An Coimisinéir Faisnéise
Information Commissioner

Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

Annual Report 2020

Supporting the Right to Information

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ISSN: 1649-0479
Designed by: wonder works

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Contents

Foreword

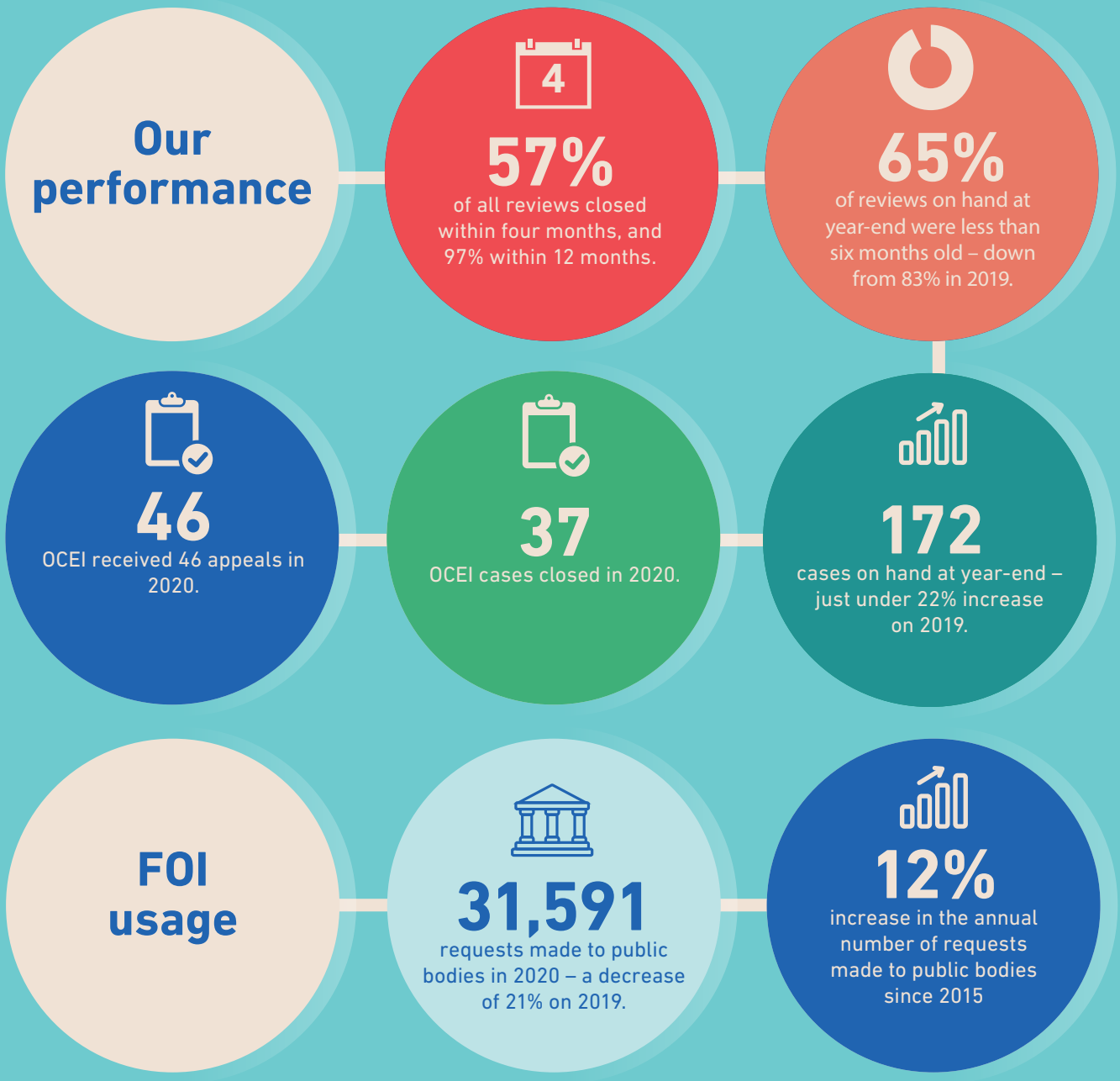
I hereby submit my eighth Annual Report as Information Commissioner to the Dáil and Seanad pursuant to section 47(2) of the Freedom of Information Act 2014.

This is the twenty-third Annual Report of the Information Commissioner since the establishment of the Office in 1998.

Peter Tyndall
Information
Commissioner July 2021

Elaine Cassidy
Director General

Performance Summary



Public body compliance

5
statutory notices were issued to public bodies by my Office in 2020, the lowest since the introduction of the 2014 Act.

32%
of reviews accepted by my Office were deemed refused at both stages of the FOI request, up from 19% in 2019.

Demand for our services

45%
Reviews deemed refused at the second stage of the request, up from 29% in 2019 to 45% in 2020.

50%
Reviews deemed refused at the first stage of the request, up from 28% in 2019 to 49% in 2020.

434
We accepted 434 applications for review in 2020 – 5% less than in 2019.

99%
of all applications to my Office were accepted within 10 days.

584
applications for review made to my Office in 2020, just under 5% less than in 2019.

1 The year in review

Chapter 1:

The year in review

Your right to information

Freedom of 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 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). Bodies such as government departments and offices, local authorities, the Health Service Executive, voluntary hospitals, and universities are included. As new public bodies are established, they will automatically be subject to FOI unless they are specifically exempt by order made by the Minister.

Access to Information on the Environment (AIE)

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 right of access under the **AIE Regulations** applies to environmental information held by or for a public authority. The primary role of the Commissioner for Environmental Information is to review decisions taken by public authorities on requests for environmental information.

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

Re-use of Public Sector Information

The European Communities (Re-use of Public Sector Information) (Amendment) Regulations 2015 (**S.I. No. 525 of 2015**) provide that the Information Commissioner is designated as the Appeal Commissioner. As such, my Office can review decisions taken by public bodies in relation to requests made under the Regulations to re-use public sector information, including decisions on fees and conditions imposed on re-use of such information.

Introduction

It is unsurprising that my report on the performance of my Office during 2020 draws attention to the considerable impact the Covid-19 pandemic has had on the delivery of FOI services across the wider public service in 2020. While the impact on some front-line service providers was enormous and had profound effects on their ability to ensure continuity of services, it was not just front-line providers that were affected. Its impact reached all aspects of public service delivery and my Office did not escape untouched. Demand for my Office's services in 2020 was broadly in line with the demand levels of recent years. Nevertheless, like the entire public sector, we experienced significant challenges in meeting that demand as a result of the pandemic. With only a small window for planning and implementation, our entire staff moved off-site to new remote working arrangements in March 2020 on foot of rapidly-evolving public health advice regarding the spread of Covid-19. Unfortunately, we had to leave behind, temporarily, a newly refurbished Office that we had moved to only four months previously.

This move required a huge effort by our staff who, by and large, were completely unused to conducting their duties off-site. Notably, our ICT department was swift in managing to ensure that staff could connect securely to our internal systems from their remote working locations. I am very grateful to every member of staff for the resilience and flexibility they demonstrated in the past year, migrating to the arrangements necessitated by the pandemic, which has brought with it so many other challenges to our individual lives. I should add that I was also heartened by the number of my staff who volunteered to redeploy in order to support the national effort in contact tracing during the earliest stages of the government's response to the pandemic. While ultimately their services were not required, I am grateful for the flexibility and solidarity they demonstrated. I comment further on the impact the pandemic had on FOI service delivery in Chapter 2.

Notwithstanding the obvious burden the transformation to remote working placed on our resources, my team achieved significant results across our core activities in 2020. While the number of FOI reviews processed in the year is down on last year, the percentage reduction, at under 4%, is minor considering all of the other challenges we faced. I was also pleased to note that 57% of all cases closed were completed within four months, which is testament to the significant levels of cooperation we received from public bodies that were dealing with their own particular challenges as a result of the pandemic. It is also noteworthy that despite the many challenges, we continued to roll out an outreach programme of engagement with bodies within remit, albeit more limited than we had originally envisaged. I comment on our outreach activity in Chapter 2.

2020 was an unusual year in terms of my Office's court activity. Court appeals have a significant impact on my Office's resources each year. In my 2019 Annual Report, I reported that I had appealed the judgment of the Court of Appeal in *The Minister for Communications, Energy and Natural Resources v the Information Commissioner & Ors*. [2019] IECA 68 (the enet case) to the Supreme Court. That judgment had given rise to uncertainty regarding the position my Office should adopt in relation to a presumption provision in the Act. Pending the outcome of that appeal, we were compelled to apply to the courts for the suspension of a number of unrelated cases due to the potential impact of the Supreme Court's findings on those cases. The Supreme Court delivered its judgment on the appeal in September 2020, and on a separate appeal of the judgment of the High Court in *University College Cork v the Information Commissioner* [2018 No 12 MCA] which dealt with similar legal issues.

While the Court decided to remit both cases back to my Office for fresh consideration, it found that I was correct in my approach on a number of points, including in relation to the core question regarding the presumption issue. The Court also made some helpful findings in relation to the manner in which the courts should approach appeals of my decisions and the parameters of an appeal on a point of law. However, the enet judgment has caused my Office to revisit its approach to the consideration of public interest tests and has given rise to specific challenges in doing so. I report on these judgments and others issued in 2020 in more detail in Chapter 2.

Since 2017, I have been calling for a formal review of the FOI Act. No such review has taken place to date. Having regard to the issues my Office continues to come across on an ongoing basis, I am reinforced in my opinion that there are certain aspects of the Act that would benefit from amendment. I comment on some of those issues in Chapter 2. In my 2019 Annual Report, I noted that the formation of the new government in 2020 would present an opportunity for commencing a review. While this did not come to pass, I will continue to press the Department of Public Expenditure and Reform to give consideration to a review of the Act in its entirety.

In Part II of my Report, I report on my role as Commissioner for Environmental Information.

Peter Tyndall
Information Commissioner
Commissioner for Environmental Information

Office Developments in 2020

Case Management System

Towards the end of 2019, my Office commenced the roll-out of a new case management system with a view to improving the efficiency of our case management processes. The roll-out continued in early 2020. The benefits of the new system were quickly realised when our staff were forced to move to remote working at short notice due to the pandemic in March. In essence, the new system allowed us to adapt to a largely paper-free process, much sooner than we had planned for. During the course of the year, we migrated all OCEI cases onto the new system. A cross-organisational team has also been working with our ICT unit to develop comprehensive and reliable case-management reporting. Staff are also currently working on the development of an in-house knowledge management system as part of the overall project.

Office Green Team

A Green Team was established in the Office in 2020 comprising of enthusiastic volunteers. The main aims of the Green Team are to introduce environmentally friendly measures in the Office in the areas of energy, waste, transport and water, as well as improving the quality of the working environment. The Green Team has commenced a series of themed monthly awareness programmes to assist staff in making more environmentally sustainable decisions both in work and at home. Measures taken by the Office include monitoring of energy usage and air quality in the Office; providing keep cups to staff; increasing the number of lockers to encourage a change in commuting habits; waste and recycling awareness programmes; provision of filtered drinking water taps in place of bottled water; and, the replacement of desktop computers with more energy efficient laptops. The Green Team, with the support of senior management, will endeavour to introduce further initiatives that promote environmental sustainability for both individuals and the organisation. The move to home working and the reduction in the use of paper necessitated by the pandemic have both contributed to significant improvements in the year. It is likely that some of these gains can be retained when the situation returns to normal.

Human Rights – Public Sector Duty

The Irish Human Rights and Equality Commission Act 2014 introduced a positive duty on public bodies to have due regard to human rights and equality issues. My Office is committed to providing a service to all clients that respects human rights and their right to equal treatment and has adopted a proactive approach to implementing this duty. Our approach is underlined by our core organisational values which include independence, customer focus and fairness, and which are evident in both the culture of the office and our internal policies and procedures.

In 2018, we established a cross-organisational working group on our public sector duty (my Office is one of a number of constituent Offices coming within the Vote of the Office of the Ombudsman). The group considered the human rights and equality issues relevant to our functions and identified the policies, plans and actions needed to address these. On foot of this, a Public Sector Duty Committee was established and an Equality Officer appointed.

The Committee has made a considerable amount of progress since 2018. It oversaw the introduction of an e-learning module on human rights and equality for new staff members, carried out a review of all communications in the Office, introduced a revised internal communications strategy focusing on the availability of needs assessments and assistive technologies and enhanced the accessibility of the Office for staff and visitors.

Up to 2020, the Committee had largely focused on what proactive changes it could make within the organisation. However, in 2020 it expanded its focus to explore how it could implement the public sector duty and promote human rights and equality through the public service bodies it deals with. The group is currently focusing on developing measures for the integration of human rights and equality into the complaints process within the Office of the Ombudsman.

Irish Language Scheme

In 2019, my Office and the Office of the Ombudsman jointly prepared and published our fourth language scheme under the Official Languages Act 2003. As part of that scheme, we are committed to bringing its provisions to the attention of the public in a number of ways, including by reporting in my Annual Reports on the scheme itself and subsequent updates on the delivery of commitments on particular services. The scheme (available on **www.oic.ie**) is in place for a period of 3 years from 8 April 2019, or until a new scheme has been approved.

During 2020, we published bilingually a report of an investigation conducted under section 44 of the Act into compliance by FOI bodies with the statutory timeframes for processing requests and the requirement to provide adequate reasons for refusing requests. We updated both English and Irish versions of our FOI publication scheme. We also processed five applications for review where the applicants identified Irish as their language of choice.

Statutory notices issued to public bodies

The FOI Act provides that I can issue statutory notices to public bodies in certain circumstances. I can issue a notice under section 23 where I am not satisfied with the adequacy of the reasons given by an FOI body for its decision on a request. Under section 45, I can issue a notice to require the production of information that I deem relevant for the purposes of a review. In my 2019 Annual Report, I reported that the seven statutory notices issued during the year was the lowest number of notices issued since the introduction of the 2014 Act. During 2020, my Office issued three statutory notices under section 23 and two statutory notices under section 45 of the Act. I am pleased that the downward trend has continued. The level of compliance shown by FOI bodies with the requirements of the Act is a significant improvement over previous years. I would note, however, that my Office took a pragmatic and sympathetic approach to the difficulties some FOI bodies faced in meeting my Office's requests for information in the early months of the pandemic arising from the significant challenges they faced at the time in maintaining essential services.

Notices issued under Section 23 of the FOI Act

Where a public body decides to refuse a request, whether wholly or partly, it is obliged to give the requester a statement of the reasons for the refusal. It is not sufficient for the body to simply paraphrase the words of the particular exemptions relied upon. The decision should show a connection, supported by a chain of reasoning, between the decision and the decision maker's findings. It should generally include

- 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.

Where my Office considers that the statement of reasons given is inadequate, I am obliged, under **section 23**, to direct the head of the body to provide a statement containing any further information in relation to the above matters that is in the power or control of the head. As I have mentioned above, the section 44 investigation my Office carried out in 2019 and reported on in early 2020 included an examination of compliance by FOI bodies with the requirement to provide adequate reasons for refusing requests. That **report** contains specific recommendations with the aim of enhancing general compliance by public bodies with section 23 requirements.

In 2020, we issued a notice under section 23 to the heads of Cork City Council (the Council), the then Department of Education and Skills (the Department), and the Defence Forces. In each case, we considered that the original and/or internal review decisions fell short of the requirements of the FOI Act, and we sought a more detailed statement from the public body in each case.

In the case involving the Council, the request had been very poorly handled and had arisen from a protracted engagement between the Council and the applicant regarding a parking ticket dispute. The Council provided the statement of reasons as requested and, ultimately, revised its position in the case, released additional records to the applicant and the matter was settled without the need for a formal decision by my Office.

In the case involving the Department, the request was simply refused under section 15(1)(g), which provides for the refusal of frivolous or vexatious requests. Following receipt of the section 23 notice, the Department, in essence, pointed to resource constraints due to Covid-19 and other staff constraints as the reasons for the inadequate response to the applicant. It also provided an explanation as to why it had relied on section 15(1)(g) and also referred to section 15(1)(c), which is essentially concerned with the refusal of voluminous requests. However, the Department went on to explain that it had reviewed the matter and was now in a position to release relevant records to the applicant. The applicant settled the matter on the basis of the records received. I was pleased to note the following commitment the Secretary General gave in his response to my Office:

> "I note your view on the Department's approach to this case and regret that it did not meet expectations. However, I can assure you that the Department is aware of its obligations under freedom of information legislation and seeks to comply fully with the FOI process in law and spirit. While we can expect some practical difficulties will continue to present in terms of the current unprecedented public health challenge, through remote and other working arrangements, I can assure you that the Department will continue to review its systems to ensure that it meets its obligations in the future."

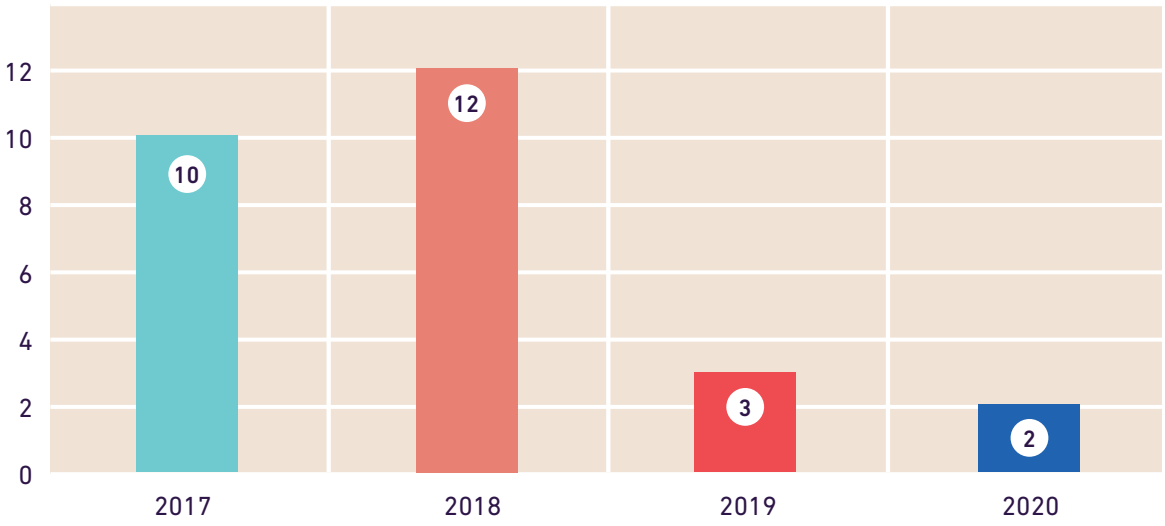
In the case involving the Defence Forces, the records at issue were released and the matter was settled without the need for a formal decision by my Office.

Notices issued under Section 45 of the FOI Act

Under **section 45**, 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. It is important that public bodies comply with the time frames set out by my Office, as delays impact on our ability to comply with the requirement that we issue decisions as soon as may be and, in so far as practicable, within four months of receipt of applications for review. In the vast majority of cases, public bodies supply the relevant information we need in a timely manner in order to progress reviews.

In 2020 my Office issued notices under section 45 to Horse Racing Ireland and Offaly County Council. In the case involving Horse Racing Ireland (HRI), the applicant had applied for a review of the deemed refusal of his request as HRI failed to issue an internal review decision within the statutory timeframe. We asked HRI to issue its effective position on the request. As it failed to do so, we issued a section 45 notification, following which HRI issued the correspondence, some 11 weeks after it should have issued its internal review decision.

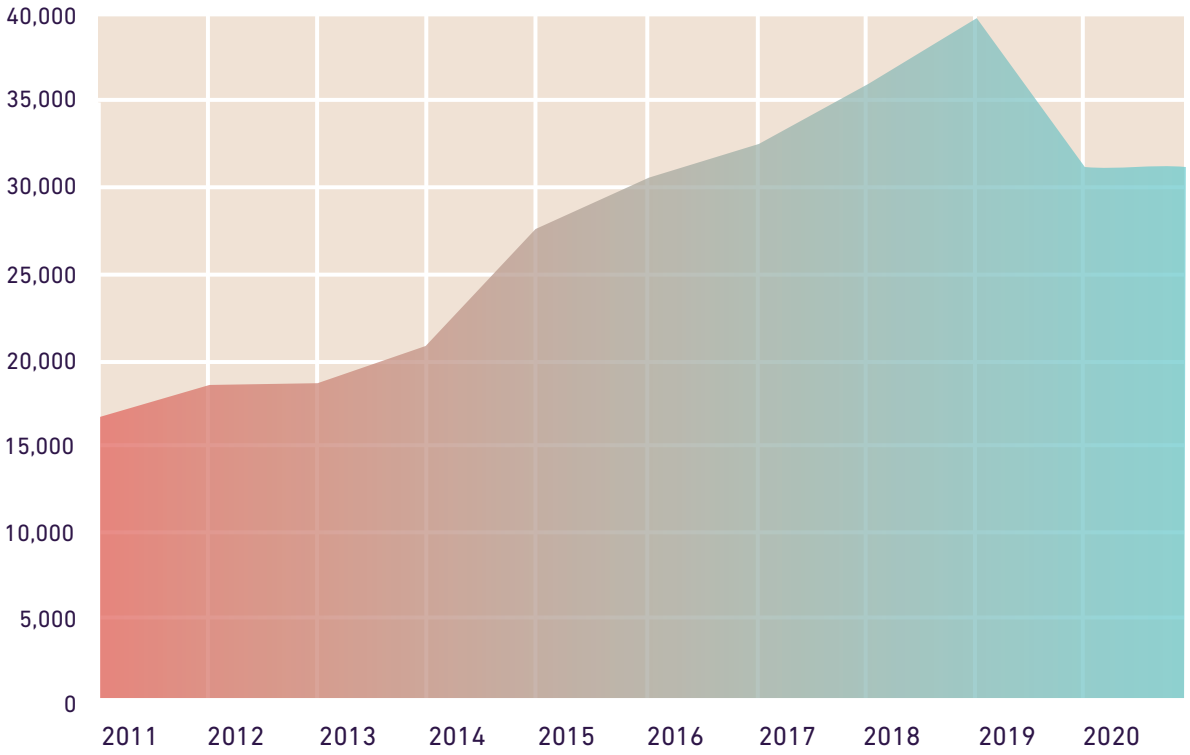
In the case involving Offaly County Council, we issued a notification under section 45 as the Council failed to provide us with copies of the main subject records when requested and despite a number of reminders to do so. The records were eventually provided, almost 11 weeks after they had been first sought.



Key FOI statistics for the year

This part of Chapter 1 provides more detail on FOI usage during the year under review. Further information is provided in the tables in Chapter 4.

