Office of the Information Commissioner

Review of the Freedom of Information Act 2014

Submission of the Office of the Information Commissioner to the Department of Public Expenditure and Reform

31 August 2022

Contents

Introduction

The Office of the Information Commissioner (the Office) welcomes the review of the Freedom of Information (FOI) Act 2014 by the Minister for Public Expenditure and Reform, Michael McGrath TD. We also welcome the consultation process initiated by the Department of Public Expenditure and Reform. We are grateful for the opportunity to make a submission to the Minister as part of his review.

The Information Commissioner (the Commissioner) is required by section 44 of the FOI Act to keep the operation of the Act under review. Our submission arises from, and forms part of, our ongoing review of the operation of the Act and is based on the direct experience of our Office in applying the FOI Act 2014 over the last seven or eight years, and indeed in previously applying the FOI Acts 1997 & 2003. We hope that our submission will assist the Minister and his Department in his aim of finding better ways of achieving transparency in public administration.

Our Office has an important and unique perspective on the operation of the FOI Act. In carrying out the various functions of the Commissioner, and particularly in reviewing FOI decisions of FOI bodies, we have considerable, perhaps unparalleled, experience in the day-to-day operation of the Act across all FOI bodies and in public administration generally.

The Department's Consultation Document sets out a number of broad themes to be explored in this Review. We address each of these themes, and a number of other matters, below. Our experience gained through our work has shown that, while the FOI Act may generally operate well, occasionally some provisions can give rise to challenges. Some of these issues are significant and have broad implications for the general operation of FOI; we also provide further details of these issues below. This submission represents our high level response to the Department's consultation document and we look forward to engaging with the Department more extensively on the detailed provisions of the Act.

We would stress that achieving improvements in the operation of the FOI Act (and in the resulting transparency in public administration) is not just a matter of the legislation itself. Our experience has been that in many instances it is the implementation of the legislation, rather than the wording of the legislation, which can make the legislation effective or otherwise. Matters such as resourcing FOI, the commitment and support of senior management to its principles, compliance with FOI time limits, and the training of staff all contribute enormously to the effectiveness of FOI.

At their heart, these matters all relate to the culture both of individual FOI bodies and the culture of public administration generally. Attention has been drawn to many of these issues in the Commissioners' Annual Reports over the years. A report published in 2020 of an investigation under section 44 of the FOI Act into the practices and procedures adopted by FOI bodies also points to some of the practical matters which, if attended to, could improve the operation of the legislation.

Executive Summary

The Commissioner welcomes this Review of the FOI Act 2014 and is grateful for the opportunity to make submissions. After many years of its operation, it is now apparent to the Commissioner that a wide range of technical changes to the existing legislation are necessary. However, we consider that the successful operation of FOI and the achievement of openness, transparency and accountability in public administration is not simply a matter of the FOI legislation itself. The resources afforded to its implementation within FOI bodies, the commitment of senior management and the training of staff are very important to the effectiveness of FOI. The culture, both of FOI bodies individually and of public administration generally, is critical. Some of the Commissioner's key recommendations to improve the operation of FOI include;

- A legislative amendment should be introduced to require FOI bodies to organise information held with a view to its active and systematic publication, specifying certain categories of information to which this requirement particularly applies.

- The Department should develop comprehensive guidelines on the provision of access to information outside of the FOI Act.

- Routine or regular records should be designed so that information which may be released under FOI can be identified and extracted easily.

- FOI bodies should be required to take a transparency by design based approach to the development of new ICT systems.

- The Department should provide for a general power for FOI bodies to disclose information otherwise than in response to an FOI request.

- A legislative provision should be introduced that would provide FOI bodies and their staff with sufficient legal protection where information is released in good faith outside of FOI.

- Records management policies and records retention schedules should be statutory requirements and should be provided for in Regulations made under the Act and by Ministerial Code or Guidelines under section 48 of the Act.

- Bodies that are subject to the Act should be specifically listed in a schedule to the Act.

- The Act should be extended to all entities that provide outsourced public services.

- A provision should be included in the FOI Act to provide for an exemption for information where the FOI body holding the information is (a) obliged by AIE regulations to make the information available in accordance with the regulations or (b) would be so obliged but for any exemption in the regulations.

- The Act should specify in greater detail how the public interest is to be determined and what particular aspects of the public interest may be taken into account.

- The Act should be amended to provide the Commissioner with express power to promote good FOI practice and the publication of information of relevance and interest to the general public in relation to their activities and functions generally.

- The Department's Code of Practice should be amended to encourage FOI bodies to establish their own FOI knowledge management databases and to provide regular refresher training for their decision makers.

Streamlining Access Regimes and Related Functions

> *How does the access provided by FOI align with or complement other accountability mechanisms?*
>
> *Should the long-term aim be to consolidate requests for information from public bodies in a single mechanism insofar as possible?*
>
> Review of the Freedom of Information Act Consultation Document

The Consultation Document poses a number of questions generally regarding the alignment of FOI with other accountability mechanisms. We are aware of the administrative burden faced by FOI bodies receiving a large number of requests, particularly where these requests are for the same information from the same person under different access regimes. We broadly welcome any proposal to the streamlining of access mechanisms in order to reduce the administrative burden generally, provided *that any such streamlining does not diminish the substantive rights of requesters.*

Streamlining the various access mechanisms would not be straightforward. As the Consultation Document notes, some access mechanisms derive from European law and some derive from national law. In practice, streamlining access regimes will require that the FOI regime is altered in a way that does not diminish the rights of requesters. The experience of this Office is that both requesters and FOI bodies find the multiplicity of regimes to be confusing. Therefore, streamlining should benefit both.

Access to Information on the Environment

The Commissioner also holds office as Commissioner for Environmental Information (under article 12 of the Access to Information on the Environment (AIE) Regulations 2007 to 2018). The relationship between the two regimes of AIE and FOI was addressed in a submission by the Office of the Commissioner for Environmental Information, dated 16 April 2021, in the Consultation on the Review of the European Communities (Access to Information on the Environment) Regulations 2011 to 2018[1]. In this submission, the Commissioner recognised that some differences between the regimes are fundamental, such as the difference between the bodies to whom the regimes apply, whereas other differences are not fundamental but nonetheless cause confusion for public bodies tasked with applying both regimes in parallel. For example, in a recent AIE decision, the Commissioner noted that incorrect information regarding fees was provided to an applicant for environmental information as a result of a public authority using a letter template which was intended for responses to FOI requests[2]. The Commissioner's position remains that greater alignment of these two access regimes, as is the case in some other jurisdictions, would provide easier

[1] Available at https://www.ocei.ie/publications/submissions/OCEI-Submission-on-Consultation-on-Review-of-the-AIE-Regulations-FINAL.PDF

[2] See Case OCE-103791-Q7Z1F9, available at https://www.ocei.ie/decisions/ms.-x-and-a-county-counci/index.xml.

access to information for those using the AIE regime and simplify the processing of requests by public authorities and reviews by the OCEI.

