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information for all

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Freedom of Information (FOI)

The Freedom of Information (Amendment) Act, 2003 provides for a number of changes to the Freedom of Information Act, 1997. The new Act came into effect on 11 April 2003. The main changes relate to access to documents dealing with issues being considered by the Government and to the payment of fees in advance of getting access to records under the Act. A number of fairly technical changes are also made. About 370 bodies are now covered by the Freedom of Information (FOI) legislation; there were 67 when the legislation first came into effect in 1998. These include all government departments, local authorities, health boards, third level educational institutions and nearly all the non-commercial state organisations – the full list is available on the Information Commissioner’s website at www.oic.gov.ie. The Government has stated its intention that, by the end of 2005, all bodies, organisations and groups appropriate for inclusion will be covered.

The FOI legislation basically provides that you have the right to access records held by the public bodies which are covered by the legislation, you have the right to access your own personal records and you have the right to have these corrected if necessary. There are a number of exceptions to the general right of access and the changes are mainly concerned with these exceptions. There are some changes in relation to personal information.

The legislation also provides that public bodies must publish information about their activities - this is known as the Section 15 Manual. They must also publish the rules, procedures, guidelines and practices used by them when making decisions and information on how schemes are administered – this is known as the Section 16 Manual. These obligations on public bodies are not changed. The new Act does, however, provide that the electronic publication of the manuals meets the requirements – in practice, a number of organisations have not published paper versions of the manuals because of their size.



The requirement for public bodies to provide the Minister with a summary of the Section 15 Reference Book and the publication of these collected summaries no longer exists – it was never done anyway.

Access to records

The general principle of FOI legislation is that there is a right to access records held by the public bodies covered by it. There is a range of exceptions to this general rule. These exceptions are added to by the following:

Costing of political proposals

The FOI legislation does not now apply to records held by a public body relating to the costing or assessment of any proposals of a political party which has been carried out for that party – for example, political parties sometimes ask the Department of Finance to cost their policy proposals before an election.

Parliamentary questions

The legislation also does not apply to a record given to a Minister for use during proceedings in the Houses of the Oireachtas. This means that, among others, records given to a Minister for answering parliamentary questions may not be accessed. When a TD puts down a parliamentary question, the Minister's reply may be given orally or in writing. In the case of oral questions, the Minister gives an answer and the TD may then ask supplementary questions. The Minister usually has a file on the subject in the Dáil chamber and he/she usually has further information on that file to help in answering any further questions. Sometimes, this additional information is included in the Dáil report for the day. There is nothing in the Bill to stop this practice continuing but, if that additional information is not put into the public domain in this way, it will not be possible to access it under FOI.

General access

Under the original Act, public bodies must refuse access to certain records and may refuse access to others – these are mainly related to the business of government. The 2003 Act extends the range of records to which access must be refused. The Minister for Finance said that the changes were “based on the need to ensure that the business of Government can be properly and efficiently organised”.

Documents relating to Government meetings (Section 19)

The original Act provided that access could be refused to documents prepared by a Minister or Attorney General or for a Minister, Attorney General or member of the Government secretariat for a Government meeting

(documents relating to statements made at a Government meeting must be refused because of the constitutional provisions on Cabinet confidentiality). This exemption did not apply to factual information or to a Government decision made more than 5 years previously.

Access to such records must now be refused and the range of such records has been widened. Access must also be refused to records which consist of communications between members of the Government, records containing information, including advice, for a member of the Government or certain civil servants for use primarily for the transaction of Government business.

The definition of Government is widened considerably under Section 19 of the Act. The original definition was that Government included committees composed of some combination of Ministers, Minister of State and the Attorney General. The new definition also includes a committee of officials appointed by the Government for the purpose of;

- ◆ assisting the Government in relation to a matter that is being considered by the Government
- ◆ that is asked by the Government to report directly to them in relation to the matter and
- ◆ in relation to which the Secretary General of the Government certifies, at the time of its appointment, that it is a committee which comes within Section 19.

Officials includes civil servants and advisors and others who may be prescribed. The Secretary General to the Government must report annually to the Information Commissioner on the number of certificates issued under the definition of Government.

Communications between members of the Government could include exchanges of letters or memoranda on policy issues and representations by one Government minister to another.

Cabinet records

The original Act came into effect on 21 April 1998. It provided that cabinet records would be publicly accessible after five years. This would mean that such records would have become available on 21 April 2003. This is changed to 10 years, so the records will not now be available until 2008.