Number of FOI requests to public bodies 2011 – 2020

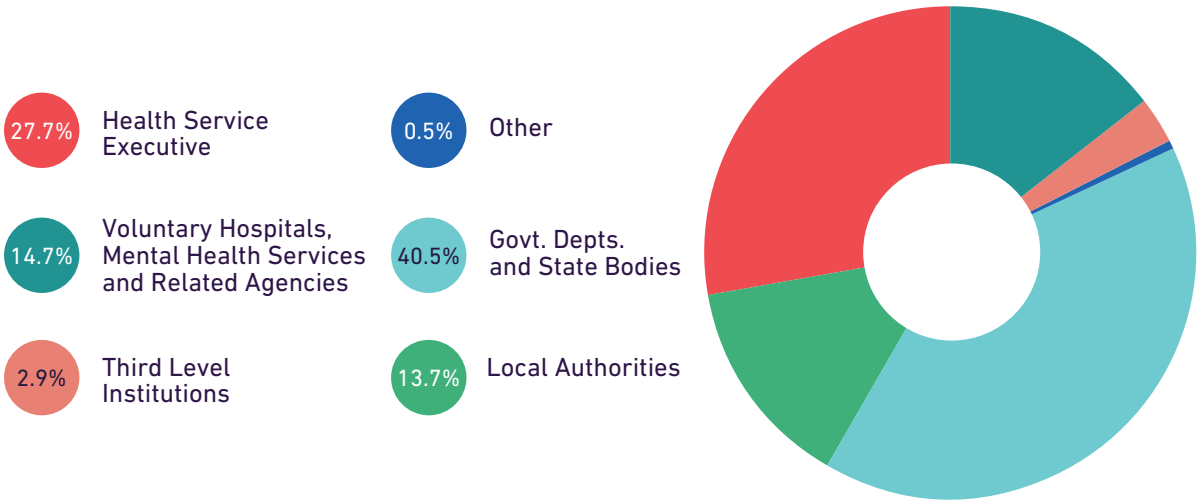


Public bodies reported a total of 31,591 requests received in 2020, representing a decrease of 21% on 2019. The reduction is unsurprising, and is most likely related to Covid-19. The past year marks the first such period in nine years that the number of requests to public bodies has decreased. Up until this point, in the five years following the introduction of the FOI Act, 2014, the number of requests made annually to public bodies had increased by 42%.

Top ten bodies who received most requests during 2020

	Public body	2020	2019	+-%
1	Health Service Executive (HSE)	8737	11685	-25
	HSE West	2638	3544	-26
	HSE South	2503	4560	-45
	HSE Dublin North East	1510	1700	-11
	HSE Dublin Mid-Leinster	1228	1105	+11
	HSE National-Corporate	858	776	+11
2	Department of Social Protection	1706	2647	-36
3	TUSLA - Child and Family Agency	986	1142	-14
4	St. James's Hospital	827	1445	-43
5	Department of Justice	818	894	-9
6	Department of Education	558	505	+10
7	Tallaght Hospital	539	521	+3
8	Irish Prison Service	488	525	-7
9	Department of Health	480	582	-18
10	An Garda Síochána	459	497	-8

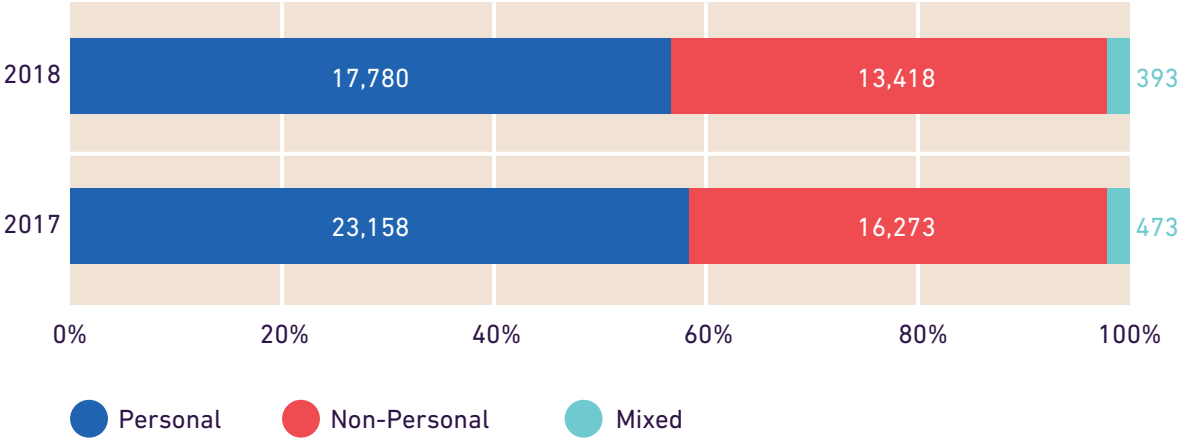
Sectoral breakdown of FOI requests to public bodies



The figures above show the downward trend observed in the number of FOI requests received by public bodies in 2020. The overall number of requests received by public bodies has been reported at a rate of 21% less than in 2019, levels not seen since 2016-2017.

- A number of government departments have changed composition since the publication of my 2019 Annual Report. Accordingly, the quantity of FOI requests received in each Department in 2020 is not fully comparable to the preceding statistics for 2019. Nevertheless, there appears to be a trend across Departments of a reduced number of requests received. The combined total number of requests reported as received by government departments and state bodies was 19% less than in 2019.
- The Houses of the Oireachtas Service recorded a decrease of 26%.
- This trend was further observed across the health sector. The HSE recorded an overall decrease of 25% in the number of requests received in 2020, compared with 2019. While the HSE National Corporate Office and HSE Dublin Mid-Leinster each saw an increase of 11% in requests received, HSE West and HSE Dublin North East recorded decreases of 26% and 11% respectively. HSE South recorded a 45% drop in requests received, compared to its activity in 2019.
- Voluntary hospitals recorded a decrease of 19% for the same period.
- There was also a noticeable decrease in the number of FOI requests received in Local Authorities, with a 22% drop in requests received across the sector.
- Roscommon County Council recorded a decrease of 45%, while both Cavan County Council and Longford County Council recorded decreases of 39% apiece. Westmeath County Council recorded a 37% decrease. Carlow County Council and Offaly County Council recorded decreases of 32% each. Galway County Council, Wicklow County Council and Waterford City and County Council recorded decreases of 30%, 29% and 28% respectively. Dublin City Council, Limerick City and County Council and Monaghan County Council all recorded decreases of 27%.
- Only Sligo County Council saw an increase, which was minor, at 1%.
- Nevertheless, some public bodies recorded a noticeable increase in the number of FOI requests received. For example, the Health Information & Quality Authority (HIQA) recorded an increase of 57% on 2019 (107 requests received) and the Property Services Regulatory Authority recorded a 225% increase (only 13 requests received).

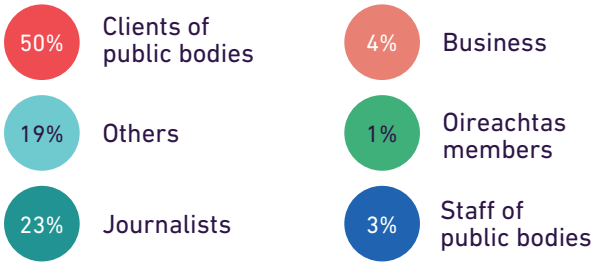
Type of request to public bodies

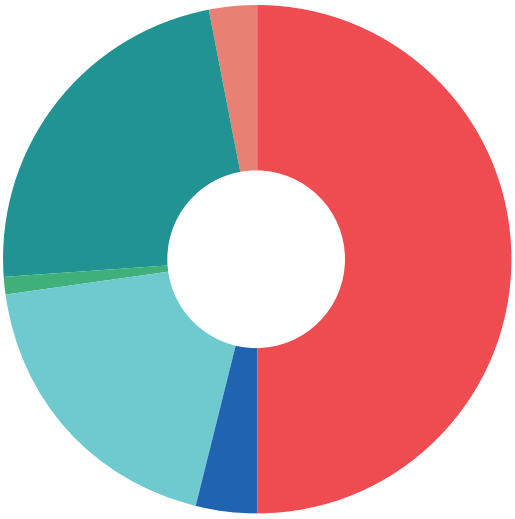


- 77% of requests made to local authorities were for access to non-personal information.
- 59% of requests made to government departments and state bodies were for access to non-personal information.
- Of the requests received by the HSE, 85% were for access to personal information.
- 87% of all requests received in the overall health sector, including the HSE and voluntary hospitals, were for personal information.

See Chapter 4, Tables 6-11, for more details.

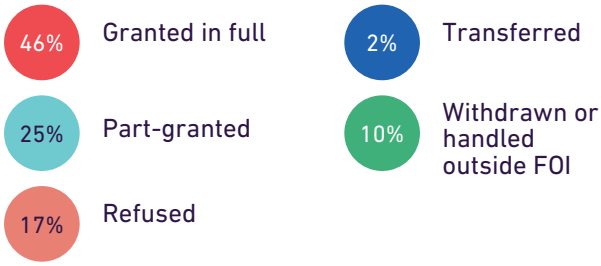
Category of requester to public bodies

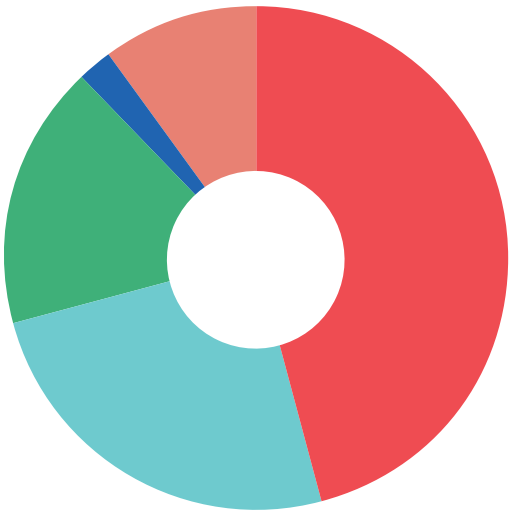




The percentage of requests for each category of requester as identified above is similar to 2019. Requests from "Others" increased by 3%. Requests from clients of public bodies fell by 1%.

Release rates by public bodies



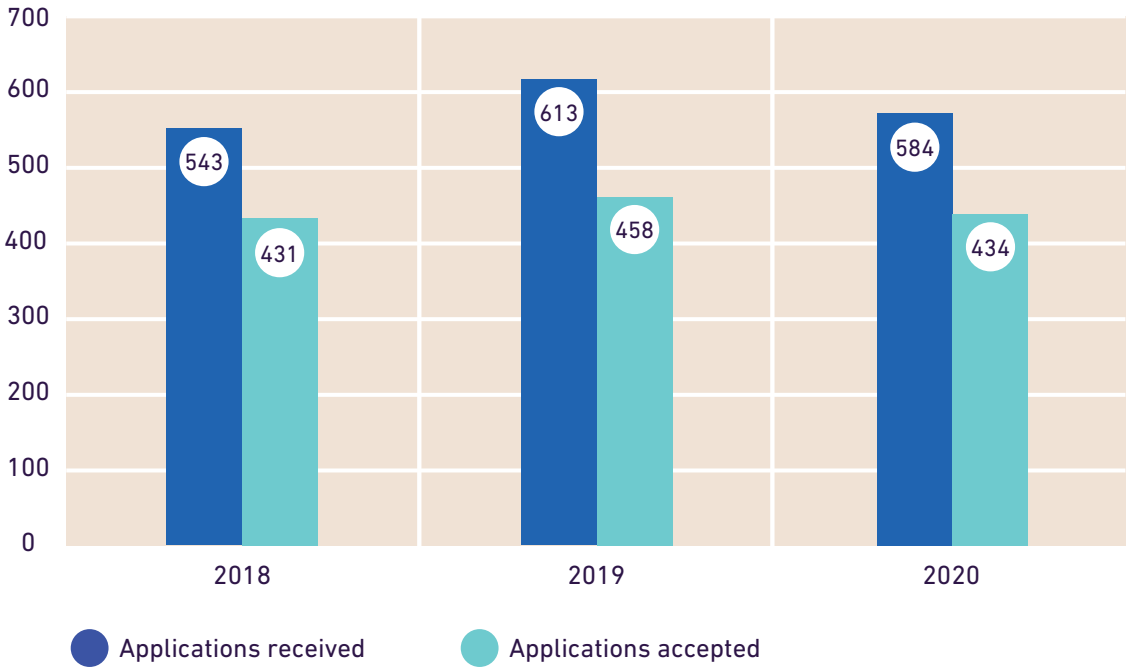


Release rates are very similar to 2019. The percentage of requests granted in full or in part, at 71%, is 2% lower than in 2019. Table 5 in Chapter 4 provides more detail on release rates by sector.

Office of the Information Commissioner caseload

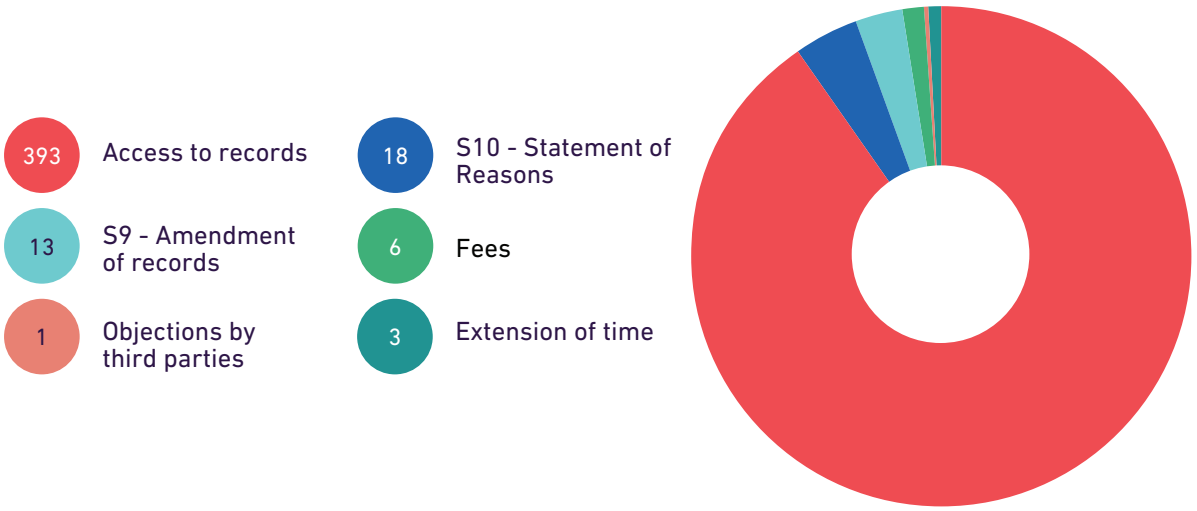
An application for review can be made to my Office by a requester who is not satisfied with a decision of a public body on an FOI request. Decisions made by my Office following a review are legally binding and can be appealed to the High Court generally only on a point of law.

Applications to OIC 2018 – 2020



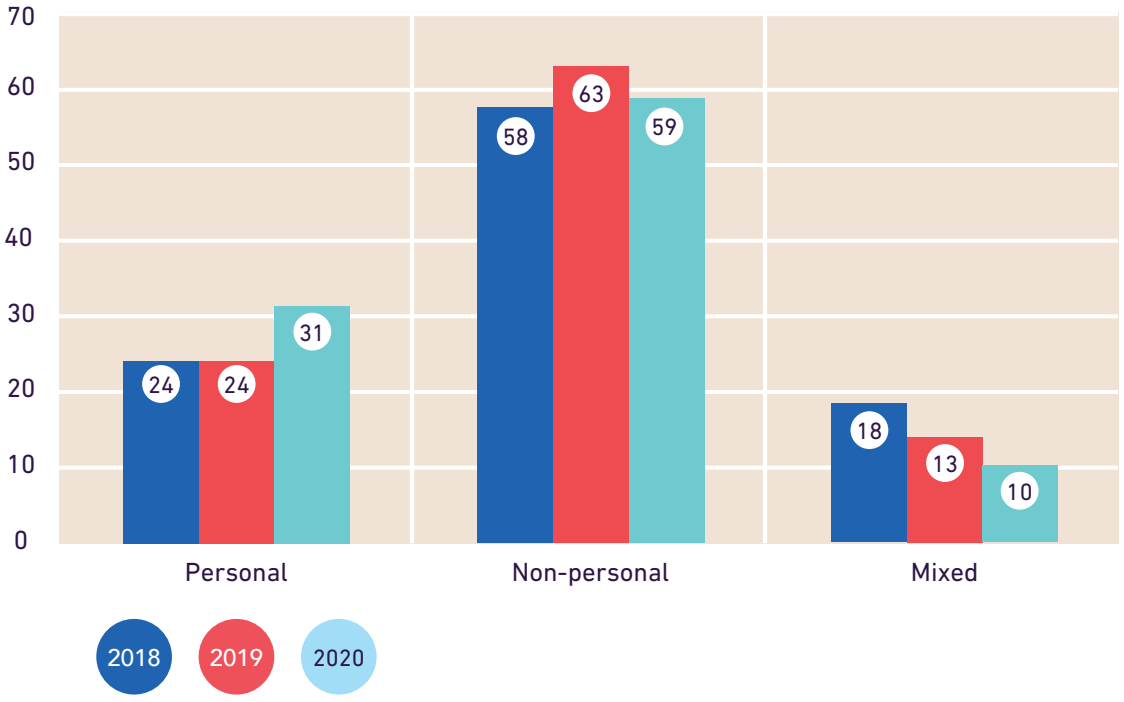
Unlike the 21% decrease in FOI requests received by public bodies, in 2020, my Office received just under 5% fewer applications for review compared to 2019, a year which marked the highest number of applications for review in a decade. While most applications are accepted by my Office, a number of invalid applications are rejected each year. Invalid applications arise mainly due to the failure of applicants to avail of internal review of the initial decision before applying to my Office for a review.

Subject matter of review applications accepted by OIC



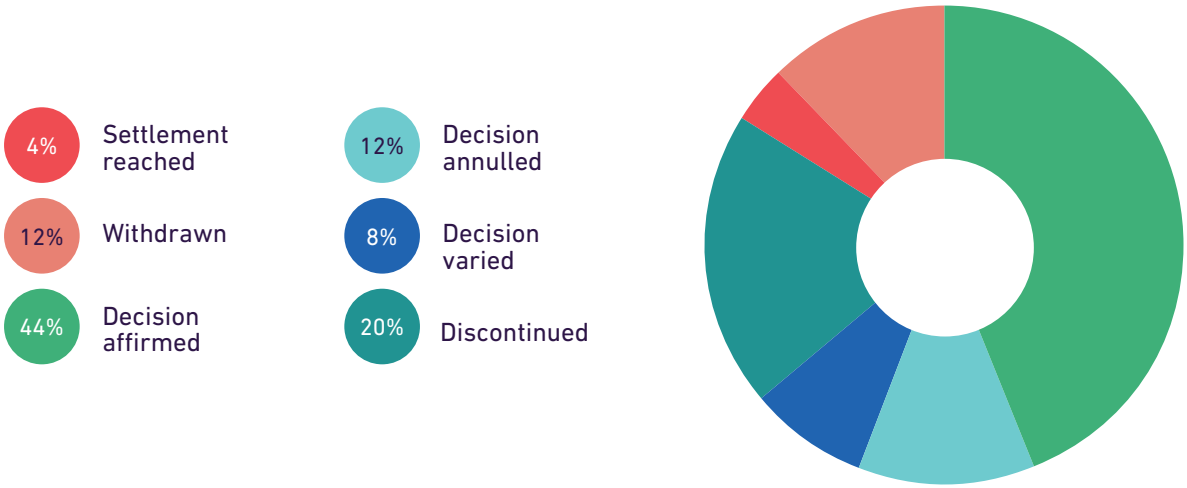
Percentage of applications accepted by OIC by type 2018 – 2020

An application recorded by 'type' indicates whether the applicant is seeking access to records that are of a personal or non-personal nature, or a mix of both.

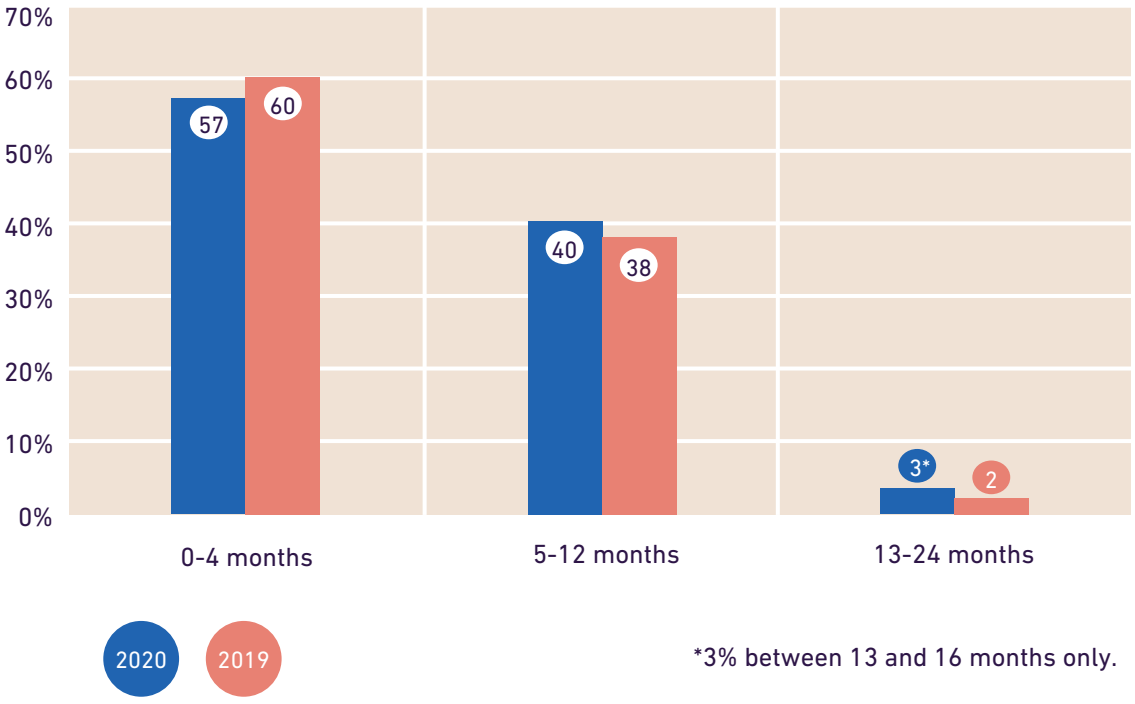


Outcome of reviews by OIC in 2020

My Office reviewed 414 decisions of public bodies in 2020, 64% of which were brought to a close by way of binding decision. The rates in the table below are similar to those of recent years.



Age profile of cases closed by OIC



*3% between 13 and 16 months only.

