragraph 3 of S.I. 333 of 1991 in the terms quoted above.

However, on the face of it, the provisions in the Regulations appear to go beyond the requirements of the directive and I consider that they should be included in the Third Schedule. It is interesting to note that Council directive 93/99/EEC makes specific provision for the possibility that national legislation in the requesting state would allow access to more information than the sending state would wish. This seems to me to imply that national access rules may permit at least some level of access to such information; indeed, the directive refers to "free access".

Vital Statistics, Births, Deaths and Marriages Registration Act, 1952, as amended by the Births, Deaths and Marriages Registration Act, 1972

I accept the Department's statement that disclosure of vital statistics should be consistent with the CSO policy on other statistics. Similar considerations arise in respect of these provisions as arise in respect of the Statistics Act, 1993, considered above. I am satisfied that the restriction contained in the Vital Statistics, Births, Deaths and Marriages Registration Act 1952, as amended by the Births, Deaths and Marriages Registration Act, 1972 should not be included in the Third Schedule.

Health Insurance Act, 1994

Section 34 prohibits the unauthorised disclosure of information by staff, consultants or advisers of the Authority. In effect, this is equivalent to the Official Secrets Act which applies to the Civil Service. I note that the Authority has not yet been established and that the Department will consider FOI access when drafting an establishment order. I consider that this provision should be included in the Third Schedule at that stage.

Stillbirths Registration Act 1994

I note that it has been agreed with the Ard Cláraitheoir that section 8(4)(c) should be included in the Third Schedule and I concur with this.

Food Safety Authority of Ireland Act, 1998

National Social Work Qualifications Board (Establishment) Order 1997 (S.I. 97 of 1997)

I note the Department's statement that these bodies are to be included in the First Schedule as and from 21 October 1999 and agree that these provisions should be included in the Third Schedule.

National Health Council on Ageing and Older People (Establishment) Order, 1997 (S.I. 120 of 1997)

Women's Health Council (Establishment) Order, 1997 (S.I. 278 of 1997)

Nursing Homes (Care and Welfare) Regulations, 1993 (S.I. 226 of 1993)

I agree with the Department that these provisions should be included in the Third Schedule.

Department of the Environment and Local Government

The Department's report identified the following provisions which authorise or require the non-disclosure of records:

Genetically Modified Organisms Regulations, 1994 (S.I. 345 of 1994)

Local Government Act, 1994

Electoral Act, 1997

Genetically Modified Organisms Regulations, 1994 (S.I. 345 of 1994)

This instrument concerns the treatment of information provided to the Environmental Protection Agency which the supplier requests should be treated as confidential. The relevant provision permits a supplier to request that such information be treated as confidential and requires the Agency to treat such information as confidential where it is accepted by the Agency that such treatment is warranted. The Department states that the intention of the relevant EU Council directive is to maximise access to information on deliberate releases of

Genetically Modified Organisms and that suppliers are required to provide verifiable justification for any requests for information to be treated as confidential. The Department considers that this provision should not be amended and that this provision should not be included in the Third Schedule. To the extent that such a provision is required by a Council Directive, I agree that it should not be included in the Third Schedule.

Local Government Act, 1994

Section 65 of this Act deals with access to local records and local archives, held by local authorities. Section 65(3) provides that the Minister may, after consultation with the Director of the National Archives, give advice or directions to local authorities in relation to, inter alia, the circumstances in which local archives or particular classes of local archives may be withheld from public inspection. The Department states that the circumstances in which such archives are withheld are similar to those used by the National Archives to withhold access and considers that this provisions should not be amended and that this provision should not be included in the Third Schedule.

I consider that this provision empowers the Minister to give advice or directions but that such advice or directions ought now to comply with the provisions of the Freedom of Information Act. The current guidelines on withholding archives from public inspection allow a Certifying Officer to certify that to make particular archives available for public inspection would be contrary to the public interest, or would or might constitute a breach of statutory duty of confidence or a breach of good faith on the ground that they contain information supplied in confidence or that they would or might cause distress to living persons on the ground that they contain information about individuals or would or might be likely to lead to a defamation action. These allow archives to be withheld on grounds not included

in the FOI Act. I have already indicated, when dealing with the report of the Department of the Taoiseach, that the relevant section of the National Archives Act should be added to the Third Schedule. I consider that the provisions of section 65 should be added to the Third Schedule for the same reasons.

