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FOI Update

The Freedom of Information Act 2014



On 14 October, 2014, the President signed the Freedom of Information Act 2014 (the “Act”) into law. The Act repeals and replaces the Freedom of Information Acts 1997 and 2003 (the “FOIA”), and results in most (but not all) regulations made under the FOIA ceasing to have effect.

According to the explanatory memorandum accompanying the Freedom of Information Bill, the purpose of the new legislation is to consolidate, modernise and update the FOI legislation generally. Its further purposes are to:

- remove the main restrictions on access to official information introduced by the Freedom of Information (Amendment) Act 2003 (the “2003 Act”);
- extend FOI to all public bodies; and
- provide a framework for the extension of FOI to non-public bodies receiving significant funding from the Exchequer.

This article summarises the main changes brought about by the Act.

FOI Bodies

Public Bodies: Perhaps the most significant change proposed is that all “public bodies” will be “FOI bodies” unless specifically exempt.

The meaning of “public body” is set out in section 6(1), which provides that certain entities shall be public bodies, including Departments of State, bodies established by enactment (other than the Companies Acts), and higher education institutions receiving public funding.

Also, unless otherwise provided, all bodies listed as public bodies in the First Schedule to the FOIA, or standing prescribed as such on 14 October, 2014, continue to be public bodies, and therefore FOI bodies.

Further, section 54 specifically “saves” a number of regulations which were made under the FOIA prescribing certain public bodies¹, and which set out particular provisions regarding the extent of the application of FOI to them.

Prescribed Bodies

Under section 7, the Minister can prescribe as FOI bodies, in whole or in part, non-public bodies that receive significant funding from the Exchequer.

Exempt Agencies

The Act provides that most commercial State bodies are to be fully exempt from FOI, such as An Post, Ervia, Dublin Bus, Coillte and ESB, as well as school boards of management (except those established or maintained by an Education and Training Board).

Partially-Included Agencies: Certain bodies are ‘FOI-able’ in part only. These include the Adoption Authority, the Central Bank of Ireland, the Garda Síochána, the Insolvency Service of Ireland, the Mental Health (Criminal Law) Review Board, NTMA, NAMA, the various Ombudsmen, the Equality Tribunal, the Labour Relations Commission and the Labour Court.

1. These bodies include: The Food Safety Authority of Ireland, the National Council on Ageing and Older People, and various hospitals, various charitable and religious organisations in so far as their functions relate to mental health or intellectual disability services. Also included as regards certain administration and communications functions only are RTE, Seirbhísí Theilifís Na Gaeilge Teoranta and DTT Network Company, and the NSAI.



Restriction of the new Act: As with the previous FOIA, the Act excludes the application of FOI to certain records, including records held, and in some cases, created by, certain persons or bodies. These include the CAB, records relating to the President, inquiries by a Tribunal of Inquiry and the private papers of Oireachtas members. Also excluded are certain records held (and/or created, where relevant) by the Courts, the Defence Forces, the Central Bank of Ireland, the Garda Síochána, the Attorney General, the DPP, and the Comptroller and Auditor General.

The Act provides a six-month lead-in time for new bodies coming under FOI. For all existing FOI bodies, the Act took effect immediately on 14 October, 2014.

Records

The definition of “record”, which is perhaps the most fundamental term or art in FOI, has been updated and modernised to include (i) material in any electronic device or in machine-readable form, and (ii) mechanical or electronic devices in which visual images or other data are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced.

An “electronic device” is also defined as including “any device which uses any electrical, digital, magnetic, optical, electromagnetic, biometric or photonic means, or other forms of related technology, or any combination thereof, to store or transmit data, or both store and transmit data”.

Arguably, whilst this modern definition brings clarity, it may not mean much practical change as the previous definition of the term was broad enough to cover any thing which held or stored information electronically.

Exemption Provisions

By contrast with other aspects of the Act, there are relatively few amendments to the exemption provisions, which are now set out in Part 4.

As with the previous FOIA, the exemption provisions can be categorised into mandatory and discretionary exemptions, and the majority still include “harm-based” and/or “balance of public interest” tests, with some providing for “class-based” exemption.