Alignment of these two regimes is particularly important where there may be a degree of overlap between the access regimes which might apply. For example, a single request could include a request for some information which falls within the definition of 'environmental information', some information which may be personal information or personal data relating to the requester and some information which falls within neither of those two categories. It is also worth noting that the FOI Act currently provides for the refusal of a request where the records sought have already been made available to the requester, meaning that if the information has already been provided under AIE that is a ground of refusal under FOI.

Some possible solutions may be found in the way other jurisdictions have approached this issue. It is noted, for example, that in the UK section 39 of the FOI Act 2000 provides for an exemption for information in FOI where the public authority holding the information is (a) obliged by environmental information regulations to make the information available to the public in accordance with the regulations or (b) would be so obliged but for any exemption in the regulations.

Data Protection

It is important to note at the outset that the FOI and Data Protection (DP) access systems have been reconciled through section 44 of the DP Act 2018 and section 37 of the FOI Act 2014. Section 44 of the DP Act provides that personal data may be disclosed where a request for access to a record is granted under FOI. In other words, DP legislation expressly takes account of FOI and does not prohibit FOI bodies from processing FOI requests or from releasing information where the records sought contain personal data/ personal information. The FOI Act provides for much broader potential access rights to personal information. The Oireachtas has provided for the protection of privacy and personal information under FOI – this is reflected in the FOI Act generally, and in section 37 in particular.

DP derives from European law and human rights concepts, in particular the protection of privacy. It imposes a wide range of obligations on controllers and processors and it extends far beyond providing an access mechanism. It applies to more organisations (including private bodies) than FOI. On the other hand, responsibility for handling access requests under DP rests with the controller (not the processor); while, under FOI, it rests with *any* FOI body which 'holds' the record.

As stated above, the Commissioner is open to options for streamlining access regimes being considered, *provided, however, that the substantive rights of the requester are not diminished*. There may be occasions where access under FOI, rather than DP, may be more beneficial from the requester's perspective.

Ombudsman & Other Complaint Mechanisms

The Commissioner is particularly well placed to comment on the relationship between FOI and the Ombudsman complaint procedure as he occupies both the position of Information Commissioner and the position of Ombudsman.

It is important to note that the Commissioner occupies these two positions under separate pieces of legislation and his staff in the Office of the Ombudsman and in the OIC work independently of each other. However, he considers that the operation of FOI and of Ombudsman complaint examinations are essentially complementary systems. As Ombudsman, he expressly takes the view that one of the core principles or rules for public bodies is for them to be open and accountable. He advises public bodies to be open and clear about policies and procedures, ensuring that information is clear, accurate and complete. He takes the view that public bodies should handle information as openly and transparently as the law allows.

While the purpose of FOI cannot be fulfilled through the Ombudsman complaints procedure nor the purpose of the Ombudsman complaints procedure be fulfilled through FOI, the two processes are both important, complementary processes which enable the public service to be open, fair and accountable.

Recommendations of the Information Commissioner

- **A provision should be included in the FOI Act to provide for an exemption for information where the FOI body holding the information is (a) obliged by AIE regulations to make the information available in accordance with the regulations or (b) would be so obliged but for any exemption in the regulations.**
- **An FOI body should be entitled to suspend an FOI request where a request by the same requester for the same information has been made under AIE.**
- **If the information sought in an FOI request has previously been made available to the requester under AIE, the FOI body should be able to refuse to process the FOI request.**

Motive

> *…public bodies can tend to feel that the "motive blind" nature of FOI prevents an engagement with the requester to understand their aims and handle the issue appropriately*
>
> Consultation Document

We note the reference in the Consultation Document to public bodies feeling that the requirement to disregard motive when processing FOI requests prevents an engagement with the requester to understand their aims and handle the issue appropriately.
Section 13(4) of the FOI Act states that "*in deciding whether to grant or refuse to grant an FOI request*" any reason that the requester gives for the request shall be disregarded. Section 13(4) of the FOI applies in relation to the making of the FOI decision; it does not

prevent the FOI body from seeking to assist the requester in tailoring their request to the particular records of interest to them, nor is the FOI body in any way prevented from releasing the particular records which the requester is seeking outside of FOI. In other words, section 13(4) prevents consideration of *why* the request was made, but does not prevent FOI bodies from seeking clarification as to *what* the request is. Indeed, the Office actively encourages engagements between FOI bodies and requesters with a view to ensuring efficient and effective request processing.

FOI bodies are required under the FOI Act to give reasonable assistance to a person who is seeking a record under the Act and are encouraged to clarify requests where there is any confusion in relation to the records sought. Indeed, the CPU Decision Makers Manual states:

> Time and effort devoted to the provision of assistance to the requester can result in significant administrative benefits for the FOI body, including:
>
> - good relationships with clients
> - promotion of 'quality customer service'
> - a more focused request, requiring less administrative resources to process it, and
> - a reduced likelihood of appeal.

However, the purpose of disregarding motive is important and should not be lost. It is not generally appropriate for the FOI body to decide on a request based on why it considers the requester is looking for the records or the use to which they may be put.

On the other hand, however, it is important to note that section 13(4) is expressly stated to be *"[s]ubject to this Act*". Thus, where the reasons or motive for the request is relevant to the application of a particular provision of the FOI Act, account may be taken of the reasons. In particular, the Courts have endorsed the Commissioner's view that this allows an FOI body to take motive into account when considering whether a request is frivolous or vexatious.

Recommendation of the Information Commissioner

- **The requirement in the Act to generally disregard motive when processing FOI requests is an important feature of the Act and should be retained in its current state.**

Transparency by Design

> *What might a "transparency by design" approach look like in the Irish civil and public sector?*
>
> Consultation Document

The Commissioner welcomes approaches or strategies that support transparency, including the concept of transparency by design. One practical way in which this might be achieved is in the design of certain routine records or records created on a regular basis. Such records could be designed in such a way as to separate information which may be made available from other information. This type of approach has obvious benefits for the FOI bodies and requesters alike.

As early as 1999, the Commissioner observed that practical problems for an FOI body in processing FOI requests would not arise or could be alleviated if it were to adopt such an approach. If regular requests are made to the FOI body for certain records, the FOI body might need to examine each record in detail, perhaps consult with other bodies, and delete exempt material before releasing the records under FOI. Such a problem need not arise, or at least it could be greatly alleviated, by ensuring that material which might be exempt is identified by the authors of the record and recorded in a designated section of the record allowing routine information to be released on request.

