

Annual Report 2015



Oifig an Choimisinéara Faisnéise
Office of the Information Commissioner



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Foreword

I hereby submit my third Annual Report as Information Commissioner to the Dáil and Seanad pursuant to section 47(2) of the Freedom of Information Act 2014.

This is the eighteenth Annual Report of the Information Commissioner since the establishment of the Office in 1998.

A handwritten signature in black ink, which appears to read "Peter Tyndall". The signature is stylized and cursive.

Peter Tyndall
Information Commissioner
May 2016



Jacqui McCrum
Director General

CHAPTER 1:

The Year In Review



Chapter 1: The year in review

Your right to information

The FOI Act 2014 provides for a general right of access to records held by public bodies and also provides that records should be released unless they are found to be exempt. The Act gives people the right to have personal information about them held by public bodies corrected or updated and gives people the right to be given reasons for decisions taken by public bodies, where those decisions expressly affect them.

The primary role of the Office of the Information Commissioner is to conduct independent reviews of decisions made by public bodies on FOI requests, where members of the public are dissatisfied with responses to those requests. As Information Commissioner, I have a further role in reviewing and publishing commentaries on the practical operation of the Act.

The FOI Act applies to all public bodies that conform to the definition of public body in Section 6(1) of the Act (unless they are specifically exempt or partially exempt under the provisions of Section 42 or Schedule 1 of the Act), and includes bodies such as Government Departments and Offices, local authorities, the Health Service Executive, voluntary hospitals, and universities. As new public bodies are established they will automatically be subject to FOI unless they are specifically exempt by order made by the Minister.

The European Communities (Access to Information on the Environment) Regulations 2007 to 2014 provide an additional means of access for people who want environmental information. The Department of the Environment, Community and Local Government has published a set of Guidance Notes which can be accessed via the website of the Commissioner for Environmental Information at www.ocei.ie.

Both access regimes are legally independent of each other, as are my roles of Information Commissioner and Commissioner for Environmental Information.

Introduction

This is my third Annual Report as Information Commissioner covering the period from 1 January to 31 December 2015. Part II of this Report concerns my work during the year as Commissioner for Environmental Information.

On the back of a productive year in 2014, my Office enjoyed yet another very productive year in 2015 and I am once again pleased to be in a position to report on key achievements in the delivery of an effective and efficient service that can only be attributed to the hard work and commitment of my staff and other stakeholders involved in the FOI regime.

At the beginning of the year, I set specific challenging targets aimed at improving case turnaround times and optimising the percentage of cases closed within four months, as provided for in the Act.

It is a positive commentary on the dedication and commitment of the staff of my Office that I can report that of the 125 reviews that were on hand in my Office at the end of 2015, 93% were less than six months old, with just three cases being older than eight months. Furthermore, of all the reviews completed during the year, 53% were closed within four months, a significant increase on recent years. I report in more detail on these achievements and others later in this Chapter.

During the year, my Office continued to build constructively on its commitment to developing additional supports for public bodies. For example, work is ongoing on the development and publication of a series of guidance notes that should assist public bodies in the interpretation and understanding of the provisions of the Act. My Office has also developed, and will shortly publish, a suite of questions to assist caseworkers in drawing attention to the key issues that should be addressed when inviting submissions from public bodies.

Staff of my Office also attended meetings of the Interdepartmental Working Group and Public Service Users Network in 2015, to provide feedback on how public bodies might improve their FOI processing and their engagements with my Office.

My Office also significantly updated and subsequently published a comprehensive procedures manual which reflects the many changes we introduced in order to improve the efficiency and effectiveness of our services. The manual provides a detailed explanation of how my Office conducts reviews under section 22 of the Act. The revised procedures, as reflected in the manual, are aimed at ensuring consistency and fairness in our approach to dealing with reviews. I believe the manual will also be of benefit to any and all who engage with my Office in the application of the Act.

The FOI Act 2014 extended FOI to a range of new bodies, a number of which are partially included under FOI, such as the Central Bank, the NTMA and NAMA. The new Act also removed the requirement to pay up-front fees for making FOI requests. It is not surprising, therefore, that the number of FOI requests made to public bodies in 2015 has increased by 38% on 2014.

My Office also received applications for review concerning a larger number of public bodies in 2015 than in previous years. In 2014, we accepted applications concerning 76 different bodies. In 2015 that number rose to 101.

The new Act has brought with it some specific challenges for my Office. A number of new bodies are still coming to grips with the complexities of the legislation, with the challenging timelines for complying with the various provisions and with the increased resource implications. As a result, my Office was not always in a position to complete reviews as quickly as we would have liked.

It is also noteworthy that some public bodies that have been subject to the provisions of the Act for many years continue to fall short in meeting their statutory requirements. For example, later on in this Report, I comment on the increase in the number of deemed refusals of requests by bodies and the number of notices issued by my Office under sections 23 and 45 of the FOI Act to enforce compliance with the Act. In the year ahead, my Office will continue to work with such bodies, old and new, with a view to improving the manner in which they deliver on the requirements of the Act.

While the FOI Act 2014 has extended the FOI regime to a broad range of additional bodies, it is by no means all-encompassing. Some bodies are included in part only. The manner in which such bodies are partially included has caused particular difficulties which I report on in Chapter 2.

Other areas of public services remain outside the scope of the Act. On this point, I welcomed the publication during the year of a Report by the Joint Oireachtas Committee on Public Service Oversight and Petitions which calls for the Act to be extended to include all aspects of the Direct Provision System, which is used to accommodate asylum seekers in Ireland. The Committee also reported that the Information Commissioner should have oversight of the Reception and Integration Agency (RIA) as well as the administration of the law relating to immigration and naturalisation.

I also note that while the Act provides for the extension of FOI to bodies in receipt of significant funding from the public purse, I am not aware that any steps have been taken to identify and include such bodies. Nevertheless, I am pleased that the Act has significantly extended the reach of FOI. Indeed, I expect to see the first application for review regarding An Garda Síochána at some stage in 2016.

The Act also included a key innovation relating to the publication of information without the need for FOI requests. The Act requires all FOI bodies to prepare and publish their own publication schemes, which will include details about the body, the services it provides, decision making processes for major policy proposals, financial information, procurement information and an FOI Disclosure Log. I was pleased to see the Minister for Public Expenditure and Reform launch, on 14 October 2015, a Model Publication Scheme and related guidance. FOI bodies had six months from that date to prepare and publish their own Publication Schemes together with the underlying documentation.

Overall, as I stated at the beginning of my introduction, I am pleased to report on a productive year for my Office. I want to acknowledge the efforts of all my staff in rising to the challenge of maintaining high standards while integrating new methods, procedures and new legislation.

I want to express my sincere thanks to Bernie McNally, the former Director General. Bernie left the Office in 2015 to take up a new role as Assistant Secretary in the Department of Children and Youth Affairs. I wish Bernie well in her new role and I thank her for her incisive contribution to the work of the Office during her time here and particularly for the time she devoted to helping me settle into my role, when I first took up my position in 2013.

I am also delighted to welcome Jacqui McCrum as the new Director General. Jacqui comes to the Office with a wealth of experience, having held several senior management positions in a major Irish financial institution and having also worked in the area of change management. In August 2013, Jacqui was appointed Deputy Financial Services Ombudsman for Ireland, a position she held until she took up her current position.

I look forward to working with Jacqui in the years to come, and I have no doubt that my Office will benefit considerably from her extensive range of specialist and management experience.

Peter Tyndall
Information Commissioner
Commissioner for Environmental Information

Office developments in 2015

Strategic Plan 2016 - 2018

2015 saw the completion of my Office's three year strategic plan for 2013 - 2015.

Accordingly, I was pleased to present my first statement of strategy as Ombudsman and Information Commissioner, the sixth such review of strategic objectives by the Office of the Ombudsman and the Office of the Information Commissioner (incorporating the Office of the Commissioner for Environmental Information).

The Strategic Plan 2016 - 2018 sets out our key objectives for the next three years, which will be supported by detailed annual business plans. It builds upon the significant achievements from the last three years and will help us to deliver continuous improvements in the services we provide to our customers.

The plan focuses in particular on extending/improving the impact of my Office on the wider public service, on continuously improving the level of services we provide and in ensuring that our systems and processes allow us to deliver on those objectives. A copy of the plan can be found on my Office's website.

Developing a first class case management system for the future

One of the objectives of the new strategic plan is that we will develop and enhance our management and administrative frameworks to enable and underpin our objectives of improving the wider public service and delivering an excellent customer focused service. New technologies offer ongoing opportunities to facilitate continuous improvement in the level of service my Office provides to its customers, and to extend and improve the impact the Office has on the wider public service.

In 2015, my Office undertook an in-depth review of its ICT infrastructure and systems and identified scope for significant improvements that will enable and underpin our strategic objectives. As part of an ICT renewal and improvement plan, the Office has committed to the development and implementation of a new case management system that will support the delivery of an effective and efficient service.

My Office has also embarked on a project to deliver a system that can manage documentation, processes, workflow and reporting requirements for varying types of cases. This will include digitalisation of services, automation of routine tasks, the minimisation of data entry and the use of electronic transfers of data between public service organisations. I anticipate that this will deliver better throughput and quality of casework along with an improved service for our customers.

In addition, I want to simplify and increase the options available to all our stakeholders for interacting with the Office, including online access. As such, in 2015, my Office commenced work on the development of an enhanced OIC website. It is envisaged that the new website will include an online portal to facilitate improved access to the Office for members of the public. The portal will offer a fast and efficient facility to submit and manage applications for review online, including quick and secure transfer of data and documents. It is intended that this system will be the first building block for a more expansive system that will be capable of streamlining interactions between all stakeholders in the FOI process.

Guidance notes

As I noted in my Introduction, my Office began the process of developing and publishing a series of Guidance Notes which provide a short commentary on my interpretation and application of the FOI Act 2014. The Notes draw on my decisions and on those of my predecessors, in giving examples of the approach my Office has adopted in the application and interpretation of particular provisions of the Act.

While the application of any provision in any case will always depend on the particular records and the relevant facts and circumstances, these Notes give general guidance on the application of the Act and should serve to assist FOI bodies in their everyday processing of FOI requests.

At the time of writing my Report, nine Guidance Notes were published on my Office's website. We intend to publish a significant number of further Guidance Notes during 2016. It is noteworthy that we intend to update or amend the Guidance Notes as required, with the result that they should serve as up-to-date reflections of current thinking in relation to the provisions they cover. I hope that all users of the FOI Act, and public bodies in particular, will find them useful.

Irish Language Scheme

During 2015, my Office, along with the Office of the Ombudsman, prepared its third draft scheme under the Official Languages Act 2003. The Scheme (available on www.oic.ie), was approved by the Minister of State at the Department of Arts, Heritage and the Gaeltacht and will remain in force for a period of 3 years from 29 February 2016, or until a new scheme has been approved, whichever is the later.

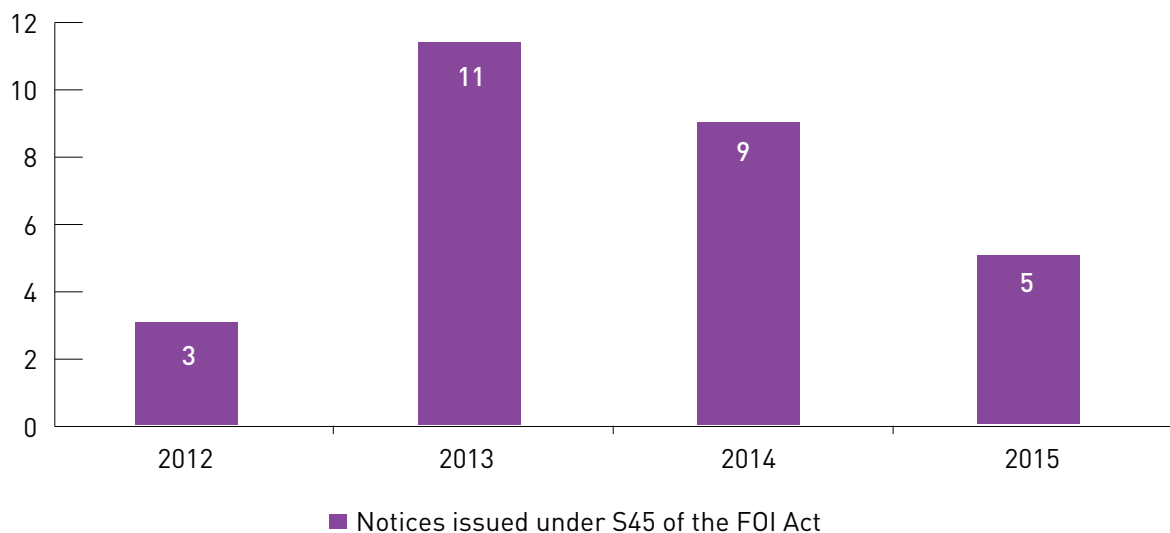
Statutory notices issued to public bodies

Notices issued under section 45 of the FOI Act

Under section 45 of the FOI Act, I can require a public body to provide me with any information in its possession or control that I deem to be relevant for the purposes of a review.

My powers under section 45 have been enhanced under the FOI Act 2014. For example, section 45(8) provides that “Where an FOI body fails to comply with a binding decision of the Commissioner under this Act, the Information Commissioner may apply to the court for an order to oblige the FOI body to comply with the decision”.

Each year I report on the number of statutory notices issued by my Office under section 45. I am pleased to report that the number of notices issued by my Office under section 45 continues to decline on a year-by-year basis.



In 2015 my Office issued notices under section 45 to the following bodies:

TUSLA - Child and Family Agency (two notices), and one each to South Dublin County Council, St. James's Hospital and the National Sports Campus Development Authority*.

*The notice to the National Sports Campus Development Authority was issued under section 37 of the FOI Acts 1997-2003.

TUSLA - Child and Family Agency

When my Office receives an application for review, the first step is to seek the decision making records from the public body to determine if the application for review is valid. Bodies are given three working days to comply with such requests, given that the records in question should be readily available for all requests. In the vast majority of cases, the bodies have no difficulty in meeting that deadline.

In a case involving TUSLA, the records were not received within the time requested, so my Office issued a reminder, which was acknowledged. However, a further week passed with no response or explanation from TUSLA. Consequently, my Office issued a notice under section 45 to the Chief Executive of TUSLA and requested the records within one week. As no reply was received, my Office re-issued the notice letter to the office of the Chief Executive but it was a further five days before a response was received from TUSLA acknowledging receipt of that letter. A further week passed and my Office again requested a response. The records were eventually received by my Office six weeks after the initial request was issued and received by TUSLA.

In a second case, my Office wrote to TUSLA on 5 October and requested a response, in the form of a focused submission, within two weeks. A focused submission from a public body provides my Office with more detail about how exemption provisions of the FOI Act were applied by the public body to refuse access to the records requested by the applicant.

In the normal course, it remains at the discretion of the public body as to whether it wishes to make a submission on a review. As section 22(12)(b) of the FOI Act places the onus on the FOI body of satisfying me that its decision to refuse to grant a request was justified, failure to justify a claim for exemption may lead to a decision to direct the release of the records at issue. However, where a public body refuses all or part of a request on the ground that the information sought does not exist or cannot be found, my Office is not generally in a position to progress the review until the body has provided details of the nature of the searches undertaken and of its records management procedures in respect of the records/information sought.

In the case in question, my Office required details of the searches undertaken by TUSLA to locate relevant records. As no response was received, two reminders issued before my Office subsequently felt it necessary to issue a section 45 notice letter to the Chief Executive of TUSLA requesting a response within one week. The eventual response was received by my Office seven weeks after the initial request.

South Dublin County Council (SDCC)

In October my Office issued a request to SDCC for a focused submission. Although my Office had several communications with SDCC over the following four weeks, my senior investigator determined that the response of the Council was not sufficient. Accordingly, a section 45 notice was issued to the Chief Executive of SDCC. A response was received by my Office within the time requested in the notice.

St. James's Hospital

A request was issued to St. James's Hospital on 20 April for copies of the relevant decision making records. While the Hospital acknowledged receipt of the request from my Office, by 8 May it had not forwarded a response concerning those records. Consequently, my Office issued a notice to the Chief Executive of the Hospital. A response was received within the time requested in the notice letter. However, the response stated that the applicant had not in fact made an FOI request to the Hospital.

I am disappointed that it had taken the Hospital so long to clarify the matter. A timely response would have promptly addressed any confusion the applicant may have experienced with the formal FOI process.

National Sports Campus Development Authority (NSCDA)

I discuss this case in more detail in Chapter 3. I had initially issued a decision in October 2014 annulling a decision of the NSCDA to refuse a request on the ground that the applicant's request formed part of a pattern of manifestly unreasonable requests for information and I directed that the NSCDA undertake a fresh decision making process on the request.

The applicant found it necessary to apply to my Office for a further review as the NSCDA failed to process the request as required. During the course of the second review, my Office asked the NSCDA to inform the applicant of its position with respect to the records sought. Eventually, my Office found it necessary to write to the Chief Executive of the NSCDA in view of the lack of progress of the applicant's request. The letter made it clear that I regarded the conduct of the NSCDA as unacceptable, as it had failed to comply with my earlier decision on the same matter.

Consequently, under the provisions of section 37(1)(a) of the FOI Act 1997, I formally required the Chief Executive of the NSCDA, or a delegated Officer, to attend before me for the purposes of providing certain information on the review.

This is of some significance as it represents only the second occasion on which any Information Commissioner has deemed it necessary to issue such a direction under what is now section 45(1)(a) of the FOI Act 2014. As it transpired, the NSCDA had written to the applicant on the same date as I had issued my notice. Accordingly, I decided to suspend the requirement that the Chief Executive attend before me.

Note: As of 1 October 2015, following a merger of the Irish Sports Council and the National Sports Campus Development Authority, Sport Ireland is the new State Agency with responsibility for sport.

Notices issued under section 23 of the FOI Act

Where I consider that the reasons given by a public body in support of a decision are not adequate, section 23 of the Act empowers me to direct the head of a public body to issue a more comprehensive statement of its reasons for the decision.

Under sections 13(2)(d) and 21(5)(c) of the FOI Act, where an FOI body decides to refuse to grant a request, the notification of the decision to the applicant shall specify

- the reasons for the refusal,
- any provisions of the FOI Act pursuant to which the request is refused,
- the findings on any material issues relevant to the decision, and
- particulars of any matter relating to the public interest taken into consideration for the purposes of the decision.

Consequently, in certain circumstances, where the details in the original and/or internal review decisions are held to be inadequate, my Office will write to the head of a public body requiring a statement of reasons for a decision.

In 2015 my Office issued notices under section 23 to the heads of the following public bodies;

- Cavan County Council
- Department of Communications, Energy and Natural Resources
- Department of Defence
- Department of Education and Skills
- Department of Justice and Equality
- Department of Social Protection
- Department of the Taoiseach
- Dublin Docklands Development Authority
- HSE Dublin Mid-Leinster
- South Dublin County Council

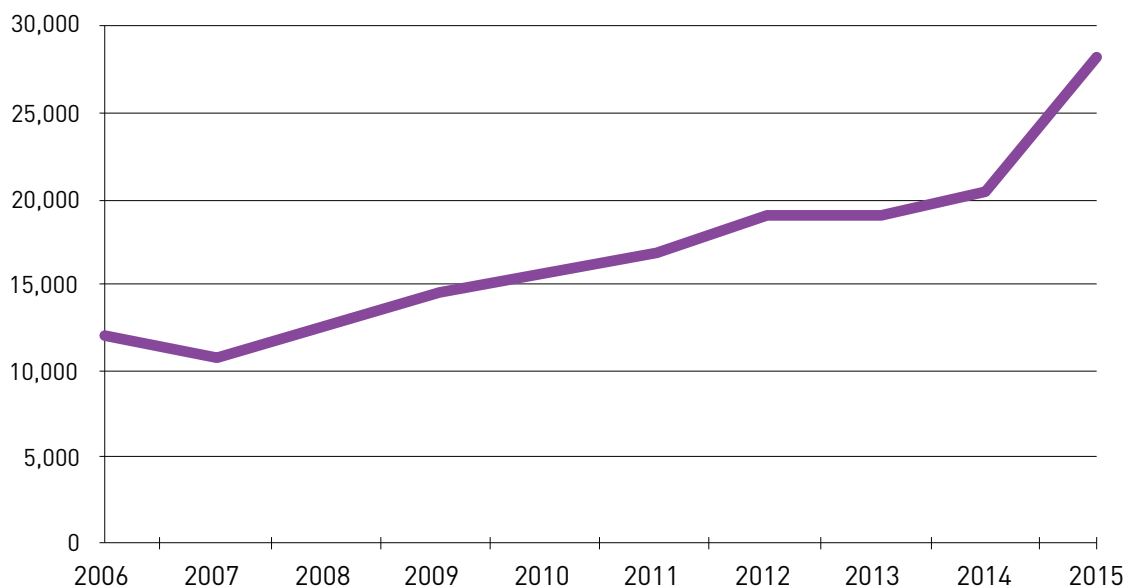
The section 23 letters written to the head of each body in 2015 stated that in most cases the public body's original and/or internal review decisions fell short of the requirements of the FOI Act. Each letter sought a more detailed statement from the public body to be provided within three weeks. In all but one case a letter of reply was received within the three-week deadline. In the remaining case a statement was not issued but the public body instead released the records at issue.