Some notable amendments include:

1. Meetings of the Government

Section 28 has replaced the old section 19, and reversed the amendments introduced by the 2003 Act, including the exemption for communications between members of the Government. It now reinstates the discretionary exemption that had been put on a mandatory footing, along with the rest of the exemption provision, in the 2003 Act.

The discretionary exemption applies to internal Government records, records created for submission to the Government, and records containing information solely for Government business. It does not apply to factual information relating to Government decisions already published, or to records relating to a decision made over 5 years previously.

The mandatory exemption applies to records that reveal the substance of statements made at Government meetings where those records are not covered by the discretionary exemption, and are not records of the Government by which a decision of the Government is published.

2. Deliberations of FOI bodies

Section 29 has replaced the old section 20. It also reverses most amendments made by the 2003 Act, including removing the power of a Secretary-General to certify conclusively that records related to a deliberative process of a Department of State.

The amended discretionary exemption applies only where granting the request would be contrary to the public interest. In that regard, the FOI body is specifically prompted, however, to consider whether, for example, granting the request would be contrary to the public interest because the requester would thereby become aware of a significant proposed decision of the body.

3. Security, defence and international relations

Section 33 has replaced the old section 24, along with making some structural and substantive amendments. For example, a discretionary exemption applies where access could reasonably be expected to affect adversely State security, defence, international relations or matters relating to Northern Ireland. However, a mandatory exemption applies to information relating to such matters where it was communicated in confidence to or by any person and expressed to be so communicated.

Under section 33(2), the records to which the discretionary exemption may apply specifically include records that contain information relating to the tactics, strategy or operations of the Defence Forces, or certain communications between the Government and a diplomatic mission or consular post in or of the State, or another government.

A mandatory exemption also applies to confidential communications relating to, for example, State negotiations with other states or international organisations and information relating to State security or defence intelligence.

4. Information obtained in confidence

Section 35 has replaced section 26, proposing one amendment only to cure an anomaly in the previous legislation. This anomaly prevented the exemption from applying to records containing confidential information provided by a third party to a public body, where the records containing the information were prepared by staff of the body concerned.

The Act now provides that a “record” for the purposes of this section includes “information conveyed in confidence in person, by telephone, electronically or in writing (including a written note taken of a phone message by a person authorised to receive such message).”

5. Personal information

Section 37, which replaces the old section 28, remains unchanged, save for an updated reference to the Medical Practitioners Act 2007.

However, the definition of “personal information” in the Act has been amended to incorporate the definition of “sensitive personal data” in the Data Protection Acts 1988 & 2003. Thus, it specifically includes information relating to trade union membership, the commission or prosecution of offences, racial or ethnic origin, civil status, disability, political opinions, and religious or philosophical beliefs.

Consequently, the Act clarifies that the rights of access to, and amendment/correction of, personal information under FOI and data protection are consistent as regards personal information/personal data.

6. Financial and economic interests of the State

Section 40 has replaced the old section 31, and introduces a new ground for this discretionary exemption, as well as specifying new types of records to which the exemption may apply.

Under section 40(1)(c), the exemption may apply where access could reasonably be expected to have a negative impact on decisions by enterprises to invest or expand in the State, on their research activities or on the effectiveness of the industrial development strategy of the State, particularly regarding the strategies of other states.

Under section 40(2), the additional records to which the exemption may apply specifically now include records relating to investment or provision of financial support by the State or a public body, liabilities of the State or a public body, or advising on or managing public infrastructure projects, including public private partnership arrangements.

Other Notable Amendments

The Act makes numerous amendments to the previous procedural and compliance requirements under FOI. These include:

1. Publication Schemes (section 8)

FOI bodies are now required to publish a “publication scheme” to replace and enhance the now out-dated sections 15 & 16 reference manuals. In addition to incorporating the old reference manuals, these schemes must specify the classes of information that each FOI body has published or intends to publish, and the terms under which it will make such information available, including any applicable charge.

In preparing, reviewing or revising these schemes, FOI bodies must have regard to the public interest in (i) allowing public access to information held by them, (ii) the publication of the reasons for their decisions, and (iii) publishing information of relevance or interest to the general public regarding their activities and functions.

