

Freedom of Information Act 2014 – an overview

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Purpose of the 2014 Act

- Enacted 14 October 2014 - but certain sections delayed
- Reform and update FOI in Ireland and in line with other EU MS
- Promote greater transparency and accountability across public bodies - open government etc. - according to Minister (viewed as a stepping stone)
- Remove restrictions on access to information imposed in FOI Act 2003
- FOI extended to all public bodies *BUT* with restrictions
- Extend FOI to non public bodies in receipt of significant public funding.
- Remove need for secondary legislation to extend FOI to include additional public bodies.

Purpose of the 2014 Act

- Obligation on FOI body to publish information and reduce requirement for requests for access – new Code of Practice & Scheme
- Legal right of access for any person to records held by FOI bodies - continued from 1997 Act.
- legal right of individuals to have personal information amended where incomplete or incorrect - continued from 1997 Act.
- Legal right for any person to obtain reasons for an act of FOI body in which they have a material interest - continued from 1997 Act.
- Remove mandatory €15 charge – new fees structure - first request (up to 5hrs in retrieval time) now free
- Repeals the FOI Acts of 1997 and 2003

FOI Bodies

- Bodies set out in s. 6 of the Act includes:
 - State Departments
 - An entity established by or under any enactments except the Companies Acts
 - Any entity established or appointed by the Government or a Minister (except companies)
 - A company of which the Government is the majority shareholder and any subsidiary of such Company
 - An entity controlled by any of the above
 - Higher education institutions in receipt of public funding
 - Any entity that was a public body under the 1997 Act
- Minister may by order declare an entity a FOI body and also revoke such order
- Minister may declare a body a prescribed body - a FOI body – s. 7

FOI Bodies

- Schedule 1 Part 1 – Public bodies partially affected, e.g. Central Bank, Director Corporate Enforcement, Equality Tribunal, Revenue
- Schedule 1 Part 2 - fully exempted bodies, e.g. CIE, AIB Permanent TSB etc.

Time scales for inclusion:

- Public bodies that were subject to 1997 Act are FOI bodies under the 2014 Act since 14 October 2014
- Public bodies that were outside the scope of 1997 Act are FOI bodies under 2014 Act since 14 April 2015
- Minister can defer public bodies becoming FOI bodies after 14 April 2015 until anytime up to 14th October 2015

Records to which 2014 Act applies

- Public bodies subject to FOI Act 1997 applies to records dating back to 21st April 1998
- HSE and local authorities applies to records dating back to 21st October 1998
- 'New' FOI bodies applies to records dating back to 21st April 2008
- The cut off dates do not apply to earlier records which are required to understand records created on or after the dates or
- to requests by individuals to access personal information

Exempt Records

- The Part 5 of the 2014 Act sets out the records access to which is restricted under the 2014 Act
- Parts 4 of the 2014 Act set out several categories of records that are exempt (with qualifications) including: records relating to:
 - Meetings of government – proposed matters for consideration; advices regarding transactions of government business; statements made at meetings
 - Deliberations of FOI bodies,
 - Functions and negotiations of FOI bodies
 - Parliamentary and Court matters
 - Law enforcement and public safety
 - State security, Defence, international relations
 - Confidential information
 - Commercially sensitive information
 - Personal information
 - Research and natural resources
 - Financial and economic interests of the State
 - Prohibited by EU law

Publication of information by FOI bodies

- FOI bodies are required to have regard to a FOI Code of Practice published by the Minister (s. 48)
- Draft Code of Practice was published for public consultation June 2014
- Draft Code of Practice proposes an FOI officer be appointed by public body and that it devotes appropriate resources for compliance with the 2014 Act – lack of resources will not justify refusal of access requests.
- Draft Code encourages routine publication of information which is typically subject to access requests e.g. in public procurement scenarios name of successful contractor, value, overall purpose and duration of contract be published.