Electoral Act, 1997

Section 14 of this Act prohibits the unauthorised disclosure of information, obtained while serving as a member of a Constituency Commission or as a person whose services are made available to the Commission, relative to the business or the performance of the function of a Constituency Commission. The Department states that section 5(2) of the Act provides that a Constituency Commission be independent in the performance of its functions and that section 14 reflects the concern about the effect of unauthorised disclosure of a commission's deliberations and the Department considers that this provisions should not be amended and that this provision should not be included in the Third Schedule.

The concerns of the Department appear to relate to the possible negative effects of unwarranted public intrusion into the deliberations of a Commission. I note that section 20 of the Freedom of Information Act provides protection for records relating to the deliberative processes of public bodies although a Constituency Commission would have to be prescribed as a public body for the purposes of the Freedom of Information Act before a right of access to records held by the Commission would be created.

I referred in my first Annual Report, submitted recently to the Dáil and Seanad pursuant to the provisions of section 40(1)(c) of the Freedom of Information Act, to a review of a decision of the Department of the Environment and Local Government to refuse access to papers of the Dublin Electoral Area Boundary

Commission which had come into the possession of the Department after the Commission dissolved. This Commission was established under the Local Government Act, 1991 and no provision of that Act authorises or requires the non-disclosure of records. In my decision, I did not accept that the knowledge that their deliberations might come into the public domain after their work was finished would affect the independent functioning of such bodies and I decided that access to the papers should be granted. In similar circumstances with respect to Constituency Commissions, section 14 may prevent disclosure of records in the hands of public bodies even after the Commission has dissolved. Therefore, I consider that section 14 should be included in the Third Schedule.

Department of Justice, Equality and Law Reform

The Department drew attention to the Criminal Justice (Location of Victims' Remains) Act, 1999 which amended section 24 of the FOI Act. This provides that a head may refuse access to a record where such access could reasonably be expected to affect adversely matters relating to the functions of the Independent Commission for the Location of Victims' Remains. I note that the Commission is not prescribed as a public body but that records relating to the functions of the Commission may be held by other prescribed public bodies. One can well understand the desire to protect certain sensitive records of the kind at which the amendment is directed. However, I am concerned that piecemeal and ad hoc amendments to the Act, some of which may not be strictly necessary, could significantly undermine the Act. I would suggest that there may be merit in ensuring that proposed amendments to the Act receive some additional scrutiny—preferably by the Joint Committee on Finance and the Public Service.

The Department's report identified the following statutes which authorise or require the non-disclosure of records:

Data Protection Act, 1988

Data Protection Act, 1988 (Restriction of Section 4) Regulations 1989 (S.I. no 81 of 1989)

Data Protection Act, 1988 (Access Modifications) Regulations 1989 (S.I. no 82 of 1989)

Data Protection Act, 1988 (Access Modifications)(Social Work) Regulations 1989 (S.I. no 83 of 1989)

Data Protection Act, 1988 (Section 5(1)(d)(Specification) Regulations 1989 (S.I. no 84 of 1989)

Data Protection Act, 1988 (Section 5(1)(d)(Specification) Regulations 1993 (S.I. no 95 of 1993)

Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993

Official Secrets Act, 1963

Registration of Title Act, 1964

Land Registration Rules 1972 (S.I. 230 of 1972)

Censorship of Publications Act, 1929,

Censorship of Publications Act, 1946,

Censorship of Films Act, 1923,

Censorship of Films Act, 1925,

Censorship of Films Act, 1930,

Censorship of Films Act, 1970,

Censorship of Films Act, 1992

Video Recordings Act, 1989.

Employment Equality Act, 1998

Refugee Act, 1996

Data Protection Act, 1988 and Regulations S.I. no 81-84 of 1989 and S.I. no 95 of 1993

The Data Protection Act 1988 (DP Act) is concerned with the protection of individuals with regard to the automatic processing of personal data.