Key FOI statistics for the year

The charts in this section of my Report can be viewed in association with the tables of statistics in Chapter 4 and other tables in previous Annual Reports, available on the Office website at www.oic.ie.

As in previous years, I wish to acknowledge the efforts made by the lead agencies that collect statistics for inclusion in my Annual Report.

Number of FOI requests to public bodies 2006-2015



The total number of requests received by public bodies in 2015 was 27,989, an increase of 38% on the number received in 2014. This is the largest year-on-year increase in requests made to public bodies since 1999. In all likelihood, the increase is due to a combination of the elimination of up-front fees for making FOI requests and the additional bodies that came within the scope of the FOI Act from April 2015 and beyond.

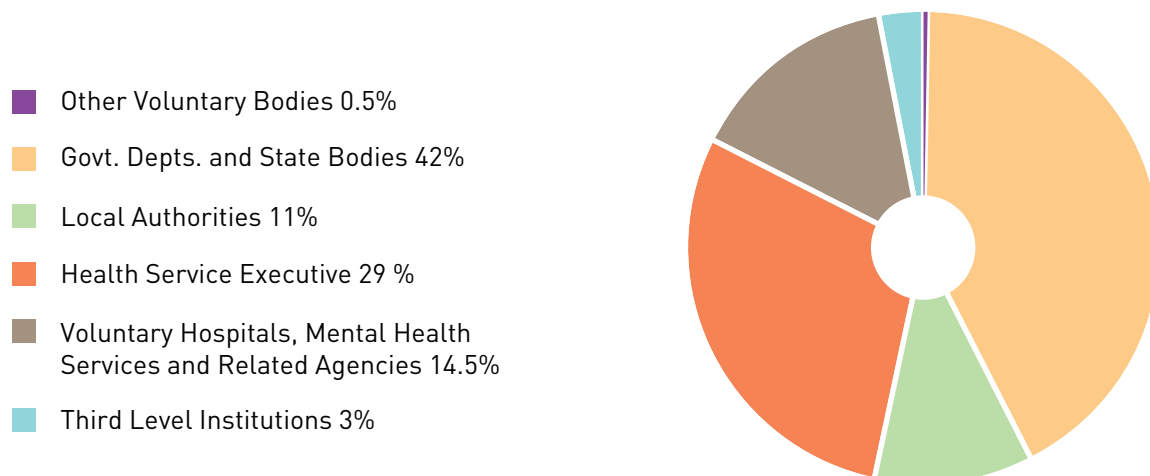
The number of requests on hand within public bodies at the year-end also continues to rise and now stands at 5,337. This total is an increase of 27% on the year-end figure for 2014. While I fully appreciate that the significant increase in requests made has put a strain on undoubtedly limited resources, I would encourage all bodies to ensure that their FOI functions receive adequate resources to allow for effective delivery of FOI services.

Statistical returns

Each year the Department of Public Expenditure and Reform (DPER) collates details of FOI requests received by the various Government Departments and agencies and makes a return to my Office for inclusion in my Annual Report. Timely return of statistics is essential to allow my Office to compile the relevant statistical tables for analysis.

This year, the Department of Transport, Tourism and Sport was very late in submitting its return. I would urge all Departments and agencies to put appropriate measures in place to ensure that future requests for statistical returns are met in a timely fashion.

Sectoral breakdown of FOI requests to public bodies



The majority of Government Departments recorded large increases in the number of FOI requests made in 2015. Notable increases in requests received include

Department of Transport, Tourism and Sport - 93 FOI requests recorded in 2014, rising to 243 in 2015; an increase of 161%.

Department of Finance - 165 FOI requests recorded in 2014, rising to 413 in 2015; an increase of 150%.

Department of Jobs, Enterprise and Innovation - 62 FOI requests recorded in 2014, rising to 144 in 2015; an increase of 132%.

Department of the Environment, Community and Local Government - 180 FOI requests recorded in 2014, rising to 395 in 2015; an increase of 119%.

Department of Arts, Heritage and the Gaeltacht - 84 FOI requests recorded in 2014, rising to 163 in 2015; an increase of 94%.

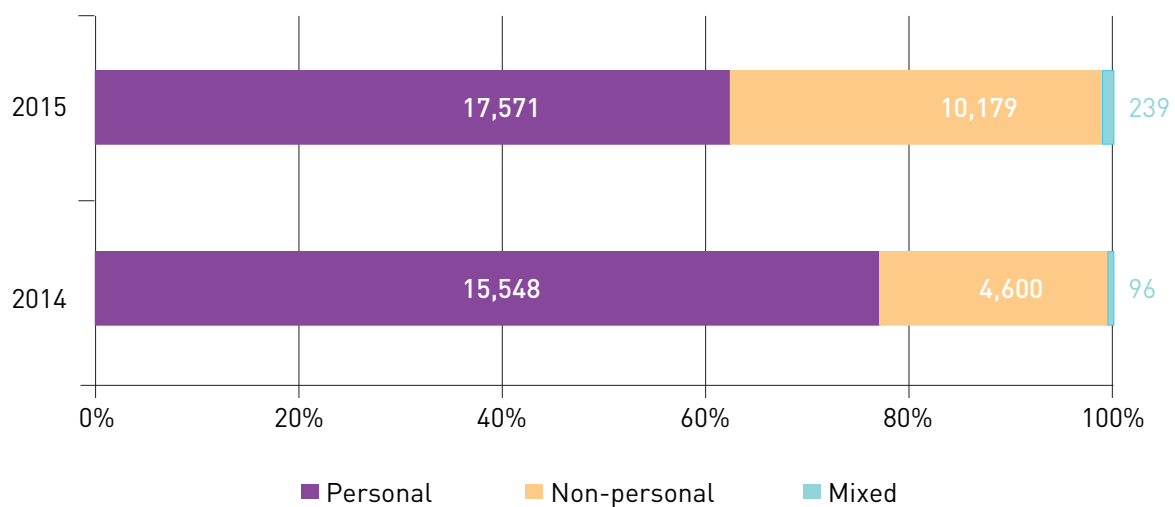
Also, the Department of Defence reported an increase in requests from 11 in 2014 to 94 in 2015, and the number of requests received by the Department of Children and Youth Affairs rose from 37 in 2014 to 77 in 2015.

On the face of it, the Department of Justice and Equality recorded only a very modest increase in requests received, from 920 in 2014 to 941 in 2015. However, in previous years, the Department included in its returns details of FOI requests received by the Irish Prison Service. In July 2015, the Irish Prison Service began recording and reporting on its own statistics. It recorded receipt of 793 requests in the second half of 2015. Had the Department continued to make returns for all requests received by the Irish Prison Service, it would have recorded an increase of 88% in total requests received in 2015, which is more in keeping with the pattern of increases across most Government Departments for the year.

I also note that Irish Water has recorded a large increase in FOI requests received. Irish Water recorded 88 FOI requests in 2014, whereas the number of requests received in 2015 is 561, an increase of 538%.

2015 saw a number of new bodies reporting receipt of FOI requests for the first time as a result of the extension of the FOI regime to all public bodies, including An Garda Síochána (183 requests), the Central Bank (101), the National Asset Management Agency (98) and the National Treasury Management Agency (50).

Type of request to public bodies



Similar to 2014, the majority of the requests were for access to personal information. However, there was a significant increase in the number of requests made for access to non-personal information in 2015. A more detailed breakdown of the requests received by public bodies can be found in tables 6 to 11, in Chapter 4. In 2014, requests for access to non-personal information accounted for 23% of all requests made in the year, whereas that figure rose to 36% in 2015.

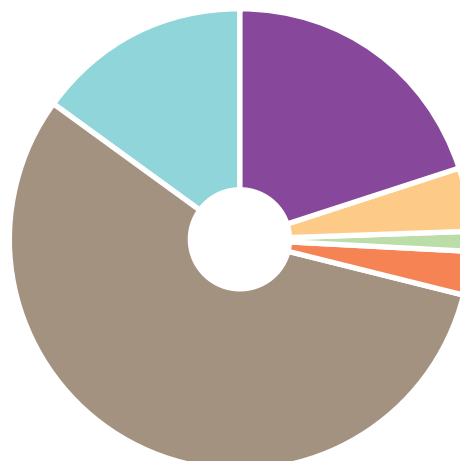
It is reasonable to conclude that the significant increase in non-personal requests made in 2015 is directly attributable to the elimination of up-front fees for making a request as provided for in the FOI Act 2014.

Top ten bodies who received most requests during 2015

Placing	Public Body	2015	2014	2013
1	HSE South	3,063	3,074	3,085
2	HSE West	2,771	2,407	2,572
3	Department of Social Protection	2,156	2,193	2,148
4	Department of Justice and Equality	941	920	550
5	HSE Dublin North East	883	864	941
6	HSE Dublin Mid-Leinster	811	794	919
7	Irish Prison Service	793	-	-
8	TUSLA: Child and Family Agency	786	-	-
9	Irish Water	561	88	-
10	St James's Hospital	547	501	488

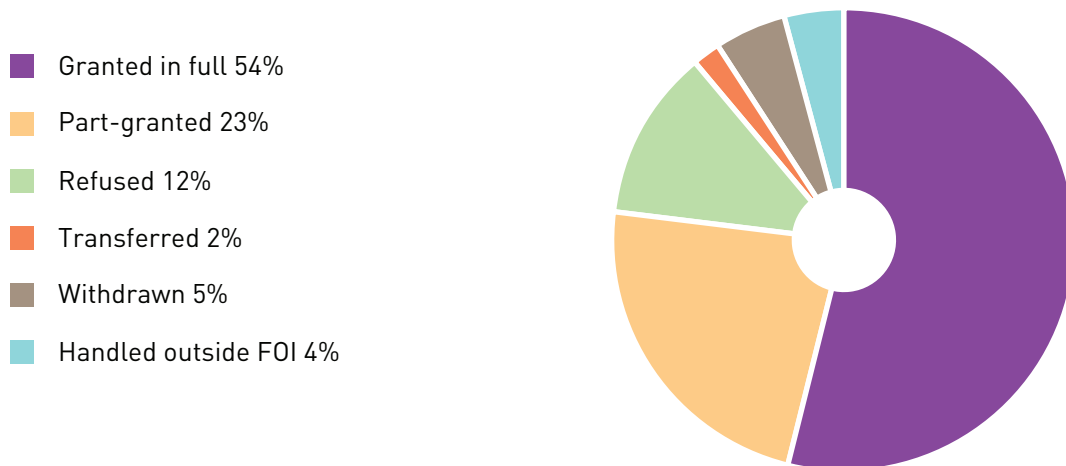
Type of requester to public bodies

- Journalists 20%
- Business 4.5%
- Oireachtas members 1.5%
- Staff of public bodies 3%
- Clients of public bodies 56%
- Others 15%



It is noteworthy that the number of journalists using FOI has increased significantly in 2015. In recent years requests by journalists generally accounted for approximately 10% of all requests made. In my view, the increase is a positive development as journalists have a significant role to play in ensuring that public bodies are held to account.

Release rates by public bodies

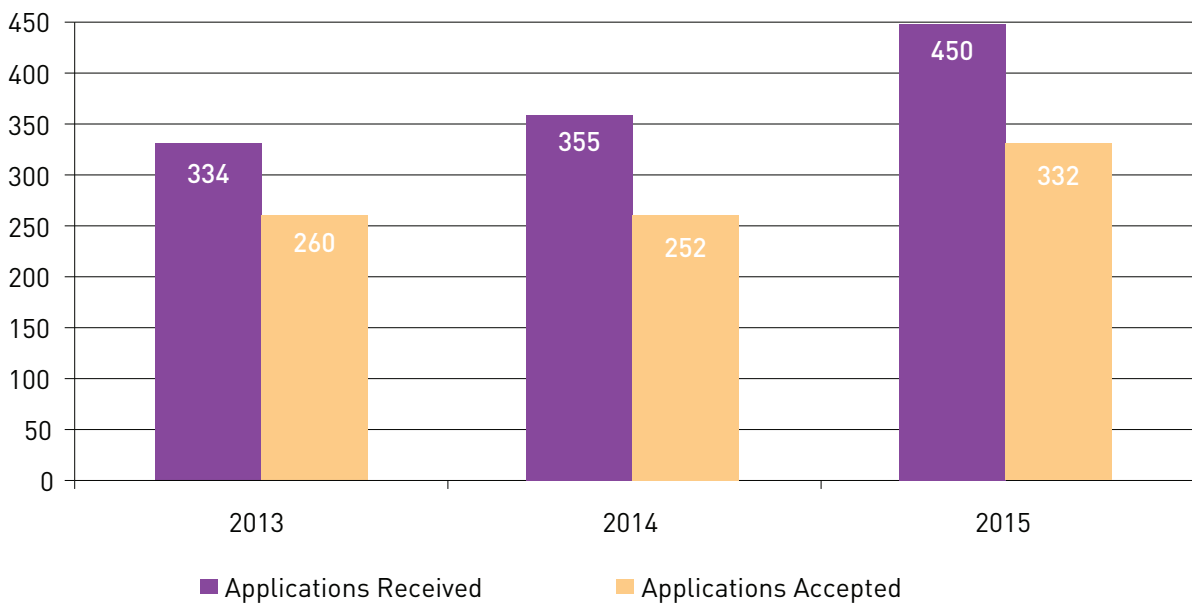


Release rates for 2015 are generally in line with the rates for previous years. More information on release rates can be viewed at table 5, Chapter 4.

Office of the Information Commissioner (OIC) caseload

An application for review can be made to my Office by a requester who is not satisfied with a decision of a public body on an FOI request. Decisions made by my Office following a review are legally binding and can be appealed to the High Court only on a point of law.

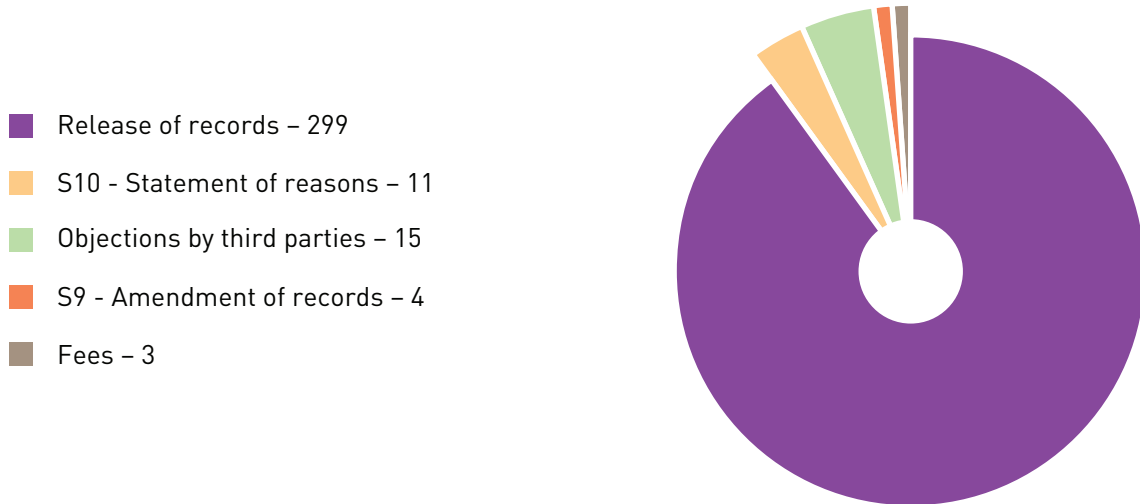
Applications to OIC 2013 - 2015



My Office recorded a 27% increase on the number of applications for review received in 2015. Indeed, the number of requests received in 2015 was 35% higher than the number received in 2013. This level of increase is reflective of the increase in FOI requests received by public bodies in the year.

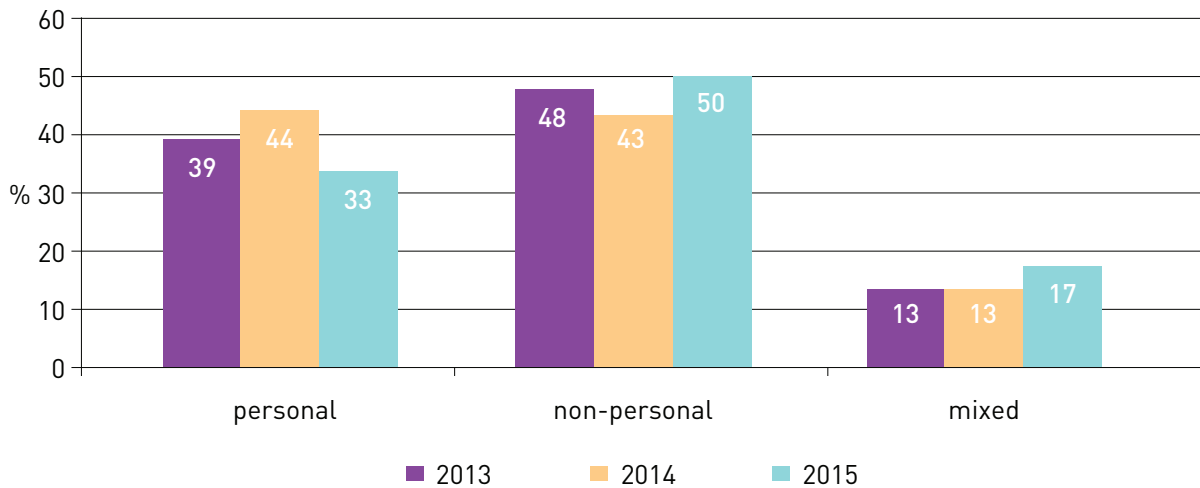
The number of applications which were accepted by my Office in 2015, at 332, represents an increase of 32% over the number accepted in 2014. The discrepancy between the number of applications received and ultimately accepted each year is primarily due to the fact that some applications are deemed by my Office to be invalid or premature (i.e. the application for review has been made to my Office before the full FOI process has been concluded by the public body).

Subject matter of review applications accepted by OIC



90% of all applications accepted by my Office in 2015 were concerned with refusals by the bodies to grant access (in part, or in full) to some or all of the records sought.

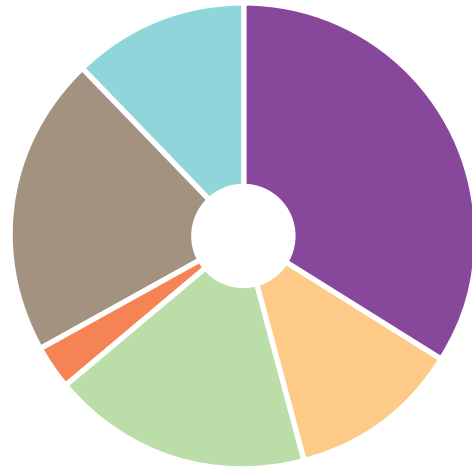
Applications accepted by OIC by type 2013 – 2015



An application recorded by 'type' indicates whether the applicant is seeking access to records which are either of a personal or non-personal nature, or a mix of both. The 'personal' figure of 33% for 2015 is the lowest percentage of personal applications accepted by my Office since 2011, whereas the percentages for non-personal and mixed applications are the highest since that year.

Outcome of reviews by OIC in 2015

- Decision affirmed 34%
- Decision annulled 12%
- Decision varied 18%
- Discontinued 3%
- Settlement reached 21%
- Withdrawn 12%



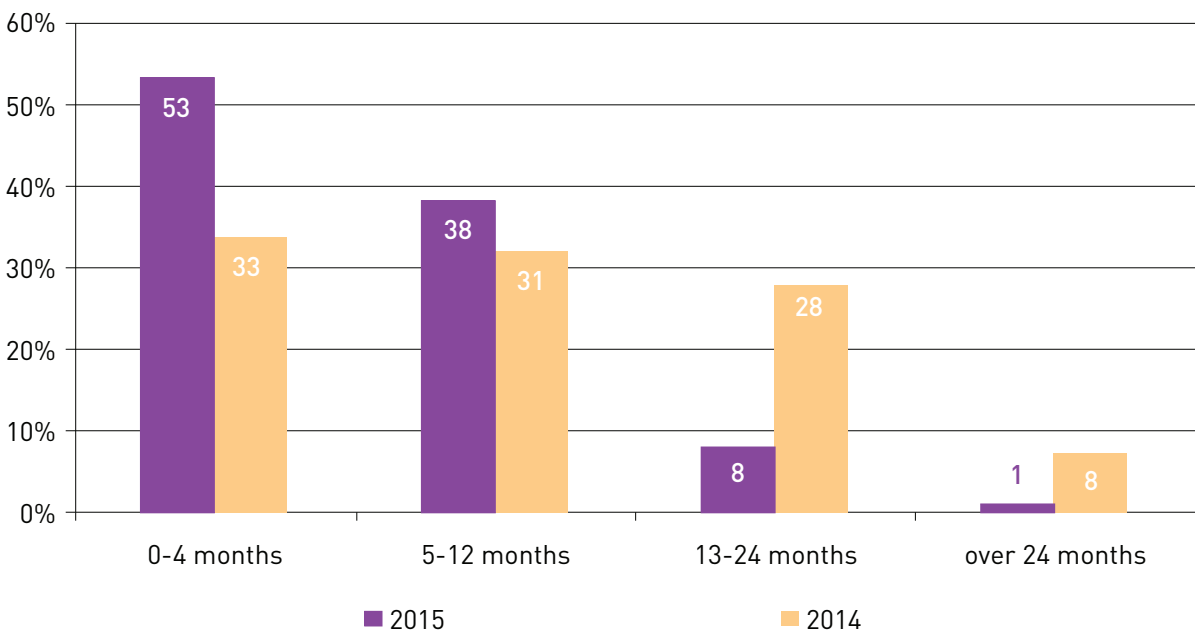
In 2015, my Office reviewed decisions of public bodies in 323 cases, representing a 5% reduction over the 2014 figure of 340.