Publication of information by FOI bodies

- FOI body should maintain a log of FOI requests and records released (except personal information)
- FOI bodies required to prepare publication schemes to conform with provisions of s.8 of the Act or 'model' scheme published by the Minister
- Deadline for publication of scheme is 14 April 2016 unless Minister changes the date by Order.

New fees structure

- €15 up front fee abolished
- Fee now for the search and retrieval of records including the costs of search, retrieval and copying subject to maximum rates
 - €20/hr for search and retrieval activity
 - But where FOI body estimates that based on that rate the charge will be no more than €101 no charge is imposed (first 5 hrs)
 - Where charge is estimated to be between €100 and €700 a charge may be imposed subject to maximum cap of €500
 - If charged estimated to exceed €700 FOI body must invite the requester to narrow the scope of the request and where requester refuses FOI body may refuse the request or proceed but impose the full charge without limit.
 - Fees for submitting decisions of FOI bodies for internal review and appeal to Information Commissioner have reduced

Right of Access to Information

A person affected by an act of an FOI body and who has a material interest in a matter affected by the act or to which it relates has the right to make an application to the head of FOI body.

Material interest:

A person has a material interest if the consequences or effect of the act confers or withholds from the person a benefit without conferring it or withholding it from the general public or a class of persons (of which the person is a member) of significant size having regards to the circumstances. i.e. if a decision results in a person being treated differently to the general public or a peer group.

Right of Access to Information cont.

- The requester must be notified of receipt of the application within 2 weeks
- Application must be made from 12 months of becoming aware of issue – but time can be extended where particular circumstances warrant it. (circumstances not defined)
- A statement in writing must be provided to the applicant within 4 weeks of the request
- Request is deemed to be refused if statement not provided within the timeframe
- The statement must include the reasons for the act and any findings on any material issue of fact made by the body relating to the act

Right of Access to Information cont.

- Does not apply to exempt records or disclosure of existence or non existence of a record for the purposes of the 2014 Act and certain decisions of the Public Appointments Service
- If the FOI body decides not to provide the statement due to restrictions in the Act a written notice to that effect must be issued within 4 weeks of receipt of the application.
- A refusal (unless it relates to exempt records) must include the reasons for refusal and any provisions of the Act which caused the refusal and findings of material issues relevant to the decisions and any matters relating to the public interest .

Right of Access to records

- Legal right of access for members of the public to access official information
- Obligation on FOI body to assist the requester
- Extends to all public bodies and service providers (unless excluded wholly or partially – see Schedule 1 of the Act)
- Sets out the principles to guide an FOI body in performing their functions
 - Achieve greater openness regarding their activities
 - Promote adherence to the principle of transparency in government and public affairs
 - Strengthen accountability
 - Improve decision making of FOI bodies
 - Facilitate more effective public participation and consultation in the role, responsibility and performance of FOI bodies

Right of Access to records

- General right of access to records unless they are found to be exempt – in response to decision in *Governor and Guardians of the Rotunda Hospital v Information Commissioner* [2013] 1 IR 1
- Access to records relating to services provided under contract for services to a public body by a commercial State body or private body (overturns restriction on such access introduced in 2003 Act)

Request for access

- Request must state it is made under the 2014 Act
- Must contain sufficient details relating to records sought and any particular form in which the information should be provided
- Requester to be notified of receipt of the request by FOI body within 2 weeks
- Notice to include information re right of review and timescale
- That request will be deemed refused if not given within the timescale (s19)
- Obligation on FOI body to assist requester if request is not in accordance with the Act
- Decision to grant in whole or in part or refuse must be within 4 weeks of request.
 - Time may be extended up to a further 4 weeks if the request or related requests concern a large number of records.

Request for access cont.