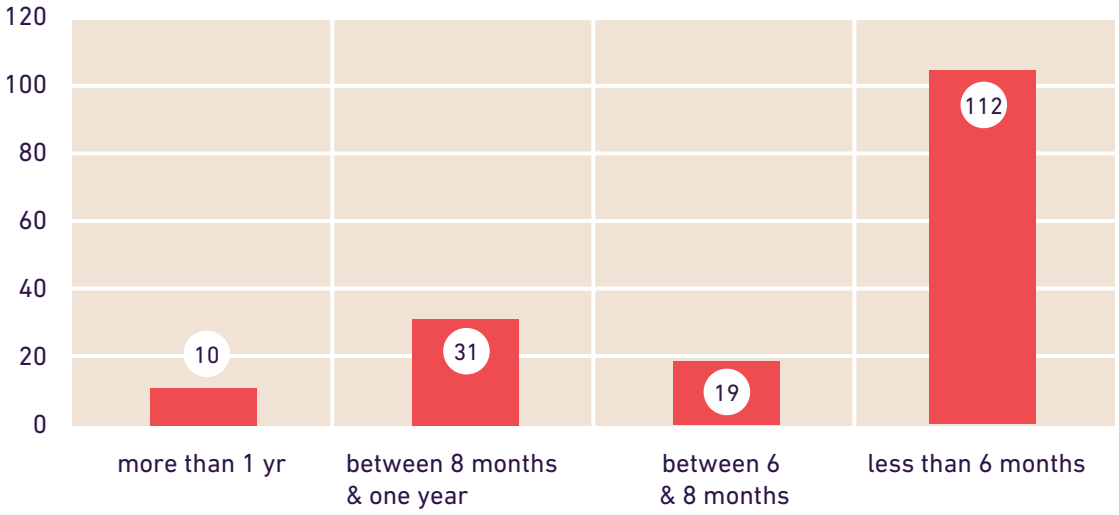
While the percentage of reviews closed within a four-month period is down slightly on 2019, the achievement of this challenging target in 57% of cases is very satisfactory, particularly in the face of the various challenges my Office faced during the year as outlined in my introduction to this Report. It is also noteworthy that, of the cases closed between 13-24 months, none was on hand for more than 16 months.

Age profile of cases on hand in OIC at end 2020

The number of cases on hand at the end of the end of 2020 was 172, an increase of 20 cases over 2019. 65% of those on hand at the end the year were less than six months old.

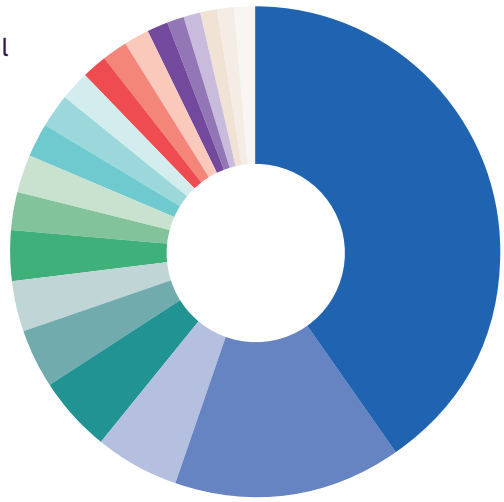
(Note: In my 2019 Annual Report, I reported the number of cases on hand at the end of 2019 as 141. As a result of the implementation of our new case management system, which has significantly improved management reporting capabilities, I can confirm that the number on hand at the end of 2019 was actually 152.)

Age profile of cases on hand in OIC at end 2020



Breakdown by public body of applications for review accepted by OIC

In 2020, my Office accepted 434 applications for review covering 104 public bodies. Last year we accepted reviews covering 123 public bodies. It is interesting to note that the number of applications accepted involving the Health Service Executive has decreased from 103 in 2018 to 76 in 2019, to 65 in 2020. I am not aware of any obvious reason for the decrease and unfortunately, unlike in previous years, my Office is unable to break down the information about the HSE into its area offices.



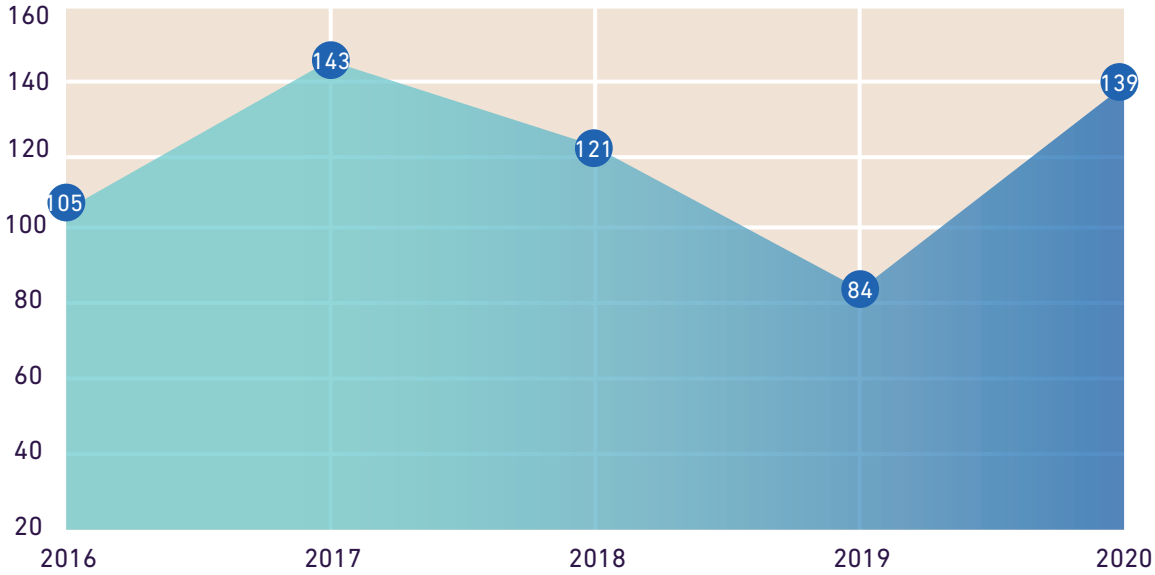
65	Health Service Executive
24	Department of Justice
21	TUSLA - Child and Family Agency
17	Defence Forces
15	Office of the Revenue Commissioners
14	Department of Employment Affairs and Social Protection
11	Department of Agriculture, Food and the Marine
11	University College Cork
10	Dublin City Council
9	Irish Prison Service
9	St. James's Hospital
7	Cork County Council
7	National Council for Special Education
7	Offaly County Council
6	An Garda Síochána
5	Department of Education and Skills
5	Fingal County Council
5	Horse Racing Ireland
5	Institute of Technology Carlow
5	Trinity College Dublin
176	Total Number of remaining accepted Reviews concerning other public bodies

Deemed refusals

The FOI Act imposes statutory time limits on public bodies for processing FOI requests. Specifically, a decision on a 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 a public body fails to issue a timely decision either on the original request (first stage) or on internal review (second stage) as provided for at sections 13 and 21 of the Act respectively, the requester is entitled to treat the body's failure as a 'deemed refusal' of the request. Following a deemed refusal at the internal review stage, a requester is entitled to apply to my Office for a review.

Deemed refusals at both stages 2016 – 2020



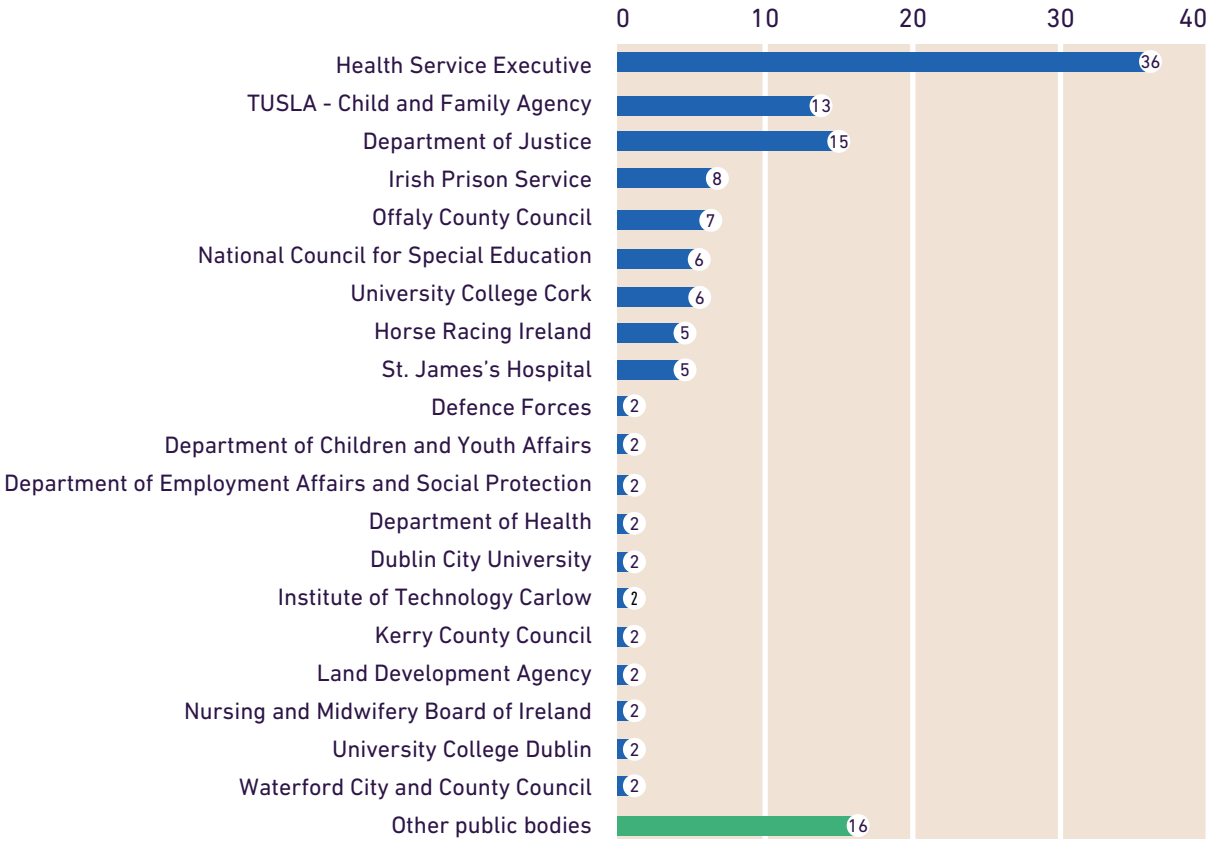
In previous Annual Reports I expressed my concern about the number and relatively high percentage of deemed refusals by public bodies and I expressed a hope for an improvement in the level of compliance. While 2019 saw a significant improvement across all stages of reporting on deemed refusals, the picture appears to have worsened in 2020. While a portion of this downturn in performance by public bodies may well be attributable to difficulties arising from pandemic-related restrictions, I am nonetheless concerned and I will be paying particular attention to trends emerging in 2021.

32% of reviews accepted by my Office in 2020 were deemed refused by the public body at both stages of the request, compared to 19% recorded in 2017, 28% in 2018 and 19% in 2019.

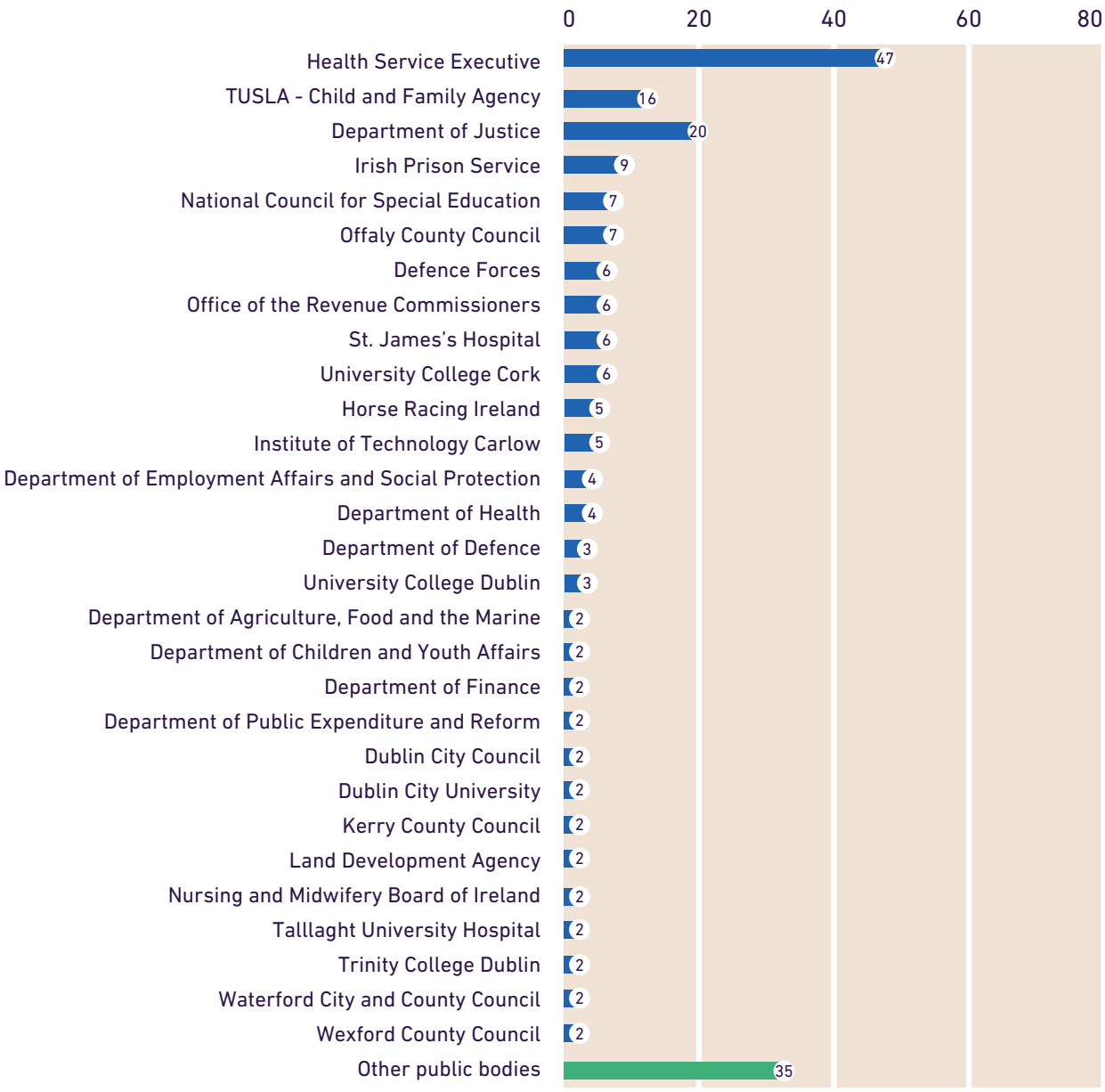
My Office recorded that 50% of accepted reviews were deemed refused at the first stage (the original decision) of the FOI request during the year. Similarly, 45% of reviews were deemed refused at the second stage (the internal review). In 2019, 28% were deemed refused at the first stage and 29% at the second stage. Each of these stages recorded 40% deemed refusals in 2018.

Chapter 4, Table 18 provides further details.

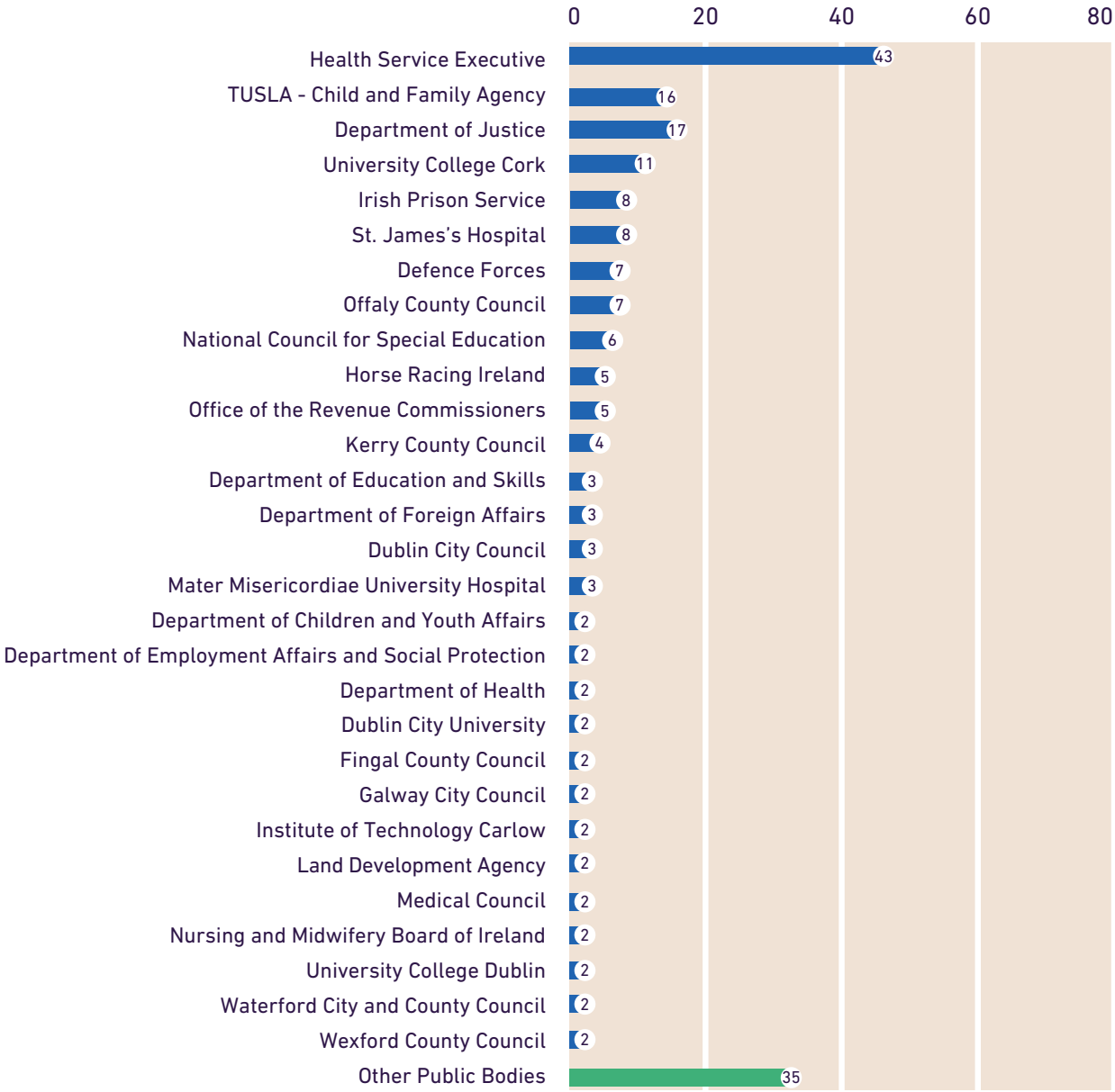
Deemed refusal at both stages by public body – 2020



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



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



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.

Section 34(13) of the FOI Act provides that

"Subject to subsections (9) and (10), a certificate shall remain in force for a period of 2 years after the date on which it is signed by the Minister of the Government concerned and shall then expire, but a Minister of the Government may, at any time, issue a certificate under this section in respect of a record in relation to which a certificate had previously been issued ..."

My Office has been notified of the following certificates renewed or issued under Section 34 in 2020.

- Three certificates were issued by the then Minister for Foreign Affairs and Trade.
- Five certificates were renewed by the then Minister for Justice and Equality.

All certificates referred to above fall for review in 2022.

Copies of the above notifications are attached at **Appendix I** to this Report.

Acknowledgment

I would like to take this opportunity to record my thanks to all of the staff of the Offices of the Information Commissioner and the Commissioner for Environmental Information, under the leadership of Senior Investigators Deirdre McGoldrick and Stephen Rafferty, for their hard work, determination and dedication in delivering a high quality service in a highly challenging and demanding year. I particularly want to express my sincere thanks to Elizabeth Dolan, Senior Investigator, who retired in 2020. I thank her for the many years of service and dedication to the Office and I wish her a long and happy retirement. My thanks also to Christopher Flood and Bernard McCabe for their assistance in compiling this Report.

2 OIC activity in 2020

Chapter 2:
OIC activity in 2020

In this Chapter, I set out a summary of some of the key OIC activities and issues concerning the operation of the FOI Act that arose during the year. I also set out a brief summary of activity in connection with my role as Appeal Commissioner under the European Communities (Re-use of Public Sector Information) (Amendment) Regulations 2015.

Covid-19 and the processing of FOI requests

In 2020 the Covid-19 pandemic impacted the provision of FOI services across the public sector. The rapid spread of the virus early in the year required public bodies to rapidly restructure their resources and the delivery of essential services.

Extraordinary efforts were undertaken by most public bodies in order to ensure continuity of service delivery, while staff acclimatised to new remote working conditions. Alongside the common burdens placed upon all public bodies by the pandemic, some public bodies also faced enormous increased demand for core services, particularly those on the front line.

During the year, the FOI Central Policy Unit of the Department of Public Expenditure and Reform (CPU) published detailed guidance for public bodies dealing with requests during the pandemic. The principal aim of the guidance was to assist public bodies in ensuring that they continued to process FOI requests to the greatest extent possible. It noted that requests must be responded to within the statutory deadlines and that the Act does not provide for the extension or abridgement of those statutory deadlines. However, it also urged requesters to take a pragmatic and proportionate approach to their use of FOI in light of the resourcing and operational issues being faced by organisations in responding to an unprecedented public health challenge, and to engage with bodies with a view, where possible, to reaching a satisfactory arrangement.

Amongst other things, the guidance offered advice on procedures for handling requests, the proactive publication of information, engaging with requesters, and the release of records. My Office welcomed the publication of the guidance and the CPU is to be commended for acting so swiftly in doing so.

Notwithstanding the challenges presented by Covid-19, I am glad to say that my Office has observed admirable efforts on the part of public bodies to ensure continuity of FOI services over the course of this tumultuous year. Understanding the difficulties first-hand, my Office engaged closely with public bodies in the early stages of the pandemic in relation to any anticipated delays in submissions to reviews or project-related activities. Where it appeared reasonable in the circumstances, my team adopted a slightly more flexible approach in the setting of deadlines for responses. By and large, this approach ensured that public bodies provided substantive submissions by the agreed deadline, rather than presenting their arguments in a piecemeal fashion. In turn, my team was able to maintain relatively streamlined operations, in spite of the challenges it faced as a result of the pandemic. The fruits of these efforts is evident in the number of cases closed in the year, and the percentage of reviews completed within four months of receipt of the applications for review.

I am pleased to say that my Office did not experience any significant deterioration in our engagements with public bodies in 2020. This is a testament to the professionalism and commitment shown by public sector staff in the face of the enormous challenges they have grappled with in the past year.

OIC outreach programme 2020

In 2020, my Office continued the rollout of its outreach programme. The programme consists of three strands:

- Increased direct engagement with FOI decision makers through various fora, including presentations and seminars,
- Increased direct engagement with public bodies through section 44 investigations and the development of a self-audit toolkit, and
- Increased engagement with public bodies at senior management level.

