

Report of the Information Commissioner

to the

Joint Committee on Finance and the Public Service

for the purpose of

Review of Non-Disclosure Provisions

in accordance with

The Freedom of Information Act, 1997 [section 32]

December 2005

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Foreword

Section 32 of the Freedom of Information Act, 1997 (FOI Act) provides for refusal of access to certain records whose disclosure is prohibited, or non-disclosure authorised, by other enactments. This is a very important provision because, essentially, it subordinates the access provisions of the FOI Act to all non-disclosure provisions in statute except for those which are contained in the Third Schedule to the FOI Act.

Each Minister of the Government has provided a report to the Joint Committee on Finance and the Public Service on the enactments, within their respective areas of remit, which contain provisions authorising, or requiring, the non-disclosure of particular records. In accordance with section 32(4) of the FOI Act, each Minister has provided me with a copy of that report. Pursuant to section 32(5) of the FOI Act, I now present my opinions and conclusions relating to those reports. Where appropriate, I include my views on matters associated with the reports and on the general operation of section 32.

Emily O'Reilly
Information Commissioner
December 2005

Introduction

The Freedom of Information Act of 1997 (FOI Act) represented a transformational development in the relationship between members of the public and the State. For the first time ever, members of the public acquired a right of access to information held by public bodies and a right, in the case of personal information, to have that information corrected.

There are, inevitably, certain exemptions to that right. Section 32 of the FOI Act, which provides for mandatory refusal of access to a record where its disclosure is prohibited by another enactment, is one of those exceptions. The mandatory refusal effect of section 32 is nullified if the enactment in question is included in the Third Schedule to the FOI Act (Enactments Excluded from Application of Section 32), viz.

"(1) A head shall refuse to grant a request under section 7 if

(a) the disclosure of the record concerned is prohibited by any enactment (other than a provision specified in column (3) of the Third Schedule of an enactment specified in that Schedule), or

(b) the non-disclosure of the record is authorised by any such enactment in certain circumstances and the case is one in which the head would, pursuant to the enactment, refuse to disclose the record."

Section 32 includes a procedure whereby its application is reviewed at five year intervals. Provision is made for the authorisation of a Joint Committee of the Houses of the Oireachtas to conduct such reviews and to report to both Houses of the Oireachtas on the operation of all non-disclosure enactments in the FOI context. The Joint Committee on Finance and the Public Service (the "Joint Committee") was so authorised and is, accordingly, mandated to review the operation of the enactments which authorise, or require, the non-disclosure of a record which might be the subject of an FOI request.

For the purpose of informing the Joint Committee's review process, section 32 also provides that each Minister of the Government must provide it with a report on the enactments within their area of governance which contain non-disclosure provisions. Ministers must specify whether, in their opinion, the provisions should be amended, repealed or allowed to continue in force. They must also comment, in relation to each provision, on whether it should be included in the Third Schedule. Each Minister must lay a copy of that report before each House of the Oireachtas and must also provide a copy to me, as Information Commissioner. I have already advised the Joint Committee of my intention to avail of the option provided to me in section 32(5) to furnish my opinions and conclusions in relation to those reports. Naturally, my focus is towards those provisions whose exclusion from the Third Schedule is recommended. I should also say that my report is based on the non-disclosure provisions identified by

Departments. Therefore, I cannot guarantee that every non-disclosure provision is included. The resources of my Office do not allow me to go beyond the application of our experience of the FOI Act to date in this regard.

If it considers it appropriate to do so, the Joint Committee may include recommendations in relation to the amendment, repeal or continuance in force of any of the non-disclosure provisions. It may also include recommendations on the inclusion of any provision in the Third Schedule of the FOI Act. Inclusion in the Third Schedule means that, pursuant to section 32(1)(a) of the FOI Act, a head of a public body cannot refuse access to a record solely on the grounds of that particular non-disclosure provision; any request for access to such a record must be considered only by reference to the totality of the FOI Act.

The review process will be completed when the Joint Committee provides a report of the results of the review to each House of the Oireachtas. In the case of the previous such review, I understand that the dissolution of Dáil Éireann and its Committees in May 2002 occurred before the Joint Committee could report to the Houses. Accordingly, assuming the process is completed as provided for in section 32 of the FOI Act, this will be the first review of the non-disclosure provisions to be presented to the Houses of the Oireachtas since the FOI Act was enacted in 1997.

While my specific objective in this report is to inform the Joint Committee of my views on the individual reports of Ministers in relation to non-disclosure provisions in legislation, there is a related wider matter to which I would draw the attention of the Committee. It is clear that the section 32 exercise, of which this report forms a part, is designed with a view to maximising the achievement of the stated aims of the FOI Act. These aims are set out in the Long Title to the Act as: "... TO ENABLE MEMBERS OF THE PUBLIC TO OBTAIN ACCESS, TO THE GREATEST EXTENT POSSIBLE CONSISTENT WITH THE PUBLIC INTEREST AND THE RIGHT TO PRIVACY, TO INFORMATION IN THE POSSESSION OF PUBLIC BODIES...". Information in the possession of public bodies can be made available under FOI only where those bodies are subject to the FOI Act, that is, listed in the First Schedule. It is unfortunately the case that a significant number of public bodies are not yet listed in the First Schedule and, accordingly, the records of these bodies are not subject to access under the FOI Act.

On 21 October 2005 the Minister for Finance announced his intention to extend the FOI Act to a further 109 public bodies. I understand that this extension, which will be done by Ministerial regulation, is likely to be effective from mid-2006. I very much welcome this announcement and agree, as stated at the time by the Minister, that the extension of FOI to these bodies will promote "greater transparency and accountability in the public sector". However, I am concerned that quite a few public bodies of some significance will remain outside the scope of the FOI Act and there does not appear to be any specific timeframe for their inclusion under the Act. Amongst the bodies not being made subject to FOI are:

In the area of the Department of Justice, Equality and Law Reform the following bodies are not proposed to be included: An Garda Síochána, Office of the Refugee Applications Commissioner, Office of the Refugee Tribunal, the Equality Tribunal, the Judicial Appointments Advisory Board and the Private Security Authority.

In the area of the Department of Finance, amongst the excluded bodies are: Central Bank and Financial Services Authority of Ireland, Irish Financial Services

Regulatory Authority, National Treasury Management Agency, State Claims Agency.

In the area of the Department of Education & Science: Vocational Educational Committees (33), the State Examinations Commission and the Residential Institutions Redress Board.

Examples of other bodies which will continue to fall outside of FOI include: the Adoption Board, Irish Red Cross, the Personal Injuries Assessment Board and the Law Society (which might be included to the extent that it performs statutory functions under the Solicitors Acts). In the case of the Garda Ombudsman Commission, which is to be established shortly, one could expect it to be made subject to the FOI Act on the same limited basis as applies to the Office of the Ombudsman.

For the FOI Act to have the greatest possible impact in promoting transparency and accountability in the public sector, it is necessary that it should apply to public bodies generally. Given that the FOI Act provides very strong protections for those interests which require to be protected, it is difficult to see why the Act has not been extended to all public bodies.

Freedom of Information: Principles & Assumptions

It will be useful to begin this report with a brief statement of the principles and assumptions on which the Freedom of Information regime is framed. It is very significant that the FOI Act envisages disclosure of information as the norm. In its Long Title, the FOI Act speaks of "access to the greatest extent possible". It follows, therefore, that the FOI Act views a decision not to disclose information which has been requested under FOI as a departure from that norm and as a decision which must be justified in each individual case.

Principles

- Non-disclosure provisions must be specific
- Necessity for each non-disclosure provision must be clear
- Non-disclosure provisions must be kept to a minimum
- Non-disclosure provisions must not be confused with confidentiality provisions
- Non-disclosure provisions must be reviewed on a regular basis
- Non-disclosure provisions emanating from EU Directives must be 'intra vires' those Directives, i.e. they must stay within the four walls of the Directives.

Assumptions

- Public bodies holding records covered by non-disclosure provisions may, or may not, be included in the First Schedule (subject to FOI in their own right)
- If not, there is no access mechanism through that public body, however, access may be achieved if the records in question are in the possession of a public body which is subject to FOI.
- Non-disclosure provisions are justified only where the FOI Act is not strong enough to protect the interests concerned
- There are relatively few situations where FOI Act does not provide proper safeguards and protect the interests concerned
- The Official Secrets Act continues to protect against unauthorised disclosure by civil servants

Interaction of FOI Act & Non-Disclosure Provisions

Fundamentally, the FOI Act provides for access, on request, to the greatest extent possible, to information in the possession of public bodies, in a manner which is consistent with the public interest and the right to privacy.

In Part III, the FOI Act provides for a number of exemptions to that right of access. The FOI (Amendment) Act, 2003 substantially amended Part III by extending the range of circumstances in which a record may be regarded as an exempt record. The interaction of the FOI Act with specific non-disclosure provisions in individual pieces of legislation is therefore quite complex. Given the extent of the amendment, the case for repealing individual non-disclosure provisions in individual enactments is stronger than ever before. At the very least, the case for including the vast bulk of such provisions in the Third Schedule to the FOI Act, and therefore opening them up to the scrutiny of the FOI Act, is compelling.

The FOI Act becomes relevant only when it is invoked in a request for access to a record. As time passes, the operation of the FOI regime over a growing range of public bodies is producing increasing familiarity with the categories of records which the FOI Act itself exempts from disclosure. Inevitably, the passage of time is also increasing the difficulty in maintaining a clear and coherent perspective on the overall position.

Regrettably, there is a growing number of non-disclosure provisions in individual pieces of legislation. The number now being reported on exceeds 150 instances. For instance, of the 78 non-disclosure provisions which are recommended by Ministers for exclusion from the Third Schedule, 29 were enacted since 1997. Of the 34 non-disclosure provisions which are recommended by Ministers for inclusion in the Third Schedule, 23 were enacted since 1997. Approximately one third of all existing non-disclosure provisions were introduced in an FOI environment. This shows that a culture of secrecy continues and there can be no doubt but that it hinders the achievement of a simple, transparent and consistent approach to the treatment of information in public bodies. Given the mandate bestowed on me by the FOI Act in relation to fostering and developing publication of information, I must promote coherence and clarity and I must ensure that the overall momentum of the FOI Act is sustained and not eroded. For instance, I note that some individual non-disclosure provisions can, without sufficient reason, be wider than comparable or parallel exemptions in the FOI Acts. I do not accept that any non-disclosure provision should be omitted from the Third Schedule to the FOI Act (and thus be exempted from any further consideration under the FOI Act) solely on the basis that it is the same as an exemption in Part III of the FOI Act.

I believe that the FOI Act could be considerably strengthened by the creation of a new Non-Disclosure Act which would accommodate all non-disclosure provisions currently housed in individual enactments. The centralisation of non-disclosure provisions, which are essentially distinct from the substantive content, in a single Non-Disclosure Act

would be beneficial on several fronts:

- It would be transparent across the board
- It would help to standardise the approach to non-disclosure / secrecy provisions across Departments
- It would provide a single repository for reference purposes
- It would be reliable and comprehensive
- It would facilitate amendment
- It would assist FOI decision-making
- It would streamline the five year Joint Committee review procedure

Finally, were such an Act to materialise, it could be a possible vehicle to include provisions for defining and laying down protections for "whistleblowers" who divulge information which they consider to be in the public interest. Alternatively, the Joint Committee may consider that this important and complex area could best be regulated by separate legislation.