Deliberations of public bodies (Sections 20 and 21)

Under the original legislation, access to records relating to the discussions and decision making procedures of a

public body may be refused, but only where disclosure would be contrary to the public interest. Records may also be refused where their disclosure could prejudice the effectiveness of certain operations of public bodies e.g. audit, control or investigative functions, industrial relations negotiations. However, the information could be made available where, on balance, the public interest would be better served by granting rather than refusing the information.

Under the new rules, access must be refused if the Secretary General certifies that the record contains matter relating to the deliberative processes of a Department. It will not be possible to have this decision reviewed. Secretaries General will have to issue reports on the numbers of certificates issued.

There may be some doubt as to when the deliberative process starts and finishes. The standard way in which government decisions are made is as follows: the relevant Department prepares a memorandum on the issue. This sets out the issues involved and puts forward a proposal for a decision. Usually, it includes an assessment of the costs involved in implementing the proposed decision and it may also outline, for example, the effect of the proposed decision on poverty (poverty proofing) and/or equality, on rural dwellers or on the environment. This memorandum is circulated to other Departments for comments. There may be a number of discussions orally or in writing between officials and/or Ministers on the issue. Sometimes, the issue may be referred to a sub-committee of Ministers (for example, the cabinet Sub-Committee on Social Inclusion). As a result of this process, a revised Memorandum for Government is drawn up which incorporates any relevant comments or objections by other Departments. This memorandum is then discussed at a Cabinet meeting and a decision may be made or, if there is disagreement, it may be deferred for further discussion. If a decision is made, then usually a public announcement to this effect is made. If the decision relates to something which can be immediately implemented, then clearly, the deliberative process has ended. If the decision is to introduce legislation, there are many more steps to go before the deliberate process ends. The relevant department usually draws up what is called the "Heads of a Bill". This is a broad outline of what is to be contained in the Bill. This is sent to other Departments and to the Cabinet for a decision and then to the Attorney General's office for the drafting of the Bill.

The Oireachtas and the Courts (Section 22)

The original Act provided that access to various records relating to the Courts and the Oireachtas must

be refused. This general exemption now also applies to various records of tribunals.

Law enforcement (Section 23)

Under the original Act, access may be refused where the disclosure of the information concerned could prejudice or impair law enforcement. The new legislation provides that access may also be refused if disclosure would endanger the life or safety of any person.

Defence and security (section 24)

The original Act provided that access to records may be refused where disclosure would adversely affect defence, security or international relations. The Act specifies some of the records under this heading e.g. the tactics used by the Gardaí and Army against subversive organisations; negotiations between the State and the institutions of the EU. The new Act provides that access to such records must be refused.

Confidential and other sensitive information (Sections 26 - 31)

The original Act provided that access may be refused to records which contain information which has been given to a public body in confidence and to commercially sensitive information. The new Act includes new rules about knowing the identity of the requester in cases where such access may be granted. Time limits for the granting of information may be extended.

Personal information

The original Act provides for access to records which "relate to personal information". This is now amended to "contains personal information". In a High Court case, the Court held that the test to be applied to determine whether a record "relates to" personal information is whether there is a "sufficiently substantial link" between the requester's personal information, as defined in the Act, and the record in question. The Minister said that this had led to a certain amount of confusion in public bodies and the change was being made in order to ensure greater clarity.

In general, personal information may only be accessed by the person concerned and can only be corrected by him/her. The new Act allows the Minister to make Regulations for applications by the parent or guardian of certain people or in cases where the person is dead. Similarly, Regulations may be made for parents/guardians and representatives of the deceased to be given information about decisions which particularly affect the person. (In practice, such Regulations have been made and this provision clarifies that it is legitimate to make them.)

Fees

The new Act gives the Minister the power to introduce regulations dealing with the payment of fees in advance. The original Act provided for the payment of fees but it seems that they were rarely charged. Fees will not be charged for personal records.

The Minister for Finance said that, in a survey in his Department, it was estimated that on average an FOI request took eight hours of working time and cost €425. The provisions for charging in the original Act were not being operated as was originally intended – the intention was that fees would be charged unless the request was for personal information or in exceptional circumstances. In practice, the Minister said that fees were only charged in exceptional circumstances. The Act allows the Minister to prescribe fees for requests for access to records and for applications for reviews of decisions which may have to be paid before anything else happens. No decision has yet been announced on the level of fees to be charged.

A request could have been refused because the required fee had not been paid. This has been extended to cover situations where the requester had not paid the required fee on a previous occasion.

