

IMF BAIL OUT ELECTION ANSWERS
MAJOR FLAWS TRANSPARENCY
MORTGAGE LENDERS
BANKING REGULATING HOMES CONTEXT
GRANT CUTS
NEGOTIATIONS RESPONSIBILITY
FOSTER CARE
COMMUNICATE
FAMILY JUSTICE TROUBLED BANKS
INFORMATION
COMMISSIONER
ANNUAL REPORT
2011



Oifig an Choimisinéara Faisnéise
Office of the Information Commissioner

2012 © Government of Ireland

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

Tel: (01) 639 5689
Fax: (01) 639 5674
Email: info@oic.gov.ie
Website: www.oic.gov.ie

ISSN: 1649-0479
PRN: A12/0101



Oifig an Choimisinéara Faisnéise
Office of the Information Commissioner

Annual Report 2011

Contents

Foreword 6

Part I - Information Commissioner

Chapter 1: The year in review 9

Your right to information	9
Introduction	10
Key FOI statistics for the year	15
Office of the Information Commissioner (OIC) caseload	20
Settlements and withdrawals	25
Deemed refusals	25
General enquires to OIC	26
Fees received by OIC	27
Statutory notices	27
Statutory certificates issued by Ministers/Secretaries General	29
Appeals to the Courts	31
Staffing matters	31

Chapter 2: Issues arising 35

Government plans for FOI	35
Regulations under section 28(6) of the FOI Act	36
Poor case handling by public bodies	36
Section 29	38
Splitting FOI requests	39
Settled cases	39
Court judgments	41

Chapter 3: Decisions 47

Formal decisions	47
Significant decisions	48
Department of Communications, Energy and Natural Resources	48
Department of Health & Children	49
Health Service Executive	51
Department of Justice and Equality	52

Chapter 4: Statistics 55

Part II - Commissioner for Environmental Information

Chapter 1: Introduction	69
What is environmental information?	69
What is a public authority?	70
Facilitating access to environmental information	70
Charges	71
Refusal grounds	71
Guidance	72
Appeals received in 2011	72
Issues arising in 2011	73
High Court and Supreme Court judgments	75
Statistics	76
Chapter 2: Decisions	79
Appendix I	
Certificates issued under section 20 and section 25 of the FOI Act	85
Appendix II	
Review under section 25(7) of Ministerial Certificates issued	88
Appendix III	
Annual Energy Efficiency Report 2011	89
Organisation Chart	91



Foreword

I hereby submit my ninth Annual Report as Information Commissioner (the fourteenth Annual Report of the Information Commissioner since the establishment of the Office in 1998) to the Dáil and Seanad pursuant to section 40(1)(c) of the Freedom of Information Acts 1997 and 2003.

A handwritten signature in black ink, reading 'Emily O'Reilly'. The signature is fluid and cursive, with a long horizontal stroke at the bottom.

Emily O'Reilly

Information Commissioner
May 2012



Pat Whelan
Director General

ELDER ABUSE 124 CLAIMS OF ELDER ABUSE
AGAINST HOME HELPERS

HSE SPENT €1.43M
TO HOLD TB MAN

CONCERN OVER SLOW PROGRESS
IN REGULATING HOME HELPS

REGULATING

HSE CHILDREN ADMITTED
TO ADULT PSYCHIATRIC
UNITS DESPITE BAN

STAFF PAY

OVER 130 UCC STAFF
PAID MORE THAN €100,000

OUTPATIENT

OVER 60,000 ON OUTPATIENT WAITING
LISTS AT DUBLIN HOSPITALS

CHAPTER 1

Chapter 1: The year in review

Your right to information

The Freedom of Information Acts, 1997 and 2003 gives people a right of access to records held by many public bodies including Government Departments, the Health Service Executive and Local Authorities. It also gives people the right to have personal information about them held by these public bodies corrected or updated and gives people the right to be given reasons for decisions taken by public bodies, where those decisions expressly affect them.

The European Communities (Access to Information on the Environment) Regulations 2007 to 2011 provides an additional means of access for people who want environmental information. The Regulations cover more organisations than the FOI Act. The Department of Environment, Community and Local Government has published a set of Guidance Notes which are available on the website of the Commissioner of Environmental Information at www.ocei.gov.ie.

It should be noted that these two functions are legally independent of one another, as indeed, are my respective roles as Information Commissioner and Commissioner for Environmental Information.