A related matter is the need to ensure that amendments to the FOI Act itself, particularly where amendments have the effect of restricting the scope of the Act, occur only after full consideration of the need for such a restriction. I am concerned that this may not be the case at present. For example, in mid September 2005, my Office became aware that the FOI Act had been amended by the Safety, Health and Welfare at Work Act 2005 which had commenced on 1 September 2005. This information was given to one of my staff by a member of the public while dealing with an enquiry. The effect of the amendment is that, for all practical purposes, the Health and Safety Authority is no longer subject to the FOI Act. While I, as Information Commissioner, have no statutory entitlement to be consulted in relation to amendments to the FOI Act, it would seem sensible (and indeed many would assume this would happen) that some such consultation should take place. I think it is undesirable that the FOI Act should be amended in a piecemeal fashion; such an approach tends to favour the sectional interests of particular public bodies over and above the purpose and principles of the FOI Act generally. Page 22 of this Report is relevant in this connection.

As already mentioned, the reports of individual Ministers show that, since the FOI Act was passed (21 April 1997), over 50 new non-disclosure provisions have been introduced in individual enactments. That figure is not necessarily reliable; I recognise that the reports may not have captured every provision and I also note that eight of the non-disclosure provisions reported have a 1997 date. Obviously, these would have been enacted almost in tandem with the FOI Act and five of the eight are recommended for exclusion from the Third Schedule. The level of consultation with the Joint Committee which may have preceded the introduction of any of the post FOI Act non-disclosure provisions is not known to me. I do know, however, that my Office was not consulted at any stage. The Joint Committee, in the course of this review, may wish to consider whether the effectiveness of the section 32 review process could be strengthened by means of an FOI audit procedure which would be stitched in, at the

drafting stage, to the introduction of any new non-disclosure provisions in the future. In practice, this would mean that the procedures around the drawing up the draft heads of a Bill would include full consideration of its projected interaction with the FOI Act, as amended.

There is also a logical question as to whether the existing mechanism, of a

presumption that non-disclosure provisions override the FOI Act unless they are included in the Third Schedule, might not be converted to its opposite i.e. to a presumption that any non-disclosure provision is subservient to the FOI Act unless it is included in the Third Schedule. I would favour the latter. It would be clearer; it would be more focused; it would be more user-friendly for FOI decision-makers and it would mean that the Third Schedule would be more compact and more easily understood. It would be eminently more user-friendly to have a Third Schedule which contained those non-disclosure provisions which would always override the FOI Act (this is not part of any single statute currently) than to continue with the existing arrangement which contains a growing list of non-disclosure provisions which can be subject to the FOI Act. The wording of section 32(1) could be amended to take account of a revised perspective without any knock-on effects.

The UK Government has recently published the report of its initial review of statutory provisions on disclosure of information in the context of the introduction of its statutory Freedom of Information regime in January 2005. That review identified 210 statutory provisions which prohibit the disclosure of information under its Freedom of Information Act. The Act empowers the Secretary of State, by order, to amend or repeal any enactment which appears to him to be capable of preventing disclosure of information under the Act. He would exercise this option for the purpose of removing or relaxing the prohibition.

The UK report indicates that 183 of the 210 provisions identified could be so amended by the Secretary of State. Of those 183, 13 have already been amended, 40 are scheduled to be amended and 19 will have a "sunset clause" inserted. The remaining 111 are being retained for other reasons or are still under review. The 27 enactments which could not be so amended are made up of 20 which implement international confidentiality obligations and seven which were passed after 30 November 2000 and, therefore, post-date the passing of the Act.

By contrast, Ireland has more than 150 non-disclosure provisions in its statutes and, of the 78 recommended for exclusion from the remit of the FOI Act, 29 were introduced since 1997. Additionally, of the 34 recommended for addition to the remit of the FOI Act, 23 have been introduced since 1997.

The UK report makes it clear that removal or relaxation of a prohibition on disclosure does not mean that the information it protected will necessarily be disclosed, that the removal of a statutory bar on disclosure does not mean that FOI exemptions will not apply to the information concerned. They make the distinction by citing the public

interest test, which allows for a derogation from most FOI exemptions, and which, where it prevails, will lead to the release of information. By contrast, a statutory prohibition on disclosure is absolute, even where it may be at odds with the public interest.

The UK report also deals with the reasoning behind the introduction of "sunset clauses" to information which diminishes in sensitivity over time and which means that, after a specified period (up to 90 years), requests for that information can be considered under normal FOI procedures. This is a useful concept.

EU Law

Many non-disclosure provisions arise from EU law e.g. the European Communities (Authorisation, Placing on the Market, Use and Control of Plant Protection Products) Regulations, 1994 (S.I. No. 139 of 1994) under the control of the Department of Agriculture and Food and the European Communities (Recognition of Medical Qualifications) Regulations, 1976 (S.I. 288 of 1976) which is administered by the Department of Health and Children. Given that EU law may take precedence over domestic law, it is important to ensure that the inclusion in the Third Schedule of some of these provisions does not compromise EU law. Ideally, any such provision should be applied in a context which acknowledges the existence and spirit of the FOI Act. In any event, they should not ever exceed the non-disclosure provisions of the EU law in question; neither should they confuse confidentiality provisions with non-disclosure provisions. In some instances, EU law may possibly place greater restrictions on access to information than those contained in the FOI Act or, indeed, the national legislation of other member states. It is equally the case that EU law on occasion takes account of Member State variations in rules relating to access to information. For instance, Council Directive 93/99/EEC, which deals with measures concerning the official control of foodstuffs, recognises that different member states may operate different rules. In Article 7.2 that Directive provides as follows:

"Where a Member State has rules permitting free access by persons to information held by competent authorities, this fact must be revealed at the time of the request to another Member State or during the exchange of information if no such request occurs. If the sending Member State indicates that the information involves matters of professional or commercial secrecy, the receiving Member State shall ensure that the information is not divulged more widely than is provided under paragraph 1. If it is not possible for the receiving Member State to restrict the giving out of information in this way, it shall not be contrary to the terms of this Directive for the sending Member State to withhold the information."

Generally, while I accept the overall legislative constraints imposed by EU membership, I believe that the spirit of the FOI Act should always be fostered to the greatest extent when, and wherever, possible.

Comments on Reports of Individual Departments: Approach

The following points explain how my report is structured:

1. My consideration of each Department's report starts with a Table setting out (in date order) the non-disclosure provisions identified by that Department, stating in relation to each provision whether it is already included in the Third Schedule and giving the Department's recommendation as to whether it should be retained in the Third Schedule, added to the Third Schedule or remain outside the Third Schedule. The Table also states whether I agree or disagree with the Department's recommendation.
2. Where a Department recommends that a non-disclosure provision be added to the Third Schedule, my commentary will not deal with that matter further as in all such cases I agree with the recommendation.
3. In the case of a non-disclosure provision already included in the Third Schedule, and where the relevant Department recommends that it should be retained in that Schedule, I will not comment further on the matter (again, because I agree with these recommendations).
4. Where a Department recommends that a non-disclosure provision, not already included in the Third Schedule, should remain outside the Schedule, I will not generally comment further where I agree with that recommendation. But where I disagree with such a recommendation, my commentary will set out the grounds on which I recommend that the provision be included in the Third Schedule.

Department of Agriculture & Food

The Department reports on six non-disclosure provisions of which four are included in the Third Schedule.

Title	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
Agriculture (Research, Training & Advice Act), 1988	Section 14	Y	-	-
Bord Glas Act, 1990	Section 23	Y	-	-
EC (Mutual Assistance as regards correct application of legislation on veterinary and zootechnical matters) Regulations, 1993	Article 3(2)	N	Exclude	Agree
Milk (Regulation of Supply) Act, 1994	Section 16(1)	Y	-	-
Bord Bia Act, 1996	Section 26	Y	-	-
EC (Authorisation, Placing on the Market, Use and Control of Plant Protection Products) Regulations, 2003	Article 11	N	Exclude	Disagree

Two non-disclosure provisions are recommended for exclusion from the Third Schedule - article 3(2) of **EC (Mutual Assistance as regards correct application of legislation on veterinary and zootechnical matters) Regulation, 1993 (S.I. No. 150 of 1993)** and article 11 of **EC (Authorisation, Placing on the Market, Use and Control of Plant Protection Products) Regulations, 2003 (S.I. No. 139 of 1994)**.

The former is concerned with mutual assistance between Member States and with the EU Commission to ensure the correct application of legislation on veterinary and zootechnical matters. It is a provision which authorises, rather than prohibits, the release of certain information to other Member States or to the EU Commission. As such I would question its consideration in the context of section 32 in the first place and agree that it has no place in the Third Schedule.

The latter is concerned with requests for confidentiality where industrial and commercial secrets might be attendant on applications for authorisation of a plant protection product. Its classification as a non-disclosure provision may not be appropriate. However, for the avoidance of doubt, I do not agree that it should be excluded from the Third Schedule because the reason stated by the Department (compliance with Council Directive 91/414/EEC) is not supported by the Directive in question. The Directive includes a derogation in its article 14 which recognises the impact of Council Directive 90/313/EEC of 7 June 1990 on freedom of access to information on the environment. Given that the article 14 provision is already subject to the condition that it is without prejudice to this particular freedom of information mechanism, it follows that it should

also be without prejudice to the FOI aspect. In my view, it should be included in the Third Schedule.

Department of Arts, Sport & Tourism

The Department reports on five non-disclosure provisions of which all but one are already included in the Third Schedule.

Title	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
Irish Film Board Act, 1980	Section 18	Y	-	-
Irish Horseracing Industry Act, 1994	Section 17	Y	-	-
Irish Sports Council Act, 1999	Section 21	N	Include	Agree
National Tourism Development Authority Act, 2003	Section 22	Y	-	-
Arts Act, 2003	Section 20	Y	-	-

In relation to section 21 of the **Irish Sports Council Act, 1999**), the Department has reiterated its 1999 recommendation that this non-disclosure provision should be included in the Third Schedule. As my predecessor pointed out at that time, the provision in question does not prohibit the disclosure of records under the FOI Act. However, for the removal of any doubt, I agree that the provision should be included in the Third Schedule.

I note that the Department has emphasised the importance of the provision itself to guard against unauthorised disclosure of information, for example outside the FOI Act.

Department of Communications, Marine & Natural Resources

The Department reports on twelve non-disclosure provisions of which eight are already included in the Third Schedule and a further two are recommended for inclusion.