It should also be noted that two exemptions in the FOI Act have exclusions for factual information. In light of this, factual information could be recorded in a separate part of certain records. In this way, the factual part of a record may be easily extracted and may be released. Indeed, it is noted that the Cabinet Handbook now advises that every Memorandum to Government should "present factual information so that it can be easily extracted for Freedom of Information purposes".

Recommendations of the Information Commissioner

- **Routine or regular records should be designed so that information which may be released under FOI can be identified and extracted easily.**
- **FOI bodies should be required to take a transparency by design based approach to the development of new ICT systems.**

Proactive Publication

> *Should the FOI legislation be more prescriptive about the types of information that must be published?*
>
> *...What kind of incentives might effectively promote publication…?*
>
> Consultation Document

This Office has been calling for a more proactive approach to publication for many years. As recently as 2020 in a Commentary published on Compliance by Public Bodies, the Commissioner called for bodies to publish as much information as possible, particularly of the sort that is regularly requested from the body under FOI. He saw this as a practical way to reduce the burden of FOI processing.

The Commissioner is of the view that the introduction of a mandatory requirement on FOI bodies to prepare and publish FOI Publication Schemes has fallen short in its intended purpose. Such Schemes rarely contain the sort of information that might negate the need for FOI requests. They have become quite formulaic and limited in the nature and extent of information published and regularly updated. The Commissioner's view is that this legislative provision should be strengthened.

Under the existing FOI regime, the Commissioner would strongly encourage both FOI bodies and the Central Policy Unit (CPU) in the Department of Public Expenditure and Reform to consider broadening the type and extent of information to be published. The Commissioner would also suggest that publication guidelines should assist FOI bodies in publishing information in a format that is fully accessible and can be readily interrogated. While we note the observation by public bodies that publication often leads to further requests for background material, we would suggest that thought be given to the likelihood of such requests at the time of publication. If further background or supplemental information exists, the possibility of publishing this further information should be considered.

A study by the Commissioner in 1999 on the compliance by public bodies with their publication obligations under sections 15 and 16 of the 1997 Act identified several issues which had arisen in relation to those obligations. These included implementation, responsibility, delays and the preparation and review of the material. These issues remain relevant today.

Moreover, following an investigation into compliance by public bodies with the provisions of the FOI Act 1997 in 2001, the Commissioner made a number of key recommendations concerning the management of information and promoting access to information. His recommendations, which remain relevant today, included a recommendation that each public body should develop comprehensive guidelines on access to information outside of

the FOI Act and identify classes of documents which are likely to be of general interest and adopt procedures to ensure that a proactive approach is taken to releasing them.

Recommendations of the Information Commissioner

- **A legislative amendment should be introduced to require FOI bodies to organise information held with a view to its active and systematic publication, specifying certain categories of information to which this requirement particularly applies. The Department may find it useful to draw on Article 7 of Directive 2003/4/EC on public access to environmental information (the AIE Directive) for this purpose.**
- **The Department should develop comprehensive guidelines on the provision of access to information outside of the FOI Act.**

Informal Release

> *How can we make the FOI process more collaborative, as well as less bureaucratic, formal and administratively onerous, while also ensuring that important rights and interests in information held by state entities are appropriately protected?*
>
> *… [C]an FOI legislation or guidance provide an enabling framework to allow bodies to routinely release non-exempt information…?*
>
> *… What supports would be required to give public servants the confidence to release information routinely ...?*
>
> Consultation Document

The Commissioner wholly encourages the release of non-exempt information outside of the FOI process. Such an approach has obvious tangible benefits for both FOI bodies and requesters alike. As outlined at the outset of this submission, achieving improvements in FOI is not just a matter of the legislation itself. Matters which can improve the operation of the Act include, for example, resourcing FOI, the commitment and support of senior management to its principles and the training of staff.

This Office considers that the culture of FOI bodies and of public administration generally is critical. It is important to have a genuine culture of openness and one in which staff of FOI bodies will have the confidence to release appropriate information outside the formal FOI process and have a sense of support from senior management in doing so.

It should be noted, of course, that section 11(8) of the FOI Act 2014 provides

> *(8) Nothing in this Act shall be construed as prohibiting or restricting an FOI body from publishing or giving access to a record (including an exempt record) otherwise than under this Act where such publication or giving of access is not prohibited by law.*

The CPU Guidance Note No 2 states clearly that the CPU supports a proactive approach by FOI bodies to the disclosure of information in an open and accessible manner on a routine basis outside of FOI, having regard to the principles of openness, transparency and accountability as set out sections 8(5) and 11(3) of the Act.

The question might be legitimately asked why, after nearly 25 years of FOI, more information is not released outside of FOI. One possible reason for this reluctance may relate to concerns by some FOI bodies, particularly those created by statute, that they have insufficient powers to disclose information otherwise than pursuant to an FOI request. In addition, there may be concerns that release outside the FOI Act does not attract the protections afforded to FOI bodies and staff of FOI bodies where the information or records are released. Section 49 of the Act provides immunity from legal proceedings for certain specified acts where the act was *"required or authorised by, and complied with"* the provisions of the Act or was reasonably believed by the head of the FOI body to be so

required or authorised and in compliance. In other words, the protections from legal proceedings apply where release is under the Act.

The Consultation Document makes reference to section 8 of the Government Information (Public Access) Act 2009 of New South Wales. Section 8 provides for the informal release of government information and states that an agency is authorised to release such information in response to an informal request unless there is an overriding public interest against disclosure. Sections 113 and 114 of that Act provide protection against actions for defamation or breach of confidence, and against criminal offences, in respect of such decisions where the person believes in good faith that disclosure is so permitted.

Recommendations of the Information Commissioner

- **The Department should provide for a general power for FOI bodies to disclose information otherwise than in response to an FOI request.**
- **A legislative provision should be introduced that would provide FOI bodies and their staff with sufficient legal protection where information is released in good faith outside of FOI.**

Managing the Increased Volume of 'Records'

> Given the challenges posed by the vast expansion of the amount of information generated by public bodies, should the FOI mechanisms aim to provide better quality of disclosure and transparency by focusing efforts on the most valuable information?
>
> … [S]hould [FOI] .. seek to identify categories of particularly high value material that warrant particular treatment, such as mandatory proactive publication?
>
> … [H]ow could the FOI mechanism, be more effectively targeted in order to ensure the most efficient deployments of resources? …
>
> Consultation Document

This Office strongly endorses the principle of accountability and notes the reference in the Consultation Document to a focus on accountability in terms of substantive decisions and other actions of public bodies. The Commissioner sees FOI as having a significant role in the enhancement of accountability.