Bodies which have contracts with public bodies

The original Act provides, under section 6(9) that “A record in the possession of a person who is or was providing a service for a public body under a contract for services shall, if and in so far as it relates to the service, be deemed for the purposes of this Act to be held by the body, and there shall be deemed to be included in the contract a provision that the person shall, if so requested by the body for the purposes of this Act, give the record to the body for retention by it for such period as is reasonable in the particular circumstances.”

This would seem to bring a range of non public bodies effectively into the ambit of FOI. GPs who provide medical card services are people who come under its terms as they provide a service for the health boards. It has never been clear what other bodies are affected by this. Many voluntary organisations provide services for which they receive funding from the health boards, the Department of Social and Family Affairs (DSFA) or other public source.

Regulations have been made that, for the purposes of this section, a “person” does not include a public

body or any other body referred to in paragraphs (a) to (g) of paragraph 1(5) of the First Schedule to the Act. It is not clear why this regulation was made nor is it clear that it is a legitimate regulation to make.

The 2003 Act does not change or clarify this provision but it does put the terms of the regulation into the primary legislation which removes any doubt about its legitimacy.

Other changes

The new Act includes a number of other changes including:

Withdrawal of FOI request

The existing legislation did not deal with the question of withdrawing a request under the FOI legislation. The new Act provides that requests may be withdrawn by notice in writing or in such other form as may be determined.

Frivolous or vexatious requests

The head of a public body may refuse an FOI request because it is frivolous or vexatious. This is being added to by “or forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the head, appear to have made the requests acting in concert”. The Minister for Finance, when outlining this provision, said that in the first year of operation of the Act, a single individual made 466 requests, was responsible for 101 internal review applications and 35 appeals to the Information Commissioner. Of these requests, 194 were made to a single public body.

Other minor or technical changes include:

- ◆ A new definition of “factual information” - includes information of a statistical, econometric or empirical nature, together with any analysis
- ◆ clarification that the number of days within which certain things must be done means working days
- ◆ the removal of the requirement for the head of a public body to put a notice in *Iris Oifigiúil* about the name of the person to whom FOI responsibility is delegated
- ◆ commencement of the Act for the purposes of local authorities and health boards means 21 October 1998; for all other organisations, it means 21 April 1998
- ◆ the time for the Information Commissioner to complete a review is extended from 3 months to 4 months.

Data Protection (Amendment) Act 2003

The Data Protection (Amendment) Act, 2003 was signed into law on 10 April 2003. It will be brought into effect on 1 July 2003. The main purpose of this Act is to bring into effect the provisions of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. It amends the Data Protection Act 1988 – the main change is that the data protection rules will now apply to information held in manual or paper files. The Directive should have been implemented by October 1998 and member states had three years from then to ensure full compliance – so the final effective date was October 2001. Parts of the Directive were already covered by the 1988 Act and parts were brought into effect by the European Communities (Data Protection) Regulations, 2001 – this came into effect on 1 April 2002 and was an interim measure pending the 2003 Act. The new Act brings all of the Directive into effect and also includes some provisions which are not required by the Directive. The following is a very brief summary of the main data protection rules as they apply after the new Act comes into effect, with emphasis on the changes made. Full information is available from the Data Protection Commissioner at www.dataprivacy.ie

The data protection legislation aims to protect the privacy of people about whom personal information is held whether on computer or in manual or paper files. Under the legislation, you have the right to know if someone holds personal information about you and, subject to some exceptions, you have the right to access that information and have any inaccuracies corrected. People or organisations who hold personal information (they are called data controllers) have specific obligations in relation to obtaining and processing that information. The legislation is enforced by the Data Protection Commissioner who, among other things, keeps a register of data controllers and investigates complaints about failure to comply with the legislation. Certain data controllers, including those who hold sensitive personal information, are obliged to register with the Data Protection Commissioner.

Personal Data

The legislation specifies conditions for processing personal data with more stringent conditions for “sensitive personal data”. “Personal data” is data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller. There is no provision for access to data in relation to a dead person.

‘Sensitive personal data’ means information about you such as your racial or ethnic origin, political or religious opinions or beliefs, whether or not you are a member of a trade union, your physical or mental health, your sexual life, any involvement in the criminal process. Membership of a trade union has

been added by the 2003 Act. Data controllers who hold sensitive personal data are obliged to register with the Data Protection Commissioner who will refuse to register them unless satisfied that appropriate safeguards are in place to protect the privacy of the individuals concerned.