Settlements and withdrawals

Applications may be settled, withdrawn or discontinued following discussions between the applicant, the public body and my Office.

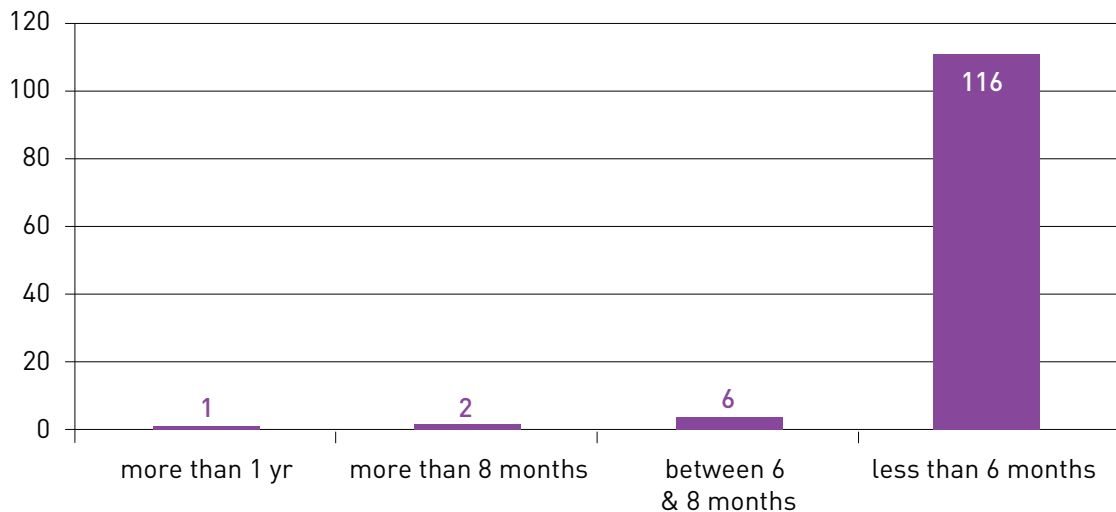
Withdrawal or settlement of applications often follow as a result of the intervention of my Office, where, for example, a more detailed explanation of a decision is given to the applicant by the public body, or additional records are released or part granted.

Age profile of cases closed by OIC



The table above shows how long it took for a review to be completed by my Office. I am very pleased to be in a position to report that 53% of all cases closed in 2015 were closed within four months. This represents a 20% increase on 2014 and a 27% increase on 2013.

Age profile of cases on hand in OIC at end 2015

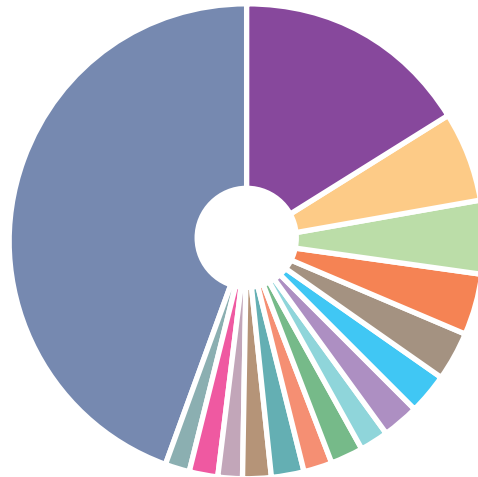


In previous years, my Office reported on the age profile of cases on hand in terms of years. From the time of my appointment, I set challenging objectives for the elimination of the substantial backlog of cases on hand. I am particularly pleased, for the first time since my appointment, to be in a position to report on cases on hand in terms of monthly increments.

At the beginning of 2015, my Office set itself a challenging target of having no cases over eight months old on hand at the end of the year. I am pleased to report that only three of the 125 cases on hand at the end of the year were over eight months old, generally for reasons beyond the control of my Office.

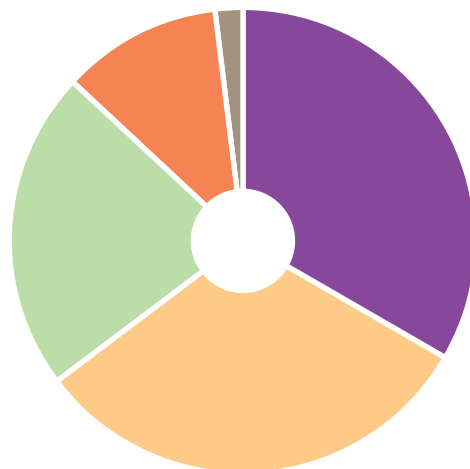
Breakdown by public body of applications for review accepted by OIC

- Health Service Executive – 54
- Department of Justice and Equality – 20
- TUSLA: Child and Family Agency - 17
- Department of Social Protection – 14
- University College Dublin - 11
- Department of Transport, Tourism and Sport - 9
- Office of the Revenue Commissioners - 8
- Department of Agriculture, Food and the Marine – 7
- Department of Communications, Energy and Natural Resources – 7
- Department of Education and Skills – 7
- Irish Water – 7
- Cork County Council - 6
- Defence Forces – 6
- Department of Finance - 6
- University College Cork - 6
- Other Bodies (5 or less) - 147



Breakdown of HSE cases accepted by OIC

- HSE South – 18
- HSE West – 17
- HSE Dublin Mid-Leinster – 12
- HSE National – 6
- HSE Dublin North East – 1



Deemed refusals

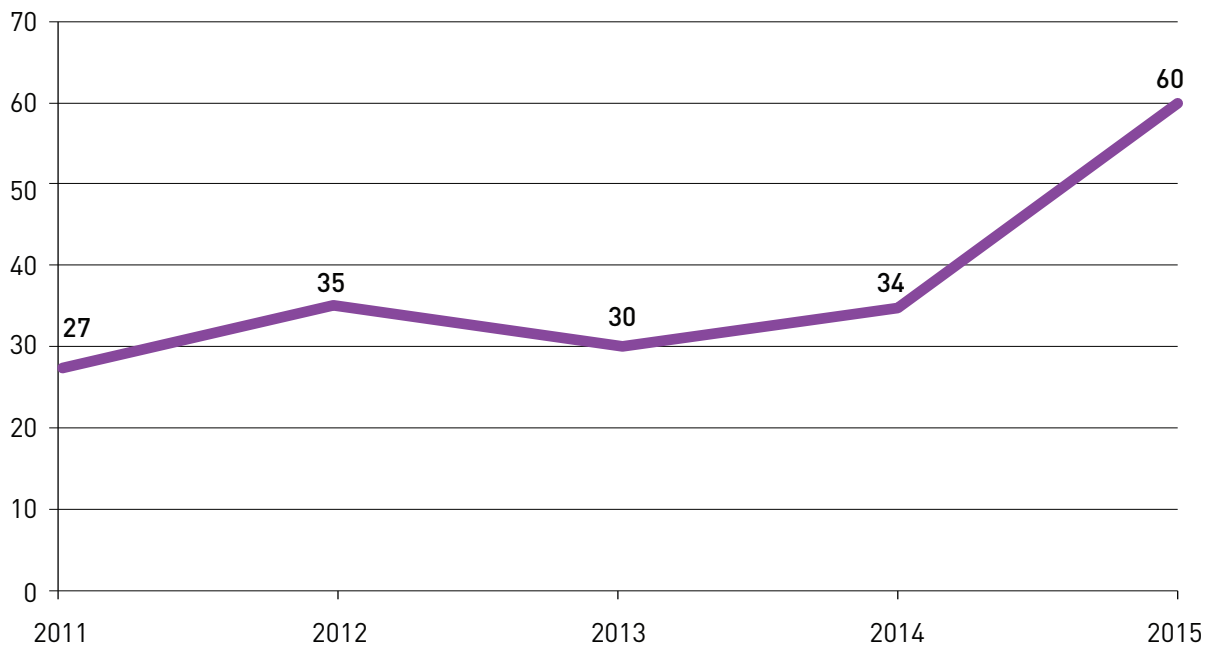
The FOI Act imposes statutory time limits on public bodies for processing an FOI request. Specifically, a decision on an original request should issue to the requester within four weeks and a decision on a request for an internal review should issue within three weeks.

Where no decision is issued, either at the original request (first stage), or internal review (second stage), or a decision is issued late, the requester has the right to regard that decision by the public body as a 'deemed refusal' of access.

Following a deemed refusal at the internal review stage, a requester is entitled to apply to my Office for a review.

The charts below show how many requests were deemed refused in the year at each stage of the request, and where both stages were deemed refused.

Deemed refusals at both stages 2011 - 2015

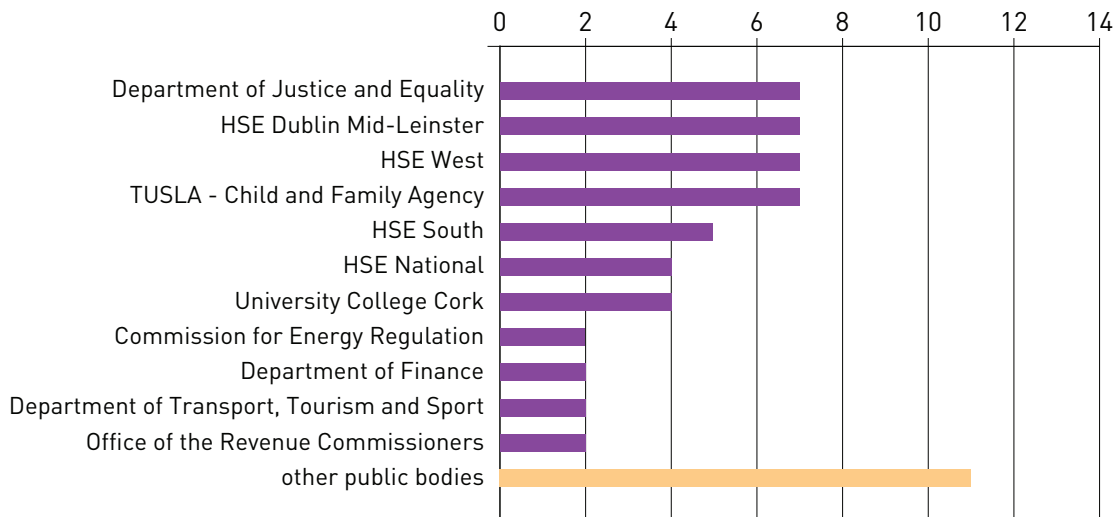


When my Office first commenced reporting, in 2007, on the number of FOI requests that were recorded as deemed refused at both stages, the then Commissioner expressed concern that 8% of all applications accepted by her Office in that year were on the basis of deemed refusals.

I am very disappointed to have to report that 60 (18%) of the 332 applications accepted by my Office were recorded as deemed refused at both stages of the FOI request in 2015. This is the highest number ever recorded by my Office, since it began reporting on this matter.

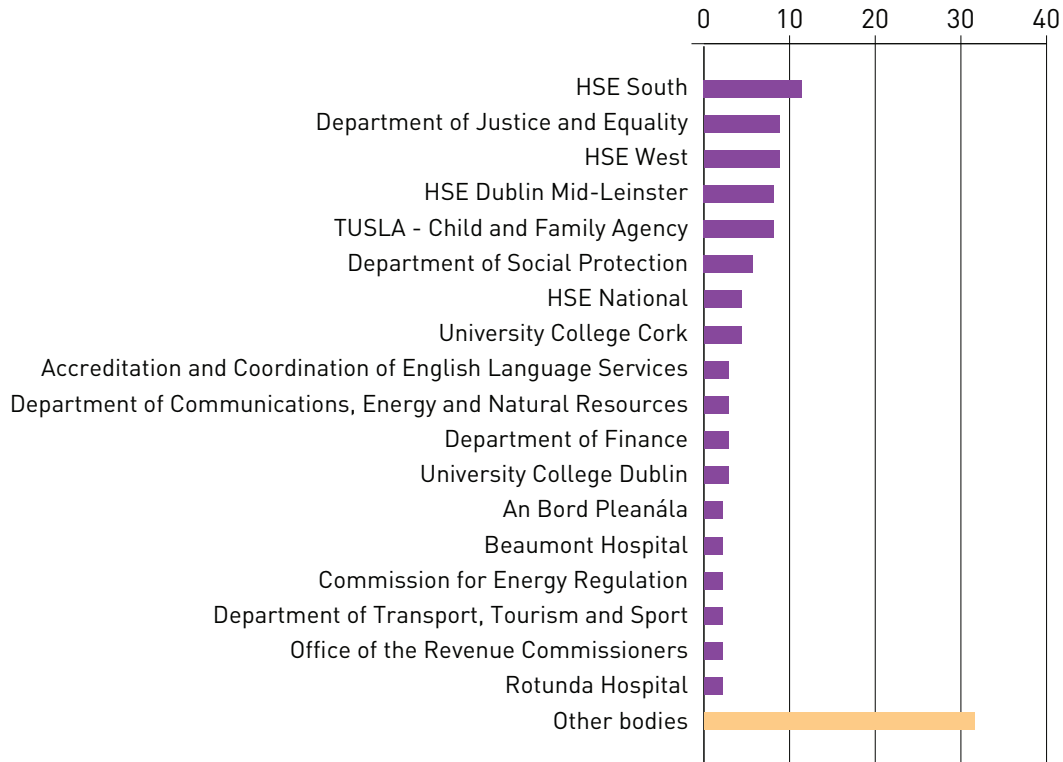
As I have stated earlier in this Chapter, I fully appreciate that the significant increase in requests made to public bodies has put a strain on undoubtedly limited resources. Nevertheless, the number of cases where the requester received neither an initial decision nor an internal review decision is unacceptably high. For 2016, my Office will be scrutinising those cases more closely and will be following up with a number of the bodies that account for the large number of deemed refusals at both stages in 2015.

Deemed refusal at both stages by public body - 2015



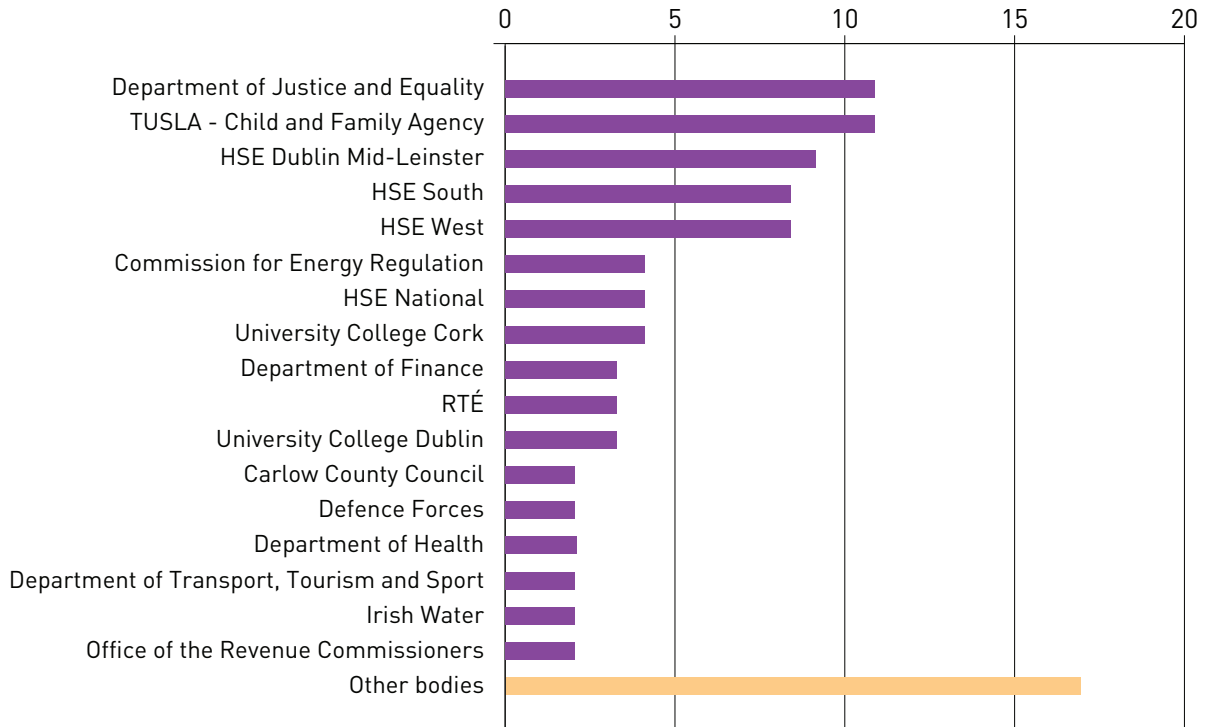
The HSE and TUSLA account for half of all requests which were recorded by my Office as deemed refused by a public body at both stages of the FOI request.

Public body - deemed refusal at 1st stage of FOI request



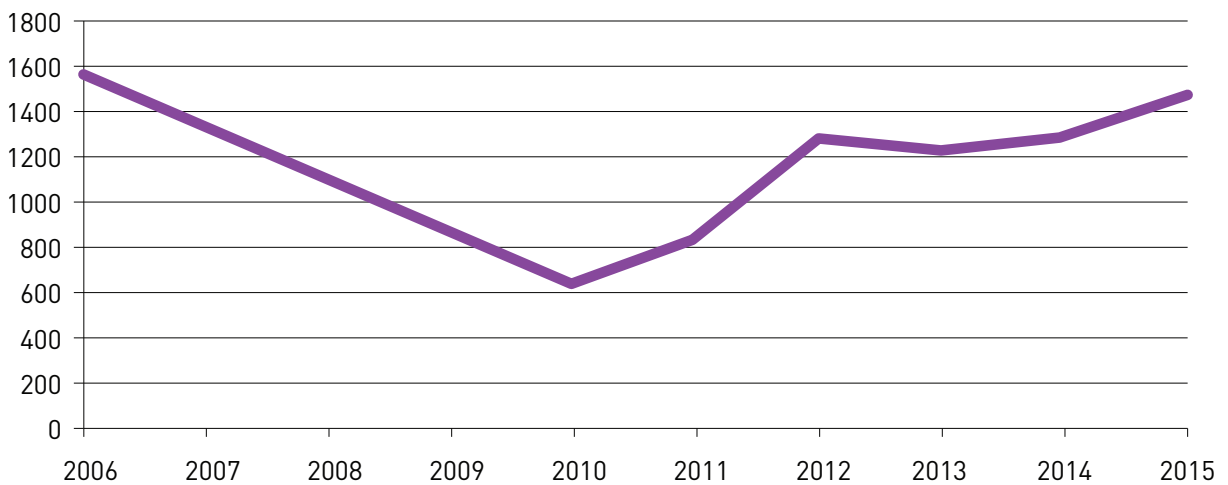
The total number of applications that were recorded by my Office as deemed refused by the public body at the first stage of the FOI request is 114, or 34% of all reviews accepted by my Office in 2015. Where a deemed refusal occurs at this first stage, the requester is entitled to write to the public body concerned and request an internal review.

Public body - deemed refusal at 2nd stage of FOI request



The total number of reviews recorded as deemed refusals at the second stage is 97, or 29% of all reviews accepted by my Office in 2015.

General enquiries to OIC



My Office recorded a 15% increase in the number of general enquiries in 2015, compared to 2014. The number of enquiries, at 1,462, is the second highest number recorded by my Office in the last ten years.

Fees received by OIC

During 2015, my Office received 178 applications for review where a fee was paid. The total amount received was €9,050. A total of €4,210 was refunded to applicants for the following reasons:

- applications were either withdrawn, settled, or discontinued;
- other applications were rejected as invalid, or a fee was not due;
- the public body had not issued an internal review decision within the time limit (section 19 of the FOI Act refers).

Statutory Certificates issued by Ministers

Section 34 of the FOI Act

Where a Minister of the Government is satisfied that a record is an exempt record, either by virtue of section 32 (Law enforcement and public safety), or section 33 (Security, defence and international relations) and the record is of sufficient sensitivity or seriousness to justify his or her doing so, that Minister may declare the record to be exempt from the application of the FOI Act by issuing a certificate under section 34(1) of the Act.