Enactment	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
Gas Act, 1976	Section 20	Y	-	-
Postal & Telecommunications Services Act, 1983	Section 37	Y	-	-
Marine Institute Act, 1991	Section 15	Y	-	-
Harbours Act, 1996	Section 33	Y	-	-
Fisheries (Amendment) Act, 1997	Section 30	N	Exclude	Disagree
Turf Development Act, 1998	Section 32	N	Include	Agree
Electricity Regulation Act, 1999	Section 13	Y	-	-
Merchant Shipping (Investigation of Marine Casualties) Act, 2000	Section 18	N	Exclude	Disagree
Gas (Interim) (Regulation) Act, 2002	Section 23(5)	Y	-	-
Communications Regulation Act, 2002	Section 24	Y	-	-
Sustainable Energy Act, 2002	Section 19	N	Include	Agree
Digital Hub Development Agency Act, 2003	Section 27(5)	Y	-	-

In the case of the **Fisheries (Amendment) Act, 1997**, the Department says that the body it established - the Aquaculture Licences Appeal Board (ALAB) - is not a prescribed public body for purposes of the FOI Act and it recommends the omission of its non-disclosure provision from the Third Schedule. The non-disclosure provision in the Fisheries (Amendment) Act, 1997 relates to 'confidential information' obtained by the ALAB (including information expressed by the Board to be confidential) in the course of an appeal against a decision of the Minister on an aquaculture licence application. ALAB is being included in the schedule of bodies to whom the FOI Act applies (First Schedule) with effect from mid-2006. For this reason and, given that its records could be held in the Department, I am of the view that section 30 should be included in the Third Schedule. Were such to be the case, the safeguards in the FOI Act are sufficient to ensure that information would not be released inappropriately. I am particularly mindful of the public interest dimension which could attach to information in this area.

In the case of the **Merchant Shipping (Investigation of Marine Casualties) Act, 2000**, the Department says that the body it established - the Marine Casualty Investigation Board (MCIB) - is not a prescribed body for purposes of the FOI Act and it recommends the omission of its non-disclosure provisions from the Third Schedule. The non-disclosure provision in the Merchant Shipping (Investigation of Marine Casualties) Act, 2000 relates to confidential information obtained by MCIB in the course of an investigation. Unlike the Fisheries (Amendment) Act, 1997, it defers to the FOI Act in modifying the extent to which the MCIB can express

information to be confidential. MCIB is being included in the schedule of bodies to whom the FOI Act applies (First Schedule) with effect from mid-2006. For this reason and because such records could be held in the Department, I hold the view that section 18 should be included in the Third Schedule. Were this to be the case, the safeguards in the FOI Act are sufficient to ensure that information would not be released inappropriately. I am particularly mindful of the public interest dimension which could attach to information in this area.

Department of Community, Rural & Gaeltacht Affairs

The Department reports on four non-disclosure provisions of which one is already included in the Third Schedule and one is now recommended for inclusion.

Enactment	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
Udarás na Gaeltachta Act, 1979	section 15(1)	Y	-	-
Western Development Commission Act, 1998	section 18	N	Include	Agree
Dormant Accounts Act, 2001	section 26(2), 40*	N	Exclude	Disagree
Unclaimed Life Assurance Policies Act, 2003	section 24(2)	N	Exclude	Disagree

* the Dormant Accounts (Amendment) Act, signed on 25 May 2005, includes provision for repeal of section 40.

The Department says that the surviving non-disclosure provision in the **Dormant Accounts Act, 2001** is essentially the same as the exemption provided for in section 22 of the FOI Act in relation to refusal of access on the basis of legal professional privilege. The Department says that the provision should be excluded from the Third Schedule. I cannot support the Department's view in this regard because, not least, section 22 of the FOI Act is neither connected to, nor dependent on, any other provision in statute. I take a view that section 26(2) should be included in the Third Schedule and that requests for access to records of this nature should be decided on by reference to the safeguards of the FOI Act.

Equally, the Department says that the non-disclosure provision in the **Unclaimed Life Assurance Policies Act, 2003** is essentially the same as the exemption provided for in section 22 of the FOI Act in relation to refusal of access on the basis of legal professional privilege and that it should be excluded from the Third Schedule. For the reasons already stated in the previous paragraph I cannot support this view. I take a view that section 24(2) should be included in the Third Schedule and that requests for access to records of this nature should be decided on by reference to the safeguards of the FOI Act.

Department of Defence

The Department says that there is no legislation within its remit which comes within the scope of section 32(3) of the FOI Act.

I note that the Department has amended paragraph 11(2) of **Defence Forces Regulation A5** (relating to Courts of Inquiry) in response to my predecessor's recommendation to the Joint Committee in the course of its 1999 review.

I further note that the Department has not recommended that the provision should be included in the Third Schedule. If exclusion from the Third Schedule is the intention, I do not agree with the Department. When my predecessor recommended that paragraph 11(2) should be included, he did so from the perspective that section 46 of the FOI Act did not, in its subsection (1)(a)(iii), necessarily restrict the FOI Act from application to the records of a service tribunal. Section 46 restricts only certain records which are **held by** a service tribunal. Given that, in certain circumstances relating to disposal of proceedings, the convening authority "shall forward to principal military branch of the Department of Defence concerned ... one certified copy ... of the proceedings and findings (if any) ..." [paragraph 9(1)], it is clearly the case that section 46 may not always apply to such records.

My predecessor held that paragraph 11(2) should be included in the Third Schedule because the existing blanket restriction on access was incompatible with the purpose of the FOI Act, as expressed in its Long Title, and because the FOI exemptions provided for any circumstance in which it might be appropriate to refuse access to such records. I share this view; indeed the May 2004 amendment, which prohibits disclosure except where expressly directed otherwise by the Minister, could be seen as a further impediment on access to such records under the FOI Act. I recommend that paragraph 11(2) should be included in the Third Schedule.

Department of Education & Science

The Department reports on non-disclosure provisions in three enactments and recommends exclusion from the Third Schedule in each case:

Enactment	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
Education Act, 1998	Section 53	N	Exclude	Disagree
Commission to Inquire into Child Abuse Act, 2000	Section 28	N	Exclude	Disagree
Ditto	Section 27	N	Exclude	Agree
Ditto	Sections 31, 33 & 34	N	Exclude	Agree
Residential Institutions Redress Act, 2002	Section 28	N	Exclude	Disagree
Ditto	Sections 30 & 31	N	Exclude	Agree

The Department says that section 53 of the **Education Act, 1998** should continue to be excluded from the Third Schedule. The Department explains that the intention of the section 53 provision is to prevent the creation of crude "league tables" on school performance. The Department also points out that the impact of the restriction on the FOI Act was recognised by the Oireachtas when the Education Act became law in 1998, over a year after the enactment of the FOI Act.

It is clear from the outcome of the Supreme Court appeal in *Sheedy and the Information Commissioner* (2005) [which ruled that when the Department used section 53, which is a discretionary provision, to refuse school inspection reports, that decision overruled any rights to access which might exist under the FOI Act] that the impact of section 53 extends well beyond the prevention of crude "league tables". In the *Sheedy* case, the Supreme Court ruled that section 53, when invoked by the Minister, prohibits the disclosure of very general information about schools deriving from the inspection process. Whether the Oireachtas intended this to be the case is open to question. In my view, serious consideration should be given to repealing section 53. For as long as it continues in force, it should be included in the Third Schedule to allow for full consideration of any FOI requests for access to school records.

Overall, given the societal role of the Department and the extent of its interaction with citizens I find it disturbing that section 53 of the Education Act, 1998 has been found by the Supreme Court to be totally exempt from the scope of the FOI Act.

The **Commission to Inquire into Child Abuse Act, 2000** (CICA Act) includes provisions that

- prohibit the disclosure of information provided to the Confidential Committee (section 27)
- a person cannot be obliged by law to disclose information provided to the

Commission or the Investigation Committee (section 28)

- an order for discovery will not be made against the Commission or the Committees in legal proceedings to which they are not a party (section 31)
- cancel the right of access, under the Data Protection Act, 1988, to personal information provided to the Commission, or one of its Committees (section 33)
- create an exemption under the FOI Act in the case of records where access could prejudice the effectiveness of the Commission (section 34).

Overall, I note that the Department's recommendations in this regard are premised on the pre-existence of the FOI Act at the time of the enactment of the CICA Act which is equated with acceptance by the Oireachtas that it is outside the scope of the FOI Act. However, with regard to the prohibition on disclosure contained in section 27 of the CICA Act, I am taking account of the fact that the involvement of the Confidential Committee is a choice which is made by persons who do not wish to submit to the investigation process. I agree that the provision should not be repealed and that it should not be included in the Third Schedule. However, it seems to me that the prohibition on disclosure could be time-modified to an extent which would, for example, allow archivists or historians of the future have access to such information. The introduction of an expiry date - a "sunset clause" - would achieve this objective. Alternatively, subsection 5 could be considered for repeal, thus permitting the transfer of such records to the National Archives in the longer term. Either way, I hold the view that due account should be taken of the historical import of this body of records.

Section 28 of the CICA Act provides for non-disclosure of information provided to the Commission or Investigation Committee (but not the Confidential Committee). There are two stated exceptions from this provision - disclosure to a member of An Garda Síochána and to the HSE. My view is that this non-disclosure provision should be added to the Third Schedule where, if necessary, the safeguards contained in the FOI Act would be more than adequate to protect the functions of the Commission and any Investigation Committee.

I agree with the Department's recommendations in relation to the non-inclusion in the Third Schedule of sections 31, 33 and 34 of the CICA Act.

With regard to the **Residential Institutions Redress Act, 2002** (RIR Act), I also note the Department's contention that the restrictions on the FOI Act were accepted by the Oireachtas in its passing of the RIR Act.

With regard to the prohibition on disclosure contained in section 28 of the RIR Act, I note the stringent nature of the provision which creates an offence for the disclosure of any substantive information by any person, including an applicant for, or recipient of, an award under the Act. In my view this particular provision - section 28(6) - should be repealed not least because it represents a level of statutory prohibition

which, I believe, is excessive. It should be noted the, by way of contrast with section 27 of the CICA Act which provides for the disclosure of abuse to the Confidential Committee where a person chooses to do so, section 28 is not cognisant of the wishes of an applicant for redress. At the very least, I recommend that the prohibition could be time-modified to an extent which would, for example, allow archivists or

historians of the future have access to such information. The introduction of an expiry date - a "sunset clause" - would achieve this objective. Alternatively, subsection 3(b) might be repealed, thus permitting the transfer of such records to the National Archives in due course. Finally, I recommend, as an immediate step, that section 28 be added to the Third Schedule of the FOI Act.

Department of Enterprise, Trade & Employment

The Department reports on nineteen non-disclosure provisions, four of which are currently included in the Third Schedule. The Department is now recommending the removal of three of these provisions and the inclusion of four other provisions. In all, fourteen of the non-disclosure provisions reported on are recommended for exclusion from the Third Schedule.

Before dealing with the provisions reported on by the Department I should draw the Joint Committee's attention to a significant FOI amendment which has occurred since the Department provided its report in June 2004. The Safety, Health & Welfare at Work Act, 2005, which was signed on 22nd June 2005 and commenced with effect from 1 September 2005, removed section 45 of the Safety, Health and Welfare at Work Act, 1989 from the Third Schedule and replaced it with section 73 of the Safety, Health & Welfare at Work Act, 2005. It also amended section 46 of the FOI Act to the effect that the FOI Act does not apply, at all, to records held, or created, by the Health and Safety Authority in relation to its enforcement functions. The Appendix to this Report contains an exchange of correspondence between the Department of Finance and my Office in this connection; it illustrates the difficulty.