The legislation sets out the circumstances in which personal data may be processed. Broadly, this requires that the data should have been obtained and processed fairly, it should be accurate and complete and kept up to date, it should be obtained for one or more specified explicit and legitimate purposes, it should not be processed for any other purposes, it should be kept for no longer than those purposes require and there should be appropriate security measures to ensure that unauthorised access does not occur. Under the 2003 Act, it also requires that you (you are known as the data subject) have given consent to the processing or the processing is necessary for one of a number of reasons including

- ◆ the performance of a contract to which you are a party
- ◆ taking steps at your request before you enter a contract
- ◆ complying with the data controller’s legal obligations
- ◆ preventing injury to your health or loss of your property
- ◆ the administration of justice
- ◆ the performance of government functions or functions in the public interest
- ◆ pursuing the data controller’s legitimate interests.

The conditions for the processing of sensitive personal data are more stringent.

You are entitled to ask a data processor not to process personal data for the purposes of direct marketing. You must be told of your right to object.

You have the right to have inaccurate information corrected or deleted. The new Act provides that such information may be blocked. This means that it is marked in such a way that it is not possible to process it for purposes in relation to which it is marked. Where such information has been blocked, anyone to whom this information was disclosed in the previous 12 months must be notified unless this proves impossible or involves disproportionate effort.

Access to manual records

Until now, the legislation has only applied to data held on computer. The 2003 Act extends the data protection legislation to “manual data”. This means information which is in manual or paper files. The Act defines “manual data” as information that is recorded as part of a “relevant filing system” or with the intention that it be part of a relevant filing system. This means that:

- ◆ the personal data must be part of a set
- ◆ the set must be structured
- ◆ the structure must refer to individuals or to criteria relating to individuals; and
- ◆ specific information relating to a particular individual must be readily accessible.

If any of these criteria is not met, the manually processed data concerned is not covered by the legislation. The bulk of personal information is, of course, now held on computer but information such as medical records and school records may still be in manual form.

Manual data will come within the scope of the legislation when it comes into effect. However, manual data already in existence need not comply with all the conditions for the collection and processing of data until 24 October 2007. However, the right to have the data corrected, removed or blocked will apply progressively to such manual data during that period, in particular when a person makes an access request.

Resolution of disputes

The Data Protection Commissioner is in charge of implementing the legislation and you may complain about any breach. In practice, complaints are often resolved by the intervention of the Commissioner without the need for any formal rulings. The 2003 Act makes specific provision for such resolution.

Transfer of personal data between countries

The legislation provides that personal data may not be transferred to a country outside the European Economic Area (the EU countries, Norway, Iceland and Liechtenstein) unless an adequate level of protection is considered to exist. The Data Protection Commissioner may prohibit the transfer of data in such circumstances. He may operate a prior checking system of processing operations likely to present specific risks. (There are some exceptions to this general rule - if you consent to the transfer of data or if it is necessary for various reasons including entering into contracts.)

The European Commission may make a finding that an adequate level of protection exists in a particular country and such a decision is binding on the Data Protection Commissioner. To date, the Commission has decided that the data protection rules in Switzerland and Hungary are adequate. It has also decided that there are adequate safeguards for transfers to data controllers in Canada who are covered by the relevant Canadian legislation. A Commission decision has been made in respect of transfers to the USA that the safeguards are adequate when the transfer is to organisations which have unambiguously and publicly disclosed their commitment to comply with a set of “safe harbour” privacy principles and are subject to the statutory powers of a US Government body empowered to investigate complaints and obtain relief against unfair or deceptive practices as well as redress for individuals.

The Data Protection Commissioner must also comply with any Commission decisions that certain contractual clauses offer sufficient safeguards for the transfer of personal data. Two such decisions have been taken to date. A decision dated 15 June 2001 contains a set of standard contractual clauses for general use while a decision dated 27 December 2001 contains a set of contractual clauses adapted to cover transfers to data processors located outside the EEA.

Retention of Telecommunications Data

“Traffic data” is the information which the telephone companies and the Internet services Providers have about your use of their services. This includes information on what numbers were called, when the calls were made, how long they lasted and the location of the mobile phone user but the content of the phone calls cannot be traced. (The tapping of phones is allowed under certain circumstances but that is not the issue here.) The e-mail addresses used and the date, time and size of the message sent are also recorded. (It is not clear if the content is also recorded). Every time you log on to a website, the web pages visited, the files downloaded, and any transactions made are all recorded.