The schemes are similar to those required under the UK FOI legislation; however, whilst they must be prepared having regard to the FOI Code of Practice and any model scheme or guidelines published by the Minister, unlike the UK, the Irish Act does not require that they be approved by the Information Commissioner.

The requirement to publish a publication scheme will take effect 12 months from the date of enactment of the Act, or earlier by Ministerial order.

2. The right of access (section 11)

Section 11, which replaces the old section 6, makes several procedural amendments, including:

- (i) For newly 'FOI-able' public bodies, subject to certain limited exemptions, the right of access applies to records created on or after 21 April, 2008.
- (ii) In complying with the right of access, FOI bodies must have regard to the following key FOI principles:
 - “the need to achieve greater openness in the activities of FOI bodies and to promote adherence by them to the principle of transparency in government and public affairs”,
 - “the need to strengthen the accountability and improve the quality of decision making of FOI bodies”, and
 - “the need to inform scrutiny, discussion, comment and review by the public of the activities of FOI bodies and facilitate more effective participation by the public in consultations relating to the role, responsibilities and performance of FOI bodies.”

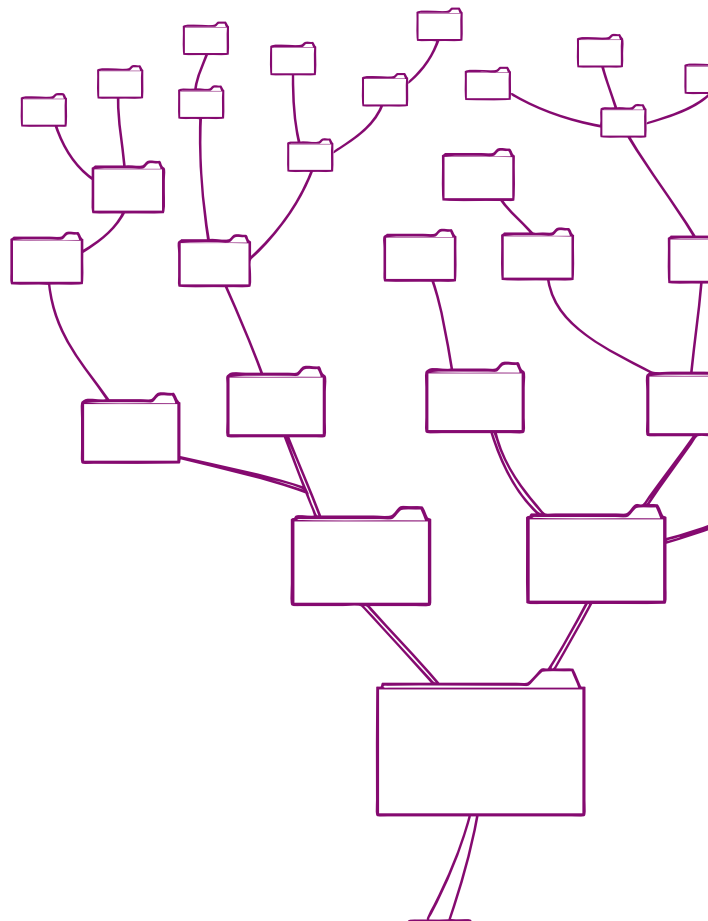
These principles should help FOI bodies to identify “true” public interest factors for the purposes of applying public interest tests, as was considered to be necessary by the Supreme Court in *Rotunda*².

- (iii) Section 11(7) replaces the old section 6(7), and provides that there is no right of access to an exempt record where (i) the exemption is mandatory, or (ii) where the exemption is subject to a public interest override, if the factors in favour of refusal outweigh those in favour of release.

This amendment seeks to strike a balance between the pre- and post-*Rotunda* positions on whether the exemption provisions should be interpreted narrowly. According to the explanatory memorandum that accompanied the FOI Bill, this section was intended to clarify that there is a general right of access to records which will only be set aside where an exemption clearly applies.