- Notice must include:
 - The decision and date it was made
 - The person dealing with request (unless releasing identity would prejudice their wellbeing)
- If granted in whole or in part the notice must include
 - the date and form in which records will be available and
 - the period of time records will be kept available and
 - if any fee is payable, the amount
- If refused in whole or in part notice must include:
 - Reasons for refusal
 - Unless refusal relates to certain restrictions ,the provisions of the 2014 under which request was refused, any relevant material issues , and matter relating to the public interest
 - If deferred reasons and timescale
 - Right to review and appeal decision

Request for access cont.

- Obligation on FOI body to pass a request to another body in its opinion 'more closely related' to the subject matter of request within 2 weeks of the request
 - Requester to be notified in writing
 - next FOI body then deemed to have received request
- If records sought are held by another FOI bodies requester must be informed in writing.
- FOI body may advise the requester that the records sought may alternatively be accessed under the European Communities (Re-use of Public Sector Information) Regulations 2005 or the European Communities (access to information on the Environment) Regulations 2007
- Where part of a record is exempt access to the non exempt part of the record is provided for.

Refusal on administrative grounds

- Refusal on administrative grounds include:
 - if record does not exist or cannot be found
 - Particulars relating to request not provided (unclear)
 - the FOI body intend to publish the record within 6 weeks of the request;
 - the record is in the public domain;
 - the request would cause substantial and unreasonable interference or disruption of the work of the body - particular functional area within the body;
 - Record is required by law to be released and will be within 12 weeks
 - Frivolous or vexatious or manifestly unreasonable;
 - Fee not paid;
 - Record already released to same or other requester (possibly acting in concert with previous requester)
- May not refuse unless the requester assisted to refine the request if possible for re-submission

Internal review

- Application for review to FOI body within 4 week of decision – may be extended on reasonable grounds
- Internal review is carried out by higher function within the FOI body.
- The following may be reviewed internally:
 - Initial decision of FOI body to refuse request;
 - Refuse amendment of record
 - Refusal of application under section 10 or the contents of the statement under s 10
 - A deferral
 - Issue as to format of record
 - Access to part only of record
 - Fee charged
- Notice of decision within 3 weeks

Review by Commissioner

- Applies to list set out in s 21 (1) including:
 - Decision to refuse access in whole or in part
 - Refusal to amend personal record
 - Refusal of access to information (s 10)
 - Decisions to refuse access due to the restrictions under s 42 of the Act
 - fees charged
 - Decisions to extend time etc.
- Application for review made within 6 months (with exceptions) of notice of decision – may be extended by Commissioner on reasonable grounds
- Commissioner may affirm, vary or annul a decision of an FOI body.
- Decision must be made as soon as may be but not later than 4 months from application – must specify period within which decision is effective
- Commissioner may attempt to have parties reach settlement

Review by Commissioner

- All parties notified of application may make submissions
- Onus is on FOI body to show its initial decision was justified
- Commissioner may request further information from FOI body relating to its decision under review and body must comply within 3 weeks
- Commissioners decision is binding on parties subject to appeal to the High Court
- Where information is confidential personal or commercially sensitive Commissioner can consider the request afresh rather than just the public interest basis for refusal
- Commissioner may discontinue a review or refuse an application for review in a number of cases e.g. frivolous and vexatious, unreasonable, unrelated to request , not enough information, issue is moot etc.
- Notice to refuse must be given as soon as may be after decision,

Appeal to High Court

- Grounds for appeal of decision of Commissioner now includes finding of fact.
- Other appeals on point of law
- Timescale to initiate an appeal is now 4 weeks where the appeal is on recommendation of the Commissioner
- Where a request is granted by the Commissioner only in part the timescales for appeal is 8 weeks.
- Commissioner may refer a question under review to the High court for determination and postpone her decision following such determination by the High Court until convenient. (FOI body may pay costs of referral)
- Where an appeal is dismissed by the High Court that involved a point of law of exceptional public importance it may order some or all of the costs to be paid by the FOI body concerned.
- Same principle regards costs applies to appeal of decision of the High Court now directly to the Court of Appeal