Each year, Ministers must provide my Office with a report on the number of certificates issued and the provisions of section 32 or section 33 of the FOI Act that applied to the exempt record(s). I must append a copy of any such report to my Annual Report for the year in question.

My Office has been notified of the following certificates renewed or issued under section 34 in 2015.

Three section 34 certificates were renewed by the Minister for Justice and Equality and they will fall for review in 2017. A copy of the notification is attached at **Appendix I** to this Report.

Three certificates were issued under section 34 of the Act by the Minister for Foreign Affairs and Trade. These certificates will fall for review in 2017. A copy of the notification is attached at **Appendix I** to this Report.

Review under section 34(7)

I was notified by letter dated 3 June 2015 that pursuant to section 34(7) of the FOI Act, the Taoiseach, the Minister for Public Expenditure and Reform and the Minister for Jobs, Enterprise and Innovation carried out a review of the operation of subsection 34(1) of the Act for the period ended 30 April 2015.

The letter concluded that the Taoiseach, the Minister for Public Expenditure and Reform and the Minister for Jobs, Enterprise and Innovation were satisfied that it was not necessary to request revocation of any of the 13 certificates reviewed, seven of which were issued by the Minister for Justice and Equality and six by the Minister for Foreign Affairs and Trade. A copy of the notification is attached at **Appendix II** to this Report.

Acknowledgement

I want to acknowledge the support of my Senior Investigators, Elizabeth Dolan and Stephen Rafferty, during the year. I also want to thank all the staff of the Office of the Information Commissioner and the Office of the Commissioner for Environmental Information for their continuing commitment to our shared values and for their work throughout the year.

My thanks also to Diarmuid Goulding and Bernard McCabe for their assistance in compiling my report as Commissioner for Environmental Information, and to Edmund McDaid for his assistance in compiling the Annual Report.

**HSE knew
of 'quasi
illegal'
adoptions
in 2011**

Irish Examiner - 16/12/2015

**FOI Material reveals Cork lost out twice
over on LEADER funding says councillor**

West Cork Times - 17/11/2015

**€1.5m spent on agency
staff at hospital in 21 months**

Roscommon People - 20/11/2015

CHAPTER 2:

Issues Arising



Chapter 2: Issues Arising

This Chapter highlights issues which arose during the year concerning the operation of the FOI Act.

Issues reported on are

- The Central Bank as a partially included agency
- Change in level of protection for records of certain bodies
- Publicly available records
- Access to records held by Irish Water
- Access to records of deceased persons by next-of-kin
- Addressing poor practice
- Different effective dates for certain bodies
- Re-use of public sector information
- Appeals to the Courts

I was pleased to note that when the Minister for Public Expenditure and Reform decided to reform the FOI legislation in light of the commitment in the Programme for Government, he also decided to consolidate the legislation to improve its accessibility for users of the Act. However, this was not a straightforward task as the legislation is quite complex and rather technical. Having had the benefit of operating the FOI Act 2014 for the past year, my staff have identified a number of technical issues of interpretation which have given rise to specific challenges in conducting reviews. I report on a number of those issues below.

The Central Bank as a partially included agency

An issue of great concern to my Office relating to the application of the FOI Act 2014 arose as a result of the manner in which the Central Bank of Ireland (the Central Bank) has interpreted its inclusion in Schedule 1, Part 1 of the Act. The vast majority of bodies are deemed to be public bodies for the purposes of the Act by virtue of their inclusion in any of the categories set out in section 6. Schedule 1, Part 1 contains a list of bodies that are partially included for the purposes of the Act and also includes details of the functions and/or records of those bodies that are included or excluded.

During the course of a review by my Office, the Central Bank argued that the Act does not apply to records held by it which fall within the categories of records identified in Schedule 1, with the result that the Act, including the internal and external review provisions, does not apply to such records. It further argued that as the exclusion applies to records containing certain specified information, the Act does not apply to such records even though they may also contain information that would otherwise be subject to the provisions of the Act.

Clearly, I could not accept such an argument. To do so would essentially allow the Central Bank to throw a blanket over all of its records without external independent oversight by my Office. Furthermore, it would result in the possible withholding of information that the Oireachtas clearly intended should be released under the Act. In my view, the effect of the Central Bank's inclusion in Schedule 1 is that it is entitled to refuse access to certain records as described in Schedule 1, but in doing so it must comply with the provisions of the legislation, which include offering rights of internal review and review by my Office.

My officials met with the Central Bank to express my Office's concerns as to the position it adopted. My Office also contacted the Central Policy Unit (CPU) of the Department of Public Expenditure and Reform, given its responsibility for ensuring that the policy and legislative framework for FOI supports the effective operation of FOI in public bodies.

Following receipt of legal advice from the Office of the Attorney General on the matter, CPU confirmed that my interpretation of the legislation was correct. To put the matter beyond doubt, it subsequently published Guidance Note 23. The Guidance Note clarifies that where access to records (or parts of records) is refused on the basis that the body is not a public body for the purposes of records covered by Schedule 1, Part 1 of the Act, the requester is entitled to apply for an internal review of that decision and ultimately to appeal to the Information Commissioner if the internal reviewer upholds the original decision.

The Guidance Note further clarifies that in the case of a request where part of the records contain information which fall into the specific categories listed in Schedule 1, Part 1, only those parts of the records should be excluded consistent with the purpose of the Act, namely to give members of the public access to the greatest extent possible to records that are in the possession of public bodies.

Following publication of the Guidance Note, my Office again contacted the Central Bank to determine if it was prepared to accept the approach set out. In response, the Central Bank stated that it did not agree with the interpretation of Schedule 1 adopted in the Note and that it remained its position that my Office has no jurisdiction to entertain review applications in respect of Schedule 1 records.

At the invitation of the Central Bank, my officials attended a second meeting, following which the Central Bank made a set of proposals for allowing reviews by my Office on a non-statutory basis. At that stage, I wrote to the Governor of the Central Bank to express my profound disappointment with the position the Central Bank chose to adopt on the matter.

In my letter, I questioned how the Central Bank's interpretation of the Act could be regarded as consistent with its previously stated commitment to the principles of openness, transparency and accountability in respect of the governance and functions of public bodies, or with its stated claim that it embraces the provision of access to records held by it in accordance with the Act.

I pointed out that the Central Bank's position was entirely at odds with the spirit and intent of the legislation and that adopting the position taken by the Central Bank would lead to absurd consequences that could never have been intended by the Oireachtas in the passing of the Act. I also noted that a number of other bodies included in Schedule 1 had readily adopted the position outlined in Guidance Note 23.

I understand that CPU also wrote to the Central Bank to ask it to accept my jurisdiction to conduct reviews in accordance with Guidance Note 23. At the time of writing, the Central Bank has not accepted my jurisdiction to conduct reviews in respect of Schedule 1 records.

Change in level of protection for records of certain bodies

Under section 46 of the FOI Acts 1997 & 2003, the Act did not apply to certain records relating to specified functions of a number of bodies. For example, the Act did not apply to records relating to reviews conducted by my Office, regardless of what body held the records.

Under the FOI Act 2014, a number of such bodies are now included in Schedule 1, Part 1 as partially included agencies. While this means that those bodies remain entitled to refuse access to those records that they hold which are excluded under Schedule 1, the protection from release does not extend to such records if they are held by other bodies that are subject to FOI. A potential right of access to such records now exists unless they are exempt under other provisions of the Act.

It is important that the affected bodies are aware of this change in the level of protection for records relating to their functions.

Publicly available records

Certain provisions of the FOI Acts 1997 & 2003 were realigned when the FOI Act 2014 was passed in October 2014. A number of those re-alignments have caused my Office to revisit its understanding of, and approach to, the application and interpretation of those provisions. One such issue arises in relation to records that are publicly available for inspection, purchase, or removal and how the FOI Act 2014 operates in respect of such records.

Under the FOI Acts 1997 & 2003, section 46(2) provided that the Act did not apply to records that were available for public inspection, purchase, or removal. This provision was not included in the FOI Act 2014. Instead, under section 15(2) a public body is now entitled to refuse to grant access to such records.

On the face of it, it may appear that there is no significant difference in the way such records are treated. However, as it is no longer the case that the Act does not apply to such records, certain other provisions of the Act are affected.

For example, my Office took the view that the right of amendment of records as provided for under section 17 of the FOI Acts 1997 & 2003 did not apply in the case of publicly available records, as the Act did not apply to such records. However, as such records are now subject to the provisions of the FOI Act 2014, while it is open to a public body to refuse requests for access, it may not refuse a request for amendment on the ground that the Act does not apply to them.

My Office has not yet had to make a formal determination on such a matter.

Access to records held by Irish Water

With one or two notable exceptions (see below), for the vast majority of public bodies that have been brought within the scope of FOI for the first time under the FOI Act 2014, the right of access to records held by those bodies applies to records created on or after 21 April 2008.

Amidst a significant level of publicity surrounding its activities, and prior to the passing of the FOI Act 2014, the Minister for Public Expenditure and Reform introduced the Freedom of Information Act 1997 (Prescribed Bodies) Regulations 2014 (S.I. No. 140/2014) in March 2014, prescribing Irish Water as a public body “for the purposes of paragraph 1(5) of the First Schedule to the Freedom of Information Act 1997”.

Article 2 provides that “These Regulations shall be deemed to have come into operation on 17 July 2013”. In other words, Irish Water became a public body for the purposes of the FOI Acts 1997 & 2003 with effect from 17 July 2013.

During the course of the year, my Office had cause to consider the scope of the right of access to records held by Irish Water, i.e. to what records held by Irish Water does the right of access under the FOI Acts 1997 & 2003 apply? In determining that issue, my Office must look to the provisions of the FOI Acts 1997 & 2003, under which the Regulations were made.

Section 6(4) of the FOI Acts 1997 & 2003 provides for a right of access to “records created after the commencement of this Act”. Under section 2(1), the term “commencement of this Act” means “the time at which this Act (other than subparagraphs (3) and (4) of paragraph 1 of the First Schedule) comes into operation”. Under section 1(2), the Act came into operation on 21 April 1998.

Irish Water was prescribed for the purposes of paragraph 1(5) of the FOI Acts 1997 & 2003. Accordingly, it seems to me that the right of access to records held by Irish Water extends to records created on or after the commencement of the FOI Act 1997 & 2003, namely 21 April 1998.

My Office raised this matter with CPU, who take the view that the right of access is restricted to records created on or after the date the Regulations are deemed to have come into operation, namely 17 July 2013. However, in my view, the fact that the Regulations are deemed to have come into operation on 17 July 2013 does not mean that the right of access to records held by Irish Water is limited to records created on or after that date. The Regulations operated to prescribe Irish Water as a public body, but did not determine the records to which the right of access applied.

Since the coming into operation of the FOI Act 2014, the question of the right of access is determined by that Act. Under section 11(4), the right of access to records held by Irish Water extends to records created on or after the effective date. Under section 2(1), in the case of an entity that immediately prior to the enactment of the FOI Act 2014 was a public body within the meaning of the Act of 1997, the effective date is 21 April 1998. As Irish Water was such an entity, the effective date is 21 April 1998.

It should be noted, however, that I have not yet had cause to make a formal determination on this specific point in the course of a review before my Office.

Access to records of deceased persons by next-of-kin

Article 4(1)(b)(iii) of the Freedom of Information Act 1997 (Section 28(6)) Regulations, 2009 (S.I. No. 387 of 2009) provides that a request for access to records which would disclose the personal information of a deceased individual shall be granted to the spouse or the next of kin of the individual in certain circumstances and having regard to any relevant guidelines published by the Minister.

Article 4(2) of S.I. No. 387 of 2009 provides that “next of kin” is the person or persons standing nearest in blood relationship to the individual in accordance with section 71(2) of the Succession Act, 1965. The Department of Public Expenditure and Reform published Guidance Notes in 2009 pursuant to the provisions of S.I. No. 387 of 2009.

According to the Guidance Notes, for the purpose of establishing a claim to be the next of kin of the deceased, next of kin are described (in accordance with the Succession Act, 1965) as follows:

- child or children of the person to whom the records relate, then
- parents or surviving parent of the person to whom the record relates, then
- brothers and sisters of the person to whom the record relates, then
- nephews and nieces of the person to whom the record relates, then
- the person or persons who, at the date of death, stand nearest in blood relationship to the person to whom the record relates, then
- the Minister for Finance.

The Succession Act, 1965 sets out, at Part VI, the rules relating to the distribution of the estate of a deceased individual on intestacy. Sections 67 to 69 set out the rules of hierarchy relating to the deceased’s spouse, children, parents, brothers and sisters, and nieces and nephews. Sections 70 and 71 address shares of next-of-kin and ascertainment of next-of-kin. In essence, the Succession Act 1965 distinguishes next-of-kin from other close relatives as described in sections 67 to 69. In other words, the ascertainment of next-of-kin as set out in section 71 arises only where the individuals concerned are not captured by the provisions of sections 67 to 69. Section 71 of the Act provides as follows:

“(1) Subject to the rights of representation mentioned in subsection (2) of section 70, the person or persons who, at the date of the death of the intestate, stand nearest in blood relationship to him shall be taken to be his next-of-kin.

(2) Degrees of blood relationship of a direct lineal ancestor shall be computed by counting upwards from the intestate to that ancestor, and degrees of blood relationship of any other relative shall be ascertained by counting upwards from the intestate to the nearest ancestor common to the intestate and that relative, and then downward from that ancestor to the relative; but, where a direct lineal ancestor and any other relative are so ascertained to be within the same degree of blood relationship to the intestate, the other relative shall be preferred to the exclusion of the direct lineal ancestor.”

Article 4(2) of S.I. No. 387 of 2009 provides that next-of-kin is the person or persons standing nearest in blood relationship to the individual in accordance with section 71(2) of the Succession Act, 1965. As worded, the Regulations do not allow for sections 67 to 69 of the Succession Act to be considered when establishing next-of-kin. They specifically require that next-of-kin must be established in accordance with section 71(2) and as a result, a number of potential issues arise.

Arguably, S.I. No. 387 of 2009 does not provide access rights for close relatives of the deceased as described in sections 67 to 69 of the Succession Act, 1965 in any circumstances, apart from the spouse who is specifically mentioned as a class of requester in Article 4(1)(b) (iii). Also, the application of the rules set out in section 71(2) of the Succession Act, 1965 for establishing next-of-kin in the context of S.I. No. 387 of 2009, may produce results which run contrary to the objectives of sections 67 to 69 of the Act. For example, pursuant to rules set out in section 71(2), it would appear that the brother or sister of the deceased stands nearer in blood relationship than the children of the deceased.

Accordingly, while it appears to be the case that the Oireachtas intended that the establishment of the next-of-kin would follow the approach set out in sections 67 to 71 inclusive of the Succession Act, 1965 (and the Guidance Notes suggest this to be the case), then it appears that this is not what is provided for in S.I. No. 387 of 2009.

While this is a rather technical issue, it is an important point in the context of the ability of the close relatives to access records of deceased persons under the FOI legislation. I am happy to report that when my Office raised the issue, CPU acknowledged the problem and at the time of writing, new regulations are being drafted which should resolve the matter.

Addressing poor practice

From time to time, my reviews highlight particular problems with how an FOI body processes requests or otherwise complies with the provisions of the Act. Sometimes it is sufficient to highlight such matters in published decisions or in correspondence, including statutory notices, to the public body concerned. However, when the issues appear to show a systematic ongoing failure to properly operate the legislation, I normally contact the head of the FOI body to offer a meeting with my staff who will assist in supporting improvements, including participating in training interventions where necessary.

In this context, senior staff from my Office met with officials of the Department of Justice and Equality in 2014. They welcomed the Department's positive response and committed to offering whatever support my Office might be in a position to provide in terms of improving the Department's application of FOI, including participating in any training interventions the Department might wish to roll out. Unfortunately, I have seen little evidence that the proposals to engage and to improve from 2014 have met with success, since that meeting.

During 2015, my Office has dealt with several cases involving the Department in which provisions of the Act have not been complied with, including those covering time periods for decision making and release of records, notification of appeal rights, provision of records and other information to my Office and application of certain exemptions.

For instance, in Case No. 150284, the Department failed to furnish to the applicant the reasons for its refusal of a request with the result that a statutory notice was served on the Secretary General requiring that a proper statement of reasons be given to the applicant and to me. While I recognise that compliance with the Act places demands on the resources of FOI bodies, I find it difficult to understand why offers of support from my Office along with the substantial training, guidance, sample letters and other materials available through CPU are not taken up. This is even more surprising in the case of bodies such as the Department that have been subject to the FOI Acts for the past 18 years.

It seems to me, from the cases that come before me, that the commitment of senior management in the public service to the objectives of FOI and to improved openness and better governance varies considerably between the various bodies. In any case, I propose to continue to engage in 2016 with the Department of Justice and Equality and with other bodies whose FOI practices have been identified by my Office as being particularly poor.

Different effective dates for certain bodies

As I outlined above, the right of access to records held by the vast majority of public bodies that have been brought within the scope of FOI for the first time under the FOI Act 2014 applies to records created on or after 21 April 2008. However, there are a number of exceptions. The Minister for Public Expenditure and Reform introduced the Freedom of Information Act 2014 (Effective Date for Certain Bodies) Order 2015 in April 2015. The Order provides for a different effective date for certain bodies, as follows:

21 April 2012 for the Private Residential Tenancies Board, and 14 October 2014 for the Refugee Applications Commissioner and the Refugee Appeals Tribunal.

Re-use of public sector information

Directive 2013/37/EU of the European Parliament and of the Council on the re-use of public sector information, and the earlier Directive it amends (2003/98/EC), create an EU statutory framework for the re-use by businesses and citizens of existing information held by public sector bodies in new products and services.

The Directive places an obligation on public sector bodies to provide information about material that they are prepared to release under the Directive, to the benefits of re-users, with the aim of boosting economic activity. It is important to note that the Directives do not create any new rights of access to information.

Directive 2013/37/EU has recently been transposed into Irish law. The European Communities (Re-use of Public Sector Information) (Amendment) Regulations 2015 (S.I. No. 525 of 2015) came into force on 24 November 2015. S.I. No. 525/2015 amends S.I. No. 279/2005 (the Re-use of Public Sector Information Regulations).

The new Regulations amend the regime in the 2005 Regulations by giving effect to a number of provisions contained in the 2013 Directive, including that the means of redress available to a re-user must now include the possibility of review by an impartial body capable of making binding decisions. While the 2005 Regulations provided for an Appeal Commissioner, S.I. No. 525/2015 designates the Information Commissioner as the Appeal Commissioner.

Accordingly, my Office can now accept applications for review of decisions taken by public bodies in relation to requests made under the Regulations to re-use documents. However, no such applications for review have been made to date.

Appeals to the Courts

A party to a review, or any other person who is affected by a decision of my Office, may appeal to the High Court on a point of law. A decision of the High Court can be appealed to the Court of Appeal/Supreme Court.

Three appeals of decisions of my Office were made to the High Court in 2015, one by the applicant and two by the relevant public body. In one of the cases involving the Office of the Houses of the Oireachtas, the matter was remitted back to my Office on consent. The second case was heard in 2015 but judgment was reserved to 2016. The third case is listed for hearing later in 2016.

There were no High Court judgments delivered in 2015. While two High Court cases were brought to a conclusion in 2015, neither required a High Court judgment. I mentioned the first of the two cases in my Annual Report for 2014. I explained at the time that the applicant, on behalf of Westwood Club, applied to the High Court for an Order directing my Office to complete the review in his case that had been suspended, pending the outcome of a related High Court appeal concerning the same applicant.

In the event, I issued my decision prior to the hearing of the judicial review proceedings and the appeal was effectively withdrawn when the applicant accepted that only the issue of costs remained to be determined following the making of the decision.

In the second case, the applicant appealed to the High Court arising from my decision to affirm the decision of the Department of Defence to release certain records with the name and address of the applicant redacted. He argued that even with the redactions, the release of the records would disclose personal information relating to him. During the exchange of affidavits it became apparent that the Department had failed to notify my Office of the entirety of the records it had intended to release.

Accordingly, my Office successfully applied to the High Court to have the matter remitted back for reconsideration. However, the applicant subsequently appealed that decision of the High Court to the Court of Appeal. This was the only appeal to the Court of Appeal made in 2015. The case is listed for hearing later in 2016. One Court of Appeal judgment was delivered in 2015. The full text of the judgment is available on www.oic.ie. What follows is a summary of the main points in the case.

Patrick Kelly and the Information Commissioner [2014 No. 1436]. Judgment delivered on 30 November 2015

Background and issue

In her High Court judgment of 7 October 2014, O'Malley J. held that the Court had no jurisdiction to entertain an appeal of the discontinuance by the then Information Commissioner of seven of the applicant's review applications on the ground that they were vexatious. The applicant appealed the decision of the High Court to the Court of Appeal.

The principal issue before the Court of Appeal concerned the interpretation of section 42(1) of the FOI Acts 1997 & 2003, which provides for a right of appeal to the High Court on a point of law from a decision by my Office following a review.