Section 2 deals with the fairness of obtaining information and its accuracy and security measures to protect it. It also provides that such data shall be kept only for one or more specified and lawful purposes and shall not be used or disclosed in any manner incompatible with that purpose or those purposes.

Section 4 creates a right of access to certain information relating to individuals that can be processed automatically. Section 5 of the Act restricts the right of access in certain cases.

S.I. 81 of 1989 preserves existing restrictions on disclosure and authorisations of the withholding of information in relation to tracing the connection between entries in the Adopted Children's Register and the register of births and of information obtained in the course of an investigation by the Ombudsman.

S.I. 82 prohibits the supply of health information to a patient under the DP Act if it would cause serious harm to the data subject's physical or mental health. S.I. 83 makes similar provision in respect of social work data.

S.I. 84 of 1989 has been revoked by S.I. 95 of 1993. The latter Regulations restrict access to personal information kept by certain organisations with statutory functions designed to prevent financial loss to members of the public through dishonesty, incompetence or malpractice in the provision of financial services or the management of companies or the conduct of people who have been adjudicated bankrupt.

The effect of section 5 and of the various regulations described above is to restrict access granted under section 4 of the DP Act. It does not seem to me that these

provisions restrict the right of access granted by the Freedom of Information Act and there is no need to add these provisions to the Third Schedule. However, the fact that the Department has included these provisions in its report suggests that it may be of the view that these provisions restrict the right of access under the FOI Act. If this is the Department's view, and if it is correct, then I would recommend that these provisions be included in the Third Schedule.

Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993

Section 10 contains provisions in relation to certain proceedings and evidence and the Department states that its purpose is to preserve as far as possible the confidentiality of the interception system. I am satisfied that this section refers only to particular proceedings and while it authorises non-disclosure of records at those proceedings I am satisfied that it would not be appropriate to include it in the Third Schedule.

Section 12 provides that the Minister shall ensure that such arrangements as he considers necessary exist to limit to the minimum necessary the disclosure of the fact that an authorisation for interception has been given and the contents of any communication which has been intercepted pursuant to an authorisation and to ensure that copies of such communication are not made to any extent greater than necessary and are destroyed as soon as their retention is no longer necessary. Necessary is defined as meaning necessary "for the purpose of the prevention or detection of serious offences or in the interests of the security of the State." The Minister is of the view that no change should be made to these sections. The Department of Public Enterprise is also of the view that the

provisions should be allowed to continue in force and should not be included in the Third Schedule.

It is clear that the effectiveness of the power to intercept communications must depend on its being exercised in secret. The FOI Act gives due recognition to this necessity. For example in section 23 it provides that access may be refused if it could reasonably be expected to prejudice or impair lawful methods, systems, plans or procedures for ensuring the safety or security of persons and property. Section 24 provides an exemption in respect of records, access to which could reasonably be expected to affect adversely the security of the State. Rather unusually, both these sections also permit the head of the public body not to disclose the existence of certain records.

Without wishing to prejudge any case which might come before me as Information Commissioner, I can say that it seems to me that in the normal case access would not be granted under the FOI Act to the kinds of records covered by section 12. However, I should point out that section 23(3) does envisage that a request for otherwise exempt material may be granted if it discloses that certain investigations and associated activities were not authorised by law or contravened any law and if disclosure, on balance, would better serve the public interest. Despite the undoubted sensitivity of the material concerned, I recommend to the Committee that section 12 be included in the Third Schedule.

Official Secrets Act, 1963

Sections 4, 5 and 9 are listed in the Third Schedule of the FOI Act. I note that the Department states that an amended Official Secrets Act is on the Government's legislative programme. It is my opinion that such an amended Act should not reduce the access rights conferred upon the public by the FOI Act.

Registration of Title Act, 1964 and Land Registration Rules 1972 (S.I. 230 of 1972)

Section 107 of the Act provides for inspection of entries in, or indices to, registers and inspection of registry maps subject to prescribed conditions. These conditions are prescribed in the Land Registration Rules 1972, (S.I. 230 of 1972). Rule 188(1) states that "the registered owner of the property and any person authorised by the owner, or by order of the Court or by these rules, but no other person may inspect a document filed in the Land Registry on a dealing or transaction with the property of the owner." Rule 188(2) to Rule 188(6) provide for inspection of title documents by certain other parties.