Presentations and seminars were limited over the course of 2020, due in no small part to necessary restrictions and resource reprioritisation across the public sector as a result of the ongoing Covid-19 pandemic. However, my staff did manage to contribute to a decision makers' course run by the Institute of Public Administration and we will resume seminar delivery in 2021. In 2020, we also launched our Twitter account (@OICIreland) as a means of informing the public and practitioners alike about our work and the importance of the rights provided for under the FOI Act.

In 2020, I also published a **report** of my findings and recommendations following a section 44 investigation carried out by my Office in 2019 into compliance by FOI bodies with the statutory timeframes for processing requests and the requirement to provide adequate reasons for refusing requests. Five bodies were investigated, namely the Defence Forces, Dún Laoghaire-Rathdown County Council, the Office of the Revenue Commissioners, TUSLA – Child and Family Agency and University College Dublin.

With support from my Office, each of these bodies prepared detailed action plans to address my findings and recommendations. Over the course of the year, I kept progress in respect of the implementation of these plans under regular review. I am glad to say that each of the bodies concerned has made significant progress in realising positive change during 2020, in spite of the difficulties they each faced arising from the pandemic. For example, resourcing of the FOI function in the Defence Forces has increased to include a civilian member of staff – a departure from the previous position of solely military personnel staffing the FOI function alongside their other duties. Notably, TUSLA has made significant inroads, following enhanced high-level engagement by this Office with TUSLA's senior management. It has provided a comprehensive explanation of its plans to complete the relevant measures in early 2021, which includes implementation of an eFOI system. As I noted in my report, such a system should go a long way towards streamlining FOI management and increasing statutory compliance in TUSLA.

Finally, I am also grateful to UCD for agreeing to pilot the self-audit toolkit for FOI bodies in 2020. Its results and feedback will be invaluable in fine-tuning this resource prior to its publication.

Section 6 determinations

Bodies are deemed to be public bodies for the purposes of the FOI Act if they fall within one or more of the categories described in section 6(1) of the Act. Where a dispute arises between a body and my Office as to whether or not it is a public body, I must submit the dispute to the Minister for Public Expenditure and Reform for a binding determination (section 6(7) refers). The Central Policy Unit (CPU) of the Department of Public Expenditure and Reform published a policy and procedures document in 2016 (the CPU Policy) for dealing with such disputes.

The current section 6 dispute resolution process is wholly unsatisfactory. I have expressed my concern about the practical operation of the process on a number of occasions in the past. In my 2019 Annual Report, I noted that there was an ongoing issue regarding the time taken to resolve disputes. Unfortunately, this problem has persisted. The CPU Policy envisages that the Minister's determination will be given within twenty-five working days of receipt of a request by my Office for a determination. However, in 2020 my Office had cause to engage directly with the CPU in relation to significant delays in the issuing of determinations concerning three specific bodies, namely:

- The Office of the Secretary General to the President,
- Carlow Arts Centre Limited, and
- Kilkenny Abbey Quarter Development Limited.

The determination in respect of the Office of the Secretary General to the President has been outstanding since May 2018, when we were informed that the Minister had reopened an earlier determination from 2017, apparently on the advice of the Attorney General.

On the question of whether Carlow Arts Centre Ltd. is a public body for the purposes of the Act, we have been awaiting the Minister's determination since January 2019, while the determination in respect of Kilkenny Abbey Quarter Development Ltd. has been outstanding since January 2020. While I fully appreciate that the issues arising in such cases are often complex and require detailed legal analysis, the delays of the nature encountered in the above cases are inordinate, particularly in the case of the Office of the Secretary General to the President.

In correspondence with my Office on the matter, the CPU outlined its view that the operation of the dispute resolution mechanism is unsatisfactory and that it had brought the matter to the attention of the Minister. At the time of writing, the Department was considering a review of the operation of the CPU Policy. While I would welcome any meaningful and practical proposals for improving its operation, section 6(7) is, in my view, fundamentally flawed. It seems to me that the question of whether or not section 6(1) applies to an entity can ultimately only be determined definitively by the courts. As such, I consider that a legislative amendment to section 6(7) is necessary to properly resolve the issue. Alternatively, as my Office has suggested to the Department, if the Minister determines that a particular entity should be regarded as an FOI body for the purposes of the Act, he may wish to prescribe that body pursuant to the powers available to him under section 7 of the FOI Act. Such a course of action would render redundant any argument as to whether or not section 6(1) applies to that entity. If he determines that section 6(1) does not apply, it is open to any affected party to challenge that determination by way of judicial review.

In my previous Annual Reports, I have called for a review of the FOI Act. If such a review were to take place, this would provide an appropriate forum for addressing issues relating to the operation of section 6(7). Regardless of whether or not such a review takes place, urgent action is required to address the issues arising in the implementation of the dispute resolution process. My Office will be pleased to engage with the Department in a review of the operation of the CPU Policy. However, I remain of the view that it will be very difficult to develop a mechanism that brings the certainty I believe the process requires.

Regardless, I do not understand why a determination has been delayed in the cases currently before the Minister, nor do I consider that a review of the dispute resolution process should be necessary to allow for their finalisation. As I understand matters, all of the information necessary for the issues to be determined has already been put before the Minister.

The aim of the dispute resolution process was to provide an efficient and effective outcome for all parties involved in a dispute over whether an entity is a public body for FOI purposes. In each of the three cases at issue, a requester has been left in limbo with no indication as to when a decision will issue on the FOI request made. My Office continues to press for an urgent resolution of the matter.

For reference, my Office now publishes on its website a list of bodies that I have had cause to examine under section 6 of the Act to determine if they are public bodies for the purposes of the Act.

Section 41 - non-disclosure provisions

Section 41 of the FOI Act provides for the mandatory refusal of access to records whose disclosure is prohibited, or whose non-disclosure is authorised, by other enactments. It subordinates the access provisions of the Act to all non-disclosure provisions in statutes except for those cited in the Third Schedule to the Act.

Under section 41, all Government Ministers are obliged to furnish to a Joint Committee of both Houses of the Oireachtas a report on the provisions of any enactments within their respective area of governance that authorise or require the non-disclosure of records, specifying whether they consider any of the provisions should be amended, repealed, or added to the Third Schedule. Under section 41(6), reports must be furnished to the Joint Committee within 30 days of the fifth anniversary of the day on which the last report was furnished. The last round of reports were due to be furnished by May 2019. Ministers are also required to lay their reports before the Oireachtas and to furnish my Office with a copy. I am entitled to furnish my opinion and conclusions on the reports to the Joint Committee and, indeed, must do so if requested by the Joint Committee.

Separately, section 41 provides that the Joint Committee must, if authorised by both Houses, review, from time to time, the operation of any non-disclosure provisions and furnish to each House a report of the results of its review. While this is not a formal requirement that the Joint Committee must review the various reports submitted by the Government Ministers every five years, the submission of such reports presents an ideal opportunity for such a review. The Joint Committee may include in its report recommendations in relation to the amendment, repeal, or continuance in force of any provision.

I noted in my 2018 Annual Report that the relevant Joint Committee has only once completed the review process, in 2006. I stated my intention to contact all government departments and the clerk of the Joint Committee to follow up on outstanding reports on the process in 2019. In 2020 I continued this process with a view to furnishing a report to the Joint Committee before the end of that year. At the time of writing, a number of the reports that were due to be furnished by May 2019 remained outstanding. While I have no role in the enforcement of the requirement to furnish such reports, my Office continues to engage with the various government departments and the clerk of the Joint Committee to follow up on outstanding reports and I intend to furnish to the Joint Committee my opinion on the reports as soon as they are all to hand[1].

1 Update: On 19 May 2021, I informed the Joint Committee that I would not be furnishing it with a report of my consideration of the Departmental reports that were due for submission in 2019 due to the failure of some Departments to submit their reports to my Office.

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.

Two new appeals of decisions of my Office were made to the High Court in 2020 by the applicants in the given reviews. One appeal was made to the Court of Appeal by the FOI body involved from a judgment of the High Court in favour of my Office.

Seven appeals were concluded during the year, five High Court appeals and two Supreme Court appeals. Of the High Court appeals concluded, one was remitted back to my Office on consent, one was dismissed for want of prosecution, agreement was reached in one appeal that the relevant decision should be set aside with no requirement for a remittal, and one appeal was remitted back to my Office by agreement. Judgment was delivered in a fifth appeal, dismissing it in its entirety.

Judgments were delivered in two Supreme Court appeals. All of these judgments are summarised below. The full judgments are available on our Office website at **www.oic.ie**.

High Court Judgment – *Jackson Way Properties Limited and the Information Commissioner* [2019 69 MCA]

Background and Issue

The High Court delivered its judgment on 14 February 2020. The applicant in this case has been involved in a long running dispute with Dún Laoghaire-Rathdown County Council in connection with the applicant's claim for compensation following the compulsory purchase by the Council of lands owned by the applicant in or around 2001 in connection with the construction of the M50 motorway. The applicant's request was for access to records relating to it, including in relation to its property, its title, any covenant or burdens affecting or alleged to affect its land, the compulsory purchase of its land, claims for compensation, and various related legal proceedings.

The Council refused the request under section 15(1)(c). This section allows an FOI body to refuse to grant a request if it considers that granting the request would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of work (including disruption of work in a particular functional area) of the FOI body concerned.

Following the review, I affirmed the Council's refusal to grant the request. The applicant appealed my decision to the High Court. The main issues before the Court were whether I had correctly interpreted the concepts of "work" and "unreasonableness" in section 15(1)(c) and whether there was sufficient evidence before me that the request would cause a substantial and unreasonable interference with, or disruption of, work.

Conclusions of the Court

The Court upheld my decision. The Court concluded that the term "work" must be given its natural and ordinary meaning and rejected the argument that it is limited to the work involved in the discharge of statutory functions. It also found that the term "unreasonable" must be given its natural and ordinary meaning and, given that the section imposes a cumulative requirement, i.e. that the disruption/interference should be both substantial and unreasonable, it was acceptable for me to carry out an analysis that does not separate out unreasonable from substantial, but rather takes a global view that the statutory test in respect of both has been met.

The Court was satisfied that my reference to "voluminous requests" was clearly intended to be a shorthand description of the section. It outlined that my decisions should not be construed as if they were a statute and should not be interpreted with such rigidity that a failure to refer to a statutory provision in anything but words that perfectly reflect the statutory requirements will result in the implication being drawn that I have not properly interpreted the statute.

Finally, the Court concluded that there was an ample evidential basis for my decision. It stated that a court must not step into the shoes of the decision maker in evaluating the nature and quality of evidence and that my decision in this respect is entitled to a certain degree of deference from the Court.

Note: The applicant has since appealed the High Court's judgment to the Court of Appeal.

Supreme Court Judgment – *University College Cork v the Information Commissioner* [100/19 UCC v Information Commissioner, [2020] IESC 57 [58]]

Background and issue

This case concerned a request for access to records relating to an agreement between UCC and the European Investment Bank concerning a loan that was provided for capital development purposes. UCC refused access to the records on the basis that they contained commercially sensitive information (section 36(1)(b) of the FOI Act).

Section 22(12)(b) of the Act places the burden on the public body of satisfying me that a decision to refuse to grant a request was justified. Following review, I found that UCC had not met the burden of proof under section 22(12)(b) to show that it was justified, under section 36(1)(b), in refusing access to the relevant loan agreement.

UCC appealed my decision to the High Court. In its judgment of 3 April 2019, the Court annulled my decision. It concluded that the onus was not on UCC to satisfy me that its decision to refuse access to the records sought was justified. The High Court's decision was in part based on a Court of Appeal judgment in *The Minister for Communications, Energy and Natural Resources v Information Commissioner* [2019] IECA 68, (the enet case).

The High Court was bound by a finding in the enet case that once a record falls within an exempt category, the presumption that disclosure is not justified plays no part, and that section 22(12)(b) did not put the onus on the FOI body to justify a refusal. The Court also concluded that I had misapplied the threshold for competitive prejudice in section 36(1)(b). It remitted the matter to my Office to reconsider in light of its judgment.

I appealed the High Court's decision, as I was concerned that its findings and the Court of Appeal's findings in the enet case concerning section 22(12)(b) would affect how I conduct my reviews of decisions. I was given leave to make a leapfrog appeal to the Supreme Court, where the UCC and enet appeals were heard together on 14-15 January 2020.

Conclusions of the Supreme Court

The Supreme Court issued judgments in both cases on 25 September 2020. In the UCC case, the Court found that I was correct in my finding that the onus was on UCC to establish that the records were commercially sensitive under section 36. It also considered that my approach in requiring UCC to justify its refusal to release the records by addressing the contents of the records and explaining by reasoned argument that they met one or other of the tests for exemption was correct. The Court also made some helpful findings in relation to the manner in which the courts should approach appeals of my decisions and the parameters of an appeal on a point of law. The Court further stated that UCC should not have been permitted to change its position on a number of records before the High Court, as the appeal was confined to a point already before me.

However, the judgment also found that I had misapplied the threshold for competitive prejudice in section 36(1)(b). The Court considered that I had not sufficiently engaged with the content of the records in this case and remitted the matter to my Office for a new decision.

Supreme Court Judgment – *The Minister for Communications, Energy and Natural Resources v the Information Commissioner* [2020] IESC 57 [59]

Background and issue

This case concerns the question of access to a concession agreement between the Department of Communications, Energy and Natural Resources and a private company, enet. Under the agreement, enet manages a network of fibre optic cables which is State-owned and which enables telephone and broadband services. In my decision, I directed release of the agreement. I concluded that the release of the agreement would not involve a breach of a duty of confidence between the parties. I accepted that it contained commercially sensitive information for the purposes of section 36(1)(b) but having considered the public interest balancing test in section 36(3), I concluded that, on balance, the public interest would be better served by releasing the agreement. In making this finding, I took into account that enet was the successful bidder in a tender process for the use of a State-owned asset which generates revenue.

The Department appealed my decision to the High Court. The issues before the Court were whether I had been correct in finding that, under section 22(12)(b), the Department's decision to refuse the request was presumed not to have been justified unless it satisfied me otherwise, and whether I had erred in the way in which I had applied the exemptions set out in sections 35 (confidentiality) and 36 (commercial sensitivity). The High Court upheld my decision and the Department appealed that judgment to the Court of Appeal. The Court of Appeal allowed the Department's appeal. I appealed that judgment to the Supreme Court, given its wider repercussions for the way in which my review function operates. The Department cross-appealed the Court of Appeal's finding on section 35.

Conclusions of the Court

The Supreme Court delivered its judgment on 25 September 2020. On section 22(12)(b), the Court found that I was correct that the Department was required to justify refusal. It said that section 22(12) affords me an important tool by placing the onus on the FOI body to justify an assessment that records are exempt. It held that I am entitled to, and indeed must, approach the review on the basis that I must be satisfied that the FOI body's conclusion is properly reasoned and justifies the refusal. It said that the overriding presumption in the FOI Act is one of disclosure. It said that any refusal to disclose must be fully reasoned and sufficiently coherent, fact-specific, and logically connected to the record such that the justification is sufficient. The Court also held that I must myself adjudicate the merits of the decision to refuse by reason of an analysis of the records and the interests engaged which might suggest either disclosure or refusal.

On the public interest balancing test in section 36(3), the Court found that I improperly relied on the general principle of openness. It found that there must be a sufficiently specific, cogent and fact-based reason to tip the balance in favour of disclosure. The Court said that I fell into error in requiring that the parties show exceptional circumstances "that apply in this case such as to override the need for transparency", in that my decision was guided by the objective of transparency. It said that the test is whether the public interest that might be gained or lost by the release of the specified documents having regard to their content, might for reasons relevant to the document and the record and their contents, be better served by either release or refusal. The Court emphasised that the analysis of the public interest is carried out in the light of the contents of the records.

Finally, the Court dismissed the Department's cross-appeal on section 35. It found that section 35(2) of the FOI Act was enacted in order to avoid a situation where an FOI body and a third-party service provider could rely on a confidentiality clause to prevent release.

As I mentioned in my introduction earlier, the Court's judgment has caused my Office to revisit its approach to the consideration of public interest tests and has given rise to specific challenges in doing so.

Section 11(3) of the Act sets out three principles to which public bodies must have regard when performing their functions under the Act. Among other things, it requires public bodies to have regard to the need to achieve greater openness in the activities of FOI bodies and to promote adherence by them to the principle of transparency in government and public affairs. This provision was first introduced in the 2014 Act and there was no equivalent provision in the earlier Act.

Prior to the enet judgment, my Office placed some weight on the need for transparency and accountability of public bodies, as espoused by section 11(3), when considering the various public interest balancing tests contained in the Act. In my decision in the enet case, I explained that I take the view that there is a public interest in the proper administration of public contracts and in ensuring that value for money is obtained. I said I consider openness about the expenditure of public funds to be a significant aid in ensuring the effective oversight of public expenditure and that the public obtains value for money, and in preventing fraud and corruption and the waste or misuse of public funds. I said this public interest is not limited to the expenditure of public funds and that I also recognise that there is a public interest in transparency and accountability in the use of public property and public assets.

Specifically, I considered that it was in the public interest to disclose the terms and conditions under which enet has agreed to manage, maintain and operate what I described as a valuable State asset. I considered that enet was the successful bidder in a tender process for the use of a State-owned asset which generates revenue and that there should be transparency around this transaction.

In its judgment, the Court said that the exemption of certain records under section 36(1) recognises that there is a public interest in the protection of commercial sensitivity and that this may be normally served by the operation of the exemption itself, which provides for the refusal of an FOI request. It stated the following:

> "The Commissioner, in the present case, took the view that the size of the contract for the support of an important State-owned asset could, of itself, justify disclosure. This may reflect a view that it is desirable in the public interest to require disclosure of information regarding large public expenditure in strategically important State assets and infrastructure. If that is the basis of the decision, it seems to me to improperly rely on the general principle of openness as the decision to order release must be one that emerges from a consideration of the particular records and not from a general policy. The size of a contract was not identified in the Act as a basis for disclosure. There must be a sufficiently specific, cogent and fact-based reason to tip the balance in favour of disclosure."

The Court added:

> "It seems, from the decision of the Commissioner, that different aspects of the public interest have been considered depending on the particular commercially sensitive information at issue but that "ensuring maximum openness in the expenditure of public funds and in public bodies obtaining value for money" is the one which is most often relied on and was relied on in the present case. This is not a correct interpretation of "public interest" in s. 36 as it focuses on a general public interest which is akin to that underpinning the right to access to records of FOI bodies under the Act.
>
> It may be that his approach derived from the overall purpose of the Act of fostering transparency and scrutiny of public bodies, and from a view that the release of records is desirable in itself. That approach seems to me not to properly reflect what is intended by s. 36(3) of the Act."

The Court's judgment has, in essence, required my Office to revisit its general approach to the public interest tests in the Act. While it is too early to say with certainty what effect, if any, the judgment may have, my initial concern is that it may result in less information being made publicly available that might otherwise have been made available before the judgment. My Office continues to work through the consequences of the judgment in specific cases.

Re-use of public sector information

Under the European Communities (Re-use of Public Sector Information) Regulations 2005 (the PSI Regulations), an individual or a legal entity may make a request to a public sector body to release documents for re-use. The PSI Regulations provide that, on receipt of a request in respect of a document held by it to which the PSI Regulations apply, a public sector body must allow the re-use of the document in accordance with the conditions and time limits provided for by the Regulations. Under Regulation 10 of the Regulations, decisions of public sector bodies can be appealed to my Office. A second caseworker was assigned to Re-use of Public Information (RPSI) appeals in 2020. My Office concluded seven such appeals in 2020. No new appeals under the PSI Regulations were received by my Office in 2020.

A new PSI Directive

As I noted last year, the European Commission repealed and replaced the 2003 PSI Directive in 2019. Directive (EU) 2019/1024 on Open Data and the re-use of public sector information must be transposed into Irish law by 16 July 2021. The new Directive is intended to make re-use easier, making the default position that re-use of documents should be free of charge and without conditions as much as possible. It will impose a positive obligation on public sector bodies to make public data available as open data (rather than on request) and to make all existing documents available unless access is restricted. The Directive also imposes an obligation to make high value datasets available for re-use free of charge.

2020 RPSI decisions

Four decisions on RPSI cases issued in 2020. Three related to the re-use of information concerning submissions/observations made on planning applications. The fourth (Case RPSI/19/05) concerned Monaghan County Council's refusal of a request for a machine-readable listing of all purchase orders over €20,000 for re-use. The appellant was a journalist, who had made the same request to a large number of local authorities. Three of the cases were settled when the public sector bodies in question provided information in the format sought. The fourth case went to a decision, where I varied the Council's decision to refuse the request.

The Council's decision to refuse was based, in part, on Regulations 5(5)(b)(i) and (ii), which provide that nothing in the PSI Regulations requires a public sector body to create or adapt any document in order to comply with a request, or to provide extracts from documents where this would involve disproportionate effort, going beyond a simple operation.

The Council described the process it undertook when reviewing and filtering its list of purchase orders before publication. It explained that a report was created and then a staff member manually deleted items which it was not required to publish or were exempt under FOI, before creating a pdf for publication. Pdfs are not machine-readable. Some of the original reports, which were machine-readable, had been retained but there was no procedure in place for this to be done routinely.

I was satisfied that while the Council held some machine-readable versions of the purchase orders lists published on its website, the majority of the published documents were held in non-machine-readable pdf format. I was also satisfied that the pdfs would have to be re-created to grant the appellant's request.

I accepted that there was an obligation on public sector bodies to allow the re-use of documents held by them in any pre-existing format or language, and, where possible and appropriate, in open and machine-readable format together with its metadata, in compliance with formal open standards. However, I also accepted that there are limits to the steps a public sector body is required to take in order to grant a request. In the circumstances, I found that the Council's refusal to grant the appellant's request for re-use in relation to the lists solely held in pdf format was justified. I found that its decision to refuse to allow the re-use of the records held in machine-readable format was not in compliance with the PSI Regulations and I directed it to provide those records to the appellant for re-use.

Obligations under the PSI Regulations

In my decision, I noted that the Council had no information relating to the Reuse of Public Information (RPSI) on its website. I drew the Council's attention, and that of public sector bodies generally, to the guidance published by the CPU. I noted that the guidance sets out what steps each public sector body should take in respect of the PSI Regulations, which includes publishing a PSI statement on its website. I am happy to say that the Council has since updated its website to include this information.

In my decision, I commented that I saw no reason why the Council could not publish future lists of purchase orders in machine-readable format. In my view, this would have the effect of removing the administrative burden on the Council of having to process further PSI requests for the type of records sought for re-use in this case.

I would encourage all public sector bodies to have regard to their obligations under the PSI Regulations, and to consider how the government's policy of promoting innovation and transparency through the publication of Irish public sector data in open, free and reusable formats applies to their organisation.