Conclusion of the Court

The Court of Appeal dismissed the appeal and found that the High Court had not erred in finding that there is no right of appeal to the High Court where the Information Commissioner has discontinued a review. The Court found that where the Commissioner discontinues a review, the review has essentially been aborted, or discontinued, and that there has been no decision following a review that is capable of appeal to the High Court on a point of law. It upheld the finding of the High Court that the correct method of challenging the discontinuance by the Commissioner of a review is by way of judicial review.

Freedom of Information arrives to ESB Networks

EM - 12/10/2015

**‘Records of
patient were
deliberately
removed’**

Irish Independent - 09/05/2015

€600,000 public relations bill for ministers, TDs and senators

Irish Independent - 14/07/2015

CHAPTER 3:

Decisions



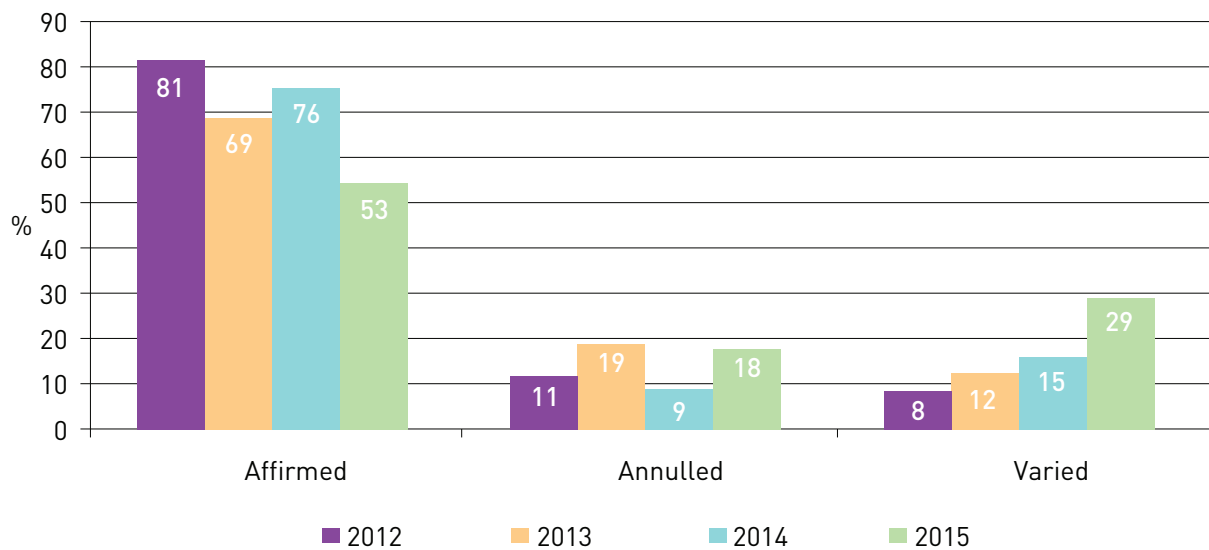
Chapter 3: Decisions

Formal decisions

My Office reviewed a total of 323 cases during the year. A formal decision was issued in 206 of those cases, representing 64% of all reviews completed in 2015. Decisions on reviews can be made by affirming, annulling, or varying the decision of the public body. The table below shows the outcomes of those reviews on which a formal decision was made from 2012 to 2015.

The remaining cases reviewed in 2015 were closed by way of discontinuance, settlement or withdrawal. See Table 16, Chapter 4 for a comparison of all reviews closed in the year.

Percentage comparison of formal decisions 2012 - 2015



Annulment of decisions to which section 38 applies

Section 38 is a statutory notification requirement which public bodies are required to observe in relation to the exemptions contained in section 35 (information obtained in confidence), section 36 (commercially sensitive information) and section 37 (personal information about a third party). In the case of each of these exemptions, the FOI body may grant a request if it is considered that the public interest is better served by granting than by refusing the request. However, any proposal to release such otherwise exempt material is subject to the provisions of section 38. That section requires the FOI body to notify certain third parties that it proposes to grant the request in the public interest and that the FOI body will consider any submissions from the third parties before deciding whether to grant or refuse the request. It also provides for the processing of such requests within a specified timeframe.

I consider that in a case where the section 38 requirements were not applied correctly, my jurisdiction to conduct a review is undermined. As such, my Office may annul decisions where timelines associated with the provisions of section 38 have not been adhered to by the body concerned.

In 2015, my Office annulled ten decisions where public bodies had failed to adhere to those time requirements.

In reviewing the decisions, my Office noted the public bodies had failed to take account of one or more of the requirements of section 38. For example, section 38(2) provides for a third party to be notified by a public body within two weeks of receiving the original request, while section 38(2)(ii) provides that a person notified under that subsection has three weeks to make a submission.

In one case, a third party was notified more than three months after the request was received. In a number of other cases, third parties were not provided with any deadlines, or submissions were accepted outside the stated three-week period.

In another case, the public body extended a deadline on the basis of staff resource issues. However, section 38 does not provide for such an extension.

Section 38 provides for a decision making process to be concluded in no more than seven weeks in normal circumstances. In addition, an internal review is not available to the requester or third party, where the request involves a consultation under section 38. As such, a timely decision by a public body will ensure that the requester and/or affected third parties can avail of a right of appeal to the Information Commissioner within a reasonable timeframe. However, in some cases, parties were either not notified of the decision of the body concerned, or were not advised of their right of appeal to my Office.

I would refer FOI decision makers to CPU Guidance Note 8 which provides FOI bodies with helpful information on ensuring compliance with the requirements of section 38.

Decisions of interest

The following cases represent a small sample of the cases my Office reviewed during the year that were concluded by way of a formal decision. The full text of all formal decisions issued during 2015 is available at www.oic.ie.

In some cases, the review was carried out under the provisions of the FOI Acts 1997 & 2003 notwithstanding the fact that the FOI Act 2014 has now been enacted. The transitional provisions in section 55 of the 2014 Act provide that any action commenced under the 1997 Act but not completed before the commencement of the 2014 Act shall continue to be performed and shall be completed as if the 1997 Act had not been repealed.

David Yip and the Houses of the Oireachtas Service – Case 150142

In this case, the applicant sought access to records of communications to and from the Ceann Comhairle in respect of Dáil Éireann's Standing Order 40A (SO 40A). This SO requires government Ministers to provide further details where the Ceann Comhairle determines that an answer to a parliamentary question given to a Dáil deputy was insufficient.

The Service argued that the majority of the records were exempt pursuant to section 42(k), section 42(l) and section 41(1) of the FOI Act 2014. It submitted that the records were 'private papers' of Dáil members and/or 'official documents' of the Dáil, and/or 'confidential communications' of Dáil members, and were therefore exempt from release.

I found that section 42(k), which is read in the context of Article 15.10 of the Constitution, protects those private papers of members and official documents of the House that are required "by the rules or standing orders of either or both of such Houses to be treated as confidential". However, I was satisfied that the Dáil had not created a standing order which provided that private papers and/or official documents should be treated as confidential, and therefore I found that section 42(k) did not apply.

I also found that the records were not 'private papers' within the meaning of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013, as they were not in the possession or control of Dáil deputies, but rather were held by the Ceann Comhairle's Office. Furthermore, I was of the opinion that the Service had not demonstrated that communications to the Ceann Comhairle from Dáil members pursuant to the SO 40A procedure were made on an understanding of confidentiality, and that, as a result, they were not 'confidential communications' within the meaning of the 2013 Act. Therefore, I concluded that section 42(l) did not apply to the records.

Finally, as section 105(1) of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 concerns 'private papers', and as I was satisfied that the records did not come within the definition of private papers under the 2013 Act, it followed that disclosure was not prohibited under section 105(1), and section 41(1) of the FOI Act did not apply. Therefore, I directed the release of the records.

It is noteworthy that Dáil Éireann has since created Standing Orders 114A-E which affords further protection for official documents, private papers and confidential communications.

Mr S and the Houses of the Oireachtas Service – Case 150073

Unlike case 150142, in this case I found that certain records were private papers within the meaning of Part 10 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013. The applicant, a journalist, sought access to all receipts and invoices held by the Houses of the Oireachtas Service in relation to a 2013 audit of expenses of the members of the Houses of the Oireachtas and copies of all receipts/invoices submitted for review by the 22 members chosen for the 2013 audit.

The Service refused the request under section 42(l) of the FOI Act 2014 on the basis that the records sought were the private papers of the members, as per Part 10 of the 2013 Act. During the course of the review, it emerged that the auditor, Mazars, held copies of certain records for professional compliance purposes. The Service deemed these records to be held by it in accordance with section 11(9) of the FOI Act.

While the term "private papers" appears in the FOI Act several times, it is not defined in the Act. Section 42(k) provides that the Act does not apply to a record relating to any of the private papers (within the meaning of Article 15.10 of the Constitution) of a member of either House of the Oireachtas or an official document of either or both of such Houses that is required by the rules or standing orders of either or both of such Houses to be treated as confidential. The equivalent provision in the FOI Act 1997 was section 46(1)(e).

The question of whether records of the expenses of members could be considered private papers in the context of article 15.10 and section 46(1)(e) of the FOI Act arose in one of the earliest decisions of my Office (Case 99168 - Mr. Richard Oakley of The Sunday Tribune Newspaper & the Office of the Houses of the Oireachtas). In that case, the then Commissioner, Kevin Murphy, considered whether the identities of members should be disclosed in association with a published list of expenses paid.

During the course of that review, it was argued that Article 15.10 provided protection for private papers of the members. In his decision, Mr Murphy found that the records did not concern the private business of the members or their dealings with constituents or other third parties but rather related to the discharge of their public duties as Oireachtas members and he found that the records did not come within the term "private papers of its members".

I noted that against this background, it would seem reasonable for me to conclude that receipts and invoices for expenses incurred by members in the course of the performance of their functions would not ordinarily be considered to be private papers of the members.

However, for the purposes of considering the applicability of section 42(l), the question I was obliged to consider was whether such records were private papers within the meaning of Part 10 of the 2013 Act. For the receipts and invoices held by the members to be deemed private papers within the meaning of the 2013 Act, they had to be in the possession or control of the members in relation to their political role or in their capacity as members. Having regard to the nature of the procedures that apply to expense payments, as described by the Service, I accepted that receipts and invoices were held by the members. I also accepted that the members held such records in their capacity as members. Accordingly, I found that such records were private papers within the meaning of Part 10 of the 2013 Act and that the FOI Act did not apply to the records, under section 42(l).

As for the records held by Mazars, that the Service accepted were under its control, I noted that such records were clearly not held by the members. However, for section 42(l) of the FOI Act to apply, it is sufficient that the records sought relate to private papers within the meaning of Part 10 of the 2013 Act. The records held by Mazars, being copies of records which I accepted to be private papers, clearly related to such private papers. Accordingly, I found that the Act did not apply to those records.

On the matter of the apparent inconsistency between the conclusions I came to in this case, and the conclusions of Kevin Murphy in case 99168, I noted that section 42(l) is an entirely new provision in the FOI Act 2014 and that there was no equivalent provision contained in the FOI Act 1997. I further noted that it is quite broad in nature and affords a more significant protection for private papers of members of the Houses than previously existed.

As I stated in my decision, it could be argued that such a broad protection for records of the type at issue in this case is inconsistent with the requirements imposed on FOI bodies under section 11(3) and that it might be expected that information relating to expenses of members of the Oireachtas should be fully transparent and subject to public scrutiny under FOI. Reluctantly, however, I had to have regard to the prevailing legislation at the time of my decision, and I accepted that the records sought by the applicant in this case were records falling within the scope of section 42(l) of the FOI Act 2014.

Mr Y and the Houses of the Oireachtas Service – Case 140158

In yet another case involving the Houses of the Oireachtas Service, my review was concerned with whether the Service was justified in refusing access to certain records relating to access arrangements for the Houses of the Oireachtas. Specifically, the applicant sought details of all Oireachtas access pass holders, not including Oireachtas staff but including those who have passes from political parties and a list of everyone signed in as a visitor by a TD or Senator for the first three months of 2014.

The Service made wide ranging submissions on the case. It argued that section 127 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 (the 2013 Act) operates so as to exclude the records at issue from the scope of the FOI Act. That section of the 2013 Act provides that the FOI Act does not apply to certain records relating to the business of Oireachtas committees. The Service argued that the records sought related to the business of the Joint sub-Committee on Administration.

The Service also argued that the records at issue were official documents of the Joint sub-Committee and that section 46(1)(e) of the FOI Act applied. Section 46(1)(e) provides that the Act does not apply to “a record relating to any of the private papers (within the meaning of Article 15.10 of the Constitution) of a member of either House of the Oireachtas or an official document of either or both of such Houses that is required by the rules or standing orders of either or both of such Houses to be treated as confidential”.

While I accepted that the sub-Committee in question has a function in representing the views of members and making recommendations in relation to security and access arrangements for the Houses, I considered that records relating to business conducted by the sub-Committee would include records such as minutes of sub-Committee meetings where security and access matters were discussed and records containing details of any recommendations made by the sub-Committee on the matter of security and access. I found that the records at issue did not relate to business conducted or to be conducted by the sub-Committee and that they were not captured by the exclusion from the scope of the FOI Act as set out in section 127 of the 2013 Act. I also found that section 46(1)(e) did not apply as the records were not official documents of the sub-Committee.

I did accept, however, that the Service operates a policy of not disclosing the list of persons with access passes to the complex as one of its measures for ensuring the safety or security of the Oireachtas complex and persons working within the complex. I was satisfied that the disclosure of the list of such persons could reasonably be expected to prejudice or impair that policy or method and that section 23(1)(a)(iii) applied in respect of that list.

On the matter of access to a list of everyone signed in as a visitor by a TD or Senator for the first three months of 2014, the applicant agreed to limit the scope of his request to a single week and the issues of principle remained to be considered.

The records at issue comprised extracts from the Visitors Register for the Houses. The register contained details of the visiting individual and his/her address, the date and time of the visit, a pass number which is valid for the day, and, in most cases, the name of the member of the House or the political party who signed in the individual.

I found that the vast majority of the individuals who attended at the Houses did so in a personal capacity, as they signed in using a residential address. I found those entries to be exempt from release under section 28 (personal information) of the FOI Act 1997 (section 37 of the 2014 Act).

On the other hand I found that certain individuals who signed in to the Houses attended in their capacity as officers of public bodies and that the information contained in the records relating to those individuals was not personal information for the purposes of the Act, and should be released.

There remained certain other individuals who signed in to the Houses citing as their addresses entities including trade unions, representative bodies, non-governmental organisations, or private companies. I considered that such individuals should not be regarded as having attended in a personal capacity and that it was reasonable to assume that such individuals attended as representatives of the particular entities identified in the Register. I directed the release of those details.

[Note: This decision was subsequently appealed to the High Court by the Service. My Office accepted that a procedural error arose during the course of the review and successfully applied to have the case remitted back. At the time of writing, a fresh review was ongoing.]

M Solicitors and the Department of Public Expenditure and Reform – Case 150082

In October 2013, the Minister for Public Expenditure and Reform announced that Premier Lotteries Ireland Ltd (PLI) had been selected as the preferred applicant for the 20-year licence to run the National Lottery. Following that decision, the applicant in this case sought a copy of the successful tender for the licence, and a copy of the draft and final licences.

The Department had refused the request on the grounds that the information requested was confidential (section 35 of the FOI Act 2014) and commercially sensitive (section 36). It also contended that the Regulator of the National Lottery had sole statutory jurisdiction to decide whether the licence should be published.

In respect of the draft and final licences, I was satisfied that the National Lottery Act 2013 did not prohibit me from directing release pursuant to FOI. I also found that the majority of the licences did not contain commercially sensitive or confidential information. PLI identified certain specific clauses of the licences that it believed should be exempt from release.

While I accepted that these clauses were commercially sensitive, I was satisfied that there was a strong public interest in favour of their release. I directed the release of the entirety of licences, save for two clauses which I found to be exempt under section 36, and one schedule which I found to be exempt under section 35. Subsequently, the Regulator published the licence (with the same redactions) on his website.

Regarding the tender documentation, it came to my Office's attention during the investigation of the review that PLI had also submitted a redacted version to the Department during the tender process, with a view to protecting its commercially sensitive information. Despite this, PLI contended that none of the documentation, whether redacted or otherwise, should be released, as they were protected by section 35 and 36. I was satisfied that the majority of the redacted tender should be released. However, I determined that significant portions of the full tender should be protected under section 36, as I accepted that they contained commercially sensitive information, and that the public interest did not favour their release.

Gavin Sheridan and the Department of Finance – Case 150086

A key change brought about by the FOI Act 2014 was a reduction from ten to five years in respect of the period during which certain cabinet records are exempt from disclosure. In this case, one of the first in which the new five year rule was considered, a request was made to the Department for copies of Ministerial briefing papers for Cabinet meetings in 2007, 2008 and 2009.

The Department refused to release a number of records under section 28. While section 28(1) provides an exemption for certain Government records, it is subject to section 28(3)(b) which provides that records which would otherwise be exempt under section 28(1) will not be exempt if the record relates to a decision of the Government that was made more than five years before the receipt of the FOI request.

The Department argued that there is no five year time limit in the constitutional obligation to respect the confidentiality of discussions at meetings of the Government as set out in Article 28(4)(3) of the Constitution. It argued that the well established rule of statutory interpretation which requires that a constitutional interpretation be applied to a provision should be applied in this case. It argued that when Section 28 as a whole is interpreted in this light it is clear that the documents which would reveal the contents of discussion at cabinet need not be released pursuant to the Act, irrespective of whether the meeting concerned was more than five years prior to receipt of the FOI request.

I noted that section 28 of the 2014 Act is broadly similar to the equivalent provision of section 19 of the FOI Act 1997, before the period of protection was amended under the 2003 Act from five years to ten years. I also noted that in a previous case in relation to section 19(3)(b), the then Commissioner found that “Memoranda for Government and briefing notes are exactly the type of records that were intended by the Oireachtas to fall for release under section 19(3)(b), at the expiration of the ten year period of protection, for records relating to meetings of Government.” I found that the four records at issue were the type of document intended to fall for release under section 28(3)(b) of the Act and I directed the release of the records.

Mr X and the Department of Finance – Case 140063

The special liquidation of Irish Bank Resolution Corporation Limited (IBRC) is of course the subject of significant interest to the Irish public, but it raises novel issues in relation to the consideration of the public interest under the FOI Act. In this case, the applicant, a journalist, sought access to the monthly and any other reports of the Special Liquidators of IBRC to the Minister related to the liquidation process, the minutes of any meetings held between the Minister or any officials in the Department and the Special Liquidators, and any briefing documents prepared for such meetings.

Section 31 of the FOI Act 1997 is the exemption that is intended to protect the financial and economic interests of the State and public bodies but it is subject to a public interest balancing test. Having regard to the IBRC Act 2013, I found that sections 31(1)(a) and (b) applied to records containing the confidential communications between the Special Liquidators and the Minister regarding the IBRC liquidation process.

I accepted that the role of the Special Liquidators is similar to that of a Court appointed liquidator and that the Special Liquidators thus owe a duty of care not only to the Minister but to all stakeholders involved. The letter of engagement setting out the terms and conditions of appointment of the Special Liquidator in accordance with section 7 of the IBRC Act specifies that all communications supplied by the Special Liquidators to the Minister shall be supplied on a confidential or restricted basis and shall not be disclosed without the Special Liquidators’ prior written consent. In any event, I noted that a liquidator operates in a fiduciary capacity in relation to the company concerned and that a fiduciary relationship requires trust, good faith and confidentiality in relation to third parties.

In the circumstances, I was satisfied that confidentiality is regarded by both the Special Liquidators and the Minister as necessary to facilitate the liquidation process and to allow for the free exchange of information relevant to IBRC’s interests and the Minister’s role in overseeing the liquidation process. I therefore considered it reasonable to expect that disclosure of the records concerned, in full or in part, would undermine the liquidation process, which would be contrary to the public interest as recognised by the IBRC Act.

In reaching my conclusion, I noted that the costs of the liquidation process will be paid at least indirectly out of public funds. However, I also noted that the amount of taxpayer money involved has yet to be determined, with the success of the liquidation process being a significant factor in the equation. The IBRC Act recognises a public interest in the State's financial support to IBRC being recovered as fully and efficiently as possible. I therefore did not accept it could, on balance, serve the public interest to risk undermining the liquidation process while it remains ongoing by disclosing information that could inhibit the exchange of information between the Special Liquidators and the Minister. I noted, however, that I would expect the Department to consider making further information available once the liquidation process is completed.

Mr X and the Department of Finance – Case 140153

The issue before me in this case was whether the Department was justified in refusing access to certain records relating to Anglo Irish Bank (Anglo) and other Irish banking institutions dating from the period of November 2008 to December 2009. Section 33AK of the Central Bank Act 1942, as amended, is a secrecy provision that prohibits the disclosure of certain confidential information by personnel from the Central Bank and the Financial Regulator, which is now part of the Central Bank. The majority of the records had been prepared in reference to section 33AK of the Central Bank Act and made available to the Minister under section 30 of the Credit Institutions (Financial Support) Scheme 2008, which provides for the confidential treatment of any information made available to the Minister under the Scheme.