Since this information is kept largely for the purposes of calculating your bill and giving you information about it, general data protection law would require that it be deleted once the bill is paid or any queries in relation to the bill have been sorted out. The Data Protection Commissioner made an order, in January 2001 requiring all the telecommunications companies to register with his office. In the process he discovered that the traffic data was being routinely retained for 6 years. The Commissioner told the companies that such information should routinely be kept for no more than 6 months. The companies accepted this but the Department of Justice was concerned about access to this information for crime and security investigations. The Department wanted a three year retention period. In April 2002, the Minister for Public Enterprise issued Directions under the Postal and Telecommunications Services Act, 1983, requiring the companies to retain the traffic data for three years. This was pending the enactment of primary legislation. It is intended that primary legislation will be introduced this year. The proposed Telecommunications (Retention of Traffic Data) Bill is not yet published. The Minister for Justice, Equality and Law Reform held an information forum on data retention earlier this year – the proceedings of the forum are available at www.justice.ie Comments on the issues involved may be sent to dataretention@justqp.justice.ie.

The Data Protection Act allows the companies to disclose traffic data to law enforcement agencies in certain circumstances. The Gardai and the Army have the power to access such data when investigating serious crime or in the interests of the security of the state. This is provided for by section 98 of the Postal and Telecommunications Services Act 1983 as amended by the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.

EU Directive 97/66 deals with the retention of traffic data. It was brought into Irish law in May 2002 by the Data Protection and Privacy in Telecommunications Regulations, 2002 (Statutory Instrument 192 of 2002). There are detailed rules about matters such as

- ◆ retention of detailed telephone records – broadly, they may only be retained for the time required to process bills but may also be retained for law enforcement purposes under strict conditions - in each case it should only be for a limited period and where necessary, appropriate and proportionate in a democratic society.
- ◆ caller ID – you have the right to hide your number generally or in particular cases, you have the right to reject incoming calls when the caller’s number is not shown
- ◆ public telephone directories – you have the right to be excluded from such directories
- ◆ direct marketing – you may sign up to a central ‘opt out’ register, to indicate that they do not wish to receive unsolicited telephone calls; this register is maintained by the Commission for Communications Regulation (ComReg, formerly known as the ODTR – www.odtr.ie).

The rules are generally enforced by the Data Protection Commissioner.

This Directive has now been replaced by Directive 2002/58 – this is due to come into effect by October 2003. The new Directive will not change the basic rules on data retention. The EU is considering a proposal to require the companies to retain traffic data for a year in order to allow the law enforcement agencies have access if they considered it necessary (a 3 year retention period has also been suggested.) The Data Protection Commissioners from the EU member states have expressed reservations about this.

Video surveillance – public consultation

The European Commission is examining the issues arising from the use of video surveillance systems. The Data Protection Commissioners of the EU member states have produced a working document on the subject and this is being considered at present. The working document is available at www.europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wp67_fi.pdf

Comhairle Publications

Publications are available on request in a number of formats; large print, floppy disk, audiotape and Braille. They can also be accessed online on the Comhairle website.

Directory of National Voluntary Organisations and Other Agencies: A comprehensive directory listing over 500 voluntary organisations in Ireland and related public agencies with descriptions, contact details, publications, email and web address.

Entitlements for People with Disabilities and Entitlements for the Over Sixties are produced annually. These booklets bring together information on all aspects of entitlements, services and supports for their readers, including social welfare, health, tax, housing and other supports.

Information for those affected by Bereavement: This booklet is for people who have been recently bereaved and provides information on dealing with the practical and material matters that arise following a death. It contains information on what to do immediately after a death, possible social welfare entitlements, tax, financial and legal issues that may arise and where to go for further information and support.

Employment Rights Explained: This booklet deals with all aspects of employment law. It provides straightforward and practical information in a question and answer format, and is useful for both employees and employers.

Budget Information Pack: Produced annually in December, this comprehensive pack brings together measures announced on Budget Day and in the weeks following.

Leaflets: These include: Medical Cards, Information for School Leavers and Information for Part Time Workers.

Social Policy and Research Reports include:

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- ◆ Supporting Carers
- ◆ Advocacy: Regional Fora Report
- ◆ Employment Rights – issues around employment legislation and enforcement
- ◆ Information provision at local level – developing an integrated approach

A full list can be supplied on request in print or on audiotape.

Voice: A new quarterly social policy publication highlighting the queries and concerns voiced by users of information and advice agencies.

Resource Database for Community and Voluntary Sectors: A comprehensive web-based information resource for voluntary and community organisations which contains information on funding, sources, legal structures, managing an organisation, support agencies and policy developments.

Training Programme: Available in print, on the Comhairle website and on the Citizens Information Database at www.cidb.ie

Managing Volunteers: Available in print, price €8.85 incl. postage.

Current Account: The Journal of the National Money Advice and Community Education Unit

How can we help you? An interpersonal skills video with comprehensive training notes

Training Manual for Information Givers: A distance learning pack for use in conjunction with the Citizens Information Database, price €69.83.

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