Many of the questions raised in the Consultation Document in the context of managing the increased volume of records overlap with other themes in the Document. The issue of mandatory publication requirements has already been discussed above and the question of whether particular records should be subject to such requirements may be dealt with in that context.

We note the reference to differing transparency requirements applying to records of particular standing or importance. However, in our view this can be addressed in a Records Management and Retention Policy which should specify the records to be retained.

There is no doubt that there has been an enormous expansion in the generation of information over recent years and that this has given rise to considerable challenges. At its heart, however, the issue is one of records management (including, in particular, electronic records). The need for good records management goes far beyond FOI and is important in the general management of any organisation, and particularly in public bodies generating large amounts of records.

Good record management is also critical to an effective FOI regime. When an FOI body receives an FOI request, it should be in a position to determine immediately whether it holds the records sought and, if so, where they may be expected to be found. It should be able to determine what enquiries and searches are reasonable in any case.

<u>Electronic Records</u>

Devising a good records management policy has become more challenging in recent times, particularly with the increase in electronic records. Electronic records may be held in a variety of locations/document management systems and devices. They may be held centrally, locally or by individual staff. The modes of electronic communication continue to

increase and now include e.g. text messages, WhatsApp and various other messaging services, as well as email.

This has led to information being dispersed across multiple databases, e-mail accounts, messaging services and electronic devices including phones, etc. While these developments have led to fast and efficient communication, it can now be difficult to identify and collate all the records falling within the terms of an FOI request. A robust record management policy is very important and should cater for all these records.

Records Management Policies

Given the very large volume of records, the need for a Record Management Policy to cover all types of records has become critical. Such a policy should set out the types of records held by an FOI body and the criteria by which records are retained or destroyed.

Furthermore, because of the very large amount of records created and received by FOI bodies, it is neither practicable nor necessary for FOI bodies to retain every single record (apart altogether from requirements under GDPR/ data protection). Essential records must be retained and stored in a way that can be easily identified and extracted. Such records may include, for example, official records supporting and evidencing decision-making. Where records are to be retained, clear requirements regarding their filing and storage are required.

It is acknowledged that not all records will need to be retained. Information of a trivial nature or multiple copies of records are not necessary. A Records Management and Retention Policy should distinguish between records that need to be retained and records that are suitable for destruction. It should be possible to explain why records have been destroyed.

The Code of Practice for FOI issued by CPU in September 2015 points to what it describes as a lack of clarity and knowledge deficits relating to the management of electronic records. It states that there is a compelling need for sound record management practices and systems. The Code also states that the Department of Public Expenditure and Reform should develop central guidance on records management on which public bodies can base detailed guidelines pertinent to their own organisational needs. The need for such central guidance is now urgent.

Recommendations of the Information Commissioner

- **Records management policies and records retention schedules should be statutory requirements and should be provided for in Regulations made under the Act and by Ministerial Code or Guidelines under section 48 of the Act. If necessary, for the avoidance of any doubt, the Act should be amended to make specific provision for the making of Regulations in relation to records management. The Minister may wish to consider consulting with the National Archives in the development of such a Code or Guidelines.**

- **Records management policies should incorporate the principle of transparency by design referred to earlier and provisions regarding the creation of records as well as record formats/design.**

Improving the Request Process

> *How to clarify the standard for a valid request?*
>
> *How can further engagement between requesters and public bodies be encouraged …?*
>
> *…that a requester's motive cannot be a ground for refusing a request … may be interpreted in an overly broad way by public bodies and act as an impediment to effective collaboration…*
>
> *Should we improve and clarify the standards and procedures for administrative refusal… where requests are too large or will significantly disrupt a public body?*
>
> *The current arrangements for extensions of time were identified … as requiring further examination.*
>
> Consultation Document

While the setting of criteria for a valid request is essentially a policy matter, we nevertheless note that the Act already requires that a request should contain "sufficient particulars in relation to the information concerned to enable the record to be identified by the taking of reasonable steps" – section 12(1)(b) refers. In addition, one of the grounds on which a request may be refused is where the FOI request does not comply with this requirement – section 15(1)(b) refers.

This Office considers that many of the issues raised in the Consultation Document regarding improving the request process are actually already within the power of FOI bodies to resolve. For example, the Consultation Document asks how further engagement between requesters and public bodies can be encouraged in order to assist them in meeting their objectives – this can, in many cases, be achieved by FOI bodies by contacting requesters. We have drawn attention above to benefits that can result from this. FOI bodies have long been advised to contact requesters to clarify requests where necessary. Indeed, as we stated above, FOI bodies are required under the Act to give reasonable assistance to a person who is seeking a record under the Act. The CPU Decision Makers Manual emphasises this.

The Consultation Document also asks whether the standards and procedures for administrative refusal should be improved or clarified where requests are too large or will significantly disrupt a public body. There are several administrative grounds for refusal of a request under the Act. It is unclear how these existing administrative grounds for refusal in section 15 of the Act are not adequate to deal with these concerns of FOI bodies.

The CPU Decision Makers Manual provides guidance on the operation of these provisions. This Office has also published Guidance Notes on a number of them, including section 15(1)(c) (voluminous requests) and 15(1)(g) (frivolous or vexatious requests). In our

experience, one of the common issues that arises where FOI bodies seek to apply section 15(1)(c) is the failure of the FOI body to assist or to offer to assist the requester in relation to such a request *as required* under section 15(4).

Extension of Time

The Consultation Document refers to the extension (or shortening) of time for consideration of FOI requests under section 14 of the Act. This should not be an issue where the requester and FOI body are in agreement. Where, however, the FOI body seeks to extend the time for a decision under section 14 and the requester is not in agreement, there is the practical issue how an appeal of the decision under section 14 operates.

A decision to extend the time for making a decision may be extended under section 14 for a period not exceeding four weeks. This decision to extend the time may be reviewed by the Commissioner. However, we face very real challenges in making meaningful decisions in a timely fashion, given the need to process the application for review, to seek submissions from the parties and to consider and analyse the issues arising within the four week period. It is clear, therefore, at a practical level that the review process for considering decisions to extend time is unlikely to achieve a useful result in real terms.

The circumstances under which the time for making a decision may be extended are quite limited. They include (a) where the request relates to a large number of records, or (b) where the FOI body has such a number of other similar FOI requests, such that compliance with the prescribed time period is not reasonably possible.

This Office considers that a strong case can be made for removing the ability to extend the time for making a decision altogether. In practice, all of the cases that have come before this Office to date have fallen into category (a). It is important to note that there are several provisions in the Act that allow bodies to administratively refuse voluminous requests (sections 15(1)(c) and 27(12)).