Accordingly, I accepted that the records concerned fell within the ambit of section 32(1)(a) of the FOI Act 1997, which is a mandatory exemption provision that applies where the disclosure of a record is prohibited by an enactment not specified in the Third Schedule to the 1997 Act. Certain other records were found to be exempt under section 22(1)(a) (legal professional privilege) and section 26(1)(b) (duty of confidence) of the FOI Act. Notably, it was not disputed by the applicant, a member of the Oireachtas Banking Inquiry, that a common law duty of confidence generally exists in relation to the banking information of individual borrowers (see, e.g., *Walsh v. National Irish Bank Limited* [2008] 2 ILRM 56).

However, despite the objections of the IBRC Special Liquidators, I directed the release of certain information relating to Anglo, including a report dating from 2009 insofar as it related to the restructuring plan submitted at the time by Anglo to the European Commission. In reaching my decision, I had regard to the nature of the options under consideration at the time (including the assumptions upon which the options were based) and the fact that Anglo was subsequently merged with another banking institution to become what is now known as IBRC and then placed in special liquidation. I also noted that, according to the IBRC Progress Update Report published on 13 March 2015, “significant progress” had been made “in deleveraging the loan books of IBRC and managing other aspects of the liquidation”.

As the information in the 2009 report relating to Anglo's restructuring plan thus appeared to be truly historic and obsolete, I did not accept, in light of the general nature of the IBRC's objections, that the release of the information under FOI would constitute an unauthorised use of the information to the detriment of Anglo or its successor, IBRC, or would otherwise be wrongful. Accordingly, I was not satisfied that the Department owed a duty of confidence to Anglo or the IBRC or any other third party with respect to the restructuring plan relating to Anglo. I also found no basis for concluding that any other objections applied with respect to the information concerned.

Mr Q and RTÉ – Case 150034

The applicant sought copies of records showing the amount of damages paid by RTÉ arising out of legal complaints from January 2010 to February 2014, to include details of the programme involved, if any, and the recipient of the money. RTÉ released details of payments made in respect of various individual personal injury and third party/employer's liability claims but withheld the name of the claimants. It also released details of the total amount paid each year in respect of individual legal claims under the headings TV, Radio or News Programme and Corporate Cases. The total amount reflected all of the payments made in respect of legal claims with the exception of one particular payment. It refused to release any details of the specific amounts paid, the names of the payees and the programme involved.

My Office found that the release of the details of the recipients of the payments and the amounts they received would disclose personal information relating to the individuals concerned. It also found that releasing details of the amount paid, associated with the particular programme would involve the disclosure of personal information relating to identifiable individuals, and that the disclosure of the amount of the payment that was withheld from the total amount paid each year in connection with the second category of payments described above would involve the disclosure of personal information relating to an identifiable individual.

On the matter of where the balance of the public interest lay, the applicant cited a number of previous cases where public bodies have released records relating to the expenditure of public funds. However, the specific cases mentioned related to payments made to members of the Oireachtas or companies providing goods or services to a public body under a contract for service. My Office considered that the individuals in those cases voluntarily entered into arrangements with public bodies for the provision of services, property, etc, for which State monies were payable. In this case, the payments were made to private individuals who had taken a legal action of some sort against RTÉ that resulted in a payment. My Office took the view that the circumstances of the payments are very different and the same arguments for release did not apply.

My Office found that the release of the details at issue would result in a significant breach of the rights to privacy of the individuals concerned. My Office further found that the public interest in the promotion of openness and accountability had been served to some extent by the limited information released by RTÉ to the applicant and while the release of the records in full would serve to further enhance the level of openness and accountability, it found that the public interest in so doing was not sufficiently strong to outweigh the public interest in ensuring that the privacy rights of the individuals in question were protected.

Colman O’Sullivan and Irish Water – Case 150141

This review concerned the refusal of Irish Water to release records relating to the salary expectations of candidates for positions within Irish Water as expressed at interview, on the ground that no such records existed. During the course of the review, Irish Water stated that it held certain records containing salary expectations of candidates but that such records related to a “pre-screening” stage, which, it argued, was not the same as the interview stage.

My Office sought details of this pre-screening stage from Irish Water. Irish Water indicated that the pre-screening stage varied depending on whether it was conducted by a recruitment agency or by Irish Water itself. In relation to its own in-house recruitment process, Irish Water explained that all CVs were screened using a scoring sheet and the top eight to ten CVs were selected for phone screening. During the phone screening, the majority of candidates were advised of the salary on offer and asked if that salary was in line with their expectations. Responses given by the candidates were noted by Irish Water.

My Office took the view that the pre-screening process amounted to an interview process. On foot of the pre-screening contacts, certain candidates were eliminated and the top candidates were invited to interview. Thus, my Office found that the records held by Irish Water containing salary expectations expressed by candidates at pre-screening stage were within the scope of the review, as the pre-screening stage amounted to an interview stage.

My Office found that Irish Water had not fully considered whether the pre-screening records fell for release under the FOI Act and accordingly, found that Irish Water had not justified its decision to refuse the request on the ground that no relevant records existed. My Office annulled Irish Water’s decision and directed it to make a fresh, first instance decision in respect of the original request.

Mr X and Cork County Council – Case 140157

My review in this case had its background in a request for records relating to an internal Council investigation into its agreement to buy lands at Deerpark, Charleville in April 2006. It was already public knowledge that such an investigation had been carried out.

In making his FOI request for records relating to that investigation, the applicant contended that the investigation had concerned the conduct of a named Council official. The Council refused to confirm or deny whether the requested records existed on the basis that to do so would disclose personal information (section 28(5A) of the FOI Act 1997 refers).

I affirmed the decision of the Council. I found that the disclosure of the fact that the Council held records concerning the investigation carried out would not, in itself, disclose personal information. However, the applicant's FOI request was predicated on a contention that the investigation focused on "the conduct of" the named official. I thus considered the request to seek access to records related to any investigation carried out by the Council into the conduct of the named official, in relation to the agreement to purchase the land in question.

Section 28(5A) prohibits the public body from disclosing whether or not records exist where it considers that disclosure of their existence or non-existence would have the effect of disclosing personal information. To disclose the existence or non-existence of records in this case would have confirmed whether or not the Council had conducted an investigation into alleged wrongdoing by the official.

I also decided that if such records existed, in the circumstances of this case, the public interest in protecting the employee's right to privacy would outweigh the public interest in favour of release.

Ciarán Doherty and the Department of Social Protection – Case 140253

JobBridge is an internship scheme that provides work experience placements for jobseekers for a specified period. The costs of the internships are borne by the State, in the form of social welfare payments plus a top-up payment. The applicant in this case requested various details about the scheme, including reports on the host organisations that had been excluded from further participation.

In relevant part, the Department refused access to the names of the employers that had been excluded from participation in the scheme. I accepted that release of the names would disclose that the employers had somehow breached scheme requirements and that release could prejudice the competitive positions of the employers in the conduct of their business (section 27(1)(b) of the FOI Act 1997 refers).

However, as section 27(1)(b) does not apply where the public interest would, on balance, be better served by granting the request, my Office consulted with the various excluded employers regarding the possible release of their names in the public interest. Roughly half replied, and many alleged that the Department had not treated them fairly in deciding to exclude them from further participation in the scheme.

Following further enquiries by my Office, the Department stated that it had not notified all employers in writing of their exclusion from the scheme, that a formal complaints procedure had only been adopted in August 2014, and that, in contrast to the current provisions, employers had been given indefinite bans regardless of the type of breach of scheme requirements that had occurred.

While I have no role in determining if fair procedure was complied with, I took this as an acknowledgment by the Department that the continued exclusion of the employers on the list as at the date of the request did not necessarily comply with the requirements of fair procedure.

Employers taking part in the scheme indirectly benefit from State monies. In the normal course, I would consider the public interest in openness and accountability to weigh heavily in favour of the release of the names of employers who have been excluded from further participation. However, to have directed release in this case would have risked identifying employers as having breached or abused the scheme in circumstances where the Department's decision to exclude them from the scheme may have been flawed. I decided, on balance, that the public interest weighed in favour of withholding the names concerned.

Although the Department had not identified or considered the requested reports for release, I decided that these should be withheld. I could not see any basis on which I would direct the release of reports concerning excluded employers when I had found their names to be exempt in the particular circumstances above.

Mr X and the Department of Education and Skills – Case 150067

In this case, the applicant had made a request to the Department for records concerning project contracts relating to the School Transport Scheme. The School Transport Scheme is operated by Bus Éireann on behalf of the Department. Part of the review considered if any of the requested records were physically held by the Department in its own right. I accepted that this was not the case.

The remainder of the review considered whether records held by Bus Éireann in relation to the scheme and its operation were under the control of the Department. Under the FOI Act 1997, records held by a third party but under the control of a public body are deemed to be held by the body and a potential right of access to such records exists.

As the FOI Act does not define the term “control”, my decision took account of High Court judgments involving my Office that dealt with the concept, namely *The Minister for Enterprise, Trade and Employment v the Information Commissioner* [2006] IEHC 39, and *Westwood Club v Information Commissioner and Anor* [2013 No. 176 MCA]. These judgments set out various non-exhaustive matters to consider when considering if an entity is controlled by a public body, such as which party has day to day operation of the relevant functions; which party has real strategic control; and the extent of the financial nexus between the parties.

I also had regard to *Student Transport Scheme Ltd v Minister for Education and Skills & Anor* [2012] IEHC 425 (the *Student Transport Scheme Ltd* case), which concerned the nature of the relationship between the Department and Bus Éireann. Although this did not deal with control in an FOI context, and is under appeal, I considered it appropriate to have regard to matters described as “established fact” and obiter comments.

I found the Department to control Bus Éireann’s operation of the scheme. While I accepted that the Department was not involved, at a hands-on level, in the day to day operation of school transport, this does not determine the matter. Amongst the issues I considered were the fact that the relationship of principal and agent is relevant when considering control. Bus Éireann was described as the Minister for Education’s agent, and having to operate the scheme in accordance with his general directions and policy, in various documents considered in the *Student Transport Scheme Ltd* case. In that case, Mc Govern J. described the relationship as non-contractual (“entirely administrative”) and noted that Bus Éireann’s functions in respect of the scheme can be varied at will by the Department. He also said, essentially, that the Department exercised a control over Bus Éireann’s operation of the scheme which is similar to that it exercises over its own sections. The Department also financed the projects the subject of the request.

I also accepted that the Department’s control of Bus Éireann’s operation of the scheme meant records held by Bus Éireann concerning the scheme were under its control. In arriving at this view, I had regard to the general entitlements of principals, under laws of agency, to records created in the scope of the agency. I considered the records requested to be of a sort that can reasonably be said to have come into existence for the purpose of Bus Éireann’s operation of the scheme and in turn its agency relationship with the Department. I was not made aware of any material that the Department had agreed not to seek of Bus Éireann in relation to its operation of the scheme. I also noted that the Department has broad rights of inspection of, and access to, Bus Éireann’s records relating to the scheme.

Having found the records to be under the control of the Department, I annulled the Department’s effective refusal of relevant records as held by Bus Éireann and directed it to make a fresh decision in relation to the records.

Mr X and Meath County Council – Case 150155

This case followed on from a review I conducted in 2014 (Case 120210), on which I commented in my 2014 Annual Report.

The initial request stemmed from actions taken by Meath County Council on a planning enforcement matter. In 2004 and again in 2009, it issued Enforcement Notices to the applicant concerning alleged breaches of planning permission. The Notices were found by the Courts to be, respectively, invalid and procedurally flawed.

In May 2012, the applicant made an FOI request for records relating to these Notices. Although his request specifically included records held by the Council's legal advisor, the Council did not obtain or consider any of these records for release. In my decision in Case 120210, I annulled the Council's effective refusal of the legal advisor records and directed it to consider these records afresh. The Council released some of the records in full and in part and fully withheld the rest, which the applicant ultimately appealed to my Office.

I do not intend to go into detail about the actual decision that my Senior Investigator arrived at in this case. What I want to draw attention to is the Council's lack of engagement with this review. It is even more disappointing that I have to do so given that my 2014 Annual Report made similar observations in relation to Case 120210.

The Council was invited to make submissions to my Office for the purposes of the review but did not do so. According to its original decision, it considered "legal advice privilege" to apply to the records (one of the two limbs of legal professional privilege, covered by section 22(1)(a) of the 1997 Act). However, it had cited section 22(1)(b), which is concerned with records that, if released, would result in a contempt of court.

The Council failed to indicate if it considered litigation privilege (the second limb of legal professional privilege) to apply to any of the records, or to explain why this might be the case. Neither did it explain why it considered the withheld records to attract legal advice privilege.

My staff spent considerable time examining the records at issue. A number of the withheld records contained the same content as records I had directed be released in Case 120210, or as records that the Council itself had released on initial receipt of the request in 2012. This is an exercise that should have been carried out by the Council.

Finally, but importantly, in Case 120210 the Council had confirmed that there had been discovery of records to the applicant during the Court cases concerning the issued Notices. Due to undertakings given by the applicant to the Court, it would be a contempt of court to release discovered records to him under FOI. Such records are required to be withheld under section 22(1)(b) of the FOI Act.

The Council was asked to identify any records at issue in this case that, if released, would result in a contempt of court. It did not do so. My Senior Investigator directed the Council to identify any records to which legal advice privilege had been found not to apply but which had been discovered to the applicant, and to withhold them under section 22(1)(b). Otherwise, this Office's decision could inadvertently have directed the release of records that would be in contempt of court. I am very disappointed with the Council's approach to this review. I expect it to engage properly with any further cases that come before me.

Mr X and the Health Service Executive – Case 140320

In this case, I considered the provisions of article 4(1)(b)(iii) of the Freedom of Information Act 1997 (Section 28(6)) Regulations 2009 (SI no. 387 of 2009), which designates two classes of applicant, the spouse or the next of kin of a deceased person, as potentially being entitled to seek access to records under section 28(6) of the FOI Act.

The HSE had refused access on the basis that the applicant was not entitled to seek access to records, as the spouse of the deceased took priority over him. I held that the Statutory Instrument provides for a potential right of access to both types of requester. I therefore found that the surviving spouse does not displace the right of access potentially accruing to the next of kin.

I annulled the decision of the HSE and directed it to undertake a fresh decision making process on the basis that the applicant belongs to a class of individual outlined in article 4(1)(b)(iii) of SI no. 387 of 2009.

X and the National Sports Campus Development Authority (NSCDA) – Case 150068

A significant issue in this review was an argument of the NSCDA that an implied undertaking existed on records which were the subject of an Order for Discovery in proceedings involving both the applicant and the NSCDA at the time of the review by my Office in 2015. An implied undertaking is given by a party to whom documents are produced that he or she will not use them for other purposes, and that any such use of the documents is a contempt of court.

The NSCDA stated that as the records were the subject of an Order for Discovery, they were exempt under section 22(1)(b) of the FOI Act 1997, even though neither the swearing of the affidavit of discovery, nor the handing over of the subject records had taken place at the time the NSCDA had made its decision on the records requested.

I did not accept the NSCDA's argument. It seems to me that, if for any reason, the swearing of the affidavit of discovery or the handing over of the subject records did not take place, it could not have been envisaged by the legislature that any implied undertaking would exist indefinitely over a category of records and that release of the records to an applicant under FOI would be prohibited.

Consequently, as an affidavit of discovery was not sworn and discovery had not been made, at the time of my decision, I directed the release of a number of records. An outstanding matter was whether other relevant records existed. I was not satisfied with the response of the NSCDA to this query by my Office. Consequently, I also directed the NSCDA (now Sport Ireland) to undertake a third new decision, with reference the applicant's original request, first made in 2012.

Mr X and the Department of Justice and Equality - Case 150098 Conn Corrigan and the Department of Justice and Equality - Case 150105

Both of these cases related to the Legal Services Regulation Bill. The applicants requested copies of correspondence with the Department about the Bill from interested parties such as the legal profession's representative bodies. The Department refused the requests. It argued that releasing the records would harm their deliberations about the legislation, which were ongoing.

When my Office examined the records, it became clear that not all of them related to the deliberative process. Some were already in the public domain. Others related to the process of consultation with interested parties, rather than the substance of the Department's deliberations. The Department did not appear to have examined each of the records individually. It instead applied a blanket exemption to all records. Furthermore, the Department did not appear to have considered a previous decision by my Office which was directly relevant to lobbying about legal services legislation.

Public bodies must examine each record individually and should avoid applying blanket exemptions when processing FOI requests. I also encourage public bodies to consider my Office's previous decisions. As I have stated earlier, my Office is developing guidance notes on the various exemptions under the FOI Act, which highlight particularly relevant decisions. I would encourage public bodies to make use of these guidance notes, which can be found at www.oic.ie. In these cases, I directed the release of the records sought, which included submissions on the Bill made by representative bodies and members of the legal profession.

FoI requests to Department
increase by almost 100%

Medical Independent - 23/07/2015

**Council splashes €85k on two
carpets for the Mansion House**

The Herald - 20/07/2015

Nama loses five-year battle
over release of information

Irish Examiner - 24/06/2015

CHAPTER 4:

Statistics



Chapter 4: Statistics

Section I - Public Bodies - 2015

Table 1:	Overview of FOI requests dealt with by public bodies
Table 2:	FOI requests dealt with by public bodies and subsequently appealed
Table 3:	FOI requests received - by requester type
Table 4:	Outcomes of FOI requests dealt with by public bodies
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Table 8:	FOI requests received by the HSE
Table 9:	FOI requests received by voluntary hospitals, mental health services regulators and related agencies
Table 10:	FOI requests received by third-level education institutions
Table 11:	FOI requests received by other bodies
Table 12:	Fees charged

Figures for the above tables are supplied by the Department of Public Expenditure and Reform, the HSE, the Local Authorities FOI Liaison Group, the Department of Health, the National Federation of Voluntary Bodies and the Liaison Group for the Higher Education Sector, and collated by the Office of the Information Commissioner.