3 Decisions

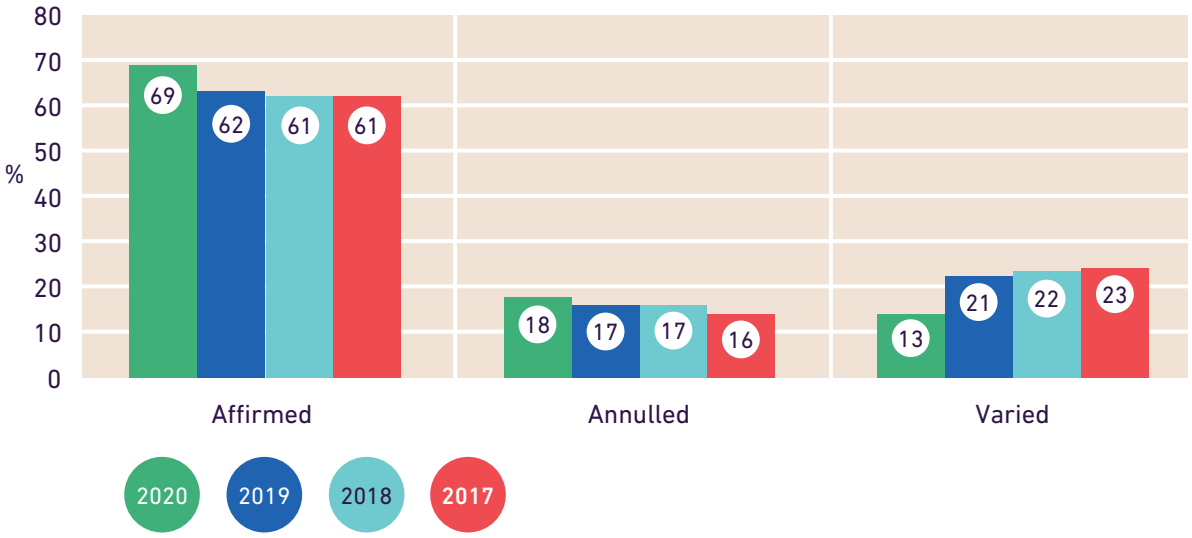
Chapter 3:

Decisions

Formal decisions

My Office reviewed 414 cases in 2020, of which 265 (64%) were concluded by issuing a formal decision in the review.

The table below provides a percentage comparison of the outcomes of the reviews that were completed by way of formal decision in 2020.



The remaining reviews were closed by way of discontinuance, settlement or withdrawal. For a three-year comparison of the outcome of all reviews completed in the year, see Table 15, Chapter 4.

Decisions of interest

The cases in this Chapter represent a sample of cases my Office reviewed during the year that were concluded by way of a formal decision. All formal decisions issued by my Office are published in full at **www.oic.ie**.

Section 29 - Deliberations of Public Bodies

Section 29 of the Act serves to protect records relating to the deliberative processes of public bodies. For the exemption to apply, the public body must show that release of the records would be contrary to the public interest. This is a stronger test than the public interest balancing test found in other exemptions.

An Investigation by the Data Protection Commission into Public Service Cards (PSC) – Case OIC-53314

Case OIC-53314 concerned records held by the Department of Employment Affairs and Social Protection relating to a statutory investigation by the Data Protection Commission (DPC) into the Public Services Card. The records comprised requests for information from the DPC, the Department's responses and a preliminary report from the DPC setting out draft findings for comment. During my review, the DPC issued a final report to the Department in relation to some, but not all, of its investigation. The Department published the final report, together with some of its correspondence with the DPC, as well as its summary response to the final report.

The Department relied on section 29 (deliberations of public bodies) to withhold access to the draft report and correspondence. Having regard to the contents of the records, I found that they contained information relating to the deliberative process of both the Department and the DPC.

In examining whether release would be contrary to the public interest, I considered that the particular circumstances arising in this case were worthy of further scrutiny. This case was unusual in that copies of the records were held by the Department, but were also held by the DPC, which is a partially included agency under Schedule 1, Part 1 of the FOI Act. I had found in previous cases that such records held by the partially included agency concerned were excluded from FOI, but that the exclusion did not extend to the same records held by other FOI bodies.

I had regard to submissions made by the DPC in support of the Department's decision. The DPC noted that, as a partially included agency, records concerning its core functions could not be obtained directly from the DPC under FOI. It argued that this amounted to a recognition that its investigative work should be treated as confidential and should not be subject to public scrutiny while an investigation was ongoing.

In my decision, I accepted that the Oireachtas considered that records relating to the DPC's core functions are worthy of a higher level of protection than other non-core related records. Among other things, I found that the records concerned a stage in the DPC's investigations where the parties' positions were subject to clarification, challenge, and debate. I considered that there was a public interest in preserving the integrity of the DPC's investigative process by allowing it to be conducted without detailed public scrutiny of the relevant documents at all stages of the process. I found that the draft report and some of the correspondence between the parties contained matters that were not yet concluded. I also found that the publication of the final report (which was comprehensive and detailed) had significantly enhanced transparency around the position of both parties concerning certain matters to which the report and investigation related.

While this decision should not be taken to imply that all draft reports are exempt in circumstances where a final report has issued, I found, in the circumstances of this case, that the release of the records at issue would be contrary to the public interest.

Pre-application Consultation Records regarding Strategic Housing Developments – Case OIC-57675

Case OIC-57675 concerned a request to An Bord Pleanála for access to pre-application consultation (PAC) records relating to a proposed Strategic Housing Development (SHD). The Board refused access to all of the records under section 29(1) of the Act (deliberations of public bodies). Having regard to the contents of the records concerned and the Board's description of the various stages of the SHD planning process, I accepted that the records contained information relating to the Board's deliberative process concerning the PAC. However, I also had to consider whether release of the records would be contrary to the public interest.

The Board and the applicant both cited recent OCEI cases that dealt with PAC records relating to Strategic Infrastructure Developments (SIDs) in support of their respective positions. In Case CEI/17/0031, I directed the release of certain records held on a pre-application consultation file for a proposed SID project. The Board informed my Office that it had changed its position on the publication of SID PACs in January 2019 following my decision in Case CEI/17/0031 and that it now grants access to these records once 18 months have elapsed without any activity on the file.

However, even though the PAC relating to the proposed SHD had concluded in the case under review, there was no provision for the file to be made publically available unless and until a related planning application was lodged. The Board stated that this was in line with planning legislation.

I noted that while the Board's decision may comply with planning legislation, which does not provide for the publication of the records sought at that particular stage, it had not cited any provision of planning law that **prohibited** the publication of PACs or their release under FOI. I also noted that the Company that submitted the PAC in question had not made any submission in support of the Board's decision, on its own behalf, or argued that there would be any harm from release of the records concerned.

The Board argued that release of the records at this stage of the process would prejudice its own decision-making, would be confusing to the public and would comprise third party participation. It also stated that as no development could proceed at this stage of the process, there could be no negative impact on the public interest arising from a refusal to release the records.

In my decision, I took the view that it had been open to the Oireachtas to design the pre-planning process so as to make it open to the public at all stages, and it chose not to do so. However, I also considered that arguably transparency should apply to both strategic infrastructure and housing developments, which are subject to particular procedures for submission and approval.

I found that the Board had not demonstrated that the disclosure of the particular records sought at this stage in the process would be contrary to the public interest. I annulled its decision and directed the release of the records sought to the applicant.

Access to records held by or under the control of public bodies - the meaning of "held" and "control"

The FOI Act provides for a right of access to records held by public bodies. For the purposes of the Act, records held by a public body includes records under the control of the body. In 2020, my Office handled a number of complex cases involving the meaning of "held" and "control". The cases below illustrate a range of important points that should be borne in mind when dealing with these matters.

Meaning of "Held" and Use of Staff Email in a Private Capacity – Case OIC-91800

Case OIC-91800 involved a request to the Health Information and Quality Authority (HIQA) for records relating to the applicant and his children. HIQA refused access to a number of emails it identified as coming within the scope of the request on the ground that their release would involve the disclosure of third party personal information.

The records at issue were of an inherently private nature and were not created in the course of the performance of any function of HIQA. The records did not contain any information that related in any way to the work of HIQA. It was apparent that a HIQA staff member had used a work email address in a private capacity and not in connection with his/her work. The staff member was not acting in the capacity of carrying out any official functions. The question arising, therefore, was whether or not HIQA held the records for the purposes of the FOI Act.

The meaning of records held has previously been considered by the courts. In *Minister for Health v Information Commissioner* [2019] IESC 40 (known as the Drogheda Review case), the Supreme Court found that for a record to be held within the meaning of the equivalent provision of the Act of 1997, the public body must be in lawful possession of the record in connection with, or for the purpose of, its business or functions and must also be entitled to access the information in the record.

In this case, the records at issue were not created by a staff member while carrying out his or her official functions. They contained the personal information of a number of individuals, and details of their private lives, but no information relating to the business of HIQA. They did not pertain to HIQA's official functions; they related solely to the private affairs of an individual. As such, while the records were present on HIQA's systems, I found that HIQA did not hold the records for the purposes of its business or functions. Accordingly, I found that HIQA did not hold the records for the purposes of the Act.

Archive of the McAleese Report "Held" by the Department of the Taoiseach – Case OIC-53487

An Inter-Departmental Committee (IDC) was established pursuant to a government decision in June 2011 for the purpose of establishing the facts of State involvement with the Magdalene Laundries. Following the completion of its tasks, the IDC determined that the most appropriate course of action would be to deposit the archive of its work (the archive) with the Department of the Taoiseach.

In case OIC-53487, the applicant submitted a request to the Department for access to records that she believed were held as part of the archive, namely records relating to a specified Magdalene Laundry, and personal records relating to her. The Department refused the request on the ground that it did not hold the records of the archive for the purposes of the Act.

I considered this case to be distinguishable from the Drogheda Review case and a number of issues in the decision are of note.

The Department argued that while the records of the archive were stored by it for safekeeping, they were not held by it for the purposes of the FOI Act. It argued that while it was in physical possession of the archive, it did not hold the records in connection with, or for the purpose of, its business or functions. It said it agreed to abide by the wishes of the IDC in order to assist the Chair of the IDC in concluding his work and that it accepted the archive on the clear understanding that it would be for safekeeping purposes only and that it would not have agreed to the IDC's request on any other basis.

The Department said the boxes containing the archive were in secure storage within the Department but were not considered Department files and were not included in its Registry Database. It also argued that certain restrictions in relation to access to the archive applied and that it did not possess any scope or discretion to waive the application of the restrictions. Further, the Department said that, per the final Report of the IDC, the archive consisted only of copies of relevant State records and all such records identified remained in their original files and locations and it considered that they were held by the relevant department/body from which they originated.

It seemed to me that the essence of the Department's argument was that it did not hold the records at issue in connection with, or for the purpose of, its business or functions, as it had no role or function at any point in relation to the Magdalene Laundries or in relation to the work of the IDC.

I found that the records of the archive held by the Department are records in their own right for the purposes of the Act and that they cannot be said to be held by the bodies that hold the originals of those records. As such, the records of the archive fell to be considered for release on their own merits by whatever body holds them for the purposes of the Act.

Without question, the archive of records comprises State records. As such, ownership of the archive must necessarily rest with an arm of the State. I did not accept that the FOI Act could not apply to the records simply because no public body had expressly accepted that it held the records. If that was the case, it would be a simple matter for records that the Oireachtas intended would be subject to FOI to be placed beyond the scope of the Act. I noted that it is the function of the Department to support the role of the Taoiseach and government and to coordinate the work of all government departments - it has a cross-cutting function. I considered that by taking possession of the archive of records, as a discrete set of records concerning a specific body of work undertaken in respect of the functions of a number of departments, the Department had essentially, and properly, accepted ownership of the archive. I was satisfied that, by doing so, the Department held the archive in connection with its business or functions.

Furthermore, I did not accept that the Department was not entitled to access the archive by virtue of a restriction imposed by the IDC. The evidence in this case was distinguishable from the Drogheda Review case. The record at issue in that earlier case was a transcript of a meeting the requester had with the reviewer as part of the relevant review. Following the conclusion of his independent review, the reviewer, a former High Court judge, delivered to the Department of Health a number of sealed boxes of records containing such transcripts with an accompanying letter in which he set out the basis upon which the boxes were being delivered to the Department. He stipulated that the boxes of records deposited may not be disclosed or opened in any circumstances except by court order for discovery, of which he wished to be notified. He stated that the boxes contained information he received on the assurance he had given to each participant in the review that their communications with the review would be treated as confidential and that in the absence of such assurance, he was satisfied that many individuals would not have participated in the review.

Separately, the reviewer indicated that he had made it clear to the participants that the transcripts were exclusively for his use only and would not be made available to anyone else, and that the records were essentially his documents that he had lodged with the Department for safekeeping.

The Supreme Court found that the High Court had been correct in finding that the reviewer was entitled to settle the terms upon which he would obtain cooperation from persons who contributed to the review and was entitled to impose terms and conditions when sending the documents to the Department, and that the Department accepted them into their custody on those terms. It noted that this conclusion of the High Court had been reached in accordance with the evidence of the communications between the Department and the reviewer.

In this case, the Department relied on an extract from the Report of the IDC to support its claim that it accepted the archive on the understanding that access to the archive as a whole should be restricted. However, I was satisfied that the extract in question was, instead, an acknowledgement by the IDC of the sensitivity of the records in the archive and of the fact that restrictions on access would necessarily apply, **in accordance with relevant legislation**.

This was not the same as the IDC imposing terms and conditions on the Department such as arose in the Drogheda Review case, nor did the IDC claim ownership of the records. Indeed, the IDC expressly acknowledged that maintenance of the records of the archive together in a single location would be a concrete outcome to the Committee's work and "may be a resource for future research".

In the circumstances, I saw no reason why the Department would not be entitled to access the information contained in the archive of records. I found that the Department was in lawful possession of the records at issue in connection with, or for the purpose of, its business or functions and that it was also entitled to access the information in those records. I found that the records were held by the Department for the purposes of the Act. I annulled the Department's refusal of the request and remitted the request to the Department for consideration afresh.

The Importance of all Relevant Parties Explaining their Relationships – Case OIC-57745

Case OIC-57745 had its background in a number of previous cases involving the applicant's attempts to obtain access to records relating to the Professional Development Service for Teachers (PDST). It is a good example of the complexities that can arise in determining the issues of "held" and "under control" within the meaning of the Act. It also illustrates the importance of all relevant parties fully engaging with a review and properly explaining their inter-relationships where this is necessary for my Office to determine the question of which body holds the relevant records.

The applicant first submitted a request directly to PDST for certain records. PDST argued that it was not a public body for the purposes of the Act and the applicant sought a review by this Office of that decision (**Case OIC-59187**). I found that PDST was not a public body for the purposes of the Act, noting PDST's position that it was a service provider under the aegis of the Teacher Education Section of the Department of Education and Skills. I found that PDST was, in essence, a programme or service for the delivery of certain support services to teachers and was not a separate legal entity in its own right.

Subsequently, the applicant submitted the same request to the Department. The Department refused the request under section 15(1)(a) on the ground that it did not hold any relevant records. The applicant sought a review by my Office of that decision (**Case OIC-53305**). In its submissions to my Office, the Department said that the Dublin West Education Centre (DWEC), an independent statutory body, 'hosted' PDST. It said all funding for PDST from the Department was routed through DWEC and that FOI requests for information held by DWEC, including that relating to PDST, must be made directly to DWEC. I found, having regard to the Department's explanation of the nature of its relationship with DWEC and of the nature of the relationship between DWEC and PDST, that records held by PDST were not under the control of the Department and were not, therefore, deemed to be held by the Department for the purposes of the FOI Act.

The applicant subsequently submitted the same request to DWEC, which was refused by DWEC on the ground that it does not hold the records sought for the purposes of the Act. In considering whether records held by PDST might be deemed to be under the control of DWEC, I noted that the High Court had considered the issue of control in the case of *Minister for Enterprise, Trade and Employment v the Information Commissioner* [2006] IEHC 39 and in the case of *Westwood Club v the Information Commissioner* [2014] IEHC 375 (the Westwood case). I noted that the judgments in those cases set out various non-exhaustive matters for consideration in whether 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 noted that in the Westwood case, the High Court indicated that while the day-to-day workings of an entity and whether the public body interferes with its day-to-day operations is an important matter, it is not, however, to be taken as definitive. It found that control must include the real strategic control of one entity by the other and the financial nexus between them.

I found that DWEC had no role in the day-to-day operations of PDST and that the financial arrangements of PDST were such that they did not support an argument that the records of PDST could be said to be under the control of DWEC. I noted that PDST was funded entirely by the Department and that funding was merely routed through DWEC, and that DWEC did not have any control of, or input into, PDST's budget. On the matter of strategic control, I noted that DWEC had no control over PDST's national programme of work, nor did PDST require DWEC's approval in relation to the national programme of work.

In all of the circumstances, I found that the relationship between DWEC and PDST was not one that would entitle DWEC to regard records held by PDST concerning its core functions as being under its control. As such, I found that DWEC was justified in refusing the request on the grounds that it did not hold the records sought and that they were not under its control for the purposes of the Act.

I further explained that in hindsight, it seemed that my decision in the case involving the Department did not have regard to the full details of the nature of the relationships between the three entities as was made available in the course of the review concerning DWEC. I noted that at the time of my decision concerning the Department, I did not have access to DWEC's explanation of its relationship with PDST and had that explanation been available, I would have come to a different conclusion in that case.

I affirmed the refusal by DWEC to grant the request on the ground that it did not hold the records for the purposes of the Act. In my decision, I suggested that the applicant make a fresh request to the Department. The applicant did so and when the matter came before my Office again, the Department eventually accepted that PDST was a service provider to the Department and that relevant records were, indeed, under its control.

Amendment of records under section 9 – Whether the applicant is identifiable from the information at issue – Case OIC-55811

Apart from affording a right of access to records held by public bodies, the Act also affords a right of amendment of incomplete, incorrect, or misleading personal information in records. In case OIC-55811, the Department of Foreign Affairs and Trade refused an application for the amendment of information contained in a published Information Note on the Election Observation Roster on the ground that the information in question was not personal information relating to the applicant and was not incomplete, incorrect or misleading. The relevant part of the Information Note stated that an applicant for selection to be included on the roster requested, as part of an appeal, a reasonable accommodation on grounds of a disability. It contained brief details of that applicant's assertions that a request for reasonable accommodation had been attached to his original application for selection and of the reasons why the Department found that no such accommodation had been sought at that stage in the process. The applicant argued that to state that his request for disability accommodation was not made was incomplete, false and misleading and should be deleted.

Before I could examine whether or not the applicant had shown that the information at issue was, on the balance of probabilities, incomplete, incorrect or misleading, I first had to consider whether it was personal information relating to him. To qualify as personal information, the information must relate to an identifiable individual. On that point, the applicant argued, among other things, that the roster was a small community and that he was readily identifiable to the community in the Information Note. He also said he had sought parliamentary assistance and argued that it would be apparent to the Deputies and Senators involved in his case that the relevant part of the Information Note referred to him.

I took the view, however, that the Information Note was not sufficiently detailed such that the applicant would be readily identifiable to the members of what he described as the roster community. It contained nothing about the nature of the accommodation sought or the reason why it was sought. Furthermore, while it may well have been apparent to the Deputies and Senators involved in his case that the relevant part of the Information Note referred to him, I did not accept that this, of itself, meant that the relevant information could be properly classified for the purposes of section 9, as personal information relating to an identifiable individual.

I found that for the purposes of section 9, the fact that an individual may be able to identify certain information as being about him or herself did not mean that the information is personal information about an identifiable individual. Similarly, the fact that other individuals who have been made aware of the information by the individual in question may be able to identify that information as being about the individual did not, in my view, mean that it should be regarded as personal information about an identifiable individual for the purposes of section 9. I found that what is relevant for the purposes of section 9 is whether an individual is identifiable to any party other than those s/he has already made aware of the information at issue.

In the particular circumstances of the case, I found that no individual who was not already aware of the details relating to the applicant's request for a reasonable accommodation could reasonably determine that the relevant information contained in the Information Note related to him. Accordingly, I found that the information at issue was not personal information relating to the applicant as an identifiable individual for the purposes of section 9 and, as such, the applicant was not entitled to apply for an amendment of that information. In light of my finding that the Information Note did not contain personal information relating to the applicant, I also found that the requirement set out in section 9(4) (that if an application for amendment of a record is refused, the body must attach to the record concerned a copy of the application or, if that is not practicable, a notation indicating that the application has been made) did not apply.

Section 31(1)(a) – Dominant purpose in litigation privilege and records containing policy – Case OIC-57897

The Department of Defence refused a request for access to a report of a working group regarding litigation arising from the use of malaria chemoprophylaxis ("Lariam") in the Defence Forces, completed in 2017, on the ground that it was exempt from release under section 31 of the Act.

Section 31 exempts from release records which would be withheld on the ground of legal professional privilege (LPP) in court proceedings. LPP can be complex in operation but in short, it enables a client to maintain the confidentiality of two types of communication, namely:

- confidential communications made between the client and his/her professional legal adviser for the purpose of obtaining and/or giving legal advice (advice privilege), and
- confidential communications made between the client and a professional legal adviser or the professional legal adviser and a third party or between the client and a third party, the dominant purpose of which is the preparation for contemplated/pending litigation (litigation privilege).

For litigation privilege to apply, the records must have been created for the dominant purpose of contemplated/pending litigation. The fact that a record may have other uses does not, of itself, mean that the dominant purpose for its preparation cannot have been pending or contemplated litigation, nor does it mean that such other uses must be regarded as co-equal purposes for its creation.

In this case, the applicant argued that it was unclear that the dominant purpose of the report was for litigation. He argued that even if it was prepared for pending or contemplated litigation, the report appeared to have had at least one other co-equal purpose, namely the making of prospective policy recommendations on a number of matters not restricted to the use of Lariam by the Defence Forces.

Of course, the onus is on the party asserting privilege to show, on the balance of probabilities, that the dominant purpose of the creation of the record was pending or contemplated litigation. In my view, the Department had, indeed, shown, on the balance of probabilities, that the dominant purpose for the creation of the report at issue was pending or contemplated litigation. The Department established the working group in 2011 as it was dealing with a number of claims taken at the time concerning the use of Lariam. The group was set up to review issues in relation to the use of Lariam, particularly having regard to the current and potential litigation. The title of the report itself indicated that it concerned litigation arising from the use of malaria chemoprophylaxis.

In this decision, I also found that the fact that a record may contain information concerning the making of prospective policy recommendations does not mean that such parts of the record cannot attract litigation privilege. The release of such information may still involve the disclosure of information of relevance to the issue of the pending or contemplated litigation. I also found that the inclusion of such information does not mean that the dominant purpose for the creation of the report cannot have been pending or contemplated litigation. I affirmed the Department's refusal under section 31(1)(a).