Enactment	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
Industrial Relations Act, 1946	Section 22	Y	Exclude	Disagree
Prices Act, 1958	Section 25	N	Include	Agree
Industrial Relations Act, 1969	Section 14	Y	Exclude	Disagree
Industrial Development Act, 1986	Sections 42 & 43	Y	Include	-
Industrial Relations Act, 1990	Section 25(6)	Y	Exclude	Disagree
Companies Act, 1990	Section 21	N	Exclude	Disagree
Patents Act, 1992	Sections 28, 88, 94, 96 & 101	N	Exclude	Agree
Patents Rules, 1992	Rules 23, 64 & 65	N	Exclude	Agree
Trade Marks Act, 1996	Sections 43, 70 & 91	N	Exclude	Agree
National Standards Authority of Ireland Act, 1996	Par. 5 of Second Schedule	N	Include	Agree
Transnational Information and Consultation of Employees Act, 1996	Section 15	N	Exclude	Agree
Industrial Development (Enterprise Ireland) Act, 1998	Section 16	N	Include	Agree
Company Law Enforcement Act, 2001	Section 17	N	Exclude	Disagree
Industrial Designs Act, 2001	Sections 38(3), 39(2) & 39(5)	N	Exclude	Disagree
Industrial Designs Regulations, 2002	Regulation 31(2)	N	Exclude	Disagree
Competition Act, 2002	Sections 32, 22(4) & 21(3)	N	Exclude	Disagree

Industrial Development (Science Foundation Ireland) Act, 2003	Section 17	N	Include	Agree
Companies (Auditing and Accounting) Act, 2003	Section 31	N	Exclude	Disagree
Personal Injuries Assessment Board Act, 2003	Section 73	N	Exclude	Disagree

The Department recommends that the non-disclosure provisions of the **Industrial Relations Act, 1946** (section 22), the **Industrial Relations Act, 1969** (section 14) and the **Industrial Relations Act, 1990** [section 25(6)] should be removed from the Third Schedule. The Labour Relations Commission (LRC) was prescribed for purposes of the First Schedule to the FOI Act by S.I. No. 128 of 2001. Inter alia, these Regulations provide that those LRC functions concerning the provision of services connected with trade disputes or to particular employers, trade unions, employer organisations, employees or their representatives and associated communications are excluded from the remit of the FOI Act. The Committee will note that this is a retrograde recommendation which would erode three existing FOI access points. I do not agree that this should ever be the case and I recommend that all three provisions should remain in the Third Schedule where the safeguards of the FOI Act can be applied.

The non-disclosure provision of the **Companies Act, 1990** relates to information obtained by the Director of Corporate Enforcement in the course of an investigation. The Department says that the provision should not be included in the Third Schedule. The reason given is that disclosure of such information via the FOI Act would represent an unwarranted public intrusion into a company's private affairs. This could benefit competitors and adversely affect market position. Additionally, such disclosure could compromise a criminal investigation. Section 27 of the FOI Act provides for exemption for commercially sensitive records and section 23 does likewise for records concerning law enforcement and public safety. I also note the Department's views on the probability of a large number of judicial reviews. Even if this was not largely irrelevant to the matter under consideration, it is no more than conjecture which presumes that a statutory provision can be judged on the basis of possible outcomes rather than on its inherent merits. I recommend that section 21 of the Companies Act, 1990 should be included in the Third Schedule.

The Department has recommended that section 17 of the **Company Law Enforcement Act, 2001** should be allowed to continue in force and that it should not be included in the Third Schedule. This provision, which exempts a number of circumstances from the prohibition on disclosure, states in its introduction that the provision is subservient to law. Section 17 provides that "*Information obtained by virtue of the performance by the Director of any of his or her functions which has not otherwise come to the notice of the public, shall not be disclosed, except in accordance with law*". This construction suggests that section 17 may be subservient to the FOI Act. Nevertheless, and for the removal of doubt, I recommend that the provision be added to the Third Schedule which will allow the application of the safeguards of the FOI Act.

Sections 38(3), 39(2) and 39(5) of the **Industrial Designs Act, 2001** and article 31(2) of the **Industrial Designs Regulations, 2002** provide that a proprietor of a design may defer publication of that design for 30 months. The overall purpose is to protect the confidentiality of commercially sensitive information. Generally, I do not favour duplication of effort and I would regard sections 12(2)(b)(ii) and 27 of the FOI Act as providing very adequate safeguards in this particular area. I recommend that these provisions be added to the Third Schedule.

The Department reports that the **Competition Act, 1991** has been repealed and replaced with the **Competition Act, 2002**. While paragraph 9 of the Schedule to the 1991 Act was included in the Third Schedule, the Department says that its successor - section 32 of the 2002 Act - should be excluded from the Third Schedule. I disagree with this view. The only distinguishable difference between the former provision and the current provision is that the current provision entitles persons injured by a disclosure of information obtained by the Competition Authority pursuant to its powers to sue the person who made the disclosure. The safeguards for information of this nature contained in sections 26, 27, 28 of the FOI Act are more than adequate and I recommend that section 32 of the Competition Act, 2002 should be included in the Third Schedule.

The Department recommends that two further non-disclosure provisions of the Competition Act, 2002 should be excluded from the Third Schedule.

1. section 22(4), which is used to provide for the removal, prior to publication, of commercially sensitive information from Competition Authority determinations following a full investigation of proposed mergers, and
2. section 21(3), which is used to provide similarly for determinations following an initial investigation.

I do not agree with the Department in either case because, it seems to me, the protection afforded by sections 26, 27, 28 of the FOI Act to information of the nature in question is quite sufficient. I recommend that these provisions should be included in the Third Schedule.

In relation to the **Companies (Auditing and Accounting) Act, 2003**, the Department stresses the importance of the obligation of confidentiality on the directors, management, staff and advisers of the Irish Auditing and Accounting Supervisory Authority (IAASA) - a body which has not yet been established on a statutory basis. While I agree that there are issues of confidentiality, it seems to me that the powers assigned to heads in sections 23, 26 and 27 of the FOI Act offer sufficient protection for the type of information in question. I am concerned at the absolute nature of this provision which is designed to support the IAASA in being able to offer a guarantee of confidentiality to complainants. Otherwise, the view is that complainants will not come forward despite the protections of the FOI Act with regard to exempting information

obtained in confidence from disclosure. While I recognise the concerns, I do not agree with them and favour the inclusion of the section 31 provision in the Third Schedule, not least to permit the application of a public interest test in certain circumstances.

The **Personal Injuries Assessment Board Act, 2003** was passed to provide for the assessment, outside the courts system, of claims relating to personal injuries. Section 73 prohibits the disclosure of information obtained by any member of the Board or by any member of its staff, committee, adviser or consultant. The Department says this provision should not be included in the Third Schedule. The provision, which contains a qualified prohibition on disclosure, is prefaced with the

term "Save as otherwise provided by law ...". My view is that this clearly includes the FOI Act and, for that reason and the avoidance of doubt, section 73 should be included in the Third Schedule.

Section 15 of the **Transnational Information and Consultation of Employees Act, 1996** is a non-disclosure provision relating to confidential information arising from the transposition of EC Directive 94/95 into Irish law. The information in question originates with private bodies who are outside the scope of the FOI Act. This alone is not an incontrovertible basis on which to rule information outside the scope of the FOI Act. However, I agree in this instance that the provision in question should not be included in the Third Schedule.

Department of Environment, Heritage & Local Government

The Department reports on nine non-disclosure provisions, three of which are already included in the Third Schedule. The Department recommends two provisions for inclusion in the Third Schedule and four for exclusion.

Enactment	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
Air Pollution Act, 1987	Section 16	N	Include	Agree
Radiological Protection Act, 1991	Section 36(1)(d)	Y	Exclude	Disagree
Environmental Protection Agency Act, 1992	Section 39	Y	Include	-
Electoral Act, 1997	Section 14	N	Exclude	Disagree
Planning & Development Act, 2000	Section 113	N	Include	Agree
Local Government Act, 2001	Section 80	N	Include	Agree
Genetically Modified Organisms (Contained Use) Regulations, 2001	Article 9	N	Exclude	Disagree
Housing (Miscellaneous Provisions) Act, 2002	Section 13	Y	Include	-
Genetically Modified Organisms (Deliberate Release) Regulations, 2003	Article 10	N	Exclude	Disagree

The Department says that section 36 of the **Radiological Protection Act, 1991** should be excluded from the Third Schedule because it relates directly to obligations under the international convention for the physical protection of nuclear material. The Department may not be aware that the provision is currently included in the Third Schedule and that this is a recommendation for its removal. The safeguards of the FOI Act are more than adequate to respect these obligations. The provision has existed since 1991, the FOI Act has included the provision in its Third Schedule since 1998 and, unless the Department can provide some evidence of a negative effect, I recommend that the provision should remain in the Third Schedule.

The Department says that the non-disclosure provision of the **Electoral Act, 1997** (section 14) should continue to be excluded from the Third Schedule. My predecessor recommended that it should be included. He took account of the fact that, if a Constituency Commission was not prescribed as a public body for purposes of the FOI Act, a right of application for access to its records could not arise. However, records of a Constituency Commission could be held in a prescribed public body and I believe that the provision should be included in the Third Schedule.

The **Genetically Modified Organisms (Contained Use) Regulations, 2001** and the **Genetically Modified Organisms (Deliberate Release) Regulations, 2003** have replaced the Genetically Modified Organisms Regulations, 1994. The 'confidentiality' provisions of each (articles 9 and 10 respectively) provide that notifiers of information

may make a request to the Environmental Protection Agency (EPA) that certain information would be treated as confidential for purposes of article 7 (Mandatory grounds for refusal of information) or 8 (Discretionary grounds for

refusal of information) of the European Communities Act, 1972 (Access to Information on the Environment) Regulations, 1998. Any such request must be accompanied by verifiable justification. Given that the two non-disclosure provisions of the European Communities Act, 1972 (Access to Information on the Environment) Regulations, 1998 contain qualifying conditions which closely resemble a number of the stated exemptions of the FOI Act, it is arguable whether either 'confidentiality' provision could, or should, be described as a non-disclosure provision for purposes of section 32(1) of the FOI Act. Effectively, these provisions are the conduit for the delivery of the non-disclosure provisions of the European Communities Act, 1972 (Access to Information on the Environment) Regulations, 1998 in so far as information on genetically modified organisms is concerned. I also note the obligation on the EPA to consider the public interest in the decision-making process on whether or not to accede to any request for confidentiality. On balance, I believe these provisions should be subject to the oversight of the FOI Act which contains adequate safeguards to respect the objectives of the European Communities Act, 1972 (Access to Information on the Environment) Regulations, 1998. I recommend that they should be included in the Third Schedule.

Department of Finance

The Department reports on twelve non-disclosure provisions of which all but one is recommended for exclusion from the Third Schedule.