Training

The comments in the Consultation Document indicate that there may be a lack of the appropriate level of training for FOI Officers and decision makers. FOI Officers and decision-makers need training and support in order to achieve the level of expertise to deal with requesters and make good quality decisions. Resources, training and culture need to be addressed if FOI is to function well. In our view, part of the challenge FOI bodies face arises due to their failure to provide sufficient, accessible knowledge management resources to support decision makers in carrying out their functions in circumstances where they may be called on only occasionally to do so. While a vast amount of supporting materials has been made available through the CPU and through this Office, we regularly see the same mistakes being made in the processing of requests which is a clear indicator that the available resources are not being utilised in the decision making process.

As set out in its Code of Practice that the Minister published pursuant to section 48 of the Act, the Department has responsibility for developing and maintaining a single training framework for FOI. Noting that FOI bodies must have regard to the Code and any guidelines

in the performance of their functions under this Act, this Office considers that the Code should require FOI bodies to ensure that regular refresher training is provided to their decision makers.

Recommendations of the Information Commissioner

- **The provision in the Act that allows for the extension of time for making a decision in certain circumstances should be removed.**
- **The Department's Code of Practice should be amended to encourage FOI bodies to establish their own FOI knowledge management databases and to provide regular refresher training for their decision makers.**

Fees and Charges

> *…[T]he model for applying of search and retrieval fees in particular is highly technical, difficult to interpret and implement, including very tight time limits …*
>
> *... What is the purpose and rationale for applying fees? …*
>
> *…Is the strict two week timeframe in which it issue a fee estimate counterproductive? …*
>
> Consultation Document

Section 27, which sets out detailed provisions concerning the application of fees, is quite complex and FOI bodies often have difficulties complying with all of the requirements of the section.

In addition to the general problems that arise from the complexity of section 27, this Office considers that there are some particularly technical issues arising with the current legislation, on which we will continue to engage with the Department.

Recommendation of the Information Commissioner

- **The provisions in the Act should be amended with a view to simplifying the fees procedure. For example, the removal of the requirement to charge a deposit would simplify the overall charging process and simplify the time-frame requirements.**

Designating FOI Bodies

> *Is there a case for a return to a definitive list of FOI bodies?*
>
> Consultation Document

As the Consultation Document states, where previously the FOI legislation contained a definitive list of all the bodies that were subject to FOI, this has now been replaced by a set of criteria. Under the previous legislation, there was no dispute as to whether an entity was, or was not, a public body. The matter was clear.

By contrast, under the FOI Act 2014, the right of access applies in respect of an FOI body, which means a public body or a prescribed body. Public bodies are listed, in part by reference to criteria, in section 6 and prescribed bodies are bodies which have been prescribed by an order of the Minister under section 7. In practice, determining whether an entity is or is not a public body has not always been straightforward and has led to some uncertainties.

Where there are disputes as to whether an entity is a public body under section 6(1) of the 2014 Act, section 6(7) provides for a dispute resolution process in which the dispute shall be submitted to the Minister. However, this dispute resolution process only applies where the dispute arises between the Commissioner and an entity as to whether section 6(1) applies. This process is not available to the requester where the dispute arises between the Commissioner and the requester, or between the requester and the entity at first instance. In addition, lengthy delays have occasionally arisen in the Minister making determinations in some cases. The Commissioner is of the view that the section 6(7) provision is fundamentally flawed and should be amended.

The specific listing of FOI bodies in the Act or subsequently in Regulations, similar to the situation under the FOI Act 1997, would ensure legal certainty and avoid disputes and delays. In the immediate term, disputes over whether or not a body is subject to the Act could be eliminated altogether if the Minister was to prescribe bodies under Section 7. If the Minister determines that a particular entity should be regarded as an FOI body for the purposes of the Act, it may be open to him to prescribe that body pursuant to the powers available to him under section 7 of the Act. Such a course of action would make redundant any argument as to whether or not section 6(1) applies to that entity.

Over the years, the Commissioner has also called for an extension of the FOI Act to ensure that information relating to all public services is potentially available under the Act, regardless of what entities provide those services. In his 2017 Annual Report, the Commissioner noted that he had previously referred to issues associated with the out-sourcing of the delivery of public services to private entities and noted that many services are provided by independent or private bodies on behalf of the State and its agencies. He argued that entities to which certain public functions are outsourced (such as refuse

collection) should be subject to the same levels of transparency and accountability in respect of the delivery of those public services as public bodies.

Recommendations of the Information Commissioner

- **Bodies that are subject to the Act should be specifically listed in a schedule to the Act.**
- **In the interim, disputes over whether or not a body is subject to the Act should be resolved definitively by the Minister prescribing relevant bodies by regulation under section 7 of the Act.**
- **The Act should be extended to all entities that provide outsourced public services.**

Role of the Information Commissioner

Does the statutory framework for the Commissioner's reviews need to be updated?

Should the Commissioner's role evolve to support other changes to the approach to FOI and transparency?

Consultation Document

Enforcement of Requirements under the Act Generally

Many issues mentioned in the Consultation Document in relation to the role of the Commissioner relate to the matter of enforcement. It is worth noting here that the Commissioner does not have a direct role in relation to all requirements under the Act. For example, in relation to section 8 of the Act, which requires FOI bodies to prepare and publish a publication scheme, it is the Minister who has responsibility for publishing guidelines on publications schemes. While the Commissioner is entitled to examine and report in his Annual Report on the extent to which he considers FOI bodies to be in compliance with section 8, he has no role in ensuring that the provisions of the section are enforced.

The Act provides an enforcement mechanism for some of the requirements in the Act. In other cases, the Act provides clear consequences in the event of an FOI body failing to comply with its obligations. For example, failure by an FOI body to make a decision within the required time limit will result in a deemed refusal.

On the other hand, there are requirements on FOI bodies under the Act where no provision has been made for enforcement or for consequences of non-compliance by an FOI body. For example:

- As outlined above, FOI bodies are required to comply with section 8 of the Act to make certain information available publicly. They are required to have regard to the Code and guidelines published by the Minister in that regard. However, there is no consequence for their failure to do so and no enforcement mechanism to compel them to do so.
- Section 41(6) requires Ministers of the Government to furnish reports to a Joint Committee of the Oireachtas regarding enactments within their functional areas which authorise or require non-disclosure of records. However, in our experience these time frames are not adhered to and no consequences for the FOI bodies concerned have ensued.

The Consultation Document also refers to a perceived failure to follow previous decisions of the Commissioner. While past decisions of the Commissioner cannot in themselves be taken as determinative of a request for different records, it is also the experience of this Office that FOI bodies do not follow the approach outlined in previous decisions where it would be appropriate to do so. There are also cases where FOI bodies who have been subject to FOI since 1998 fail to apply provisions of the Act, including procedural provisions,

in a proper manner. This may frequently be related to a lack of resources, training or support within the FOI body. The Commissioner has been highlighting these issues for many years. However, there is no mechanism under the Act to deal with these situations.