Section II - Office of the Information Commissioner - 2015

Table 13:	Analysis of applications for review received
Table 14:	Analysis of review cases
Table 15:	Applications for review accepted in 2015
Table 16:	Outcome of completed reviews – 3-year comparison
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Table 19:	General enquiries
Table 20:	Deemed refusals due to non-reply by public bodies

Section I – Public Bodies - 2015

Table 1: Overview of FOI requests dealt with by public bodies

Requests on hand - 01/01/2015	4,214
Requests received in 2015	
Personal	17,571
Non-personal	10,179
Mixed	239
Total	27,989
Total requests on hand during year	32,203
Requests dealt with	26,866
Requests on hand - 31/12/2015	5,337

Table 2: FOI requests dealt with by public bodies and subsequently appealed

	Number	Percentage
FOI requests dealt with by public bodies	26,866	100%
Internal reviews received by public bodies	953	3.5%
Applications accepted by the Commissioner	332	1.2%

Table 3: FOI requests received - by requester type

Requester Type	Number	Percentage
Journalists	5,592	20%
Business	1,236	4.5%
Oireachtas Members	422	1.5%
Staff of public bodies	904	3%
Clients	15,614	56%
Others	4,221	15%
Total	27,989	100%

Table 4: Outcomes of FOI requests dealt with by public bodies

Request Type	Number	Percentage
Requests granted	14,695	54%
Requests part-granted	6,153	23%
Requests refused	3,177	12%
Requests transferred to appropriate body	524	2%
Requests withdrawn or handled outside FOI	2,317	9%
Total	26,866	100%

Table 5: Analysis of FOI requests dealt with by public service sector

	granted	part granted	refused	transferred	withdrawn or handled outside of FOI
Civil Service departments	36%	34%	16%	3%	11%
Local Authorities	48%	28%	19%	0.4%	5%
HSE	75%	14%	5%	1%	5%
Voluntary Hospitals, Mental Health Services Regulators and Related Agencies	74%	6%	6%	2%	12%
Third Level Institutions	64%	20%	9%	0%	7%
Other bodies	41%	36%	11%	1%	11%

Table 6: FOI requests received by civil service Departments/Offices

	Personal	Non-personal	Mixed	Total
Civil Service Department/Office				
Department of Social Protection	1,932	223	1	2,156
Department of Justice and Equality	626	315	0	941
Department of Education and Skills	142	271	7	420
Department of Finance	3	410	0	413
Department of the Environment, Community and Local Government	11	381	3	395
Department of Health	9	324	0	333
Department of Agriculture, Food and the Marine	139	178	2	319
Department of Public Expenditure and Reform	61	248	0	309
Department of the Taoiseach	10	279	1	290
Department of Transport, Tourism and Sport	13	230	0	243
Office of the Revenue Commissioners	112	122	0	234
Houses of the Oireachtas Service	4	172	0	176
Department of Arts, Heritage and the Gaeltacht	3	160	0	163
Department of Communications, Energy and Natural Resources	2	151	0	153
Department of Jobs, Enterprise and Innovation	23	120	1	144
Department of Foreign Affairs and Trade	15	107	0	122
Office of Public Works	2	94	0	96
Department of Defence	12	82	0	94
Department of Children and Youth Affairs	3	74	0	77
Office of the Ombudsman	16	3	0	19
Commission for Public Service Appointments	3	2	5	10
Standards in Public Office Commission	0	8	0	8
Office of the Information Commissioner	1	4	0	5
Total	3,142	3,958	20	7,120

Table 7: FOI requests received by local authorities

Local Authority	Personal	Non-personal	Mixed	Total
Dublin City Council	167	303	2	472
Galway County Council	5	165	6	176
Dún Laoghaire/Rathdown County Council	25	143	0	168
South Dublin County Council	52	93	0	145
Cork County Council	2	139	0	141
Limerick City and County Council	33	100	3	136
Cork City Council	47	85	0	132
Meath County Council	15	107	0	122
Fingal County Council	28	80	0	108
Kerry County Council	9	93	5	107
Clare County Council	11	90	3	104
Louth County Council	22	70	3	95
Mayo County Council	6	88	0	94
Roscommon County Council	7	86	1	94
Kildare County Council	15	76	0	91
Wexford County Council	20	68	0	88
Galway City Council	9	76	0	85
Kilkenny County Council	5	65	0	70
Sligo County Council	3	66	0	69
Donegal County Council	15	53	0	68
Tipperary County Council	11	49	8	68
Laois County Council	12	53	0	65
Wicklow County Council	5	58	0	63
Monaghan County Council	0	62	0	62
Longford County Council	9	49	1	59
Offaly County Council	11	44	0	55
Leitrim County Council	9	43	0	52
Waterford City and County Council	8	40	2	50
Westmeath County Council	6	43	0	49
Carlow County Council	2	41	0	43

Cavan County Council	1	36	0	37
Total	570	2,564	34	3,168
Regional Authorities	0	0	0	0
Regional Assemblies	1	1	0	2

Table 8: FOI requests received by the HSE (excluding certain agencies covered in Table 9)

HSE area*	Personal	Non-Personal	Mixed	Total
HSE South	2,983	76	4	3,063
HSE West	2,644	126	1	2,771
HSE Dublin North East	822	61	0	883
HSE Dublin Mid-Leinster	790	21	0	811
HSE National	9	506	0	515
Total received	7,248	790	5	8,043
*Figures represent the regional structure of the HSE				

Table 9: FOI requests received by voluntary hospitals, mental health services regulators and related agencies

Hospital/Service/Agency	Personal	Non-Personal	Mixed	Total
TUSLA: Child and Family Agency	715	70	1	786
St James's Hospital	516	27	4	547
Tallaght Hospital	475	4	0	479
Beaumont Hospital	326	23	0	349
Rotunda Hospital	291	19	0	310
Mater Misericordiae University Hospital	286	15	0	301
St. Vincent's University Hospital	256	17	0	273
St. John's Hospital, Limerick	235	4	0	239
Our Lady's Hospital for Sick Children, Crumlin	201	14	0	215
National Maternity Hospital, Holles Street	190	10	0	200
Temple Street Children's University Hospital	133	11	0	144
Coombe Hospital	133	6	0	139
Cappagh Orthopaedic Hospital	124	6	0	130
South Infirmary/Victoria Hospital, Cork	120	6	0	126
Mercy Hospital, Cork	108	9	0	117
Hospitaller Order of St. John of God	76	0	0	76
Health Information & Quality Authority	12	54	6	72
National Rehabilitation Hospital, Dún Laoghaire	52	0	0	52
Central Remedial Clinic	35	2	0	37
Medical Council	17	18	0	35
Royal Victoria Eye and Ear Hospital	33	2	0	35
Enable Ireland	9	0	13	22
Food Safety Authority of Ireland	3	19	0	22
St. Michael's Hospital, Dún Laoghaire	19	2	0	21
Mental Health Commission	4	14	0	18
St. Vincent's Hospital, Fairview	18	0	0	18
Our Lady's Hospice, Harold's Cross	16	1	0	17
Nursing and Midwifery Board of Ireland	9	3	0	12
Marymount University Hospital and Hospice	10	0	0	10
Other Hospitals/Services/Agencies	168	41	4	213
Total	4,590	397	28	5,015

Table 10: FOI requests received by third-level education institutions

Third Level Education Body	Personal	Non-Personal	Mixed	Total
National University of Ireland Galway	45	57	0	102
University College Dublin	38	48	0	86
Trinity College Dublin, the University of Dublin	7	49	0	56
University of Limerick	10	41	5	56
University College Cork	7	44	3	54
Dublin City University	4	34	0	38
Dublin Institute of Technology	8	24	0	32
National University of Ireland Maynooth	5	24	0	29
Institute of Technology Tralee	3	24	1	28
Waterford Institute of Technology	1	23	1	25
Cork Institute of Technology	2	20	0	22
Institute of Technology Tallaght	4	14	2	20
Limerick Institute of Technology	2	18	0	20
Other bodies	31	135	6	172
Total	167	555	18	740

Table 11: FOI requests received by other bodies

Public body	Personal	Non-Personal	Mixed	Total
Irish Prison Service	741	52	0	793
Irish Water	129	432	0	561
Social Welfare Appeals Office	287	0	0	287
Defence Forces Ireland	199	50	0	249
An Garda Síochána	35	147	1	183
RTÉ	7	172	0	179
Health and Safety Authority	14	42	76	132
Courts Service	63	55	0	118
Central Bank of Ireland	6	95	0	101
National Asset Management Agency	86	12	0	98

Public Appointments Service	33	22	3	58
National Transport Authority	2	55	0	57
National Treasury Management Agency	6	44	0	50
Road Safety Authority	21	25	0	46
Environmental Protection Agency	0	41	2	43
IDA Ireland	0	39	1	40
National Sports Campus Development Authority / Sport Ireland	3	30	0	33
Údarás na Gaeltachta	19	12	2	33
State Examinations Commission	15	16	0	31
Garda Síochána Ombudsman Commission	16	12	1	29
Arts Council	2	26	0	28
Property Registration Authority	5	2	21	28
Commission for Communications Regulation	12	14	0	26
Office of the Director of Public Prosecutions	7	18	0	25
An Bord Pleanála	0	23	1	24
Eirgrid	0	24	0	24
Other bodies (97 bodies with less than 24 requests each)	155	417	26	598
Total	1,863	1,877	134	3,874

Table 12: Fees charged

	Original Request	Search and Retrieval	Internal Review	Refunds	Net Fees
Government Departments and State Bodies	€193.00	€10,349.35	€5,596.00	€1,908.00	€14,230.35
Local Authorities	€30.00	€4,788.70	€2,790.00	€294.44	€7,314.26
Health Service Executive	€0.00	€258.40	€660.00	€15.00	€903.40
Voluntary Hospitals, Mental Health Services and Related Agencies	€0.00	€637.72	€90.00	€0.00	€727.72
Third Level Institutions	€60.00	€0.00	€60.00	€0.00	€120.00
Other bodies	€0.00	€0.00	€0.00	€0.00	€0.00
Total	€283.00	€16,034.17	€9,196.00	€2,217.44	€23,295.73

Section II - Office of the Information Commissioner – 2015

Table 13: Analysis of applications for review received

Applications for review on hand - 01/01/2015	13
Applications for review received in 2015	450
Total applications for review on hand in 2015	463
Applications discontinued	1
Invalid applications	90
Applications withdrawn	16
Applications rejected	5
Applications accepted for review in 2015	332
Total applications for review considered in 2015	444
Applications for review on hand - 31/12/2015	19

Table 14: Analysis of review cases

Reviews on hand - 01/01/2015	116
Reviews accepted in 2015	332
Total reviews on hand in 2015	448
Reviews completed in 2015	323
Reviews carried forward to 2016	125

Table 15: Applications for review accepted in 2015

Health Service Executive		54
HSE South	18	
HSE West	17	
HSE Dublin Mid-Leinster	12	
HSE National	6	
HSE Dublin North East	1	
Department of Justice and Equality		20
TUSLA: Child and Family Agency		17
Department of Social Protection		14
University College Dublin		11
Department of Transport, Tourism and Sport		9
Office of the Revenue Commissioners		8
Department of Agriculture, Food and the Marine		7
Department of Communications, Energy and Natural Resources		7
Department of Education and Skills		7
Irish Water		7
Cork County Council		6
Defence Forces		6
Department of Finance		6
University College Cork		6
Others (bodies with less than 6 applications each)		147
Total		332

Table 16: Outcome of completed reviews - 3-year comparison

	2015		2014		2013	
Decision affirmed	110	34%	154	45%	104	40%
Decision annulled	37	12%	17	5%	29	11%
Decision varied	59	18%	31	9%	18	7%
Discontinued	10	3%	19	6%	8	3%
Settlement reached	69	21%	74	22%	35	14%
Withdrawn	38	12%	45	13%	64	25%
Reviews completed	323	100%	340	100%	258	100%

Table 17: Subject matter of review applications accepted - 3-year comparison

	2015		2014		2013	
Refusal of access	299	90%	211	84%	217	84%
Objections by third parties to release information about them or supplied by them	15	5%	8	3%	16	6%
Amendment of records under section 9	4	1%	7	3%	9	3%
Statement of reasons under section 10	11	3%	24	9%	11	4%
Decision to charge a fee	3	1%	2	1%	7	3%
Total	332	100%	252	100%	260	100%

Table 18: Applications accepted by type - 3-year comparison

	2015		2014		2013	
Personal	109	33%	110	44%	102	39%
Non-personal	167	50%	108	43%	125	48%
Mixed	56	17%	34	13%	33	13%
Total	332	100%	252	100%	260	100%

Table 19: General enquiries

Year	Number
2015	1,462
2014	1,274
2013	1,218
2012	1,262
2011	824
2010	622
2009	857
2008	1,100
2007	1,315
2006	1,551

Table 20: Deemed refusals due to non-reply by public bodies

Refusal of original and internal review decisions			
Public Body	2015	2014	2013
Department of Justice and Equality	7	3	4
HSE Dublin Mid-Leinster	7	4	4
HSE West	7	3	1
TUSLA: Child and Family Agency	7	3	-
HSE South	5	5	1
HSE National	4	6	2
University College Cork	4	-	1
Commission for Energy Regulation	2	-	-
Department of Finance	2	-	1
Department of Transport, Tourism and Sport	2	-	-
Office of the Revenue Commissioners	2	-	-
other bodies	11	-	-
Total 2015	60		

Central Bank had no Irish plan to deal with 'Grexit' nightmare scenario

Irish Independent Business - 29/10/2015

Information Commissioner holds safety statements not commercially sensitive

Health and Safety Review - 02/10/2015

Local authorities have 2,600 vacant units as homeless crisis escalates

Irish Times - 28/09/2015

Part II

Commissioner for Environmental Information



Introduction

2015 saw positive developments in the work of the Office of the Commissioner for Environmental Information (OCEI), with the allocation of additional resources and improved turnaround times for appeals.

The OCEI was established under article 12 of the European Communities (Access to Information on the Environment) Regulations 2007 (the AIE Regulations). The AIE Regulations transpose Directive 2003/4/EC on public access to environmental information. The OCEI is legally separate from the Office of Information Commissioner (OIC); however article 12(10) of the AIE Regulations provides that the Commissioner for Environmental Information shall be assisted by the staff of the office of the Information Commissioner and by such other resources as may be available to that office.

The right of access under the AIE Regulations applies to “environmental information” held by or for a “public authority”. These two terms have specific meanings defined by article 3(1) of the AIE Regulations. My role as Commissioner for Environmental Information is to review decisions of public authorities on appeal by applicants who are not satisfied with the outcome of their requests for information under the Regulations. A right of appeal to my office also arises where the body or person to whom an AIE request has been made contends that it is not a public authority within the meaning of the Regulations. My decisions on appeal are final and binding on the affected parties, unless a further appeal is made to the High Court on a point of law within two months of the decision concerned.

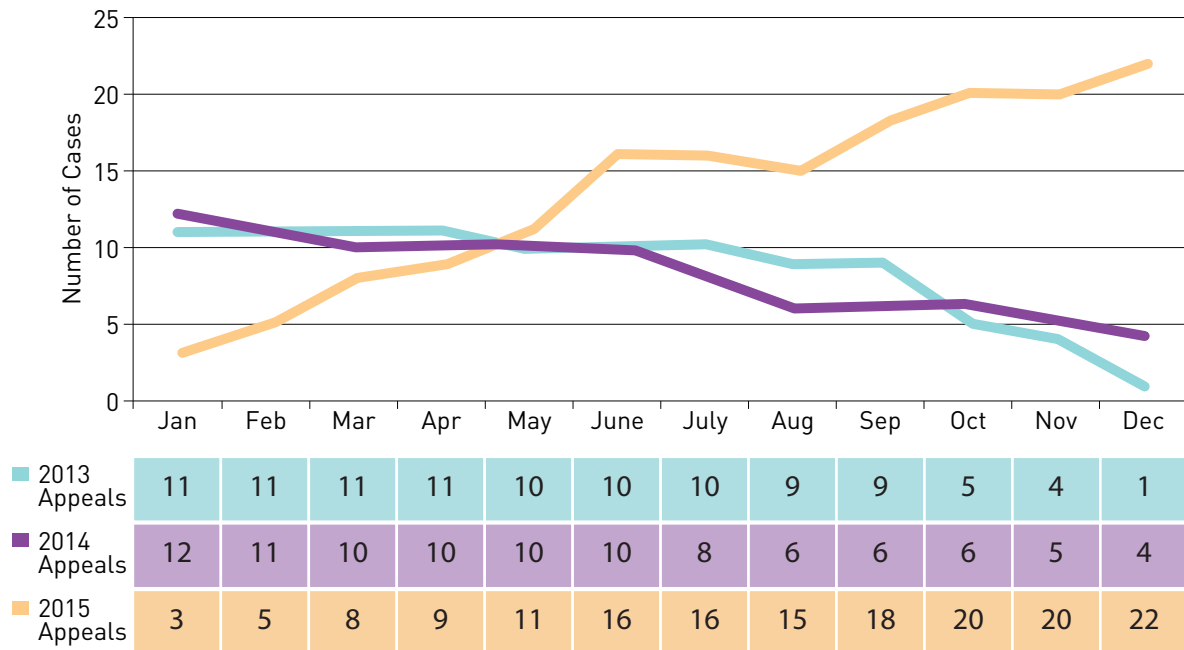
For further information on the operation of the AIE regime in Ireland, please visit my website at www.ocei.ie, which includes links to the previous Annual Reports of this office, the OCEI Procedures Manual, the website of the Department of the Environment, Community and Local Government, and Directive 2003/4/EC.

Appeals and enquiries in 2015

At the beginning of 2015, the OCEI had 23 appeals on hand; 12 dating from 2014 and 11 from 2013. In 2015 the OCEI received 31 new appeals, which was an increase of 80% on the average number of appeals received in the five previous years. The OCEI closed 27 cases in 2015; 15 formal decisions were made, eight appeals were invalid, three cases were withdrawn, and one case was settled following engagement by an OCEI Investigator.

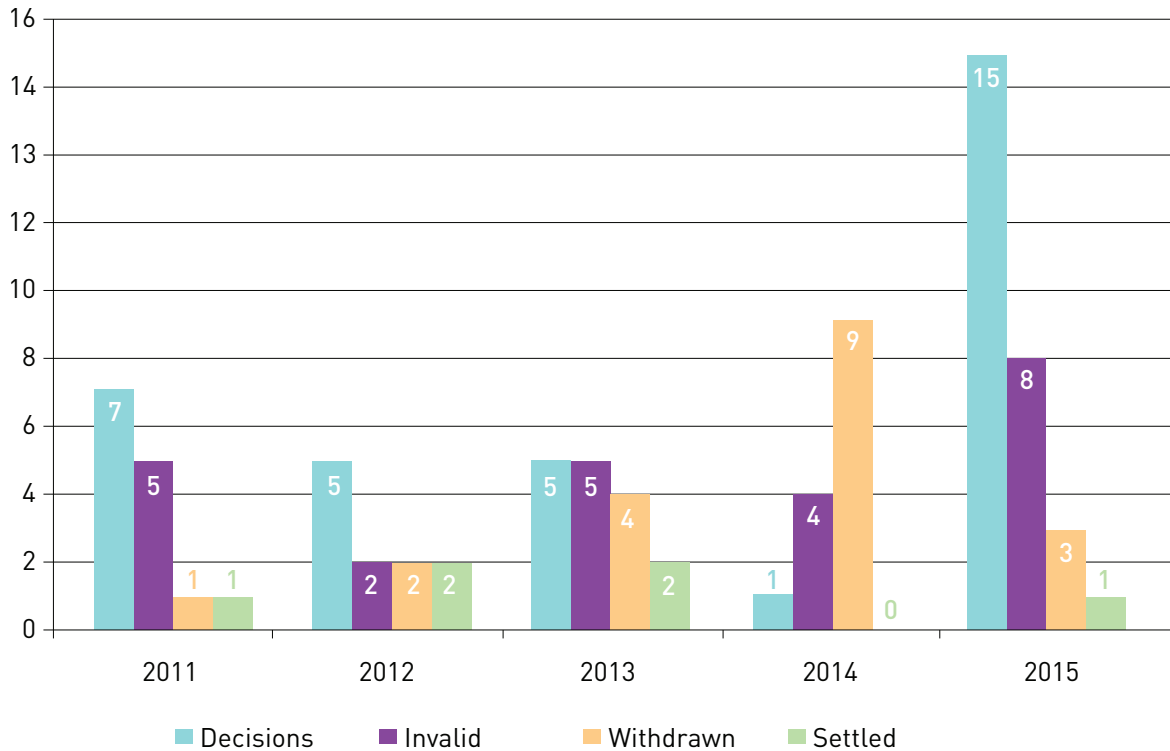
At the end of 2015, there were 27 valid appeals on hand – 22 from 2015, four from 2014 and one from 2013. At the time of writing, the outstanding 2013 and 2014 cases are being progressed by Investigators. My staff recorded 27 general enquiries about the AIE Regulations in 2015.

Cases on hand during 2015



Following a concerted effort by my office in the second half of 2015, I issued 15 formal decisions on appeals. This is the largest number of decisions to be issued in a single year since the establishment of the OCEI. All of these decisions have been published on the OCEI website (www.ocei.ie). Notwithstanding the improved turnover of appeals, significant challenges remain to process the increased volume of appeals we currently receive.

Outcome of OCEI appeals by year



Deemed refusals

The AIE Regulations include fixed time limits for decisions on AIE requests. A request is deemed to be refused when the public authority fails to issue a decision within the relevant time limit specified in the Regulations (usually one month).

In 2015, my office recorded deemed refusals concerning five public authorities that had not responded to requests within the time limits provided for in the Regulations. These public authorities were: ESB Networks Limited, the Department of the Environment, Community and Local Government, Dublin City Council, the Marine Institute, and the Commission for Energy Regulation.

Article 12(6) of the AIE Regulations

Article 12(6) of the AIE Regulations gives me certain powers in dealing with an appeal. I may:

- require a public authority to make environmental information available to me,
- examine and take copies of environmental information held by a public authority, and
- enter any premises occupied by a public authority so as to obtain environmental information.

I am pleased to report that I had no need to invoke this provision in 2015.

2015 Court Proceedings

NAMA v Commissioner for Environmental Information [2015] IESC 51

In June of 2015, the Supreme Court delivered its judgment in the case of National Asset Management Agency -v- the Commissioner for Environmental Information [2015] IESC 51. The Court found that NAMA is a public authority for the purposes of the AIE Regulations, but for different reasons than those relied upon by my office in reaching the same conclusion. The Court found that NAMA qualified as a public authority under the second category of the public authority definition, as a legal person performing public administrative functions.

In determining that NAMA was captured by the public authority definition, the Court had the benefit of the judgment of the Court of Justice of the European Union (CJEU) in *Fish Legal and Emily Shirley v Information Commissioner and Others* (C-279/12), which had not been available to my predecessor at the time of her decision. In light of the *Fish Legal* judgment, the Supreme Court was satisfied that NAMA is indeed a public authority exercising public administrative functions on the basis that, although it is obliged to act commercially, it is vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

The Court also endorsed a purposive approach to interpreting the AIE Regulations. Judge O'Donnell explained that, in interpreting the Regulations, it is not sufficient to have regard to national law and, in particular, the normal principles of statutory interpretation in Irish law. The Regulations must be understood as implementing the provisions of Directive 2003/4/EC (and indirectly the Aarhus Convention) and, as a matter of constitutional law, ought not to go further, but not fall short of, the terms of the Directive. In interpreting the AIE Regulations, therefore, it is necessary to consider exactly what the Directive does and means, which may also mean interpreting the provisions of the Aarhus Convention.

Friends of the Irish Environment Limited -v- Commissioner for Environmental Information 2014/726 JR

In 2015, a judicial review taken by Friends of the Irish Environment Limited (2014/726 JR) was concluded by settlement. This judicial review was initiated against my office in December 2014, and concerned delays in processing an appeal.