Introduction

I am pleased to introduce my ninth Annual Report as Information Commissioner. My Report covers the period from 1 January 2011 to 31 December 2011.

Last year, in my 2010 Report, I raised concern about the number of important public bodies, such as the National Treasury Management Agency (NTMA) and the National Asset Management Agency (NAMA) which do not come within the remit of the FOI Act. I indicated in that Report that I welcomed the commitment relating to freedom of information contained in the Programme for Government, Government for National Recovery 2011 – 2016 to restore the Freedom of Information Act to what it was before the 2003 amendments and to extend its remit to other public bodies. I am pleased to report, that the Department of Public Expenditure and Reform is currently working on the arrangements necessary to give effect to the commitments in the Programme for Government in relation to FOI. The amendment of the FOI Act in 2003 represented a step back from the commitment to openness, transparency and accountability which was the key factor in the enactment of the 1997 FOI Act. Many of the amendments made limited the potential for public access to records relating to Government actions. For example, the potential right of access to records of Government was pushed back to records which are ten years old as opposed to five years as envisaged in the original Act. Another example is that communications between Ministers relating to a matter before Government are now fully protected, whereas previously, these records were potentially releasable provided they did not reveal a statement made at a Government meeting.

I was also pleased to have been given the opportunity to provide suggestions for future amendments based on my experience of conducting reviews on requests relating to a wide range of public services. Foremost in mind when making my suggestions was the purpose of the Act as expressed in the Long Title:

“An Act to enable members of the public to obtain access, to the greatest extent possible.....to information in the possession of public bodies...”

The suggestions I made are designed to increase the effectiveness of the FOI Act and further benefit the public's right of access to official information. I hope to see an Act fully restored to the original Act of 1997 and one that encompasses all public bodies including the many bodies I highlighted in recent years, such as NTMA, NAMA, the Garda Síochána etc.

In 2011, the long awaited judgment was delivered in what is known as the 'Rotunda case'. This case revolved around the refusal of the Rotunda Hospital to release a

record showing the age of the applicant's mother when she gave birth to him in 1922 because it meant disclosing her personal information and because the mother had given the details of her age in confidence. The Rotunda appealed my decision that the record be released to the High Court. The High Court dismissed the appeal and the case was then further appealed on a point of law to the Supreme Court. On 19 July 2011, the Supreme Court, on the basis of a four to one majority, delivered its judgment and set aside my decision. It found that the age of the applicant's mother when she gave birth to him in 1922 was protected by the confidentiality provisions in the FOI Act.

In an address which I gave to the Medico-Legal Society of Ireland on 23 February 2012, I commented on the judgment:

"What the judgment means is that the principle of protecting the confidentiality of information given by a hospital patient takes precedence over the right of a person to information about the age of his or her own mother. And this principle, it would seem, applies even though the patient in question is dead and the information at issue is not terribly sensitive".

In my address I further commented that there continues to be difficulty in accessing 'origins information' - personal information for people who grew up separated from their parents and families - and that there is acceptance that not having such 'origins' information may leave people more exposed than would otherwise be the case to psychological stress and relationship strain and I concluded that:

"For the future, all other FOI requests for such "origins information", where they involve records held by a hospital or doctor, are likely to be refused. And this, in fact, is likely to prove a significant impediment to the Government's commitment to implement a specific recommendation made by the Commission to Inquire into Child Abuse in its major report (the Ryan Report) from 2009.

The previous Government committed itself to implementing all of the recommendations in the Ryan Report; and I assume that the present Government is standing by that commitment. Recommendation 7.05 of the Ryan Report (Vol. IV, Ch. 7) has to do with the continuation in place of family tracing services "to assist individuals who were deprived of their family identities in the process of being placed in care" and recommends that the "right of access to personal documents and information must be recognised and afforded to ex-residents of institutions". In seeking to implement this recommendation, the previous Government cited reliance on access to "origins" information under the FOI Act as an action being taken in support of the recommendation. As the Report of the Commission to

Inquire into Child Abuse, 2009 - Implementation Plan puts it: "Personal records will continue to be provided to individuals on request, under the terms of the Freedom of Information Act (ongoing)". In the light of the Rotunda judgments, it does seem probable that the FOI Act will no longer feature as an action in support of implementing Recommendation 7.05 of the Ryan Report".