Powers of the Commissioner – Section 45

The Commissioner has previously faced challenges to his powers in cases where records were refused under section 42 or Schedule 1 Part 1. We may issue requests or directions in the course of a review in such cases; for example, requesting the FOI body to provide us with the records that are the subject of the review. We are satisfied that section 45 applies in such cases and that it provides the Commissioner with adequate powers. However, on occasion, efforts to obtain the records for the purpose of a review have been resisted.

This Office considers that section 45 is clear in the powers which it gives to the Commissioner. The Commissioner may require "**any** person" (emphasis added) to furnish information or records for the purposes of a review. Insofar as a body may consider that it is constrained in doing so by virtue of other requirements, section 45(3) makes it clear that "no enactment or rule of law" shall preclude the person from furnishing the information or record to the Commissioner.

The Commissioner has been given the statutory responsibility for reviewing decisions to refuse records under FOI. Occasionally, it may be possible to determine from the wording of the request itself that the records sought fall within the terms of section 42 and are excluded or that they are not within the records included in Schedule 1 Part 1. However, in many cases, it may simply not be possible to make that determination without seeing the records themselves.

It is noteworthy that under section 45(3) of the Act, no enactment or rule of law prohibiting or restricting the disclosure or communication of information shall preclude a person from furnishing to the Commissioner information sought under section 45.

Powers of the Commissioner – Promoting FOI

Over the many years since the introduction of FOI, the Commissioner's Office has gained enormous experience and has gained unique insight into the operation of the Act. The Commissioner considers it important to share his experience and understanding of FOI. In doing so, he hopes that this promotes good practice and good decision making which is to the benefit of FOI bodies and requesters alike.

The 2014 Act sets out the powers and functions of the Commissioner and includes a provision requiring the Commissioner to keep the operation of the Act under review and permits the Commissioner to carry out investigations. The Commissioner has carried out a number of investigations over the years. We take the view that these investigations and the subsequent reports which have been published help to promote FOI and general compliance with the requirements imposed by the Act.

The 2014 Act also provides that the Commissioner may prepare and publish commentaries on the practical application and operation of the provisions of the Act, including commentaries based on the experience of holder of the office of Commissioner in relation

to reviews. An example of such a successful endeavour has been the publication of Guidance Notes on the interpretation and application of various provisions of the Act by the Commissioner.

The CPU performs a vital role in providing information, guidance and other resources on FOI to FOI bodies as well as to members of the public. The Commissioner considers that it is very important that CPU continues its work and is provided with sufficient resources to do so. The Commissioner also does not wish to encroach on the role of the CPU in any way; however, occasionally there can be confusion about the respective roles of CPU and the Commissioner in the general promotion of FOI.

We consider that, given the Commissioner's unique perspective on FOI, he can provide information and promote FOI in a way that is complementary to the role of CPU. It is noted, for example, that the UK and Scottish FOI Acts contain a provision concerning the general functions of the Commissioner and which includes the promotion of good practice by public authorities and for the dissemination of information. Moreover, the FOI Act 1997 also provided that the Commissioner should "foster and encourage" the publication by public bodies of information of relevance and interest to the general public in relation to their activities and functions generally. This provision was not included in the 2014 Act.

Recommendations of the Information Commissioner

- **While the development of appropriate and effective enforcement procedures would undoubtedly be a difficult task, the Department should examine relevant enforcement mechanisms in other jurisdictions with a view to determining if they can be adopted to ensure more effective compliance by FOI bodies with the provisions of the Act.**
- **Section 45(1)(a) should be amended to make it clear that the "person" who is required to comply with a request for information or records includes any FOI body or entity referred to in section 42 and any partially included agency referred to in Schedule 1 Part 1.**
- **Section 45(3) should be amended along similar lines so that it provides relevant bodies or entities with specific protection to allay any fears or concerns they may have regarding exposure or liability in providing records to the Commissioner.**
- **The Act should be amended to provide the Commissioner with express power to promote good FOI practice and the publication of information of relevance and interest to the general public in relation to their activities and functions generally.**

Abuse of FOI

> *Should the language and scope of section 15(1)(g) … be clarified? For example, other FOI laws refer to "abuse of process" to describe the kinds of issues that may arise.*
>
> *In other jurisdictions, the Information Commissioner equivalent can give a public body permission to refuse to process requests from a particular person … where this is justified in the circumstances.*
>
> *Were a mechanism of this nature to be introduced, what protections would be required…?*
>
> Consultation Document

The Commissioner has explained his view on the abuse of FOI and on his interpretation and application of section 15(1)(g) on many occasions. He has also addressed it in a Guidance Note which has been published by our Office. First and foremost, he takes the view that the refusal of requests on the grounds that they are frivolous or vexatious is not something that should be undertaken lightly by FOI bodies. The Commissioner stresses that FOI bodies are required to go through the rigorous processing requirements of the FOI Act.

On the other hand, the Commissioner has also made it very clear that, in his view, requesters have a responsibility to act reasonably in relation to the processing of their requests by FOI bodies. Commissioners have made many decisions over the years in relation to section 15(1)(g) and he has published a Guidance Note on the provision. The recent judgment of the Court of Appeal delivered in July 2022 in the case of *Grange v Information Commissioner* [2022] IECA 153 has provided clear support for the Commissioner's approach to requests that he deems to be frivolous or vexatious.

While noting the reference in the Consultation Document to "other FOI laws" referring to *abuse of process,* it is important to state that the Commissioner has expressly included this concept in his understanding and application of 'frivolous or vexatious' in section 15(1)(g). He has found that a request is frivolous or vexatious where it is either made in bad faith or forms part of a pattern of conduct that amounts to *an abuse of process* or an abuse of the right of access. Again, the recent Court of Appeal decision has found that the Commissioner's approach in this regard is appropriate.

The Consultation Document suggests a procedure whereby the Commissioner could give a public body permission to refuse to process requests from a particular person where this was justified in the circumstances. We have concerns about the operability of any provision of this kind. The importance of the right of access must be borne in mind, as must the fact that the current provisions provide for findings that requests are frivolous and/or vexatious, not requesters. It is very important to ensure that requesters' future access rights are not unfairly restricted.

Recommendation of the Information Commissioner

- **It is considered that the current provisions in the Act concerning frivolous or vexatious requests is sufficiently robust and it is recommended that the provision should remain unchanged.**

Further Comments and Suggestions by the Commissioner

The Public Interest

Many of the exemptions in the FOI Act include what is known as a public interest balancing test. In such cases, the relevant exemption (which would otherwise apply) does not apply where the public interest would, on balance, be better served by granting than by refusing the request. Following the judgment of the Supreme Court in *The Minister for Communications, Energy & Natural Resources v The Information Commissioner* [2020] IESC 57 (the eNet case) in 2020, challenges have arisen in applying the public interest balancing test.