Minch -v- Commissioner for Environmental Information [2016] IEHC 91

Following a hearing in 2015, the High Court delivered its judgment in the case of *Minch -v- Commissioner for Environmental Information* 2015/50 MCA on 16 February 2016. I note that the Court found in favour of the appellant, and I will address the matter in my Annual Report for 2016.

Issues arising & other matters of interest

Resources

In previous years, I have been supported in my role as Commissioner for Environmental Information by the staff of the OIC, without any specific funding allocation from the State. In 2014, I made a successful budget submission to the Department of Public Expenditure and Reform for increased resources to meet the operational needs of the OCEI. Following an open recruitment process, two additional Investigators were appointed in June 2015 to work specifically on OCEI appeals. This represents a significant improvement in the resourcing of the office, and has contributed to improved turnaround times for appeals.

Increase in number of appeals to OCEI

The European Communities (Access to Information on the Environment) (Amendment) Regulations 2014 reduced the fee for making an appeal to my office from €150 to €50. A lower rate of €15 applies to holders of medical cards and their dependents. Both my predecessor and I believed that the previous appeal fee of €150 discouraged applicants from initiating AIE appeals. This view is substantiated by the significant increase in the number of appeals since the reduction in the fee.

The consequential increase in the level of appeals to the OCEI has complicated efforts to eliminate the existing backlog of cases. As an office, we hope to improve our responsiveness and refine our practices in 2016. Notwithstanding this, AIE is a complex and evolving subject, and appeals generally involve detailed legal and factual disputes that cannot be resolved simply.

Fees for AIE requests

Article 15(1) of the AIE Regulations provides that a public authority may “charge a fee when it makes available environmental information in accordance with the Regulations...provided that such fee shall be reasonable having regard to the Directive.”

In a decision of 6 October 2015 in *East Sussex County Council v Information Commissioner* (case C-71/14), the Court of Justice of the European Union addressed the question of what is a reasonable fee under the equivalent United Kingdom Regulations. The Court held that the charge for supplying a particular type of environmental information may not include any part of the cost of maintaining a database used for that purpose by the public authority, but may include the overheads attributable to the time spent by the staff of the public authority on answering individual requests for information, properly taken into account in fixing the charge, provided that the total amount of the charge does not exceed a reasonable amount. I note that this judgment may have implications for the OCEI approach in relation to fees, as stated previously in decisions CEI/07/0006 and CEI/11/0007.

Contacts with the Department of the Environment, Community and Local Government

My office continues to liaise with the Department of the Environment, Community and Local Government in developing guidance and regulations that accurately reflect the purpose of the Aarhus Convention. In particular, I have stressed to the Department that my office is anxious to provide clarification and feedback based on our experience of implementing the AIE Regulations if and when it is considering any amendments to the Regulations.

Website updates

2015 saw updates to the OCEI website, available at www.ocei.ie. A new search function has been implemented, available at <http://www.ocei.gov.ie/en/Decisions/Decision-Search/>. This allows interested parties to search previous OCEI decisions by reference to individual articles of the AIE Regulations. The OCEI has also adopted the practice of placing links to PDF versions of decisions at the top of each new decision webpage.

Procedures manual

In October 2015, I published the [OCEI Procedures Manual](http://www.ocei.gov.ie/en/About-Us/Policies-and-Strategies/Procedures-Manual.html) for the first time, which is available online at www.ocei.gov.ie/en/About-Us/Policies-and-Strategies/Procedures-Manual.html. This manual is a comprehensive account of internal OCEI practices in carrying out appeals, and will be of guidance to appellants and public authorities interacting with the office.

Events attended

Throughout 2015, my staff and I attended conferences and training events relevant to the work of the OCEI. In June 2015, a Senior Investigator participated in a University College Cork Workshop on Access to Information on the Environment. A representative from the OCEI attended the UCC Conference on Environmental Courts, Enforcement, Judicial Review & Appeals. On 13 October 2015, I addressed the Irish Environmental Law Association on the work of the OCEI. My presentation is available online at <http://www.ocei.gov.ie/en/News/Recent-Developments.html>. In November, an OCEI Investigator made a well received presentation at the annual Department of the Environment, Community and Local Government AIE training event held in Athlone. In December 2015, an OCEI Investigator made a presentation to the 4th Meeting of the UNECE Task Force on Access to Environmental Information, held in Geneva.

Significant OCEI Decisions in 2015

Decisions on validity of requests

Article 6(1) of the AIE Regulations sets out five requirements for applicants making an AIE request. Article 11(5)(c) provides that I have jurisdiction to carry out a review where a request has “otherwise not been dealt with in accordance with Article 3, 4, or 5” of Directive 2003/4/EC. In the case of Wind Noise Info and Wexford County Council - CEI/14/0017 I interpreted article 11(5)(c) as meaning that I have jurisdiction to carry out a review where a public authority finds that a request is invalid under article 6.

Article 6(1)(d) requires an applicant to state “in terms that are as specific as possible” the environmental information which is the subject of a request. In the related cases of Mr MK and Environmental Protection Agency - CEI/13/0017 and Mr MK and the Environmental Protection Agency - CEI/13/0007 I examined two requests which were made in the form of lengthy submissions, but which did not clearly specify the environmental information which was sought. In the circumstances, I found that both requests failed to meet the requirement of article 6(1)(d), and were invalid.

Decisions on the definition of “environmental information”

Article 3(1) of the AIE Regulations defines “environmental information” for the purposes of the Regulations. The definition encompasses six different types of environmental information. In the case of Mr Jim Redmond and Coillte Teoranta - CEI/14/0011 I considered whether certain information on the transfer of an interest in land held by Coillte to a third party fell within the definition of environmental information. This appeal considered whether the information requested was information on a measure likely to affect the elements of the environment, pursuant to paragraph (c) of the definition of environmental information. As the transfer of the interest in land did not of itself reflect a possible change of use of the forest, and there was no indication that the parties had a future change of use in mind at the time of sale, I found that the information was not environmental information. This decision is the subject of an ongoing judicial review in the High Court, initiated by the appellant in January 2016 (Redmond & Anor -v- Commissioner for Environmental Information 2016/27 JR).

In the case of Mr Gavin Sheridan and An Garda Síochána - CEI/13/0013 I found that An Garda Síochána was justified in refusing access to information on the usage of Garda aircraft, information on a contract for the provision on fuel, and information on an electricity bill for a particular Garda station on the ground that the requested information was not environmental information within the meaning of the Regulations. While I accepted that helicopter and other aircraft usage by An Garda Síochána is an activity for the purposes of paragraph (c) of the definition, I found that the connection between the requested information and any impact on the environment from air travel is too remote, and subject to too many variables, to qualify as environmental information.

I found that the connection between a contract for fuel provision and the environment is too minimal where, as here, the requested contract does not provide meaningful information on such matters as the amount of fuel used by the public authority. I likewise found that the connection between a monthly electricity bill for a particular set of premises of a public authority and an environmental impact is too minimal for the requested information to fall within the ambit of the environmental information definition.

In Mr Andrew Duncan and Sustainable Energy Authority of Ireland - CEI/13/0005 I found that a study on the viability and cost-benefit analysis for Ireland exporting renewable electricity did not contain environmental information under paragraph (e) of the definition. This finding was based on an assessment of the content of the study, which revealed that although the study was clearly an economic analysis used in the framework of a measure or activity, this measure referred to a hypothetical scenario, which could not be regarded as affecting or likely to affect relevant elements or factors, as required by the definition.

In Mr Oliver Cassidy and Coillte Teoranta - CEI/13/0008 – I considered whether information in maps indicating locations of test surveys was environmental information. I found that the decision by Coillte to permit test surveys in connection with wind turbines amounted to the adoption of a “measure” under paragraph (c) of the definition, and that works on test surveys were “activities” within the meaning of the same paragraph. Since the maps showed the lands to which the measure related and where the activities took place, I was satisfied that the maps contained environmental information in the meaning of Article 3(1) of the Regulations.

Decisions on the definition of “public authority”

Article 3(1) of the AIE Regulations defines “public authority” for the purposes of the Regulations. An entity may be a “public authority” under any one of the three categories set out in paragraphs (a) to (c) of the definition: as government or public administration; as an entity empowered by the State to act on its behalf; or as an entity controlled by the State.

In Dr Edward Fahy and Irish Fish Producers’ Organisation Limited - CEI/15/0011 I considered an appeal made on the basis that the Irish Fish Producers’ Organisation (IFPO) was a public authority under paragraphs (b) and (c) of the definition. I applied the interpretative criteria provided by the Court of Justice of the European Union (CJEU) in *Fish Legal and Emily Shirley v Information Commissioner and Others* (C-279/12). In that judgment, the CJEU created two tests for deciding whether a body is a public authority - the ‘special powers’ test which applies to paragraph (b), and a ‘control’ test which applies to paragraph (c). I examined the legal powers vested in the IFPO under European Union law, and found that they did not meet the special powers test. I also found that the control exerted by state authorities over the IFPO was not sufficient in this case to support a finding that the IFPO was a public authority under paragraph (c).

Decisions on the exceptions to disclosure

The Regulations provide that access to environmental information may be refused in certain circumstances, such as where the information would adversely affect the confidentiality of personal or commercial information or the interests of third parties. Although some of the exceptions are described as mandatory, in fact, the public interest served by disclosure must be considered in every case.

In Marine Terminals Limited and Dublin City Council - CEI/14/0013 an appellant sought to access the Council's planning enforcement files, including details of individuals who had made planning complaints concerning the appellant itself. Having first found that article 10(1) did not apply to the information, I considered the exceptions under Articles 8(a)(i) and (ii) and found that, in the circumstances, release of planning complaints would adversely affect the interests and the confidentiality of personal information of the individuals involved.

In An Taisce and Bord na Móna - CEI/14/0002 the appellant requested access to information on compliance with the EIA Directive in relation to peat extraction. Article 8(a)(iv) of the Regulations provides that a public authority shall not make available environmental information where disclosure of the information would adversely affect the confidentiality of the proceedings of public authorities. I examined the information held by Bord na Móna and found that legal advice privilege and litigation privilege applied, and so the information was covered by the exception under Article 8(a)(iv). I also found that the exception under article 9(1)(b), which provides for refusal of a request where disclosure would adversely affect the course of justice, applied to certain records prepared by Bord na Móna in contemplation of an infringement procedure taken by the European Commission.

In Mr Lar McKenna and ESB Networks - CEI/13/0010 the appellant sought an extensive range of property-related information from ESB Networks on thermal and hydro-electric power generation schemes. In the circumstances, I found that article 9(2)(a) applied, as the request was manifestly unreasonable having regard to the volume of information sought, therefore ESB Networks had a discretion to refuse the request. I noted that I did not consider it to be an appropriate use of the limited resources of this office to liaise with parties to bring the volume of material requested down to a reasonable level.

In Mr. Tony Lowes and the Department of Agriculture, Food and the Marine - CEI/14/0007 I addressed the question of whether the Department was justified in refusing the appellant's request for access to preliminary reports and related documentation regarding storm damage to fish farms at Gearhies, Bantry Bay on 1 February 2014 which resulted in the loss of 230,000 farmed fish. The Department's overall examination and deliberative process with respect to the matter were ongoing at the time of the appeal.

The Department claimed that the requested information should be refused on the basis that it concerned material in the course of completion and also internal communications under Articles 9(2)(c) and (d) of the AIE Regulations.

In my decision, I did not accept that the connection between the requested information and an ongoing, seemingly indefinite, deliberative process provided an adequate basis for refusal under Article 9(2)(c) of the Regulations. Having regard to the nature and contents of the requested reports, I found that they did not comprise material in the course of completion or unfinished documents for the purposes of Article 9(2)(c). In any event, I weighed the public interest served by disclosure against the interest served by refusal, as required by articles 10(3) and 10(4). In this regard, I noted that the Aarhus Convention recognises a very strong public interest in maximising openness in relation to environmental matters so that an informed public can participate more effectively in environmental decision-making. I also recognised a strong public interest in openness and accountability in relation to how the Department carried out its functions under the relevant legislation governing the aquaculture industry. I balanced these considerations against the public interest in maintaining the integrity of the regulatory process, having regard to the specific information at issue and the submissions by the Department. On balance, I found that the public interest in disclosure outweighed the interest served by refusal.

In Mr Oliver Cassidy and Coillte Teoranta - CEI/13/0008 – I found that Coillte could not rely on the ground for refusal under article 9(1)(c), which applies where disclosure would adversely affect commercial or industrial confidentiality, as the relevant third party had taken steps to publicise the same information. I also considered the ground for refusal under Article 8(a) (iv), which provides that, subject to the public interest test, a request must be refused where disclosure would adversely affect the confidentiality of the proceedings of public authorities. The AIE Regulations do not define the word “proceedings” in this context, and so I gave the word its ordinary literal meaning. In the circumstances, I was not satisfied that details of an agreement with a third party fell within the meaning of article 8(a)(iv).

Decisions on emissions into the environment under Article 10(1) of the AIE Regulations

Article 10(1) of the AIE Regulations excludes the application of exceptions under articles 8 and 9 (1)(c) where a request “relates to information on emissions into the environment.”

In Marine Terminals Limited and Dublin City Council - CEI/14/0013 the appellant argued that certain grounds for refusal could not be applied because the complaints related to emissions of noise into the environment. Applying the test established by the General Court of the CJEU in Stichting Greenpeace Nederland-v-Pesticide Action Network Europe (T-545/11), I found that the information sought did not constitute information on emissions, because the information itself did not relate to emissions into the environment in a sufficiently direct manner.

I also considered the question of emissions under article 10(1) in Friends of the Irish Environment and the Department of Agriculture, Food and the Marine - CEI/13/0001. In this case, I found that article 9(1)(c) could not be relied upon as a ground for refusal because the

request related to emissions into the environment in the form of chemical therapeutants released at a marine aquaculture site.

Commissioner for Environmental Information overturns DAFM decision to withhold salmon farm accident report

Inshore Ireland - 08/09/2015

Freedom of information requests double in some departments after fee abolition

Irish Times - 11/05/2015

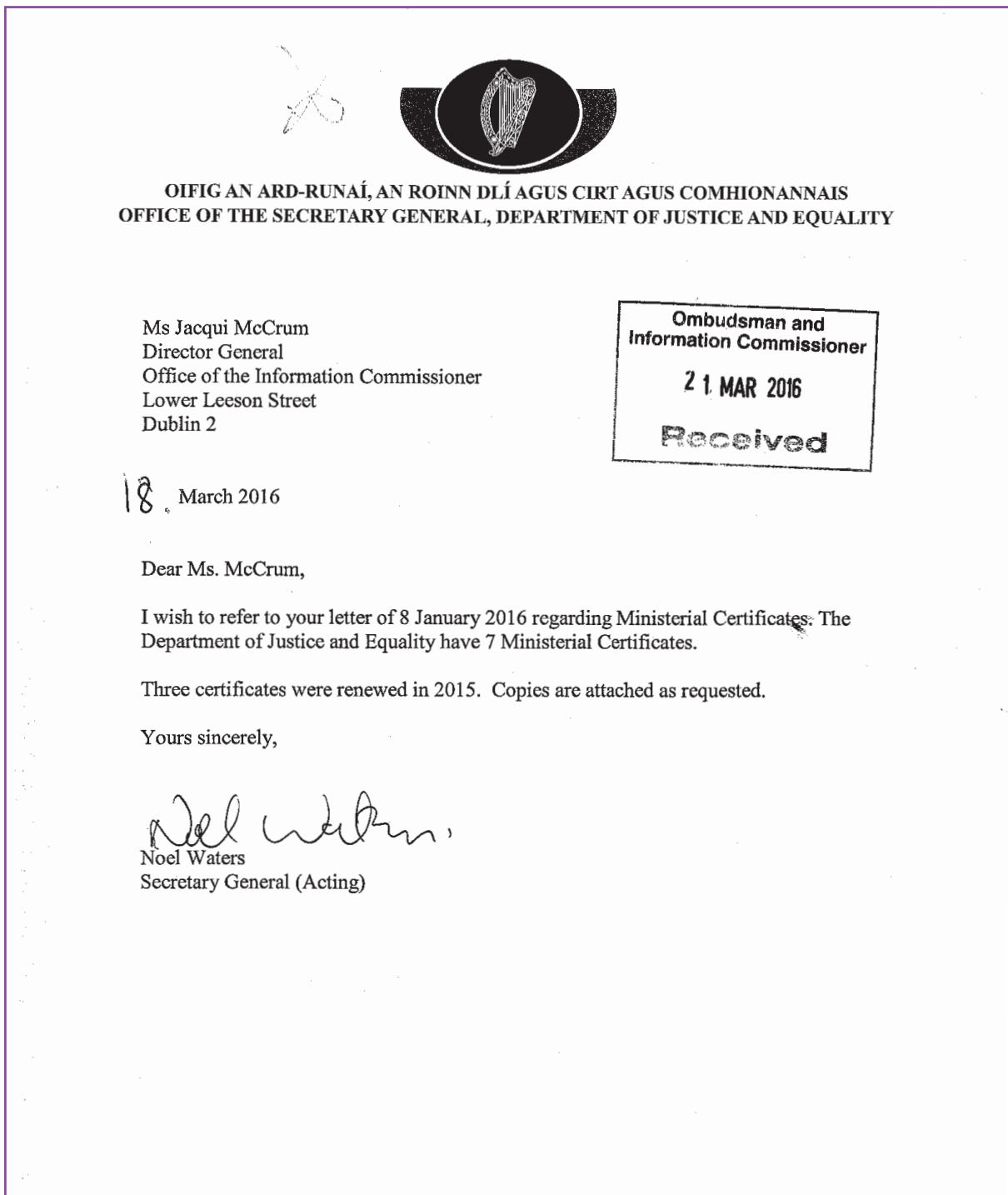
Appendices



Appendices

Appendix I

Statutory Certificates issued by Ministers in 2015



Appendix I



An Roinn Gnóthaí Eachtracha agus Trádála
Department of Foreign Affairs and Trade

29 January 2016

Ms Jacqui McCrum
Director General
Office of the Information Commissioner
18 Lower Leeson Street
Dublin 2

Notification under Section 34 of the Freedom of Information Act 2014

Dear Ms McCrum

I refer to your recent letter on the above.

On 21st July 2015 the Minister for Foreign Affairs and Trade issued three certificates in accordance with Section 34 of the Freedom of Information Act 2014 by reference to which the records are exempted under Section 32 and Section 33. The certificates related to three requests for the same set of records.

Please find enclosed copies of the certificates issued in 2015.

Yours sincerely

A handwritten signature in black ink that reads "Breandán Ó Caollaí".

Breandán Ó Caollaí

Director

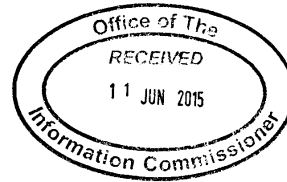
Coordination and Compliance

Appendix II

Review under section 34(7) of Ministerial Certificates issued



Roinn an Taoisigh
Department of the Taoiseach



3rd June 2015

Peter Tyndall,
Information Commissioner,
Office of the Information Commissioner,
18 Lower Leeson Street,
Dublin 2.

Re: Review of Certificates issued under Section 34 of the Freedom of Information Act, 2014

Dear Commissioner,

I would like to inform you that pursuant to the above Act, the Taoiseach, the Minister for Public Expenditure and Reform and the Minister for Jobs, Enterprise and Innovation carried out a review of the operations of the Act, for the period ended 30th April 2015 on the 3rd June 2015.

In total 13 Certificates were reviewed, seven were issued by the Minister for Justice and Equality and six by the Minister for Foreign Affairs and Trade.

The Taoiseach, the Minister for Public Expenditure and Reform and the Minister for Jobs, Enterprise and Innovation are satisfied that it is not necessary to request revocation of any of the thirteen certificates which were the subject of this review - copies of the forms signed by the reviewers to that effect are enclosed.

Yours sincerely,

Carol Woodley-Byrne
Department of the Taoiseach

Enc:

c.c. D/J&E, D/FA&T, D/IE&I, D/PER

Appendix III

Annual Energy Efficiency Report 2015

Monthly Energy Report		OPW - Office of Public Works Office of the Ombudsman	
Dec 2015			
Summary			
Month to month			
<p>Energy usage has decreased -26.3% from 58,955kWh in Dec 2010 to 43,449kWh in Dec 2015. As a result, CO2 emissions for this period have decreased by -20.3% from 19,886kg to 15,841kg, (-4,045Kg).</p>			
Annual			
<p>The base year used for all these calculations is 2010.</p> <p>Compared to this base year, energy consumption on site has decreased by -59,111kWh or -12.8% over the last 12 months.</p> <p>In terms of total CO2, production has decreased by -16.6%, since 2010 or by -34,158Kg.</p> <p>Normalised for weather variations, CO2 has decreased by -14.6%, since 2010 or by -30,134Kg.</p>			
Energy use - Dec 2015			
Annualised energy usage			
Description	Electricity	Gas	Total
Benchmark Year	284,062	179,086	463,148
Previous 12 months	228,207	175,830	404,037
% Difference	-19.7%	-1.8%	-12.8%