In this Report, I highlight a number of significant cases and issues that were dealt with by my Office in 2011. In Part II of this Report, although there is no statutory requirement on me to do so, as I have done in previous years, I report on my work as Commissioner for Environmental Information, which is legally separate to my role as Information Commissioner.

Again this year I highlight some of the information which was brought into the public domain through FOI which would otherwise have remained unknown. Some of the FOI based headlines which appeared in published media reports are dispersed throughout this report.

Publication: Medical Independent
Date: Thursday, May 19, 2011

Children admitted to adult psychiatric units despite ban

JUNE SHANNON

Five children under the age of 17 were admitted to adult psychiatric units between December 1st 2010 and January 20th 2011, despite an addendum introduced to the Mental Health Act 2001 on December 1st last year banning such practices except in exceptional circumstances, the *Medical Independent* has learned.

Publication: Irish Examiner
Date: Tuesday, August 2, 2011

HSE spent €1.43m to hold TB man

■ 24-hour security and private room to forcibly detain patient

by **Flachra Ó Cloinnáith**

THE HSE spent more than €1.43 million on 24-hour security and a private room to keep just one patient suffering from potentially lethal TB in hospital for two years against their will.

Publication: Irish Times
Date: Monday, January 31, 2011

124 claims of elder abuse against home-helpers

PAMELA DUNCAN

MORE THAN 120 complaints of alleged elder abuse by individuals providing home-help services have been received by the HSE elder abuse service since 2007.

Publication: Irish Times
Date: Thursday, December 15, 2011

Concern over slow progress in regulating home helps

Large numbers of old people are receiving care on which there are no checks, writes Pamela Duncan

TENS OF thousands of older people across the State depend on home help services to help them to stay in their own homes.

Publication: Irish Times
Date: Monday, December 12, 2011

Over 60,000 on outpatient waiting lists at Dublin hospitals in 2011

MORE THAN 60,000 patients were on outpatient waiting lists to see consultants at hospitals in Dublin in 2011, new figures show.

Freedom of Information applications obtained from the capital's five major voluntary hospitals, show some patients were waiting for up to 2½ years for first appointments with specialists.

Publication: Irish Independent
Date: Thursday, August 25, 2011

Over 130 UCC staff paid more than €100,000

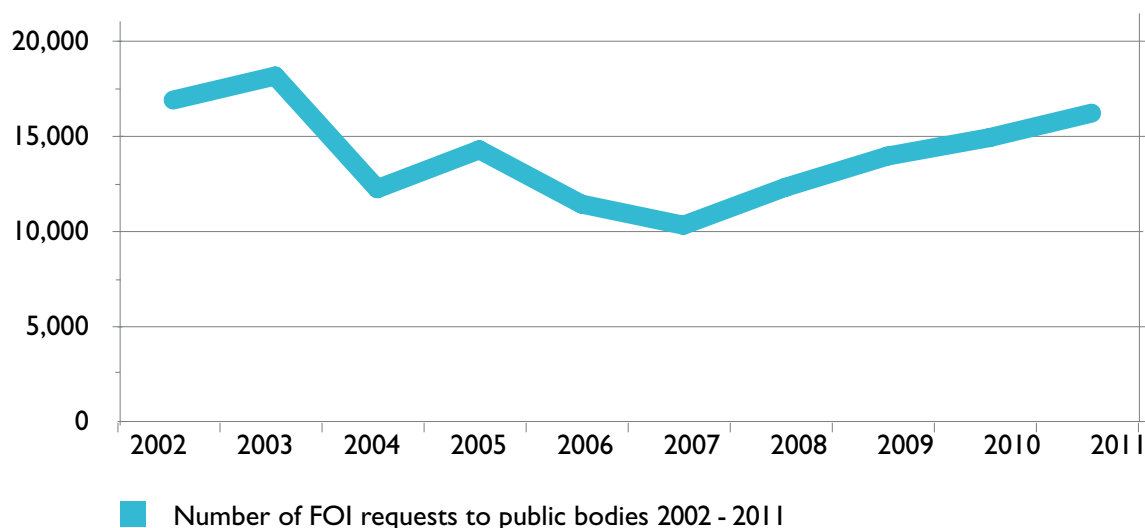
Ralph Riegel

OVER 130 staff at an Irish university were being paid more than €100,000 last year.