Enactment	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
Central Bank Act, 1942	Section 33 AK	N	Exclude	Agree
Ombudsman Act, 1980	Section 9	N	Exclude	Agree
Trustee Savings Bank Act, 1989	Paragraph 15 of Second Schedule	N	Exclude	Agree
National Treasury Management Act, 1990	Section 14	Y	No Recommendation	Retain
Waiver of Certain Tax, Interest and Penalties Act, 1993	Section 7	N	Exclude	Agree
Ethics in Public Office Act, 1995	Section 35	N	Exclude	Disagree
Public Service Management Act, 1997	Section 5(3)	N	Exclude	Disagree
Taxes Consolidation Act, 1997	Section 859	N	Exclude	Agree
Comptroller & Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act, 1998	Sections 16 & 22	N	Exclude	Agree
National Pensions Reserve Fund Act, 2000	Section 13	N	Exclude	Disagree
Ordnance Survey Ireland Act, 2001	Section 23	N	Include	Agree
National Development Finance Agency Act, 2002	Section 18	N	Exclude	Disagree
Various Double Taxation Relief Orders	Articles relating to the Exchange of Information	N	Exclude	Agree

While the Department does not address section 14 of the **National Treasury Management Act, 1990** in its report, given that it is already included in the Third Schedule, I assume that its continued inclusion is recommended. I agree that this should be the case.

Section 35 of the **Ethics in Public Office Act, 1995** is a provision which, with certain stated exceptions, prohibits disclosure of information. One exception is disclosure pursuant to an order of a court. Other exceptions include disclosure of information in the public interest by a Minister of the Government. They also include a level of disclosure of information contained in a statement of interests, by a person to whom such a statement is provided, where that person considers that a conflict may exist between an interest specified, or an interest which has not been disclosed, and the public interest. A further exception relates to the disclosure of information (non-specific) by a person, whether in the performance of their official functions or in the public interest. Such disclosure could be made to a Minister of the Government, the

Secretary-General to the Government, a Committee of a House of the Oireachtas, the Standards in Public Office Commission or a person in a public body who has been determined by the Minister for Finance to be a relevant authority in

relation to the occupiers of designated position in that body. Finally, where a person has been the subject of an investigation under the Ethics Acts, and the ensuing report does not contain a determination that a contravention of the Ethics Acts has occurred (which means that it would not be laid before either House of the Oireachtas), the information contained in the report may be disclosed. Given the safeguards of the FOI Act, and in light of the level of disclosure already provided for, my view is that section 35 should be included in the Third Schedule.

Section 5(3) of the **Public Service Management Act, 1997** exempts any record containing preliminary strategy statements, and any related Ministerial directions, from the scope of the FOI Act for a period of five years from the date of creation. At the time of the previous review in 1999, this five year moratorium was consistent with the then section 19 of the FOI Act relating to records of the Government. For the purposes of section 19 of the FOI Act, the term 'Government' now extends to committees of the Government which include certain committees consisting solely of officials. This amendment of section 19 of the FOI Act provides also for the exemption of records relating to the 'Government' to be increased from five to ten years.

I am not persuaded by the reasons put forward by the Department to support its recommendation. I do not accept that the protection of section 5(3) parallels the protection of section 19 of the FOI Act. It should be borne in mind that this line of reasoning amounts to a 'de facto' amendment of section 5(3) to extend the period of immunity of strategy statements from the application of the FOI Act to ten years also. It seems to me that strategy statements are Departmental rather than governmental records. Nor do I accept the Department's contention that section 5(3) parallels section 19 of the Comptroller and Auditor General (Amendment) Act, 1993 and section 15 of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997 since these latter provisions restrict the expression of an opinion on Government policy. It is likely that any FOI request for access to material connected with the preparation of a strategy statement (now generally a published document) would be evaluated by reference to sections 20 (Deliberations of Public Bodies) and 21 (Negotiations of Public Bodies) of the FOI Act, both of which should be resilient enough to protect the legitimate interests of Departments in relation to this material. I believe that section 5(3) should be repealed on the grounds that it is unnecessary given the protections in the FOI Act (sections 20 and 21 in particular). In any event, and if the provision is not repealed, I recommend that it should be included in the Third Schedule to the FOI Act.

I agree that section 16 of the **Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act, 1998**, which protects the privacy of certain meetings of committees should not be included in the Third Schedule. However, its section 22 is unnecessary given that, in effect, it duplicates section

46(1)(c)(ii) of the FOI Act. This provision should be repealed because it is superfluous.

I note that section 13 of the **National Pensions Reserve Fund Act, 2000**, which prohibits the unauthorised disclosure of confidential information, is prefaced with the

clause "*Save as otherwise provided by law, ..*". This indicates to me that the provision is not an absolute prohibition of the type envisaged by section 32(1) of the FOI Act which could be relied upon to support the refusal of access to information under the FOI Act. Nonetheless, and for the removal of doubt, I recommend that it should be included in the Third Schedule. This will mean that the safeguards of the FOI Act relating to commercially sensitive information can be employed in the event that such information might be requested from a public body listed in the First Schedule. I note that the National Pension Reserve Fund Commission is not listed in the First Schedule.

I note the Department's recommendation to include section 23 of the **Ordnance Survey Ireland Act 2001** in the Third Schedule. I hold the view that the section 23 prohibition on disclosure, being prefaced with "*Save as otherwise provided by law ...*", is not sufficiently strong to merit treating the provision as one to which section 32(1) of the FOI Act refers. However, for the removal of doubt, I agree with the Department's recommendation that section 23 be added to the Third Schedule.

Section 18 of the **National Development Finance Agency Act, 2002** prohibits the unauthorised disclosure of confidential information. The provision allows for disclosure to the Board, to the Chief Executive Officer and to the Minister for Finance. The Department says that the provision should be excluded from the Third Schedule. I cannot agree given that the nature of the confidential information in question is such as to fall clearly within the scope and safeguards of sections 26 and/or 27 of the FOI Act, viz.

"(a) information that is expressed by the Board or the Minister to be confidential either as regards particular information or as regards information of a particular class or description,

(b) commercial information in relation to contractors, consultants, providers of finance or any other person, and

(c) proposals of a commercial nature or tenders submitted to the Agency by contractors, consultants or any other person."

The role of the National Development Finance Agency (NDFA) in advising state authorities on the optimal means of financing infrastructure projects and the role of the National Treasury Management Agency in borrowing for the exchequer, managing the national debt and administering a number of major funds including the National Pensions Reserve Fund is fundamental and important to the state. They should be

subjected to the highest possible levels of transparency and accountability and should not be placed, de facto, outside the scope of the FOI Act. The Committee may wish to note that the comparable provision of the National Treasury Management Agency Act, 1990 (section 14) is included in the Third Schedule.

I also note that section 18 of the NDFA Act is prefaced with the clause "*Save as otherwise provided by law, ..*". This is evidence that the nature of the provision is less than that envisaged by section 32(1) of the FOI Act which could be relied upon to support the refusal of access to information under the FOI Act. Nonetheless, and

for the removal of doubt in this case also, I recommend that it should be included in the Third Schedule which, if required, will mean that the safeguards of the FOI Act relating to commercially sensitive information can be applied.

Department of Foreign Affairs

The Department reports that it does not have primary responsibility for any enactments containing non-disclosure provisions.

The Department has advised that, in common with all other Departments, it is affected by certain non-disclosure provisions which are primarily the responsibility of other Departments. For example, the Official Secrets Act, 1963 is a matter for the Department of Justice, Equality & Law Reform while the secrecy provision of the National Archives Act, 1986 is a matter for the Department of the Taoiseach.

Department of Health & Children

The Department reports on a total of thirty six non-disclosure provisions, three of which are currently included in the Third Schedule. The Department recommends that a further sixteen non-disclosure provisions should be included in the Third Schedule.

Enactment	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
Vital Statistics & Births, Deaths & Marriages Registration Act 1952	Section 2(5)	N	Exclude	Agree
Adoption Act 1952	Section 22(5)	N	Exclude	Agree
Health Service Regulations, 1971	Article 5(1), (2)	Y	Include	-
E.C. (Recognition of Medical Qualifications) Regulations, 1976	Article 8(b)	N	Exclude	Disagree
Medical Practitioners Act, 1978	Section 45(5)	N	Exclude	Disagree
E.C. (Recognition of General Nursing Qualifications) Regulations 1980	Article 7(b)	N	Exclude	Disagree
E.C. (Recognition of Midwifery Nursing Qualifications) Regulations 1983	Article 8(b)	N	Exclude	Disagree
Dentists Act 1985	Section 38(5)	N	Exclude	Disagree
Nurses Act 1985	Section 38(5)	N	Exclude	Disagree
European Communities (Health Act 1947, amendment of sections 54 & 61) Regulations 1991	3 "54 (3)"	N	Exclude	Agree
Nursing Homes (Care & Welfare) Regulations 1993	Article 20	N	Include	Agree
Health Insurance Act, 1994	Section 34(1), (2)	N	Include	Agree
Stillbirths Registration Act 1994	8(3), (4)	N	Exclude	Agree
E.C. (Active Implantable Medical Devices) Regulations 1994	Article 20(1)(c)	N	Exclude	Disagree
Irish Medicines Board Act, 1995	Section 23(1)	Y	Include	-
Voluntary Health Insurance (Amendment) Act, 1996	Section 8(1)	Y	Include	-
National Social Work Qualifications Board (Establishment) Order, 1997	Article 37, 37(1)	N	Include	Agree
National Health Council on Ageing & Older People (Establishment) Order, 1997	Article 24	N	Include	Agree
Women's Health Council (Establishment) Order 1997	Article 24	N	Include	Agree
Food Safety Authority of Ireland Act, 1998	Section 43(1)	N	Include	Agree
St. James Hospital Board (Establishment) Order 1971 (Amendment) Order 1998	Article 8	N	Include	Agree
E.C. (Official Control of Foodstuffs) Regulations 1998	Article 20	N	Exclude	Agree
St. Luke's Hospital Board (Establishment) Order 1999	Article 25	N	Include	Agree

National Council for the Professional Development of Nursing & Midwifery (Establishment) Order 1999	Article 25	N	Include	Agree
Pre-Hospital Emergency Care Council (Establishment) Order 2000	Article 35	N	Include	Agree
E.C. (Hygiene of Foodstuffs) Regulations 2000	Article 18(8)	N	Exclude	Disagree
Crisis Pregnancy Agency (Establishment) Order 2001	Article 24	N	Include	Agree
Children Act, 2001	Section 178(1), (2)	N	Include	Agree
E.C. (In Vitro Diagnostic Medical Devices) Regulations 2001	Articles 17(4)(c), 20	N	Exclude	Disagree
E.C. (Medical Devices) (Amendment) Regulations 2001	Articles 12, 24 (a)	N	Exclude	Disagree
Irish Health Services Accreditation Board (Establishment) Order 2002	Article 25	N	Include	Agree
Health Research Board (Establishment) Order 2002	Article 25	N	Include	Agree
E.C. (Amendment of Cruelty to Animals Act 1876) Regulations 2002	Article 12 (C)(1)	N	Exclude	Disagree
National Treatment Purchase Fund Board (Establishment) Order, 2004	Article 16	N	Include	Agree
National Haemophilia Council (Establishment) Order, 2004	Article 16	N	Include	Agree
Civil Registration Act 2004 [awaiting commencement]	Sections 35(1), 62(1) & 73(4)	N	Exclude	Agree

I welcome the Department's recommendation to include a further sixteen of its non-disclosure provisions in the Third Schedule.