Section 11(3) of the Act provides that, in performing any function under the Act, FOI bodies shall have regard to:

> *(a) 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,*
>
> *(b) the need to strengthen the accountability and improve the quality of decision-making of FOI bodies, and*
>
> *(c) the need to inform scrutiny, discussion, comment and review by the public of the activities of FOI bodies and facilitate more effective participation by the public in consultations relating to the role, responsibilities and performance of FOI bodies.*

Prior to the eNet judgment, both this Office and FOI bodies had regard to the general principles of openness, transparency and accountability of FOI bodies, as provided for by section 11(3), when considering where the balance of the public interest lay.

In its decision in the eNet case, the Supreme Court held that general principles of openness and transparency do not provide a sufficient basis for directing the release of otherwise exempt information in the public interest. It found that the decision to order release must be one that emerges from a consideration of the particular records and not from a general policy. It found that a public interest in "ensuring maximum openness in the expenditure of public funds and in public bodies obtaining value for money" was not a correct interpretation of 'public interest' in section 36 of the FOI Act as it focused on a general public interest which was akin to that underpinning the right of access to records of FOI bodies under the Act. The judgment found that there must be "a sufficiently specific, cogent and fact-based reason to tip the balance in favour of disclosure".

In the judgment, the Court provided examples of such public interest factors, including:

- the public interest in a scrutiny which discloses corruption and briberies (paragraph 183)
- the public interest in knowing about a fundamental error in a tendering process (paragraph 201)
- the public interest in revealing a fraud or some other form of unsavoury input into the decision-making process (paragraph 201)

While the Court acknowledged that these examples were at one end of the spectrum, it did not provide examples of what might constitute public interest considerations in more 'regular' cases which are not so close to the end of the spectrum.

Recommendation of the Information Commissioner

- **The Act should specify in greater detail how the public interest is to be determined and what particular aspects of the public interest may be taken into account. For example, the Act could suggest particular factors that may be relevant to the public interest. The Department may wish to consider the approach taken in section 12 of the New South Wales Government Information (Public Access) Act 2009, including the notes to that section.**

The Presumption

The FOI Act provides for a presumption in favour of disclosure in a review by the Commissioner of a decision of an FOI body. Section 22(12) provides that, in a review by the Commissioner, a decision to refuse access shall be presumed not to have been justified unless it is shown to the Commissioner that the decision was justified.

Arguments regarding the application of this presumption arose following the judgment of Supreme Court in the Rotunda case (*Governors & Guardians of the Hospital for the Relief of Poor Lying-In Women v the Information Commissioner* [2011] IESC 26). The matter was resolved to a great extent in the later judgment of the Supreme Court in the eNet case referred to above. In its judgment in the eNet case, the Supreme Court held that section 22(12) places the onus on the FOI body to justify an assessment that records are exempt. It held that the two presumptions in section 22(12) "both favour, on a prima facie basis, the release of the records". It found that the presumption applies both to the application of the exemption and to the application of the public interest test.

The Court stated that the presumption provides the starting point that a decision to refuse is not justified unless justifying reasons are provided. It stated that it could not be said that the language of the Act provides for an inevitable or statutorily mandated outcome should the head of the FOI body fail to justify the refusal to disclose. It further stated the Commissioner may not approach the review by the application of a formula and "must himself or herself adjudicate on 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". The Court commented that the statutory provisions can best be understood in the context of the inquisitorial nature of the statutory role of the Commissioner.

It is important to note that it has never been the case that the Commissioner directed the release of records without having regard to their contents. For example, we have regularly protected personal information in records in circumstances where the body had not sought to apply the personal information exemption, but had cited other exemptions for the refusal.

Where, during the course of a review, we become aware that a mandatory exemption applies to a record or the interests of a third party would be affected by release, the presumption will not operate to result in the automatic decision of the Commissioner to direct release of the record.

However, it is important to bear in mind that neither the Commissioner nor his staff are subject-matter experts in the vast range of matters that are covered in the very large number of records that come before his Office in reviews. It may be useful, therefore, to clarify the operation of the presumption in such cases where it is not apparent that a mandatory exemption applies and the interests of third parties do not appear to be affected.

Recommendations of the Information Commissioner

- **The Act should be amended to clarify that the presumption at section 22(12) applies to all decisions to refuse access to records, whether under Part 4 or Part 5 of the Act or otherwise (including section 6(2)/Schedule 1 Part 1).**
- **The Act should be amended to clarify that the presumption operates so that a failure to justify to the satisfaction of the Commissioner that a record is exempt may lead to a decision by the Commissioner to release the records at issue.**

Partially Included Agencies

This Office considers that the position with regard to partially included agencies in Schedule 1 Part 1 of the Act also needs to be revisited.

Exclusion of certain records

Section 6(2) of the Act states that an entity specified in Schedule 1 Part 1 shall "subject to the provisions of that Part" be a public body for the purposes of the Act. Schedule 1 Part 1, in turn, states "Section 6 does not include a reference to …" and then lists or describes various entities in different ways. For example, Part 1 reads as follows:

- Section 6 does not include a reference to … the Adoption Authority of Ireland, insofar as it relates to records concerning or arising from, the making of an adoption order….
- Section 6 does not include a reference to … the Data Protection Commissioner, or an officer of the Commissioner, in relation to a record (save as regards a record concerning the general administration of the Office of the Commissioner)

This wording is somewhat cumbersome and can be unclear. It appears that the intention may have been to exclude certain records from the ambit of the FOI Act. In which case it would probably have been clearer to state that the Act does not apply to the specified records using wording similar to that used in section 42, e.g. "The Act does not apply to … a record held by … other than….". It is unclear why section 42 and section 6(2)/Schedule 1 Part 1 are drafted in very different ways. Alternatively, a clearer structure and form of wording should be devised so that the further issues (identified below) which arise from the current structure may be resolved.

It appears that records to which access is refused pursuant to section 6(2)/Schedule 1 Part 1 do not fall within the definition of "exempt record" in section 2. This may give rise to further implications. If, however, the relevant entities and records are brought within the ambit of section 42, the issues relating to the definition of an exempt record should not arise.

Records containing excluded information

In the case of certain entities, Schedule 1 Part 1 provides that section 6 does not include a reference to those entities in so far as it relates to records "containing" specified information. This wording has given rise to arguments as to whether the entire record containing the specified information is excluded or whether only the specified information is excluded.