Section 42(k) – Records held by a Government Minister in connection with his role as a TD – Case OIC-59124

In case OIC-59124, the requester submitted a request to the Department of Transport, Tourism and Sport for access to records relating to the reopening of Stepaside Garda Station, which was within the Minister's constituency. The Department refused the request under section 42(k) of the Act, which provides that the Act does not apply to the private papers of members of the Oireachtas.

Essentially, the Department's position was that the matter of the reopening of Stepaside Garda Station was not part of its functions and, as such, having regard to the Supreme Court's approach to determining when records are deemed to be held by a public body for the purposes of the Act, it did not hold any such records. The Department argued that if the Minister has any relevant records coming within the scope of the request, they would be regarded as his private papers and would be excluded from the Act.

On the other hand, the applicant argued that section 42(k) does not apply to a member of the Oireachtas in his/her capacity as an officeholder and that emails emanating from a Special Adviser or other member of ministerial staff cannot be considered the "private papers" of a TD. The applicant's argument was, in essence, that any interactions the Minister had in relation to the reopening of Stepaside Garda Station were in his capacity as Minister and not as a TD and that any interactions his Special Adviser had in the matter can only have been in relation to the Minister's role as Minister and not as TD, as TDs do not have Special Advisers.

I did not accept that argument. I accepted that the Department had no specific function in relation to any decisions taken relating to the reopening of the Garda Station. I noted that it was not surprising that the Minister would have an interest in the matter as a TD in whose constituency the Station is based. I accepted that any records that might relate to the Minister's interactions in relation to the reopening of the Station would relate to his role as TD and would be captured by the definition of private papers as set out in Order 135 of the Dáil Éireann Standing Orders. I also accepted that any interactions the Minister's Special Adviser may have had in the matter related to the Minister's role as TD. I found that the Department was justified in refusing the request under section 42(k) of the Act.

Charging search and retrieval fees and the requirement to offer assistance

Under section 27 of the Act, public bodies are obliged to charge for the cost of searching for, retrieving and copying records where the estimated cost is likely to exceed a prescribed amount (currently €101). Furthermore, where the estimated cost is likely to exceed the prescribed overall ceiling limit (currently €700), the public body may refuse the request. However, in both cases the body must assist the requester in amending the request to reduce or eliminate the charge, if the requester wishes to do so.

Must a Public Body Provide a Schedule of Records when Offering Assistance? – Case OIC-94805

Case OIC-94805 concerned a request for information regarding a compensation scheme for Irish summer colleges as a result of Covid-19. The Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media informed the applicant that the estimated cost of searching for and retrieving the records concerned was €840. It informed him that the charge could be reduced by refining the request and that the request may be refused under section 27(12) of the Act if he could not refine it so that the estimated cost fell below the overall ceiling limit of €700.

The requester sought a schedule of records to assist him in deciding whether to refine his request or to pay the search and retrieval fees. The Department explained that the schedule could not be put together without identifying and retrieving the records.

In his application to my Office for a review of the Department's decision to charge the fee in question, the applicant said he would like me to make a ruling requiring FOI bodies to make a schedule of the records available to requesters to help them refine their requests. I explained in my decision that I could not do so.

I noted that section 27(2) specifically provides that the search for and retrieval of records includes time spent by the FOI body in preparing a schedule specifying the records for consideration for release, i.e. the preparation of a schedule is part of the work that the FOI body does not have to carry out where it intends to refuse a request under section 27(12). I further noted that the preparation of a schedule would require the FOI body to carry out a number of other steps that form part of the search and retrieval process.

It would have to determine whether it holds the records sought and would have to locate and retrieve those documents to determine if they are appropriate for listing on a schedule.

The Level of Assistance Required – Case OIC-92559

In case OIC-92559, the applicant's primary argument was that the Department of Public Expenditure and Reform did not properly comply with the requirement to assist him in amending or limiting the request. He argued that the Department should have presented him with viable options for amending his request and that it did not do so.

In my decision, I explained that the level or nature of the assistance to be provided can vary significantly from case to case and will depend on the particular facts and circumstances of the case. I noted that while there is an onus on public bodies to assist when asked to do so, it is often the case that requesters are best placed to offer suggestions as to how a more focused search for relevant records might take place, based on their knowledge of the type of information they wish to access. I accepted, however, that this is not always straightforward as requesters may not necessarily be aware of the type and nature of the records held.

On the other hand, I also noted that while public bodies would have a far greater knowledge of the nature and types of records held, there may be occasions where, in order to provide a sufficient level of assistance that might readily allow a requester to refine a request, the body would have to undertake, in part at least, one or more of the steps that would have formed part of the search for and retrieval of the records sought in the original request. I found that to require a public body to do so would defeat the purpose and intent of the mandatory obligation to charge search and retrieval fees and to charge a deposit in the first instance.

In the case in question, I found that the manner in which the Department could offer assistance to the requester that would definitively allow him to refine his request was immediately apparent. I considered that the Act does not impose such a burden on public bodies as to oblige them to attempt to identify discrete proposals for amending a request to allow for the reduction or elimination of search and retrieval fees where such proposals are not apparent. Nor did I accept that an apparent failure of a public body to readily identify such proposals means that it cannot charge search and retrieval fees. I suggested that, depending on the particular circumstances of the case, it might not always be possible to give such a level of assistance.

Section 28(1)(c) – Records of Senior Officials' Group on Covid-19 – Case OIC-95391

The issue in case OIC-95391 was whether the Department of the Taoiseach was justified in refusing access, under section 28(1)(c) of the Act, to copies of agendas and minutes for the meetings of the Senior Official's Group (SOG) on Covid-19. It was the Department's position that the requested records were exempt in full under section 28(1)(c) of the Act on the basis that they contained information for members of the government and Secretary General to the government for the purpose of the transaction of business at the Cabinet Committee on Covid-19 and Government. I observed that the exemption provided for at section 28(1)(c) of the Act would typically cover departmental briefing notes for individual Ministers attending a government meeting, notes prepared for the Secretary General to the government for the purpose of such a meeting, and the agenda of such a meeting. The sole reason for the creation of such records is to assist the government in the conduct of one or more of its meetings and, as a general matter, it is reasonable to expect that the relevant records would cease to have a purposeful existence after the conclusion of the meeting. In this case, I found that the SOG's role was not confined to providing information for a member of government or other relevant official for use by him or her solely for the purpose of the transaction of government business at a meeting of the government. Rather, as the minutes reflected, the Group was engaged with dealing with the many practical aspects of responding to and seeking to contain and mitigate the pandemic's wide impact on the country. As the relevant records documented and facilitated that work, I found that section 28(1)(c) did not apply.

I also considered section 28(2), which applies to a record containing "the whole or part of a statement made at a meeting of the government or information that reveals, or from which may be inferred, the substance of the whole or part of such a statement". I found that the records reflected statements made by the senior civil servants attending the SOG meetings and, with certain exceptions, did not record statements made at meetings of the government. Reference was made in numerous places to proposed Memoranda for Government and reports prepared for submission to government, and generally regarding issues for consideration by the Cabinet Committee. I found, however, that such references, made in advance of the relevant government meetings, did not reveal or infer the substance of the whole or part of any statement that was made at the actual meetings of the government.

Section 15(1)(c) – Voluminous requests and FOI processing during the Covid-19 Pandemic – Case OIC-92660

In case OIC-92660, the applicant, through his legal representatives, had sought from Galway County Council records relating to a specific engineering firm. The Council refused the request under section 15(1)(c) which allows a public body to refuse a request on the basis that granting it would cause a substantial and unreasonable interference with or disruption of the work of the FOI body concerned. In its decision, the Council specifically highlighted the challenges faced by its staff in accessing records during the lockdown associated with the Covid-19 pandemic. I found that the Council had not complied with the requirements of section 15(4) to assist the applicant in amending the scope of his request so that it would not fall to be refused on the basis of section 15(1)(c) and directed the Council to undertake a new decision-making process on the request.

4 Statistics

Chapter 4:
Statistics

Section I - Public Bodies - 2020

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

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

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

Table 7: FOI requests received by local authorities

Table 8: FOI requests received by the Health Service Executive

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

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 - 2020

Table 12: Analysis of applications for review received

Table 13: Analysis of review cases

Table 14: Applications for review accepted in 2020

Table 15: Outcome of completed reviews – 3-year comparison

Table 16: Subject matter of review applications accepted – 3-year comparison

Table 17: Applications accepted by type – 3-year comparison

Table 18: Deemed refusals due to non-reply by public bodies

Section I – Public Bodies - 2020

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

Requests on hand - 01/01/2020	**5805**
Requests received in 2020	
Personal	17780
Non-personal	13418
Mixed	393
Total	**31591**
Total requests on hand during year	37396
Requests dealt with	32652
Requests on hand - 31/12/2020	**4744**

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

	Number	Percentage
FOI requests dealt with by public bodies	32652	
Internal reviews received by public bodies	1068	3.3%
Applications accepted by the Commissioner	434	1.3%

Table 3: FOI requests received - by requester type

Requester Type	Number	Percentage
Journalists	7211	23%
Business	1412	4%
Oireachtas Members	311	1%
Staff of public bodies	836	3%
Clients	15698	50%
Others	6123	19%
Total	**31591**	

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

Request Type	Number	Percentage
Requests granted	15067	46%
Requests part-granted	8271	25%
Requests refused	5399	17%
Requests transferred to appropriate body	628	2%
Requests withdrawn or handled outside FOI	3287	10%
Total	**32652**	

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	22%	38%	22%	2%	16%
Local Authorities	36%	27%	27%	1%	9%
HSE	67%	20%	6%	2%	5%
Voluntary Hospitals, Mental Health Services	70%	7%	7%	2%	14%
Regulators and Related Agencies	72%	7%	6%	2%	13%
Third Level Institutions	47%	27%	16%	0.5%	9.5%
Other bodies	25%	34%	29%	2%	10%

Table 6: FOI requests received by Civil Service Departments/Offices

Civil Service Department/Office	Personal	Non-personal	Mixed	Total
Department of Social Protection	1493	207	6	1706
Department of Justice	401	413	4	818
Department of Education	169	386	3	558
Department of Health	8	472	0	480
Department of Agriculture, Food and the Marine	113	268	0	381
Department of the Taoiseach	9	334	0	343
Department of Transport	5	314	4	323
Department of Housing, Local Government and Heritage	13	304	0	317
Department of Finance	2	272	0	274
Department of Public Expenditure and Reform	16	255	1	272
Office of the Revenue Commissioners	102	140	0	242
Department of Foreign Affairs	39	202	0	241
Department of Enterprise, Trade and Employment	28	189	1	218
Department of Environment, Climate and Communications	10	174	0	184
Department of Tourism, Culture, Arts, Gaeltacht, Sport & Media	6	150	0	156
Department of Children, Equality, Disability, Integration & Youth	2	154	0	156
Office of Public Works	4	136	1	141
Department of Defence	23	80	1	104
Department of Rural and Community Development	1	56	0	57
Standards in Public Office Commission	0	33	1	34
Office of the Ombudsman	20	8	0	28
Department of Further and Higher Education, Research, Innovation and Science	0	26	1	27
Commission for Public Service Appointments	0	0	5	5
Office of the Information Commissioner	0	3	1	4
Office of the Commissioner for Environmental Information	0	0	0	0
Total	**2464**	**4576**	**29**	**7069**

Table 7: FOI requests received by local authorities

Local Authority	Personal	Non-personal	Mixed	Total
Dublin City Council	223	488	1	712
Cork City	56	172	1	229
Fingal	64	152	0	216
South Dublin	90	106	1	197
Cork	43	128	13	184
Dún Laoghaire-Rathdown	27	141	0	168
Meath	45	120	0	165
Limerick	48	114	0	162
Kildare	30	120	2	152
Galway City	35	111	3	149
Galway	29	91	27	147
Tipperary	25	119	0	144
Wexford	40	87	0	127
Clare	26	90	6	122
Mayo	5	114	1	120
Kerry	14	105	0	119
Donegal	1	116	0	117
Kilkenny	10	105	0	115
Louth	20	82	0	102
Wicklow	25	72	0	97
Sligo	0	84	0	84
Waterford	23	57	0	80
Leitrim	2	77	0	79
Laois	19	57	0	76
Roscommon	5	64	4	73
Westmeath	10	59	0	69
Offaly	12	55	0	67
Cavan	2	62	0	64
Carlow	5	58	0	63
Longford	5	55	2	62
Monaghan	6	55	0	61
Total	**945**	**3316**	**61**	**4322**
Regional Assemblies	3	4	3	10

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

HSE area*	Personal	Non-Personal	Mixed	Total
HSE West	2477	161	0	2638
HSE South	2376	97	30	2503
HSE Dublin North East	1400	107	3	1510
HSE Dublin Mid-Leinster	1164	64	0	1228
HSE National-Corporate	0	858	0	858
Total	**7417**	**1287**	**33**	**8737**

*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	882	103	1	986
St. James's Hospital	818	8	1	827
Tallaght Hospital	538	1	0	539
Children's Health Ireland	408	37	0	445
Beaumont Hospital	408	25	1	434
Mater Misericordiae University Hospital	392	30	0	422
Rotunda Hospital	249	18	0	267
St. Vincent's University Hospital, Merrion	220	21	0	241
St. John's Hospital, Limerick	236	3	0	239
National Maternity Hospital, Holles Street	196	18	0	214
Coombe Hospital	138	17	0	155
Health Information & Quality Authority	10	97	0	107
South Infirmary / Victoria Hospital, Cork	101	6	0	107
Mercy Hospital, Cork	63	12	0	75
Medical Council	33	30	0	63
National Rehabilitation Hospital, Dún Laoghaire	54	6	1	61
Cappagh Orthopaedic Hospital	49	7	0	56
Dublin Dental University Hospital	44	2	0	46
St. Michael's Hospital, Dún Laoghaire	36	3	0	39
The Royal Victoria Eye & Ear Hospital	35	0	0	35
National Paediatric Hospital Development Board	0	27	0	27
Our Lady's Hospice, Harold's Cross	24	2	0	26
Enable Ireland	25	0	0	25
St. Vincent's Hospital, Fairview	19	5	0	24
Mental Health Commission	10	13	0	23
National Treatment Purchase Fund	1	20	0	21
Other hospitals/services/agencies	186	68	4	258
Total	**5175**	**579**	**8**	**5762**

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

Third Level Education Body	Personal	Non-Personal	Mixed	Total
University College Dublin	54	110	0	164
National University of Ireland Galway	15	84	0	99
University College Cork	63	18	6	87
Trinity College Dublin, the University of Dublin	6	76	1	83
University of Limerick	10	69	0	79
Dublin City University	9	46	0	55
National University of Ireland Maynooth	12	29	0	41
Higher Education Authority	5	31	2	38
Technological University Dublin	5	29	1	35
Dundalk Institute of Technology	3	27	0	30
Waterford Institute of Technology	3	25	1	29
Institute of Technology Sligo	3	19	0	22
Athlone Institute of Technology	0	19	0	19
Cork Institute of Technology	2	17	0	19
Institute of Technology Carlow	3	15	0	18
Dún Laoghaire Institute of Art, Design & Technology	3	14	1	18
Galway-Mayo Institute of Technology	0	16	2	18
Letterkenny Institute of Technology	3	15	0	18
Institute of Technology Tralee	2	15	1	18
Royal College of Surgeons in Ireland	2	13	0	15
Limerick Institute of Technology	0	11	2	13
Institute of Public Administration	0	0	0	0
Total	**203**	**698**	**17**	**918**

Table 11: FOI requests received by other bodies

Public body	Personal	Non-Personal	Mixed	Total
Irish Prison Service	355	133	0	488
An Garda Síochána	182	276	1	459
Defence Forces	264	69	11	344
Houses of the Oireachtas Service	2	198	1	201
Health & Safety Authority	23	54	113	190
Courts Service	90	78	0	168
RTÉ	2	148	0	150
Irish Water	17	105	8	130
National Transport Authority	5	125	0	130
Social Welfare Appeals Office	88	1	0	89
Road Safety Authority	21	63	1	85
The Strategic Banking Corporation of Ireland	0	75	0	75
The Central Bank of Ireland	7	63	1	71
Office of the Data Protection Commissioner	10	55	0	65
Garda Síochána Ombudsman Commission	45	16	0	61
Environmental Protection Agency (EPA)	4	55	1	60
International Protection Office	43	13	0	56
The National Treasury Management Agency (NTMA)	2	53	0	55
Residential Tenancies Board	37	17	0	54
Sport Ireland	19	17	17	53
IDA Ireland	0	48	0	48
Office of the Director of Public Prosecutions	10	36	0	46
ESB Networks DAC	11	31	4	46
Property Registration Authority	37	8	0	45
Transport Infrastructure Ireland	2	43	0	45
Fáilte Ireland	1	42	0	43
State Examinations Commission	23	20	0	43
Central Statistics Office	3	38	0	41
An Bord Pleanála	0	40	0	40

Public body	Personal	Non-Personal	Mixed	Total
An Bord Bia	0	33	0	33
Commission for Communications Regulation (COMREG)	3	28	1	32
Waterways Ireland	0	30	1	31
Commission for Regulation of Utilities	8	22	0	30
Other bodies (138 bodies with fewer than 30 requests each)	259	925	82	1266
Total	**1573**	**2958**	**242**	**4773**

Section II - Office of the Information Commissioner – 2020

Table 12: Analysis of applications for review received

Applications for review on hand - 01/01/2020	25
Applications for review received in 2020	584
Total applications for review on hand in 2020	**609**
Applications discontinued	35
Invalid applications	108
Applications withdrawn/settled	14
Applications rejected	3
Applications accepted for review in 2020	434
Total applications for review considered in 2020	**594**
Applications for review on hand - 31/12/2020	**15**

Table 13: Analysis of review cases

Reviews on hand - 01/01/2020	152
Reviews accepted in 2020	434
Total reviews on hand in 2020	**586**
Reviews completed in 2020	414
Reviews carried forward to 2021	**172**

Table 14: Applications for review accepted in 2020

Health Service Executive	65
TUSLA – Child and Family Agency	21
Department of Justice	24
Defence Forces	17
Office of the Revenue Commissioners	15
Department of Employment Affairs and Social Protection	14
Department of Agriculture, Food and the Marine	11
University College Cork	11
Dublin City Council	10
Irish Prison Service	9
St. James's Hospital	9
Cork County Council	7
National Council for Special Education	7
Offaly County Council	7
An Garda Síochána	6
Department of Education and Skills	5
Fingal County Council	5
Horse Racing Ireland	5
Institute of Technology Carlow	5
Trinity College Dublin	5
Others (total number of remaining applications)	176
Total	**434**

Table 15: Outcome of completed reviews - 3-year comparison

	2020		2019		2018	
Decision affirmed	183	44%	174	40%	168	38%
Decision annulled	48	12%	47	11%	46	10%
Decision varied	34	8%	58	14%	62	14%
Discontinued	84	20%	66	16%	96	21%
Settlement reached	18	4%	23	5%	18	4%
Withdrawn	47	12%	61	14%	52	12%
Invalid	0		1		1	
Reviews completed	**414**		**430**		**443**	

Table 16: Subject matter of review applications accepted - 3-year comparison

	2020		2019		2018	
Refusal of access	393	90.60%	419	91%	394	92%
Statement of reasons under section 10	18	4.10%	8	2%	10	2%
Amendment of records under section 9	13	3.00%	14	3%	9	2%
Decision to charge a fee	6	1.40%	5	1%	3	1%
Extension of time under section 14	3	0.70%	0	0%	0	0%
Objections by third parties to release of information about them or supplied by them	1	0.20%	12	3%	15	3%
Total	**434**		**458**		**431**	
Note: Figures for section 14 cases were not available in previous years.						

Table 17: Applications accepted by type - 3-year comparison

	2020		2019		2018	
Personal	136	31%	108	24%	103	24%
Non-personal	255	59%	289	63%	249	58%
Mixed	43	10%	61	13%	79	18%
Total	**434**		**458**		**431**	

Table 18: Deemed refusals due to non-reply by public bodies

Deemed refusals due to non-reply by public bodies	2020	2019	2018
Health Service Executive	36	24	54
Department of Justice	15	6	5
TUSLA - Child and Family Agency	13	8	15
Irish Prison Service	8	6	3
Offaly County Council	7	-	-
National Council for Special Education	6	-	-
University College Cork	6	-	11
Horse Racing Ireland	5	1	1
St. James's Hospital	5	4	1
Defence Forces	2	2	4
Department of Children and Youth Affairs	2	2	-
Department of Employment Affairs and Social Protection	2	2	3
Department of Health	2	2	-
Dublin City University	2	1	-
Institute of Technology Carlow	2	-	1
Kerry County Council	2	-	-
Land Development Agency	2	-	-
Nursing and Midwifery Board of Ireland	2	-	-
University College Dublin	2	-	1
Waterford City and County Council	2	-	-
Other bodies (one each)	16	-	-
Total	**139**		

Part II

Commissioner for Environmental Information

Executive Summary

OCEI received 46 appeals in 2020. This was 28% fewer than we received in 2019, when we received the highest number of appeals since the establishment of the Office. We closed 37 cases in 2020, compared to 54 in 2019. This represents a 31% reduction in the number of cases closed. The number of cases closed includes those which were deemed invalid and that number can fluctuate from year to year. A better measure of my Office's output is the number of cases settled or closed by formal decision. The respective figures for 2020 are 1 and 23, compared with 1 and 37 in 2019.

In 2020, four of my decisions were appealed to the High Court. This represents a court appeal rate of 17% of decisions made, which is similar to the percentage of decisions appealed to the courts in 2019, when we experienced an all-time high of 19%.

A useful indicator for how my Office is meeting the demand for our services is the number of appeal cases on hand at the end of the year. This figure was 52 for 2020, while it was 38 for 2019 and 36 for 2018; this reflects the challenge of keeping pace with demands on the service we provide and expectations, in light of the complexity involved in the investigation and review of appeal cases, and the need to train and retain skilled investigators. A number of factors contributed to the decrease in case closures and the consequent increase in cases on hand at the end of the year. One such factor was staff turnover in the OCEI team, with the retirement of our senior investigator and the loss of experienced investigators. Other factors included the recent office move, adapting to new IT systems and the challenges posed by the Covid-19 crisis.

Introduction

Under article 12(2) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018, as holder of the Office of Information Commissioner, I also hold the Office of Commissioner for Environmental Information (OCEI). For this reason, it is my practice to include a report on OCEI in my Annual Report as Information Commissioner.

Unlike Freedom of Information (FOI) law, which is an instrument of national law firmly set in the Irish legal context, the Access to Information on the Environment (AIE) Regulations derive from both European Union law and international law. This has important implications for how the Regulations are interpreted and can often lead to different challenges from those faced when applying the FOI Act.