In relation to regulations which give effect to EU Directives, I would generally re-iterate the opinion of my predecessor to the effect that, by and large, unless the source Directive explicitly prohibits disclosure in any circumstance, their non-disclosure provisions should be included in the Third Schedule, where the protections and exemptions of the FOI Act can be applied. The Department says that the wording relating to confidentiality in such regulations is sufficiently close to that used in the relevant Directives to reflect them accurately. I believe that the safeguards built into the FOI Act are adequate to support decision-making on such information and I do not agree with the continuation of the blanket prohibition as proposed. For this reason, I disagree with the Departments recommendations in relation to the following group of regulations:

EC (Recognition of Medical Qualifications) Regulations 1976
EC (Recognition of General Nursing Qualifications) Regulations 1980
EC (Recognition of Midwifery Nursing Qualifications) Regulations 1983
EC (Active Implantable Medical Devices) Regulations 1994
EC (Medical Devices) (Amendment Regulations 2001

I recommend that these regulations should be included in the Third Schedule.

The non-disclosure provisions of **E.C. (Health Act, 1947, amendment of sections 54 and 61) Regulations, 1991** and **E.C. (Official Control of Foodstuffs)**

Regulations 1998 (both of which, according to the Department, will be repealed in 2005) and the **E.C. (Hygiene of Foodstuffs) Regulations 2000** are very similar in providing that a person who has gained access to information by virtue of inspections made in the enforcement of these regulations shall not disclose such information unless it is necessary to do so for the purpose of enforcement of the regulations in question. The Department has recalled my predecessor's concerns in this area and his view that the provisions should be included in the Third Schedule. My views concur with those of my predecessor. For example, in a decision (case reference 000103) I found that Council Directive 89/397/EEC contained a considerably narrower prohibition on disclosure than that contained in the E.C. (Official Control of Foodstuffs) Regulations, 1998 (S.I. No. 85 of 1998) and consequently that the correct interpretation of its article 20 limits the prohibition on disclosure only to that information which would reveal a manufacturing or commercial secret, or information which would prejudice the legitimate right to appeal of an enterprise.

The Department has referred to a decision of my predecessor (case reference 000282) which limited the impact of the prohibition on disclosure to records containing the facts, the raw data and any analysis thereof. In that case, and in this connection, the then Commissioner found that records disclosing information gathered "by virtue of inspections" may be characterised as records containing facts and raw data (and any analysis deriving from those facts and raw data) which were extracted in the course of an examination or inspection. He also commented that follow-on records containing information identical with, or of the same type as, information actually acquired "by virtue of inspections", are likely to belong to the category covered by the non-disclosure provisions. The Department also says that, in conjunction with other Departments and food safety agencies, it is considering how best to effect EU Regulation 882/2004, which will be binding in its entirety and directly applicable in all Member States from 1 January 2006, and establish a new regulatory framework on food safety. In these circumstances, given the proximity of 1 January 2006, I accept that the inclusion of these regulations in the Third Schedule need not be considered further in the course of this exercise. I further note that EU Regulation 882/2004 does not contain any non-disclosure provisions. Rather in its Article 7 (Transparency and confidentiality) the Regulation provides for public access to "(a) information on the control activities of the competent authorities and their effectiveness; and (b) information pursuant to Article 10 of Regulation (EC) No. 178/2002." The article 10 in question provides for the giving of information to the general public in the event of a food for human consumption, or a feed for animal consumption, presenting a risk to human or animal health.

The Department has stated that the non-disclosure provisions of the **Medical Practitioners Act, 1978, Dentists Act, 1985 & Nurses Act, 1985**, dealing with the Fitness to Practice Committees of the medical, dental and nursing professions should be excluded from the Third Schedule. The Department has explained that the fitness to

practice clauses are being reviewed across the board and that account will be taken of the views expressed by my predecessor in 1999. Briefly, those views were that, notwithstanding the absence of all three regulatory bodies from the Schedule of FOI prescribed public bodies, were their records to come into the possession of a FOI prescribed public body e.g. the Department itself, then a FOI

request should be decided by reference to the provisions of sections 26, 27 and 28 of the FOI Act. I understand that the three professional regulatory bodies concerned - the Medical Council, the Dental Council and An Bord Altranais - are to be added to the Schedule of FOI prescribed public bodies with effect from mid-2006.

A further professional regulatory body will be established under the Health and Social Care Professionals legislation. This will provide a framework within which to address the conduct/competence of 12 professions including psychologists, physiotherapists and social workers. The regulatory body in question - the Health and Social Care Professionals Council - will be added to the Schedule of FOI prescribed public bodies on establishment. In the circumstances, I recommend that the three non-disclosure provisions - section 45(5) of the Medical Practitioners Act 1978, section 38(5) of the Dentists Act 1985 & section 38(5) of the Nurses Act, 1985 be included in the Third Schedule immediately and that any new non-disclosure provisions in these areas also be included in the Third Schedule.

The non-disclosure provision identified by the Department in the **European Communities (In Vitro Diagnostic Medical Devices) Regulations, 2001** as giving effect to the Directive 98/79/EC should, if it were faithful to the Directive, be a confidentiality provision rather than a non-disclosure provision. The confidentiality provision in the Directive begins with the caveat "*Without prejudice to national law ...*" which grants flexibility at Member State level. I recommend that consideration be given to amending the Regulations to align it properly with the Directive in this regard. As it stands, the provision should be included in the Third Schedule.

With regard to the reported non-disclosure provision in the **EC (Amendment of Cruelty to Animals Act 1876) Regulations 2002** I note that the Directive which gave rise to the Regulations (Council Directive 86/609) provides that "Member States shall take all necessary steps to ensure that the confidentiality of commercially sensitive information communicated pursuant to this Directive is protected." The ensuing provision in the Regulations is a non-disclosure provision albeit headed "Confidentiality of information". I disagree with the Department and recommend that the provision be included in the Third Schedule.

The **Civil Registration Act, 2004** provides for the reorganisation, modernisation and renaming of the civil registration system. The Department explains that it has not yet been fully commenced. The Act repeals and restates a number of non-disclosure provisions, i.e. section 73(4) restates section 2(5) of the Vital Statistics and Births, Deaths and Marriages Registration Act, 1952, section 62(1) restates sections 8(3), (4) of the Stillbirths Registration Act, 1994 and section 35(1) restates section 22(5) of the

Adoption Act, 1952. In each case, the Department recommends exclusion from the Third Schedule. I agree broadly with the recommendations. With particular regard to the Adoption Act I note that the Department is involved in extensive consultation which is expected to lead to developments in the legislation and in the procedures on adoption information. In the circumstances, I agree that the Third Schedule aspect can be deferred for the time being.

Department of Justice, Equality & Law Reform

The Department reports on twenty two non-disclosure provisions of which all but two are currently excluded from the Third Schedule. A third provision is now being recommended for inclusion.

Enactment	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
Censorship of Films Act, 1923		N	Exclude	Agree
Censorship of Films Act, 1925		N	Exclude	Agree
Censorship of Publications Act, 1929		N	Exclude	Agree
Censorship of Films Act, 1930		N	Exclude	Agree
Censorship of Publications Act, 1946		N	Exclude	Agree
Official Secrets Act, 1963	Sections 4, 5 & 9	Y	Include	-
Registration of Title Act, 1964	Section 107	N	Exclude	Agree
Censorship of Films Act, 1970		N	Exclude	Agree
Land Registration Rules, 1972	Rule 188	N	Exclude	Agree
Employment Equality Act, 1977	Section 43(5)	Y	Include	-
Video Recordings Act, 1989		N	Exclude	Agree
Censorship of Films Act, 1992		N	Exclude	Agree
Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993	Section 10	N	Exclude	Agree
Ditto.	Section 12	N	Exclude	Disagree
Refugee Act, 1996	Section 19	N	Exclude	Disagree
Criminal Assets Bureau Act, 1996	Sections 10 & 11	N	Exclude	Agree
Employment Equality Act, 1998	Section 61(5)	N	Include	Agree
Employment Equality Act, 1998	Section 97(2)	N	Exclude	Disagree
Criminal Justice (Location of Victims Remains) Act, 1999	Section 9	N	Exclude	Agree
Equal Status Act, 2000	Section 36(2)	N	Exclude	Agree
Children Act, 2001	Sections 32 & 44	N	Exclude	Agree
Data Protection (Amendment) Act, 2003	Paragraph 10 of Second Schedule	N	Exclude	Agree
Independent Monitoring Commission Act, 2003	Section 9	N	Exclude	Agree
Private Security Services Act, 2004	Section 18 Par. 9 of Part 1 Schedule 2	N	Exclude	Disagree

The censorship provisions described by the Department prohibit the sale and distribution of certain publications. Arguably, they do not constitute the type of provision captured by section 32 of the FOI Act. In any event, I do not believe that the FOI Act is an appropriate mechanism for dealing with the issue of censorship. Accordingly, I agree that they should not be included in the Third Schedule.

Sections 4, 5 and 9 of the **Official Secrets Act, 1963** are included in the Third Schedule. I note the Department's remarks that an amended Official Secrets Act is on the Government's legislative programme and that the issue of de-criminalising unauthorised disclosures is being examined in that context. I expect that any amendments will not diminish the access rights afforded to the public by the FOI Act. The Department says that Sections / Regulations of the **Data Protection Act, 1988** which it had identified in its 1999 report are not now regarded as non-disclosure provisions. My predecessor had queried their categorisation and the matter was discussed in the course of his meeting with the Joint Committee on 5 July, 2000.

Section 10 of the **Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993** contains provisions relating to certain proceedings and evidence. The Department has explained that the purpose is to preserve the confidentiality of the interception system in any such proceedings and that the Minister is of the view that it should not be changed in any way. I agree with this position.

Section 12 of the same Act provides for restriction on disclosure of the existence of authorisations (to intercept) and of matter intercepted to the extent that the Minister considers necessary for the prevention or detection of serious offences, or in the interests of the security of the State. The Department says that the provision should continue to be excluded from the Third Schedule because the confidentiality of the interception system could be affected were the existence of an authorised interception to be disclosable.

Section 23 of the FOI Act provides for the refusal of access to records if doing so could reasonably be expected to prejudice or impair lawful methods, systems, plans or procedures for ensuring the safety of the public and the safety or security of persons and property. Section 24 (security, defence and international relations), to take a further example, provides that a head may refuse to grant access to records which could reasonably be expected to have an adverse effect on the security or defence of the State. Both sections also provide that, where it might be considered appropriate in order to preserve the integrity of the information concerned, a head shall not disclose whether or not the record/s exist. This constitutes robust protection for records of the nature covered by the section in question. My concern is that, if this provision is not included in the Third Schedule, the public interest test contained in section 23(3) of the FOI Act, cannot be exercised. Therefore, I cannot agree with the Department and recommend that it should be included in the Third Schedule.

The Department has recommended, in relation to section 19 of the **Refugee Act, 1996**, which provides for the confidentiality of the identity and nationality of applicants for asylum, that no changes should be made. This includes its continued omission from the Third Schedule. Given the very strong protections in sections 26 and 28 of the FOI Act, I cannot see good grounds for excluding the provision from the Third Schedule. I

recommend that section 19 be added to the Third Schedule.