- (iv) As under the previous FOIA, records held by a contract³ service provider to an FOI body will be deemed to be held by that FOI body. The Act defines “service provider” as any contract service provider who was not, itself, an FOI body at the time the FOI request was made. Consequently, service providers may now include exempt public bodies and commercial state bodies.

3. Also, services provided under any administrative arrangement will also qualify, and a formal contract is not required



2. *The Governors and Guardians of the Hospital for the Relief of Poor Lying-In Women v The Information Commissioner* [2011] IESC 26

3. Administrative Grounds for Refusal (section 15)

The Act contains useful new administrative grounds for refusal, including where (i) the FOI body intends to publish the records within 6 weeks of the request, and (ii) the records have already been released to the requester or a previous requester and are available to the requester concerned, or the requesters are acting in concert. This latter ground may be helpful for FOI bodies dealing with repeated requests and/or persistent requesters.

In addition, the administratively burdensome ground applies where interference with or disruption of work would be caused, either to the FOI body as a whole, or even to a particular functional area of the FOI body concerned. Again, this may be helpful for FOI bodies where the appropriate section/department dealing with an FOI request has limited resources, as is increasingly the case.

4. Manner of Access (section 17)

The Act provides that where searchable electronic versions of records are available, access can be provided in that form. For requesters, it is likely that records so accessed will be more useful.

For FOI requests relating to data held in more than one electronically-held record, FOI bodies are required to take reasonable steps to search for and extract such records, regardless of whether such steps result in the creation of a new record.

5. Reviews by the Information Commissioner (section 22)

The Act contains several changes to the conduct of reviews by the Information Commissioner, including the addition of new grounds on which the Commissioner may refuse a review application, such as where the review would cause an administrative burden to his Office.

It also specifies that nothing prevents the Commissioner, in conducting a review, from taking into account that a record has lost its confidentiality, is no longer commercially sensitive, or is personal information relating to a third party. Thus, in a review to which the third party consultation procedure applies, the Commissioner may now consider the request afresh, rather than just the FOI body's decision on where the balance of public interest lies.

FOI bodies should also note the new enforcement power of the Commissioner. Under section 45, the Commissioner may apply for a court order to oblige an FOI body to comply with his decision where it has failed to do so, and where the decision has become binding owing to its not having been challenged or made the subject of appeal to the High Court. The Act does not specify how orders so obtained are to be enforced, but the expectation clearly is that FOI bodies will abide by the High Court order made in any case, and wish to avoid being found to be in contempt.

6. Appeals to the High Court (section 24)

Under the previous FOIA, a decision of the Commissioner could be appealed to the High Court on a point of law only. However, the Act includes a right to appeal on a finding of fact if it is argued that the release of a record would contravene EU law.

It also reduces the time for appealing to the High Court to 4 weeks. If, however, the Commissioner's decision is to part-grant the FOI request, the time limit remains at 8 weeks, but the FOI body must release the records it is prepared to release under the Commissioner's part-grant decision within the first 4 weeks of that 8-week period. Presumably, this distinction is drawn as it will be necessary to analyse carefully those records to which access has been granted or refused before deciding whether to appeal.

7. Fees (section 27)

The Act amends the current fees provisions in that it allows the Minister, by Order, to set fees for various matters. He has already done so, reducing the fees prescribed for internal review applications from €75 to €30 and reviews by the Commissioner from €150 to €50. These reductions make FOI more accessible. However, for FOI bodies, and indeed the Commissioner, the 'nominal' fees previously prescribed were far exceeded by the costs actually incurred in processing FOI requests. Consequently, these reductions will increase the FOI costs for the State.

The Minister has also introduced a minimum threshold, and a maximum cap, for search, retrieval and copying fees. Now, if the fees are less than €100, no fee can be charged and the maximum that can be charged is €500.

8. Offences and penalties (sections 52 & 53)

For the first time, the Act makes it an offence to destroy or materially alter a record with the intention to deceive or without lawful excuse after an FOI request has been made for that record. Any person guilty of such offence is liable on summary conviction to a class B fine. Personal liability for officers of incorporated or unincorporated bodies can apply.

Proceedings for an offence must be brought within 12 months from the date of the offence, or the date on which sufficient evidence to prosecute is known.



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Legal 500, 2014

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