The AIE scheme is somewhat similar to the FOI regime but it operates in Ireland as a separate system of access. It provides rights of access to environmental information held by 'public authorities'. 'Public authorities' for AIE purposes are not the same as 'public bodies' for FOI purposes. Where a public authority for AIE purposes is also public body for FOI purposes, an applicant may request environmental information by means of either an FOI request or an AIE request, or, indeed, both (although the latter would be undesirable due to the administrative burden it would place on a public authority). I remain of the view that greater alignment of the two access regimes, as is the case in other jurisdictions, would provide easier access to information for those using AIE and simplify the processing of requests by public bodies and reviews by my Office. It would also allow a public authority, which is subject to both FOI and AIE, to process requests using whichever of the two regimes would provide the most favourable outcome for the requester. In order for this to work in practice, the objectives of both regimes would need to be evaluated by public authorities, when processing a request, particularly where active environmental decision making is a factor in a request for information. Under the current regulations, there is not scope to allow for a public authority to take such an approach.

For more information on the operation of the AIE regime in Ireland, please visit my website at **www.ocei.ie**. It displays all of my Office's decisions, and it includes links to previous Annual Reports and to the relevant legislation.

Chapter 1 The year in review

When we began work in January 2020, I hoped that forthcoming court decisions and Aarhus Convention Compliance Committee (ACCC) findings would assist my work by providing greater legal clarity. I also intended to take advantage of any decline in the number of AIE appeals or reduction in the number of court appeals to consolidate our corporate knowledge, thereby leading to greater efficiency and faster decisions.

In any event, the benefits accruing from fewer AIE appeals were offset by the need to process AIE appeals and court appeals carried over from 2019. The judgments and findings of the superior courts and the ACCC are covered later in this report.

My role as Commissioner for Environmental Information is to review the decisions of public authorities on AIE requests. Following such reviews last year, I closed 23 cases by formal decision we closed 37 cases overall. The workload of my Office in 2020 comprised work on: 38 appeal cases carried over from 2019; 6 court appeal cases carried over from 2019; 46 new appeal cases received in 2020; 4 court appeals initiated in 2020; 27 AIE-related enquiries; and two requests for environmental information held by my Office.

Unsurprisingly, given the Covid-19 crisis, 2020 was a challenging year for the OCEI. Not only did we have to move to remote working at short notice—when we were still settling into our new premises at Earlsfort Terrace, as discussed in more detail in the Information Commissioner report —but we were also in the process of adapting to new document management and case management ICT systems.

The sudden move to remote working precluded the on-site training that had been planned for OCEI investigators. This inevitably slowed the learning process and adversely affected efficiency.

In addition to these challenges, our staff complement was effectively halved for almost six months of the year. Staff turnover in a small team of four investigators, which necessitated re-allocation of cases and training of new staff, had an unavoidable detrimental effect on productivity and processing of appeals. I am pleased to say that at the time of writing this report, staffing levels at the OCEI are back to the required level with further dedicated resources assigned to the Office.

The average number of days taken to close cases in 2020 was 300 days. This was a 17% increase in the time taken to close cases in 2019. It is important to note that these figures do not mean that my Office actively worked on each case for an average of 300 days. There is a time lag between the acceptance of new appeal cases and the availability of an investigator to commence work on the case. Throughout the investigation process, older cases continue to be prioritised and preparatory work relating to litigation must be attended to, which can require work on a case to be temporarily paused.

In last year's report, I commented that I was not satisfied with the level of service we provide and I expressed my determination to do everything I could do to improve it. It is very disappointing that such an improvement was not achieved in 2020. I attribute this to a number of factors, not least the Covid-19 crisis and the resultant sudden move to remote working. In addition, many of the cases which fell for consideration in 2020 were of a complex nature. On this point, the interpretation of AIE law is challenging, particularly in relation to how it interacts with national law and the Aarhus Convention. AIE appeal investigations raise difficult and novel legal questions, which are often far from clear-cut, even with the benefit of professional legal advice. As discussed further below, the superior courts have provided valuable guidance on certain aspects of the AIE Regulations, as has the CJEU in its judgments on the AIE Directive. However, further clarity is required in order for the work of the OCEI to contribute meaningfully to the objectives of the Aarhus Convention. We are hopeful that this will be achieved through the upcoming review of the AIE Regulations, as well as the resolution of further appeals that are due to be heard in the High Court.

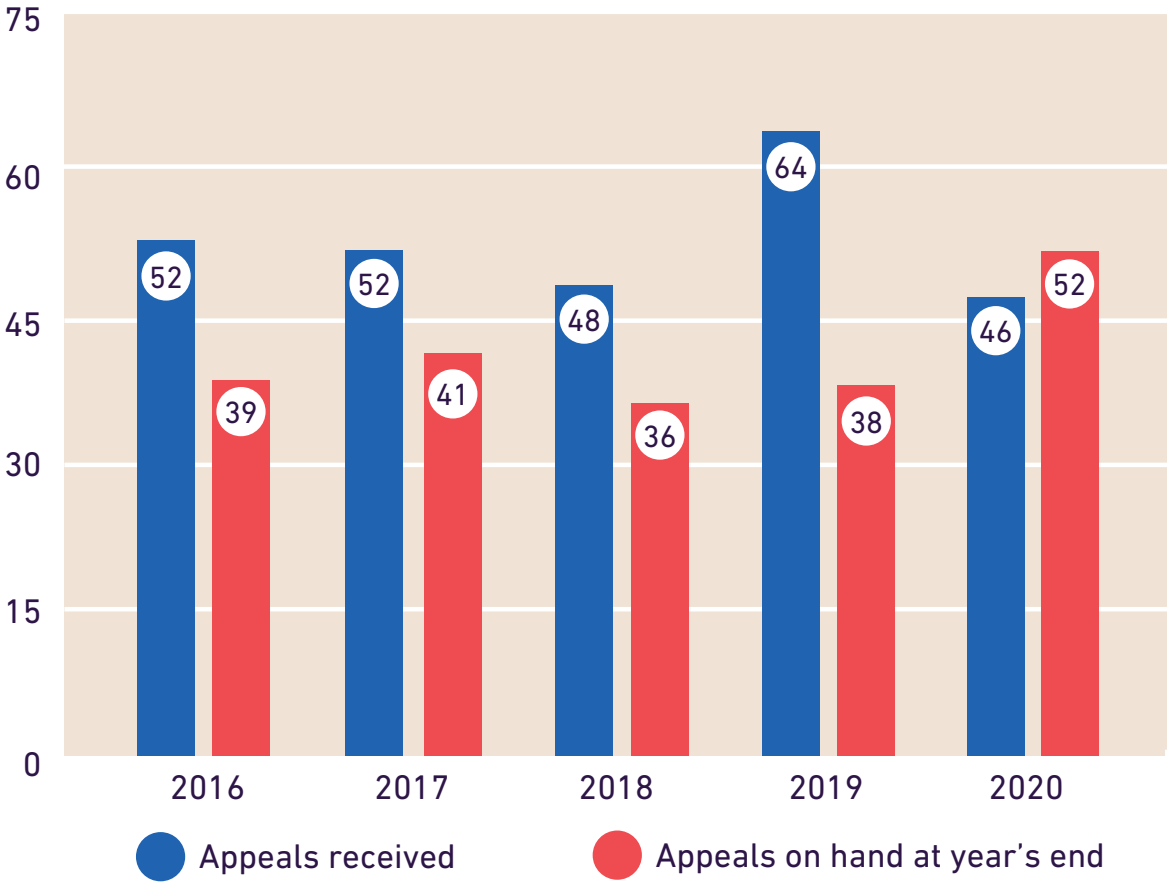
In summary, 2020 held considerable challenges for the OCEI. As we embark on our work in 2021, with a clear view on how we will make inroads in the cases that we have carried over from 2020, I am hopeful that our fully resourced team will make great strides in reducing the timeframes for processing appeals brought to my Office.

At this point I would like to express my deep gratitude to Elizabeth Dolan, the Senior Investigator with responsibility for Environmental Information who retired during the year and to Melanie Campbell, who moved on from the team. Their contribution to my Office was hugely significant, and I wish them well for the future. I also welcomed Deirdre McGoldrick as the new Senior Investigator.

Key statistics

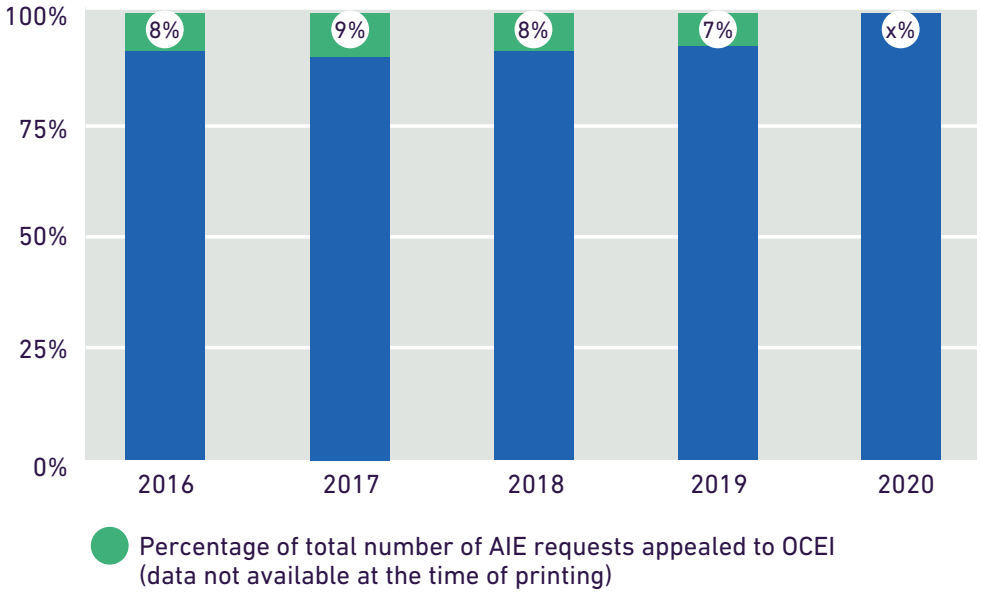
Number of appeals received and on hand from 2016 to 2020

Chart 1



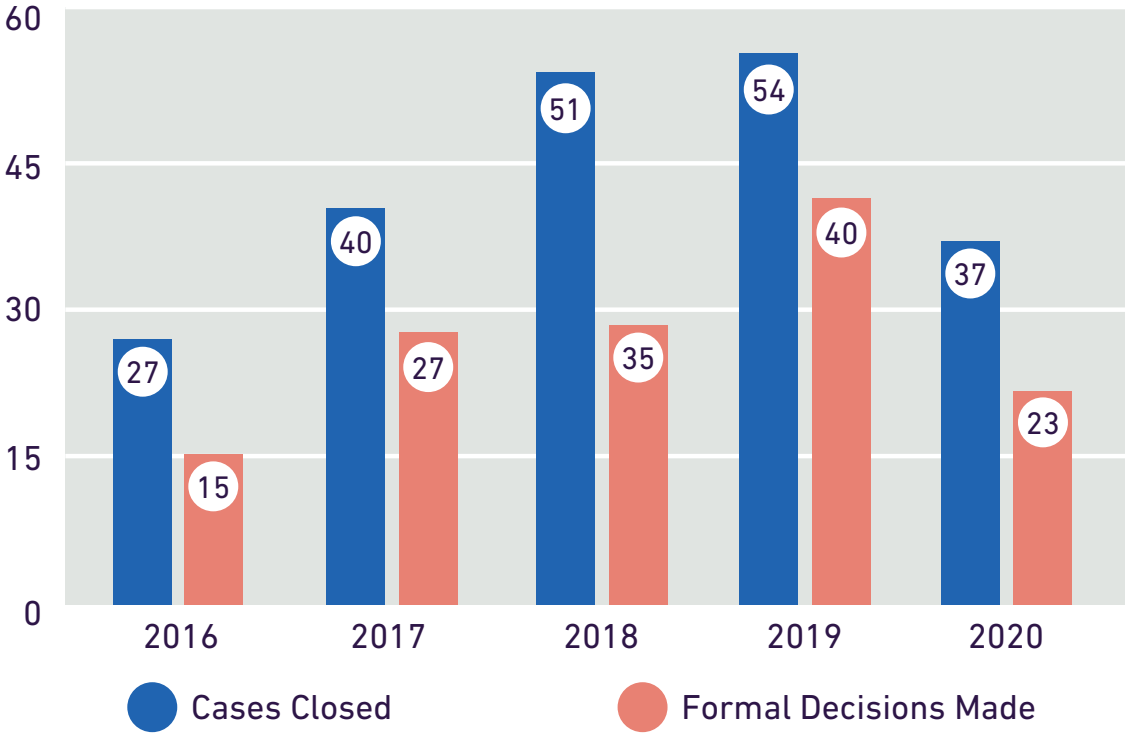
Percentage of AIE requests appealed to OCEI

Chart 2



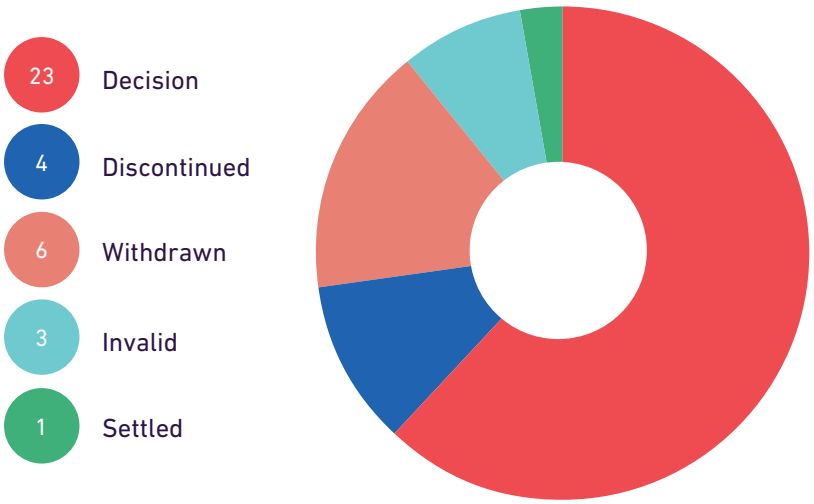
Number of cases closed and formal decisions made

Chart 3



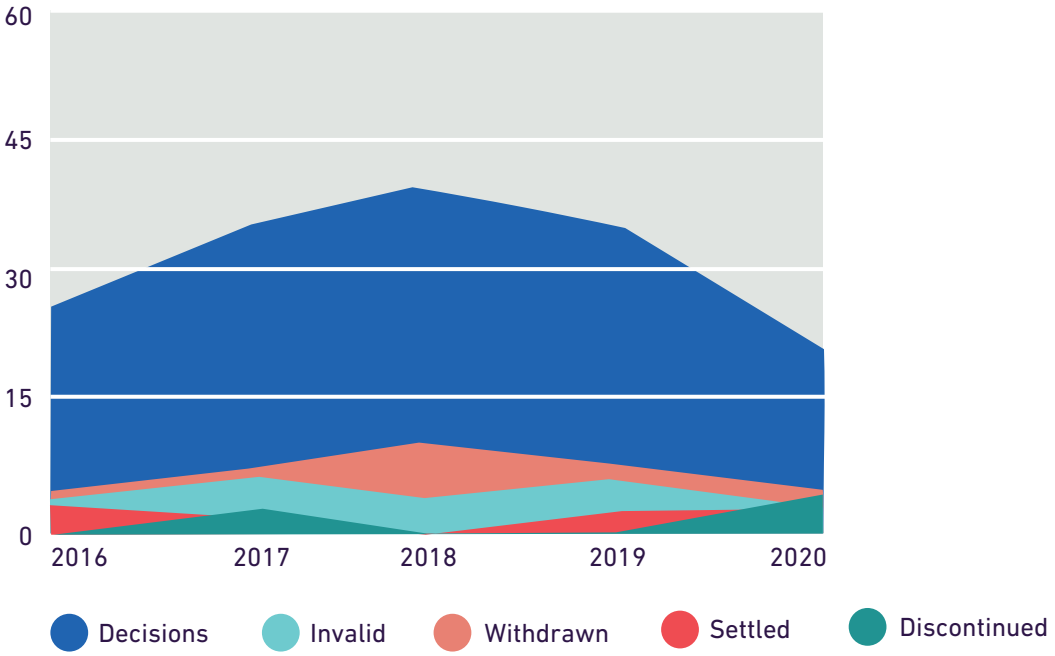
Outcome in cases closed in 2020

Chart 4



Outcome of cases from 2016-2020

Chart 5



Third party appeals against decisions made by public authorities

Article 12(3)(b) of the AIE Regulations provides that an appeal to my Office may be initiated by:

> "a person other than the applicant or third party, [who] would be incriminated by the disclosure of the environmental information concerned".

I accept that article 12(3)(b) applies where a third party believes that their interests would be affected by the disclosure concerned. The first of such appeals was made to my Office in 2018 and they are infrequent. My Office received one third party appeal in 2020: it was withdrawn later before I completed by review. While the word "incriminate" in this part of the AIE Regulations derives from the English language version of the AIE Directive, I would welcome clarity on this provision so that third parties are not unduly deterred from making appeals to the OCEI.

Powers under article 15(5) of the AIE Regulations

A case closed by withdrawal can be withdrawn either:

- by the appellant or
- by me pursuant to article 15(5) of the AIE Regulations which recognises that a case may be resolvable otherwise than by way of a binding decision. Article 15(5) provides that:

  > "The Commissioner may deem an appeal to be withdrawn if the public authority makes the requested information available, in whole or in part, prior to a formal decision of the Commissioner under article 12(5)."

In 2020, I deemed one case to have been withdrawn on the basis that the requested environmental information was made available to the appellant.

Powers under article 12(6) of the AIE Regulations

Article 12(6) of the AIE Regulations provides that in the course of carrying out a review of an appeal I may:

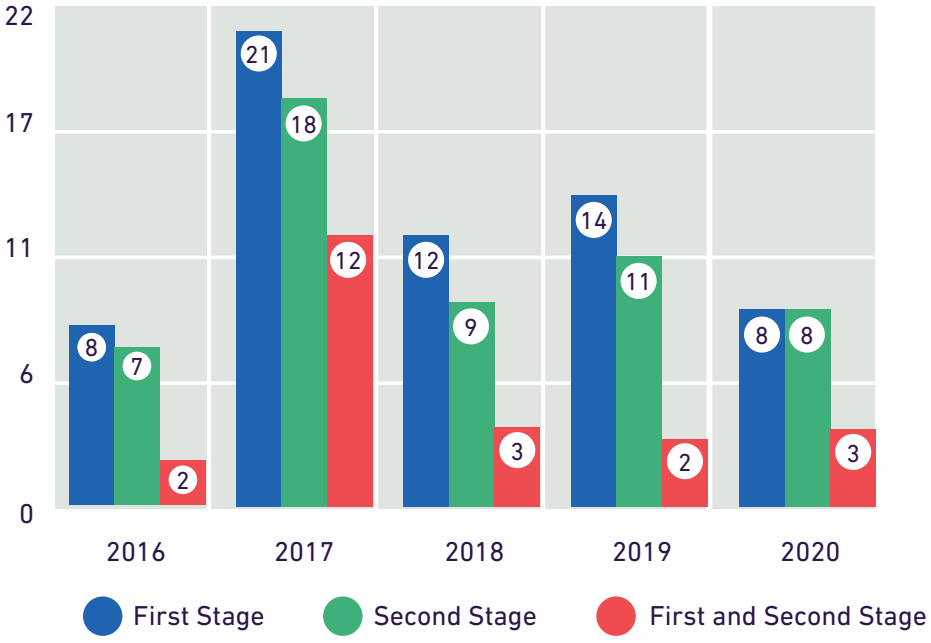
- require a public authority to make environmental information available to me.
- examine and take copies of environmental information held by a public authority.
- enter any premises occupied by a public authority so as to obtain environmental information.

I am pleased to report that I had no need to apply these powers in 2020.

Deemed refusals

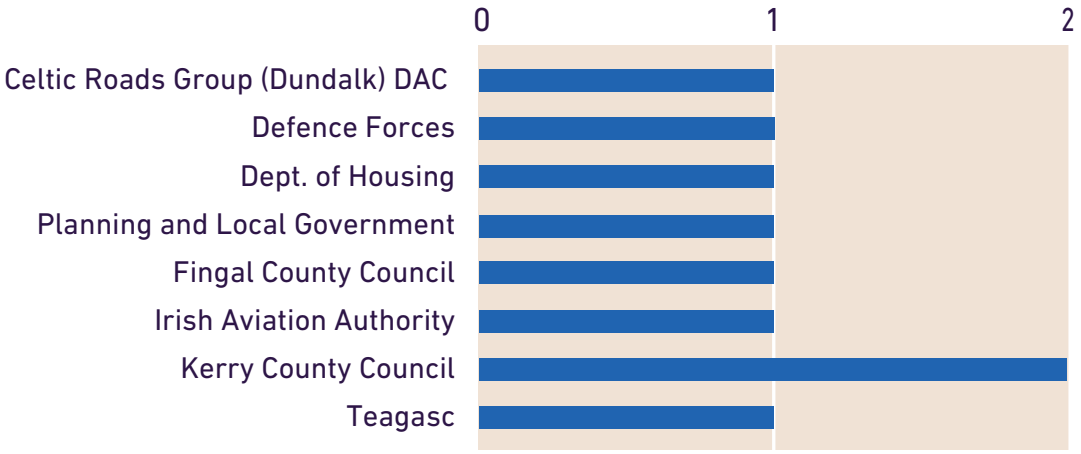
Cases in which public authorities failed to deliver a decision in time, 2016 – 2020.

Chart 6



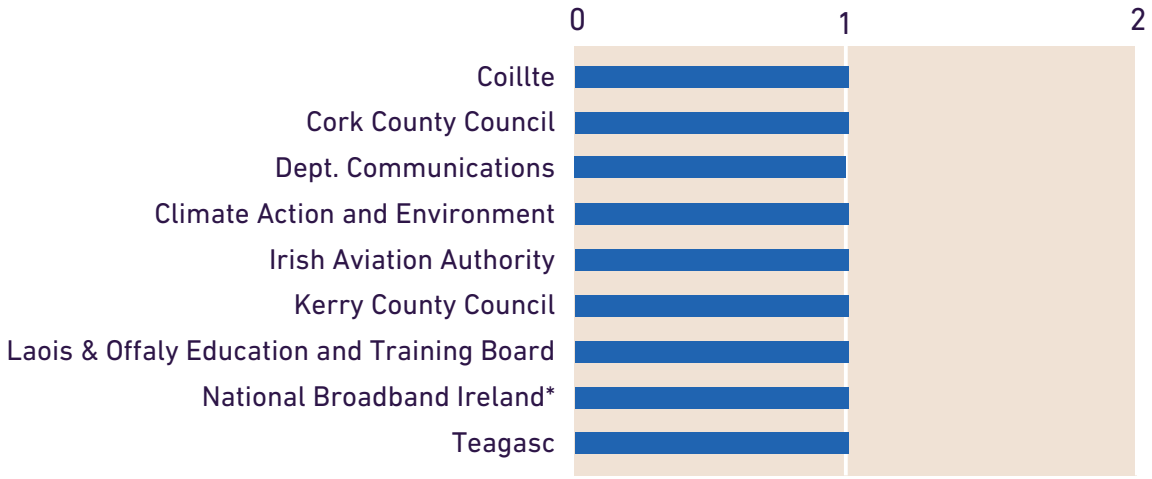
Deemed refusals at first stage

Chart 7



Deemed refusals at second stage

Chart 8



*The issue in this case was whether the entity which received the AIE request is a public authority within the meaning of the AIE Regulations.