The Department considers that the rule strikes a balance between the right to privacy of the individual in relation to their registered property and the right of others who have a genuine interest in the property. The Department also points out that the definition of personal information in the FOI Act includes "information relating to property of the individual (including the nature of the individual's title to any property)" and that Rule 188 recognises and protects this information. It adds that this right is not an absolute right and that Rule 188(8) provides that the Registrar may in special circumstances permit a person to inspect a document filed in the Registry. In exercising this power, the Department states that the Registrar is subject to the rules of natural justice and that the decision is subject to a right of appeal to the courts. The Department submits that the Rule should not be repealed because of the need to regulate the inspection and issuing of copies of records held in the custody of the Land Registry. It states that all requests for copies of documents would have to be processed under the FOI Act in the absence of this Rule and that this would create a "huge administrative burden." It does not recommend that the Rule should be included in the Third Schedule to the FOI Act.

It is clear from what the Department says that there is already an established scheme providing for access to documents held by the Land Registry. There is no evidence available to me to suggest that the present scheme is inadequate or would be improved by replacing this regime by the provisions of the FOI Act. At the moment I am of the view that these provisions should not be added to the Third Schedule. However, I would recommend that the matter be kept under review.

**Censorship of Publications Act, 1929,
Censorship of Publications Act, 1946,
Censorship of Films Act, 1923, Censorship of
Films Act, 1925, Censorship of Films Act, 1930,
Censorship of Films Act, 1970, Censorship of
Films Act, 1992 and Video Recordings Act, 1989.**

The Department rightly points out that these Acts do not restrict access to data, rather they operate a censorship system to restrict access to certain types of material. I agree that no change should be made to these Acts.

Employment Equality Act, 1998

Section 61(5)(a) provides that any information obtained by the Equality Authority in the exercise of its powers for the purposes of an inquiry which is not otherwise available shall not (a) be included in any report produced by the Authority without the consent of the person or organisation concerned, unless its non-disclosure would be inconsistent with the duties of the Authority or the object of the report and (b) such information shall not be disclosed by any person

concerned in any criminal or other proceedings under the Act without the consent of the person or organisation concerned.

The Department states that this provision is similar to section 43(5) of the Employment Equality Act, 1977 which is included in the Third Schedule and that "clarification of whether or not section 61(5) of the Employment Equality Act, 1998 has a similar exclusion may be necessary." While the Minister is of the view that this provision should be added to the list of statutory provisions which restrict access to information, he does not comment on whether the provision should be amended or repealed or whether reference to the provision should be included in the Third Schedule. These provisions deal with the permitted contents of reports of the Equality Authority and disclosure in proceedings under the Act but do not, in my opinion, authorise or require the non-disclosure of records held by the Authority as a result of a Freedom of Information request. Therefore, it may not be necessary to include them in the Third Schedule. However I note that section 43(5) of the Equality Act 1977 was so included and to avoid any doubt on the issue I would recommend that section 61(5) be similarly included.

Section 97(2) is a similar provision which applies to information furnished to, or acquired by, the Director of Equality Investigations, the Labour Court, or any person acting on their behalf, in the course of an investigation, mediation, or hearing shall not be disclosed or published except in specified circumstances. The Minister does not comment on whether the provision should be amended or repealed or whether reference to the provision should be included in the Third Schedule. My comments in relation to section 61(5) also apply to this section.

Refugee Act, 1996

Section 19(1) provides that the Refugee Applications Commissioner, the Minister for Justice, Equality and Law Reform, the Minister for Foreign Affairs and their respective officers shall take all practicable steps to ensure that the identity of applicants for refugee status is kept confidential. The report does not express a view on whether this provision should be amended or repealed nor whether it should be included in the Third Schedule of the FOI Act. The purpose of this provision appears to be to protect the privacy rights of the applicants, a concern to which full expression is given in section 28 of the FOI Act. In my view, there is no reason why this provision should not be included in the Third Schedule.

Kevin Murphy

Information Commissioner

2 November 1999