The Commissioner has decided that such records are excluded only insofar as they contain the information specified in Schedule 1 Part 1 as excluded from the scope of the Act and that the parts of the record that do not contain such information fall to be considered for release in accordance with the provisions of the FOI Act (Case No. 150195 refers). The position of the Commissioner on this issue appears to have been accepted. However, in order to put the matter beyond doubt, it is considered the Act should be amended to clarify that only those parts of the record containing the specified information are excluded, and not the entire record.

Staff of Partially Included Agencies

The wording of Schedule 1 Part 1 also leads to confusion regarding the position of staff members of partially included agencies. In particular, the question arises as to whether they are members of staff of an FOI body, both for the purposes of whether information relating to them is personal information and whether they are a member of staff of an FOI body for the purposes of section 35(2).

In our view, if the record is of a type to which the Act does not apply by virtue of the provisions of Schedule 1 Part 1, then:

- the name of the staff member is to be treated as personal information and the exclusion from the definition of personal information for members of staff of an FOI body does not apply. The public interest test in section 37 would still be addressed.
- the record cannot be regarded as having been prepared by a staff member of an FOI body for the purposes of section 35(2).

However, the wording of the provision is unclear and this Office considers that it should be clarified.

Recommendations of the Information Commissioner

- **Partially included agencies should be brought within the ambit of section 42 of the Act, with sufficient specificity to clearly identify the records held by those agencies that are excluded from the scope of the Act.**
- **The Act should be amended to clarify that only those parts of records that contain excluded information are excluded from the scope of the Act.**
- **The Act should be amended to clarify the precise circumstances when a staff member of a partially included agency is deemed to be a staff member of an FOI body.**

FOI and Accessibility

Accessibility

Accessibility and the rights of persons with disabilities form an important part of Irish Government strategy. This is reflected through government policies and legislative provisions. The requirements on public bodies, in particular, in providing access and services to persons with a disability are provided for in law.

The FOI Act addresses the issue of accessibility for persons with a disability in section 11(2)(b) of the FOI Act 2014 which provides:

> (2) An FOI body shall give reasonable assistance to a person who is seeking a record under this Act— …
>
> > (b) if the person has a disability, so as to facilitate the exercise by the person of his or her rights under this Act.

In addition, provision is made under section 37(8) and the relevant Regulations for the granting of a request where the individual to whom the record relates is subject to "a psychiatric condition, mental incapacity or severe physical disability".

Guidelines have been prepared by the Minister on the provision of assistance by FOI bodies to facilitate persons with a disability to exercise their rights under the FOI Act (FOI CPU Notice No 12). These Guidelines advise, amongst other things, that the level of service could be maximised by accepting oral requests from requesters who are unable to read, print and/or write due to their disability and enabling the requester to inspect or have records explained to him or her. The Guidelines also advise that the service provided by FOI bodies to persons with a disability could be improved by the production of key documents in video or audio format, with sub-titling as appropriate and of key records in Braille or in an appropriate voice translation medium.

It is clear, therefore, that considerable attempts have already been made to improve FOI services for persons with a disability. However, it is interesting to note the recent research carried out on behalf of UNESCO (as custodian and monitor of SDG Indicator 16.10.2) where it examined the inclusion of persons with disabilities in Access to Information (ATI) legislation. The subsequent report made a number of key findings and made recommendations to advance the rights of persons with disabilities within the larger scope of the right to information. The recommendations include, for example, the adoption of a legal framework and relevant policies; mandatory minimum accessibility standards; and, the availability of all government information in accessible formats online and offline.

While there are various provisions in Irish law concerning the rights of persons with disabilities, this Office considers that the 2014 Act should be reviewed in light of the continuing developments and requirements in the area of accessibility. While the Guidelines prepared by the Minister (CPU Notice No 12) provide important advice, the guidelines, or part of them, might be suitable for inclusion on a statutory basis. Valuable suggestions for improvement may be available from relevant representative groups, associations or experts by experience. Consideration should also be given to the UNESCO report.

Capacity

Sections 9(6), 10(6) and 37(8) of the FOI Act enable the Minister to make Regulations for the granting of FOI requests (or applications under sections 9 and 10) in certain circumstances. Regulations (SI 218/2016 and SI 53/2017) made under these sections provide for cases where the individuals to whom the information or application relates are -

> individuals who have attained full age, being individuals who—
>
> (i) at the time of the application have, or are subject to, a psychiatric condition, mental incapacity or severe physical disability, the incidence and nature of which are certified by a registered medical practitioner, and
>
> (ii) by reason of that condition, incapacity or disability, are incapable of exercising their rights under the Freedom of Information Act 2014

The Regulations provide for the granting of access to records or granting of the relevant application in such cases where to do so "would, in the opinion of the head having regard to all the circumstances, be in the individual's best interests".

This Office considers that the Regulations as currently framed may not reflect changes to the law and language on capacity under the Assisted Decision-Making (Capacity) Act 2015 (the ADM Act). For example, it is unclear as to whether the reference to 'best interests' in the sections 9(6), 10(6) and 37(8) Regulations is in keeping with the general principles of the ADM Act. That Act recognises that, as far as possible, all adults have the right to play an active role in decisions that affect them. It also sets out a new test for the assessment of a person's capacity, it seeks to minimise restrictions on the person's rights and freedoms of action, and it gives effect, as much as possible, to the will and preference of the person.

Recommendations of the Information Commissioner

- **The Act should be amended to ensure that it addresses the key findings and recommendations contained in the relevant UNESCO report.**
- **The Act should be reviewed and amended, where necessary, to ensure that it is brought into line with the provisions of the Assisted Decision-Making (Capacity) Act 2015.**

The Role of the FOI Officer

It has been the experience of this Office that one of the significant difficulties in the operation of FOI has been the failure of FOI bodies to process requests in a timely manner. We also continue to encounter poor decision-making in response to FOI requests.

Many of these difficulties could be addressed through adequate resourcing of FOI, the commitment and support of senior management to its principles and the training of staff. This Office considers that the role of the FOI officer should also be considered. The role of FOI officer within FOI bodies can be a difficult one and there is scope to enhance or strengthen that role.

This Office considers that the enhancement of the role of the FOI officer would assist the proper functioning of FOI within an FOI body. Consideration should be given to ensuring that the FOI officer is at a relatively senior level within the organisation and has adequate training, skills and resources. The FOI officer should also have a role in monitoring the FOI body's compliance with requirements under the FOI including its publication scheme as well as the quality and timeliness of its decisions.

An interesting comparative is the role of the Data Protection Office (DPO) and it is suggested that the role of the DPO might provide some precedent.

Recommendation of the Information Commissioner

- **The role of the FOI officer should be placed on a statutory footing. For example, the legislation could require the head of the FOI body to appoint an FOI officer in each case and to ensure that such an officer is sufficiently senior and has the appropriate skills to carry out the role effectively and is afforded adequate training and resources.**