Attendance at conferences

It is important that my investigative staff endeavour to keep up to date on matters both legal and environmental. With that in mind, investigators from my Office attend relevant conferences when opportunities arise. There were fewer such opportunities to do so in 2020 due to the Covid-19 crisis.

Early in 2020, members of the investigative staff attended the inaugural annual conference of the Planning, Environmental and Local Government Bar Association. This conference covered a multitude of topics from the duty to give reasons in planning decisions to developments and areas of reform in many parts of the planning and environmental legal frameworks.

Ordinarily, nominated members of my staff might have attended meetings and presentations of the Aarhus Convention Task Force on Access to Information, which are held in UNECE headquarters in Geneva. With the move to online events this year, all of my investigative staff were in a position to attend such events remotely in 2020. Members of my staff also attended conferences on Environmental and International law hosted by the Irish Centre for European law, with a view to ensuring that we remain up to date on all relevant aspects of the law.

Chapter 2 Examples of decisions made

Right to Know CLG and Celtic Roads Group (Dundalk) DAC (case OCE-93421-T8F8W7—formerly CEI/20/0017)

Celtic Roads Group (CRG) refused to grant an AIE request made by Right to Know on the basis that CRG is not a "public authority" within the meaning of the AIE Regulations. Right to Know appealed to my Office and, in a decision made in in March 2019 case CEI/17/0025, I found that CRG was not a public authority within the meaning of the Regulations. Right to Know appealed my decision to the High Court under article 13 of the AIE Regulations and the matter was remitted to my Office on consent. We re-opened the case under a new reference number and I conducted a fresh review.

The AIE Regulations provide at article 3(1)(b) that "any natural or legal person performing public administrative functions under nation law, including specific duties, activities or services in relation to the environment", is a public authority. I accepted that CRG has been entrusted by Irish law with the performance of services of public interest and that it is, for this purpose, vested with specific powers by the Roads Act and the M1 Motorway's bye-laws. Accordingly, I found that CRG is a public authority falling within the definition set out in article 3(1)(b) and required it to make a fresh decision on the appellant's AIE request.

Conor Ryan and the Irish Coursing Club (Case OCE-93741-N4Y1T2—formerly CEI/19/0057)

The Chief Executive Officer of the Irish Coursing Club (ICC) refused to grant an AIE request made by Mr Ryan on the basis that the requested information was not environmental information as defined in the AIE Regulations. Mr Ryan requested an internal review of that decision. The Regulations require such a review to be carried out by "a person unconnected with the original decision whose rank is the same as, or higher than, that of the original decision-maker" and no one in the ICC could meet those criteria. As a result, no review decision was given to Mr Ryan. When he appealed to my Office, the ICC claimed that it is not a public authority, within the definition provided by the AIE Regulations.

The ICC is, by virtue of section 26 of the Greyhound Industry Act 1958, "the controlling authority for the breeding and coursing of greyhounds". It is apparent from the terms of 1958 Act and the Welfare of Greyhounds Act 2011 that the Oireachtas regards the services performed by the ICC as serving the public interest. In the circumstances, I was satisfied that the ICC is a public authority within the meaning of article 3(1)(b) of the AIE Regulations.

On the separate issue of whether information is "environmental information", I was satisfied that the regulation of coursing is a measure affecting or likely to affect biological diversity and its components. I noted that any information on such a measure is prima facie environmental information. Moreover, I formed the view that it is also important to determine whether access

would serve the purpose of the Aarhus Convention and AIE Directive by enabling members of the public to be better informed and better able to contribute to environmental decision-making. I was satisfied that the latter requirement was met in this case and therefore found that requested information is "environmental information". I required the ICC to undertake a fresh decision-making process in relation and give a new decision to the appellant in accordance with the AIE Regulations.

Mr C of Company X and the Central Bank of Ireland (Case OCE-93732-L5L5V3—formerly CEI/19/0015)

Mr C sent an FOI request to the Central Bank of Ireland (CBI), stating that in the event that the requested information was not disclosable under the FOI Act, the request was to be processed under the AIE Regulations. The CBI notified Mr C that some of the information was publicly available and provided him with links to where that information was available. It said that it did not hold some of the requested information. Less than a month later, the CBI notified Mr C that it had decided to refuse his request under the AIE Regulations, because the requested information is not "environmental information".

Mr C asked the CBI to review its decision, arguing that the provision of car insurance is an "activity" likely to affect emissions and the profit of car insurance companies constitutes environmental information pursuant to article 3(1)(e) of the AIE Regulations.

CBI affirmed its earlier decision that the requested information is not environmental information and Mr C appealed to my Office.

The AIE Regulations define six categories of "environmental information", in articles 3(1)(a) to (f). Information is environmental information if it falls within any one of those categories, but the main issue for my review was whether the information fell within category 3(1)(c). Such information does not have to be intrinsically "environmental" in character. In this case, it was statistical and commercial information relating to the motor insurance industry. It ranged from information on insurance premiums and claims, to information on administrative costs and profits, to information on levies payable to the government.

Mr C submitted that compulsory car insurance, the regulation of car insurance, and the provision of car insurance are measures and activities affecting or likely to affect the elements and factors set out in the definition of "environmental information" in the AIE Regulations. He argued that the information at issue is on these measures and activities and is therefore environmental information of the type specified in article 3(1)(c).

I was not persuaded that was a real and substantial possibility that the alleged measures and activities affect or are likely to affect the elements and factors of the environment, either directly or indirectly. I was therefore not satisfied that he information requested is environmental information within the meaning of meaning of article 3(1)(c).

Mr B and Tipperary County Council (Case OCE-93733-N1X4G8—formerly CEI/19/0019)

Mr B submitted an AIE request to the Council seeking information relating to compliance with the planning permission for a wind farm development. The Council released some information and denied holding more. Mr B appealed to my Office, challenging the Council's position. He was concerned that the Council might have limited its search to just the planning file rather than searching for all of the information it might have held.

Having regard to the Council's account of its search efforts, I was satisfied that it took reasonable steps to identify and locate information falling within the scope of the appellant's request and that it did not possess the information at issue when the AIE request was received.

The information at issue was produced by a third party. Mr B maintained that the Council was entitled to ask for that information and that this meant that the information was held by the third party on behalf of the Council. The Council accepted that it was entitled to ask for the information if its planning function required it to do so. It submitted, however, that it was not otherwise entitled to obtain the information.

I was not persuaded that the third party held the information on the Council's behalf and the third party maintained that it did not. I accepted that the information at issue was not held by or for the Council when it received the AIE request.

Mr M and daa (Case OCE-93739-Z2H5R8—formerly CEI/19/0046)

Mr M sent an AIE request to daa seeking specific information on a study carried out into noise levels associated with a proposed second runway at Dublin Airport. Daa refused the request on the ground of article 9(2)(c) of the AIE Regulations. That article (which is subject to article 10), provides that a public authority may refuse to make environmental information available where the request concerns material in the course of completion, or unfinished documents or data.

When an internal review decision by daa affirmed this decision, Mr M appealed to my Office.

My review solely concerned the question of whether daa was justified in refusing access to a specific report entitled "Dublin Airport Runway System Development Optioneering: Noise: Runway Network A vs. B", which was drafted in April 2011, on the basis of article 9(2)(c) of the AIE Regulations.

daa maintained that the report was never finalised and it remains a draft report and a "component" of material that was in the course of completion. Mr M disputed that position, stating that the study behind the report was carried out in 2011 and is now complete.

It was apparent that the report itself was not being actively worked on by daa. In my view, the existence of a process involving the report does not necessarily render the report a record that is in the course of completion.

I concluded that the report was a standalone document that comprises environmental information in its own right, aside from the context for which it is now in use by daa.

I accepted that daa was reviewing and utilising the assessment set out in the report, but noted that the report itself, as it pertains to the situation documented in 2011, did not appear to be subject to review or correction. I therefore concluded that the report was not an unfinished document within the meaning set out at article 9(2)(c) of the AIE Regulations and refusal on that ground was unjustified. I annulled daa's decision and required it to release the requested report.

Mr X and daa (Case OCE-93707-R4X7V3—CEI/19/0048)

The AIE Regulations provide that a person making an AIE request who wants access to information in a particular form or manner may specify that to the public authority, which must comply with that request unless certain conditions exist.

In this case Mr X asked daa for "a list of all flight details for the month of July 2019 at Dublin Airport" and specified that he wished to receive the information in (Microsoft)Excel format.

daa notified Mr X of its decision to release the requested information and it provided him with an Excel file. The appellant asked daa why this file was restricted to read-only access, and daa responded by explaining that it routinely protects documents, as a matter of good security practice, so that data cannot be manipulated.

Mr X sought an internal review, challenging the format of the released information. daa's review affirmed its original decision and did not change the format of the released information. Mr X appealed to my Office.

I concluded that Mr X was given the information he sought in the manner that he specified. I therefore affirmed daa's decision granting the appellant access to the information he requested in the form and manner which he specified in his AIE request.

Chapter 3 Court appeals

My Office had 13 court appeals on hand on 1 January 2020: These challenged my decisions on the following AIE appeal cases CEI/10/0007, CEI/14/0011, CEI/16/0038, CEI/17/0017, CEI/17/0021, CEI/17/0022, CEI/17/0025, CEI/17/0033, CEI/18/0003, CEI/18/0027, CEI/18/0031, CEI/18/0032*, CEI/18/0039, CEI/19/0033* (*= joint appeal).

The status of those cases at the end of 2020 was: 4 decided (CEI/14/0011, CEI/17/0021, CEI/18/0003 and CEI/18/0027); 1 heard and judgment awaited (CEI/18/0039): 1 suspended (CEI/10/0007); 5 adjourned (CEI/17/0017, CEI/17/0022, CEI/17/0025, CEI/17/0033 and CEI/18/0032 together with CEI/19/0033); 1 remitted to my Office on consent (CEI/18/0031); and 1 case in which the High Court referred a question to the CJEU (CEI/16/0038).

Court judgments delivered

***Redmond v Commissioner for Environmental Information* [2020] IECA 83** – which challenged my decision on case CEI/14/0011

The background to this case is as follows: Jim Redmond submitted an AIE request to Coillte Teoranta seeking information on to the sale by Coillte of its leasehold interest in land in County Tipperary. Dissatisfied with Coillte's response, Mr Redmond appealed to my Office. I decided that Coillte was justified in refusing access to the information which it withheld from Mr Redmond. Mr Redmond sought a judicial review of my decision, and, in December 2017, the High Court delivered its judgment.The Court found that I was legally correct in reaching the conclusion I did on the evidence before me and refused to quash my decision. Mr Redmond appealed to the Court of Appeal and that Court delivered its judgment on 3 April 2020. Its key finding was that my conclusion that certain information captured by the request did not constitute "environmental information" was flawed and must be set aside.

***Right to Know CLG -v- Commissioner for Environmental Information & Minister for Transport, Tourism and Sport* [2020] IEHC 392** – which challenged my decision on case CEI/17/0021

The appellant submitted an AIE request for, among other things, a submission made by Ibec to the Department. I decided that the submission was not environmental information within the meaning of article 3(1) of the AIE Regulations. The High Court delivered its judgment on 31 July 2020. As the appellant had received the information sought in its request, the High Court found that the proceedings were moot. The Court dismissed the appeal and ordered that the appellant pay the cost of my legal submissions [under section 3(3)(b) of the Environment (Miscellaneous Provisions) Act 2011].

***Electricity Supply Board –v- Commissioner for Environmental Information and Anor* [2020] IEHC 190** - which challenged my decision on case CEI/18/0003

The Notice Party submitted an AIE request for a copy of the transcript of a hearing before the property arbitrator that the ESB had commissioned. I decided that it was information "on" the development of electricity infrastructure which is a measure or activity affecting or likely to affect the elements and factors of the environment. I went on to require that the ESB make the transcript available to the Notice Party by way of inspection in situ at its office. As I reported in my 2019 Annual Report, the High Court delivered its judgment on 3 April 2020 setting aside my decision on some of the grounds put forward.

1 My decision in this case was summarised in detail in my 2018 Annual Report where I reported: "Right to Know CLG v Commissioner for Environmental Information 2018/119 MCA: In Case CEI/17/0021 (Right to Know CLG and Department of Transport, Tourism and Sport), I found that a letter and submission sent by Ibec to the Department was not environmental information within the meaning of article 3(1) of the AIE Regulations. While the submission referred to transport measures affecting or likely to affect the elements and factors of the environment, I found that the connection between the submission and those measures was too minimal to be information "on" those measures within the meaning of the definition of environmental information in article 3(1)(c) of the AIE Regulations. Right to Know CLG appealed my decision to the High Court on 11 April 2018. The matter is listed for hearing on 17 July 2019"

***M50 Skip Hire and Recycling Limited v Commissioner for Environmental Information* [2020] IEHC 430** - which challenged my decision on case CEI/18/0027

The appellant carries out business as a waste collector and, as holder of a permit to collect waste, is required to supply what is known as an Annual Environmental Report to Fingal County Council. The Council received an AIE request seeking a copy of the appellant's Annual Environmental Report for 2017. The Council agreed to provide access to some of the information in the Report but refused access to the waste destination data contained in it, on the basis that this information was commercially or industrially confidential within the meaning of article 9(1)(c) of the AIE Regulations. A review carried out by the Council affirmed the Council's decision and the AIE requester appealed to my Office. I decided that the waste destination data should be released. M50 Skip Hire, as the original provider of the information, sought a judicial review of my decision. The High Court delivered its judgment on 1 September 2020. It found that my decision "was lawfully made and not vitiated by error".

Referral of a question to the Court of Justice of the European Union

In AIE appeal case CEI/16/0038, Friends of the Irish Environment Limited appealed to my Office against a decision by the Courts Service to refuse its AIE request. I formed the view that the Courts Service holds information of the type requested while acting in a judicial capacity on behalf of the Judiciary. I found that, when acting in such a capacity, the Courts Service is not a public authority within the meaning of article 3(1) the AIE Regulations. (Article 2(2) of the AIE Directive defines the term "public authorities" and permits member states to exclude certain bodies or institutions from that definition. Article 3 of the AIE Regulations is the corresponding provision in Irish Law.) Accordingly, I found that I had no jurisdiction to review the Courts Service's decision on the appellant's AIE request. Friends of the Irish Environment appealed my decision to the High Court and the Court sought a preliminary ruling from the Court of Justice of the European Union, on the answer to the following question:

> "Is control of access to court records relating to proceedings in which final judgment has been delivered, the period for an appeal has expired and no appeal or further application is pending, but further applications in particular circumstances are possible, an exercise of "judicial capacity" within the meaning of article 2(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC?"

An oral hearing took place in September 2020 and an Advocat General's Opinion issued in early December 2020. The latter opined that:

> "Article 2(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC must be interpreted as meaning that the control of access to court records, whether carried out by a court, that is to say a body formally part of the judiciary, or by a private entity established for the same purpose and acting on behalf and under the control of the judiciary, constitutes an activity falling outside the scope of that provision".

Judgment from the court is awaited at the time of going to print.

New court appeals

Four new court appeals were initiated in 2020. I agreed to the remittal to my Office of two of those cases and I will review them afresh in due course. Of the two live court appeal cases, one challenges my decision on AIE appeal case CEI/19/0007. This case was set for hearing in April 2021 (*include update before publication of Annual Report if possible*). The case arose from an AIE request to RTE from Right to Know CLG, which sought copies of emails sent to RTE by members of the public to RTÉ commenting on the quality and quantity of its reporting on climate change issues. RTE refused to grant the request, on the basis that it did not regard the emails as constituting "environmental information" within the meaning of the AIE Regulations. I found that the information is not environmental information and held, in consequence, that I had no further jurisdiction in relation to the matter. Right to Know CLG challenge that finding.

The other new court appeal challenges my decision on AIE appeal case CEI/18/0046. Right to Know CLG appealed to my Office against a decision by Transport Infrastructure Ireland to refuse its request for access to its Public Private Partnership contract with DirectRoute (Fermoy) Limited concerning the design, build and operation of part of the M8 motorway. I found that refusal was justified because the request was manifestly unreasonable having regard to the volume or range of information sought. Right to Know CLG appealed my decision to the High Court and the case was listed for hearing in April 2021 (*include update before publication of Annual Report if possible*).

Comment on court appeals

In my report for 2019, I said that there had been a significant increase in the number of my decisions under appeal to the courts. A similar proportion of my decisions were appealed in 2020. I accept, of course, that AIE requesters have a right to appeal my decisions and I welcome the resulting guidance that comes in court judgments. It is, however, an unavoidable reality that dealing with court appeals negatively affects my Office's ability to reduce the number of cases on hand: court appeals consume a substantial amount of resources, both financial and human.

Appeals against my decisions are subject to the "special costs rules" under the Environment (Miscellaneous Provisions) Act 2011. These rules limit the financial risk to parties bringing appeals against my decisions, as they provide that costs can only be awarded against a party in limited circumstances. I accept and approve of the importance of rules limiting the costs of litigation, particularly where such rules facilitate the access to justice mechanisms envisaged by the Aarhus Convention. However, I would welcome a review of the current rules, which might include consideration of a system based on reciprocal cost-capping, which would facilitate access to justice while providing a safeguard against significant draws on the resources of my Office and other public bodies subject to the special costs rules.

Many of the court appeals concern the definitions of "public authority" and "environmental information". I have repeatedly flagged the issues arising from the lack of clarity on the scope of both definitions and the need for further guidance on the matter.

Two appeals concerning the definition of public authority were listed for hearing before the High Court in March 2021. These challenged my decisions in cases CEI/17/0017 and CEI/17/0033. A further appeal hearing concerning the definition of environmental information was listed for April 2021. This challenged my decision in case CEI/19/0007.

I welcomed the judgment of the High Court which cast light on the correct interpretation of the definition of public authority in Right to Know *CLG -v- Commissioner for Environmental Information* [2021] IEHC 46. The judgment in this case was handed down in 2021 and at the time of going to print, the period for a party to lodge any further appeal had not lapsed. On this basis, I will not say much about it in this report, other than noting that the Court held that a particular windfarm company is a public authority within the meaning of the AIE legislation. Among other notable factors specific to the case, one of the bases for this finding were the facts that the ESB [itself a public authority] holds half of the issued shares in the windfarm company through a subsidiary company and it also provides day-to-day management for the windfarm. The Court concluded that: "These facts lead inexorably to a legal conclusion that [the windfarm company] is "under the control of" the ESB for the purposes of the test mandated by article 2(2)(c)". This judgment may have significant implications for other entities which, up to now, have not been regarded as public authorities within the meaning of the AIE legislation.

Aarhus Convention Compliance Committee

The Aarhus Convention is an instrument of international law. Compliance with the Convention is assessed by the Aarhus Convention Committee (ACCC). The ACCC is not a court, but it reports findings on alleged non-compliance with the Convention to the Parties to the Convention, who may adopt decisions on compliance.

Following a complaint about Ireland's compliance in August 2016, the ACCC issued its draft findings and recommendations in August 2020. Among other matters, the Committee found a failure on Ireland's part to comply with the requirements of the Aarhus Convention due to the absence of measures to ensure that AIE appeals are resolved by my Office in a timely manner. I take the draft findings and recommendations of the ACCC very seriously. As detailed in consecutive annual reports, I am committed to improving the efficiency of my Offices practices and procedures. This is particularly the case where an appeal seeks environmental information for the purpose of enabling the requester to more effectively participate in environmental decision-making.

Looking ahead to 2021

Looking ahead to 2021, my hope is that we will be able to improve the service that we provide to the public by reducing the time taken to close appeal cases and by providing clear, thorough decisions that enhance public understanding of the AIE Regulations. This hope will be realised by my expectation that we will benefit in 2021 from further clarification on the correct interpretation of the AIE Directive, which is likely to come from two sources: first, from the courts, both Irish and European Union, and second from revised Irish AIE Regulations. Greater clarification on the law could reduce the scope for disputes between parties as to the meaning of the law. My reviews would take less time if they concerned matters of fact more than questions of law.

Now that my team has had sufficient time to get to grips with using our new case management system, while working remotely for the time being at least, I am confident that we can now take full advantage of the benefits our new systems bring. With greater reporting and caseload oversight capacity, I look forward to a year of continuous improvement of our internal processes, which in turn will benefit all parties to appeals to my Office.

At the same time, I am conscious of the fact that the need for my Office to consult third parties who may be affected by my decisions is likely to continue to be a time-consuming requirement. I recognise that third parties are often unfamiliar with the AIE regime and therefore need time to seek legal advice. If the revised AIE Regulations were to require public authorities to engage earlier with third parties, I believe this could reduce the time taken for such engagement when appeals are made to my Office.

Notwithstanding these concerns, I am happy that I now have a full team of investigators and a new Senior investigator. I am confident that they will make significant progress in tackling the backlog of cases during 2021.

Appendices

Appendix I
Statutory certificates issued by Ministers in 2020

An Roinn Gnóthaí Eachtracha
Department of Foreign Affairs

9 February 2021

Mr Stephen Rafferty
Senior Investigator
Office of the Information Commissioner
6 Earlsfort Terrace,
Dublin 2,
D02 W773

Notification under Section 34 of the Freedom of Information Act, 2014

Dear Mr Rafferty,

I refer to your recent letter on the above.

On 28 January 2020 the Tánaiste, 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 2020.

Yours sincerely

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Mark Sheridan
Deputy Director
Security and Corporate Compliance

Appendix I
Statutory certificates issued by Ministers in 2020

An Roinn Dlí agus Cirt
Department of Justice

Stephen Rafferty
Senior Investigator
Office of the Information Commissioner

Sent by email only: Christopher.Flood@oic.ie

03 March 2021

Dear Mr. Rafferty,

I refer to your correspondence dated 20 January 2021 in relation to Section 34 of the Freedom of Information Act 2014.

The Minister renewed five certificates during 2020; please see below table for details. Copies of the Certificates are also attached for ease of reference.

Reference Number	
156/620/1999	Renewed
156/018/2000	Renewed
156/052/2014	Renewed
156/357/2016	Renewed
156/358/2016	Renewed

The Minister did not issue any new certificates during 2020.

Yours sincerely,

Oonagh McPhillips
Secretary General

Oifig an Ard-Rúnaí
Office of the Secretary General

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