The Department has stated that, because of its similarity to section 43(5) of the

Employment Equality Act, 1977 which is already included in the Third Schedule, section 61(5) of the **Employment Equality Act, 1998** [which provides that information obtained in the course of an inquiry shall not be included in any report produced by the Equality Authority without the consent of the subject] should be included. My predecessor commented that neither provision would appear either to authorise or proscribe the disclosure of information but that, for the sake of consistency and given their similarity, both provisions should have similar treatment under the FOI Act. He recommended that section 61(5) should be included in the Third Schedule and I agree.

Section 97(2) is a similar supplementary provision relating 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. The Department has said that, as the Equality Tribunal is not a FOI prescribed public body, the provision should not be included in the Third Schedule on those ground alone. I disagree and recommend that the provision should be included and that the protections of the FOI Act are sufficient to protect any such information which might be in the possession of an FOI prescribed public body.

The Department has recommended that no change should be made to section 9 of the **Criminal Justice (Location of Victims Remains Act), 1999**. As this provision amends section 24 of the FOI Act, the issue of its inclusion in the Third Schedule does not arise. The amendment at section 24(1)(e) provides that access to a record may be refused if it could reasonably be expected to affect adversely "matters relating to the functions of the Independent Commission for the Location of Victims' Remains (within the meaning of the *Criminal Justice (Location of Victims' Remains) Act, 1999*)."

The Department has also provided details of a number of non-disclosure provisions which have been introduced since the 1999 review.

1. section 36(2) of the **Equal Status Act, 2000**
2. sections 32 and 44 of the **Children Act, 2001**
3. paragraph 10 of the Second Schedule to the **Data Protection Act, 1988** (as inserted by section 20 of the Data Protection (Amendment) Act, 2003)
4. section 9 of the **Independent Monitoring Commission Act, 2003**
5. section 18 and Schedule 2 of the **Private Security Services Act, 2004**

1. The Equal Status Act, section 36(2) is a provision prohibiting the disclosure or publishing, except in stated circumstances, of information obtained for the purposes of any investigation, mediation, hearing or inquiry. Contravention constitutes an offence. Given the nature of this information which is acquired for a specific quasi-judicial purpose and the fact that the excepted circumstances are clearly stated and

comprehensive, I agree that inclusion in the Third Schedule would not be appropriate.

2. The confidentiality provision in section 32 of the Children Act (Diversion Programme) protects information obtained while participating as a member of a case conference on a child who has been admitted to the Diversion Programme which is

aimed at avoiding the creation of a criminal record. Section 44 relates to the Committee appointed by the Minister to oversee the Diversion Programme. In its subsection 10, it provides that, subject to the FOI Act, information obtained shall not be disclosed. The reference to the FOI Act is, presumably, intended to apply to any records of the Committee which might be in the possession of the Department. I agree with the Department that, in both respects, inclusion in the Third Schedule would not be appropriate.

3. The Data Protection Act amendment introduced a duty of confidence on the Data Protection Commissioner and on his/her Office in the case of confidential information obtained in the course of their duties. This is a duty which outlives their actual tenure of office/employment. It is also an implementation of the requirements of Data Protection Directive 95/46/EC. I believe that its inclusion in the Third Schedule would not be appropriate.

4. With regard to the Independent Monitoring Commission Act, the Department has recommended that no change should be made. I agree with these views. I note particularly that this Act contains an amendment to section 24 of the FOI Act thus listing matters relating to the function of the Independent Monitoring Commission as a category of record to which access might be refused in circumstances where adverse effect could reasonably be expected. In these circumstances, the issue of its inclusion in the Third Schedule to the FOI Act does not arise.

5. The provisions of the Private Security Services Act relate to the Private Security Authority (PSA) which was established in October 2004 with a brief to control and supervise individuals and firms providing private security services and to investigate complaints against them. Section 18 provides that, without the consent of the Authority, unless otherwise provided by law, information obtained by virtue of the work of the Authority cannot be disclosed. Similarly, members of the Private Security Appeals Board, and its Secretary, are prohibited from disclosing information obtained in the course of their duties. In each case, the Department has recommended that no changes should be made to the provisions. The Department's report of 29 October 2004 advised that a decision had not been made on whether or not the PSA should be included in the First Schedule to the FOI Act, thereby becoming a public body for purposes of the FOI Act. The Department added that the question of the inclusion of the PSA in the Third Schedule could be considered in tandem with that decision. The Minister for Finance's announcement, on 21 October 2005, of proposed additions to the First Schedule did not include the PSA. I am somewhat surprised at the decision not to include the PSA because I hold a view that there is a compelling public interest dimension to the regulatory environment surrounding the private security industry.

Accordingly, I would have anticipated that the PSA would have been prescribed for purposes of FOI and that the non-disclosure provisions of the Private Security Services Act would be recommended for inclusion in the Third Schedule. In any event, section 18 of the Private Security Services Act, being prefaced with "*Save as otherwise provided by law, ...*" may mean that the FOI Act overrides the prohibition on disclosure where that information was held by a public body within remit, e.g. the Department itself. However, it would be preferable to bring the provision within the scope of the FOI Act by its inclusion in the Third Schedule.

Department of Social & Family Affairs

The Department reports on four non-disclosure provisions, two of which are already listed in the Third Schedule and the remaining two of which are now recommended for inclusion.

Enactment	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
Combat Poverty Agency Act, 1986	Section 20	Y	Include	-
Pensions Act, 1990	Section 24	Y	Include	-
Pensions Act, 1990	Section 145 of Part XI	N	Include	Agree
Comhairle Act, 2000	Section 18	N	Include	Agree

I welcome the inclusion of section 145 of the **Pensions Act, 1990** in the Third Schedule. Given that the Pensions Ombudsman is subject to FOI, this provision could be seen as a means by which he could act without reference to the FOI Act. Its inclusion protects against such an eventuality.

I also agree with the Department that the non-disclosure provision of the **Comhairle Act, 2000** is appropriately included in the Third Schedule.

Department of the Taoiseach

The Department reports on two non-disclosure provisions, one of which is recommended for inclusion in the Third Schedule.

Enactment	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
National Archives Act, 1986	section 8(4)	N	Include	-
Statistics Act, 1993	sections 32 - 35 of Part V	N	Exclude	Agree

The Department has pointed out that while the Minister for Arts, Sport and Tourism is largely responsible for the **National Archives Act, 1986**, the Taoiseach has responsibility for the secrecy provision contained in section 8(4).

Section 8(4) of the National Archives Act provides as follows:

"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 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."

In November 1999, my predecessor recommended that this provision should be included in the Third Schedule. Therefore, I welcome this recommendation, not least because it maintains coherence with the recommendations of the Department of the Environment, Heritage & Local Government relating to the archives of Local Authorities.

The Department explains that the non-disclosure provisions of the **Statistics Act, 1993** underpin the data collection operations of the Central Statistics Office by guaranteeing that all information provided in response to statistical inquiries is treated in confidence. The Department states that, without this guarantee, respondents would be reluctant to provide the confidential and market sensitive information which is required for the compilation of official statistics. The Department has recommended that the provision should continue to be excluded from the Third Schedule. I agree for the reasons given.

Department of Transport

The Department reports on nine non-disclosure provisions, six of which are already included in the Third Schedule:

Enactment	Provision	Already in Third Schedule	Department's Recommendation	IC Opinion
Transport (Re-Organisation of Córas Iompair Éireann) Act, 1986	Section 22	Y	Include	-
Roads Act, 1993	Section 38	Y	Include	-
Irish Aviation Authority Act, 1993	Section 35	Y	Include	-
Air Navigation (Notification and Investigation of Accidents and Incidents) Regulations, 1997	Section 24(1) and 25(13)	N	Exclude	Agree
Air Navigation and Transport (Amendment) Act, 1998	Section 36	N	Include	Agree
Aviation Regulation Act, 2001	Section 19	Y	Include	-
Transport (Railway Infrastructure) Act, 2001	Section 30	Y	Include	-
Taxi Regulation Act, 2003	Section 21(1)	Y	Include	-

The Department reports on two non-disclosure provisions where continuing exclusion from the Third Schedule is recommended, viz. articles 24(1) and 25(13) of the **Air Navigation (Notification and Investigation of Accidents and Incidents) Regulations, 1997**. The provisions are that, unless the appropriate authority for the administration of justice in the state of occurrence of an accident or incident determines that the benefits resulting from disclosure of the records outweighs the adverse domestic and international impact it may have, all records associated with the investigation of an air navigation occurrence shall be confined to that investigation. The Department has explained that this is determined by the requirements of the International Convention on Civil Aviation (the Convention) (section 5.12 of Annex 13) and EU Directive 94/56/EC. The Convention, to which Ireland is a party, states in Article 26 that "in so far as its laws permit, States shall conduct investigations in accordance with ICAO procedure." Additionally, the Department says that it is essential to exclude the non-disclosure provision from the Third Schedule so as to maintain the trust of the aviation industry in the confidential nature of the Department's air accident investigation activities. The Department also explains that the sole objective of any investigation is to prevent recurrence and that the mere possibility that records could be disclosed could undermine an investigation if the willingness of those involved to voluntarily disclose sensitive information were to be adversely affected.

The regulations also provide that a draft report of an investigation in another jurisdiction cannot be released without the express permission of that other jurisdiction. This

provision derives from the Convention (Annex 13, paragraph 6.13) and the Department considers that its exclusion from the Third Schedule is necessary to preserve international relations and the effective functioning of air

accident investigation systems. The Department recognises that the class exemption provided by section 24 of the FOI Act could provide safeguards but feels that the three grounds cited (security, defence and international relations) are too limited and, therefore, that the exclusion of the provision from the Third Schedule must be maintained. In all the circumstances, I agree with the Department's views.

The Department recommends that section 36 of the **Air Navigation and Transport (Amendment) Act, 1998** should be included in the Third Schedule in view of its similarity to other included provisions , e.g. section 35 of the Irish Aviation Authority Act, 1993. In 1999, my predecessor noted that section 36 should be addressed directly in the event of Aer Rianta becoming a FOI prescribed public body. This has not happened and, since 1 October 2004, the State Airports Act changed the name of Aer Rianta cpt to Dublin Airport Authority plc. In terms of the FOI Act, its future status, and that of its counterparts - Cork Airport Authority plc and Shannon Airport Authority plc - remains to be determined. I welcome the Department's recommendation which will allow the FOI Act to apply to such records where they are held by public bodies within remit.

Table 1:

Non-Disclosure Provisions Recommended for Inclusion in Third Schedule by Departments

Department	Enactment	Provision
Arts, Sport & Tourism	Irish Sports Council Act, 1999	Section 21
Communications, Marine & Natural Resources	Turf Development Act, 1998	Section 32
	Sustainable Energy Act, 2002	Section 19
Community, Rural & Gaeltacht Affairs	Western Development Commission Act, 1998	Section 18
Enterprise, Trade & Employment	Prices Act, 1958	Section 25
	National Standards Authority of Ireland Act, 1996	Par. 5 of Second Schedule
	Industrial Development (Enterprise Ireland) Act, 1998	Section 16
	Industrial Development (Science Foundation Ireland) Act, 2003	Section 17
Environment, Heritage & Local Government	Air Pollution Act, 1987	Section 16
	Planning & Development Act, 2000	Section 113
	Local Government Act, 2001	Section 80
Finance	Food Safety Authority of Ireland Act, 1998	Section 43(1)
	Ordnance Survey Ireland Act, 2001	Section 23
Health & Children	Nursing Homes (Care & Welfare) Regulations 1993	Article 20
	Health Insurance Act, 1994	Section 34(1) & (2)
	National Social Work Qualifications Board (Establishment) Order, 1997	Article 37 & 37(1)
	National Health Council on Ageing & Older People (Establishment) Order, 1997	Article 24
	Women's Health Council (Establishment) Order 1997	Article 24
	Food Safety Authority of Ireland Act, 1998	Section 43(1)
	St. James Hospital Board (Establishment) Order 1971 (Amendment) Order 1998	Article 8
	St. Luke's Hospital Board (Establishment) Order 1999	Article 25
	National Council for the Professional Development of Nursing & Midwifery (Establishment) Order 1999	Article 25
	Pre-Hospital Emergency Care Council (Establishment) Order 2000.	Article 35

	Children Act, 2001	Section 178(1) & (2)
	Crisis Pregnancy Agency (Establishment) Order 2001	Article 24
	Irish Health Services Accreditation Board (Establishment) Order 2002.	Article 25
	Health Research Board (Establishment) Order 2002	Article 25
	National Treatment Purchase Fund Board (Establishment) Order, 2004	Article 16
	National Haemophilia Council (Establishment) Order, 2004	Article 16
Justice, Equality & Law Reform	Employment Equality Act, 1998	Section 61(5)
Social, Community & Family Affairs	Pensions Act, 1990	Section 145 of Part XI
	Comhairle Act, 2000	Section 18
Taoiseach	National Archives Act, 1986	Section 8(4)
Transport	Air Navigation and Transport (Amendment) Act, 1998	Section 36

Table 2:

Non-Disclosure Provisions Recommended for Exclusion from Third Schedule by Departments

** Denotes that the Information Commissioner does not agree with the Department's recommendation*

Department	Enactment	Provision
Agriculture & Food	EC (Mutual Assistance as regards correct application of legislation on veterinary and zootechnical matters) Regulations, 1993	Article 3(2)
	EC (Authorisation, Placing on the Market, Use and Control of Plant Protection Products) Regulations, 2003	Article 11 *
Communications, Marine & Natural Resources	Fisheries (Amendment) Act, 1997	Section 30 *
	Merchant Shipping (Investigation of Marine Casualties) Act, 2000	Section 18 *
Community, Rural & Gaeltacht Affairs	Dormant Accounts Act, 2001	Section 26(2) *
	Unclaimed Life Assurance Policies Act, 2003	Section 24(2) *
Education & Science	Education Act, 1998	Section 53 *
	Commission to Inquire into Child Abuse Act, 2000	Section 28 *
	Commission to Inquire into Child Abuse Act, 2000	Sections 27, 31, 33 & 34
	Residential Institutions Redress Act, 2002	Section 28 *
	Residential Institutions Redress Act, 2002	Sections 30 & 31
Enterprise, Trade & Employment	Industrial Relations Act, 1946	Section 22 *
	Trade Marks Act, 1996	Sections 43, 70 & 91
	Industrial Relations Act, 1969	Section 14 *
	Industrial Relations Act, 1990	Section 25(6) *
	Companies Act, 1990	Section 21 *
	Patents Act, 1992	Sections 28, 88, 94, 96 & 101
	Patents Rules, 1992	Rules 23, 64 & 65
	Transnational Information and Consultation of Employees Act, 1996	Section 15
	Company Law Enforcement Act, 2001	Section 17 *
	Industrial Designs Act, 2001	Sections 38(3), 39(2) & 39(5) *
	Industrial Designs Regulations, 2002	Regulation 31(2) *
	Competition Act, 2002	Sections 32, 22(4) & 21(3) *

	Personal Injuries Assessment Board Act, 2003	Section 73 *
	Companies (Auditing and Accounting) Act, 2003	Section 31 *
Environment, Heritage & Local Government	Radiological Protection Act, 1991	Section 36(1)(d) *
	Electoral Act, 1997	Section 14 *
	Genetically Modified Organisms (Contained Use) Regulations, 2001	Article 9 *
	Genetically Modified Organisms (Deliberate Release) Regulations, 2003	Article 10 *
Finance	Central Bank Act, 1942	Section 33 AK
	Ombudsman Act, 1980	Section 9
	Trustee Savings Bank Act, 1989	Paragraph 15 of Second Schedule
	Waiver of Certain Tax, Interest and Penalties Act, 1993	Section 7
	Ethics in Public Office Act, 1995	Section 35 *
	Public Service Management Act, 1997	Section 5(3) *
	Taxes Consolidation Act, 1997	Section 859
	Various Double Taxation Relief Orders	Articles relating to the Exchange of Information
	Comptroller & Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act, 1998	Sections 16 & 22
	National Pensions Reserve Fund Act, 2000	Section 13 *
	National Development Finance Agency Act, 2002	Section 18 *
Health & Children	Vital Statistics & Births, Deaths & Marriages Registration Act 1952	Section 2 (5)
	Adoption Act 1952	Section 22(5)
	E.C. (Recognition of Medical Qualifications) Regulations 1976	Article 8(b) *
	Medical Practitioners Act 1978	Section 45(5)
	E.C. (Recognition of General Nursing Qualifications) Regulations 1980	Article 7(b) *
	E.C. (Recognition of Midwifery Nursing Qualifications) Regulations 1983	Article 8(b) *
	Dentists Act 1985	Section 38(5) *
	Nurses Act 1985	Section 38(5) *
	European Communities (Health Act 1947, amendment of sections 54 & 61) Regulations, 1991	Article 3 "54(3)"
	E.C. (Active Implantable Medical Devices) Regulations 1994	Article 20(1)(c) *
	Stillbirths Registration Act 1994	Sections 8(3) & (4)
	E.C. (Official Control of Foodstuffs) Regulations 1998	Article 20
	E.C. (Hygiene of Foodstuffs) Regulations 2000	Article 18(8) *
	E.C. (In Vitro Diagnostic Medical Devices) Regulations, 2001	Articles 17(4)(c) & 20 *
	E.C. (Medical Devices) (Amendment) Regulations 2001	Articles 12, 24(a) *

	E.C. (Amendment of Cruelty to Animals Act 1876) Regulations 2002	Article 12 (C)(1) *
	Civil Registration Act 2004 [Awaiting commencement]	Sections 35(1), 62(1), 73(4)
Justice, Equality & Law Reform	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	
	Registration of Title Act, 1964	Section 107
	Land Registration Rules, 1972	Rule 188
	Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993	Section 10
	Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993	Section 12 *
	Refugee Act, 1996	Section 19 *
	Criminal Assets Bureau Act, 1996	Sections 10 and 11
	Employment Equality Act, 1998	Section 97(2) *
	Criminal Justice (Location of Victims Remains) Act, 1999	Section 9
	Equal Status Act, 2000	Section 36(2)
	Children Act, 2001	Sections 32 & 44
	Data Protection (Amendment) Act, 2003	Paragraph 10 of Second Schedule
	Independent Monitoring Commission Act, 2003	Section 9
	Private Security Services Act, 2004	Section 18 Par. 9 of Part 1 Schedule 2 *
Taoiseach	Statistics Act, 1993	Sections 32 - 35 of Part V
Transport	Air Navigation (Notification and Investigation of Accidents and Incidents) Regulations, 1997	Section 24(1) & 25(13)

Table 3:

Non-Disclosure Provisions Included in Third Schedule [Existing]

Part I (Statutes)

** Denotes that removal from the Third Schedule is recommended by the Department*

Department	Enactment	Provision
Agriculture & Food	Forestry Act, 1988	Section 33
	Agriculture (Research, Training & Advice Act), 1988	Section 14
	Bord Glas Act, 1990	Section 23
	Milk (Regulation of Supply) Act, 1994	Section 16(1)
	Bord Bia Act, 1996	Section 26
Arts, Sport & Tourism	Irish Film Board Act, 1980	Section 18
	Irish Horseracing Industry Act, 1994	Section 17
	National Tourism Development Authority Act, 2003	Section 22
	Arts Act, 2003	Section 20
Communications, Marine & Natural Resources	Gas Act, 1976	Section 20
	Postal & Telecommunications Services Act, 1983	Section 37
	Marine Institute Act, 1991	Section 15
	Harbours Act, 1996	Section 33
	Electricity Regulation Act, 1999	Section 13
	Gas (Interim) Regulation Act, 2002	Section 23(5)
	Communications Regulation Act, 2002	Section 24
	Digital Hub Development Agency Act, 2003	Section 27(5)
Community, Rural & Gaeltacht Affairs	Udarás na Gaeltachta Act, 1979	Section 15
Enterprise, Trade & Employment	*Industrial Relations Act, 1946	Section 22
	*Industrial Relations Act, 1969	Section 14
	Industrial Development Act, 1986	Sections 42 & 43
	Labour Services Act, 1987	Section 13
	Restrictive Practices (Amendment) Act, 1987	Section 36
	*Industrial Relations Act, 1990	Section 25(6)
	Trade and Marketing Promotion Act, 1991	Section 10
	Industrial Development Act, 1993	Paragraphs 4 & 5 of Second Schedule
	Safety, Health and Welfare at Work Act, 2005	Section 73

Environment, Heritage & Local Government	*Radiological Protection Act, 1991	Section 36(1)(d)
	Environmental Protection Agency Act, 1992	Section 39
	Housing (Miscellaneous Provisions) Act, 2002	Section 13
Finance	National Treasury Management Agency Act, 1990	Section 14
Health & Children	Health Service Regulations, 1971	Article 5(1), (2)
	Irish Medicines Board Act, 1995	Section 23
	Voluntary Health Insurance (Amendment) Act, 1996	Section 8
	Health Act, 2004	Section 26
Justice, Equality & Law Reform	Official Secrets Act, 1963	Sections 4, 5 & 9
	Employment Equality Act, 1977	Section 43(5)
Social & Family Affairs	Combat Poverty Agency Act, 1986	Section 20
	Pensions Act, 1990	Section 24
Transport	Transport (Re-Organisation of Córas Iompair Éireann) Act, 1986	Section 22
	Roads Act, 1993	Section 38
	Irish Aviation Authority Act, 1993	Section 35
	Aviation Regulation Act, 2001	Section 19
	Transport (Railway Infrastructure) Act, 2001	Section 30
	Taxi Regulation Act, 2003	Section 21(1)

Part II (Statutory Instruments)

Department	Enactment	Provision
Environment, Heritage & Local Government	Health Services Regulations, 1971	Article 5
	Fire Services Council (Establishment) Order, 1983	Article 13
	Housing (Rent Tribunal) Regulations, 1983	Article 14(3)
	European Communities Act, 1972 (Access to Information on the Environment) Regulations, 1998	Articles 7 & 8

Appendix

Correspondence with Department of Finance

- (1) Letter from Office of Information Commissioner to Department of Finance -
29 September 2005
- (2) Reply from Department of Finance to Office of Information Commissioner -
14 October 2005
- (3) Letter from Office of Information Commissioner to Department of Finance -
21 November 2005