Eleven academics and administrators at University College Cork were paid over €200,000 while 29 senior staff earned over €175,000, according to figures released under the Freedom of Information Act.

Key FOI statistics for the year

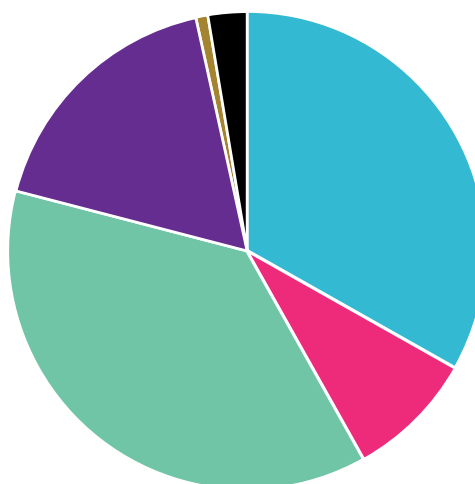
Number of FOI requests to public bodies 2002-2011



Some 16,517 requests were made to public bodies under the FOI Act in 2011. This reflects a continuation of the steady upward trend in FOI requests over the last few years. It represents an increase of more than 8% (1,268 requests) over the 2010 figure and a 15% (2,227 cases) increase over the 2009 figure. It is likely that this increase was at least partially driven by the continuing economic downturn.

The number of FOI requests on-hand by public bodies at end December 2011 has dropped by 4% over 2010, a drop from 2,466 cases to 2,379. I welcome this decrease and encourage the public bodies concerned to continue to address this backlog.

Sectoral breakdown of FOI requests to public bodies



In total, the Health Service Executive received the largest number of FOI requests in 2011 with 6,141 (up 14% on 2010); third-level institutions received 436 (up 9% on 2010); 5,479 were made to government departments and state bodies (up 7% on 2010); voluntary hospitals, mental health services and related agencies received 2,891 (up 6% on 2010); other voluntary bodies 134; local authorities received 1,436 (down 6% on 2010).

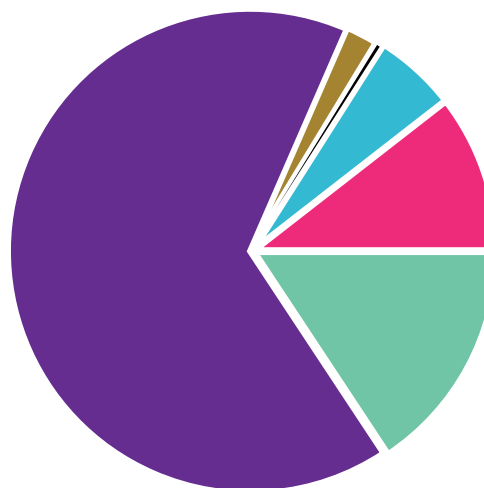
Top ten bodies who received most requests during 2011

Rank	Public Body	2011	2010	2009	2008
1	HSE West (1)	2,204	1,953	1,647	1,362
2	HSE South (2)	2,153	1,926	1,756	1,548
3	Department of Education and Skills (4)	1,170	796	569	457
4	Department of Social Protection (3)	1,106	859	556	485
5	HSE Dublin North East (5)	871	713	694	631
6	HSE Dublin Mid-Leinster (7)	690	573	427	453
7	Department of Justice and Equality (6)	597	598	844	718
8	Mercy Hospital, Cork (8)	506	403	416	200
9	St James's Hospital (-)	404	295	265	280
10	Department of Finance (9)	258	337	272	180

The table shows the top ten bodies subject to the most FOI requests during 2011 (the previous year's position is shown in brackets), with comparators for these bodies for 2008, 2009 and 2010. The rise in overall requests received by the HSE is reflected in each of the individual HSE regions which feature in the top ten. I notice a dramatic increase in the number of FOI requests received by the Department of Education and Skills (47% increase over 2010 and over 100% increase on 2009). I commented last year on the increase in the number of FOI requests received by the Department of Social Protection and I note that the increase continued in 2011 (a 29% increase in requests over 2010 and nearly 100% increase over 2009). While I have no specific data on the reasons for these changes, I think it reasonable to surmise that they are due to increased interest in accessing records relating to the economic downturn and cutbacks in service. More detailed tables showing a breakdown of requests received in each sector are contained in [chapter 4](#).

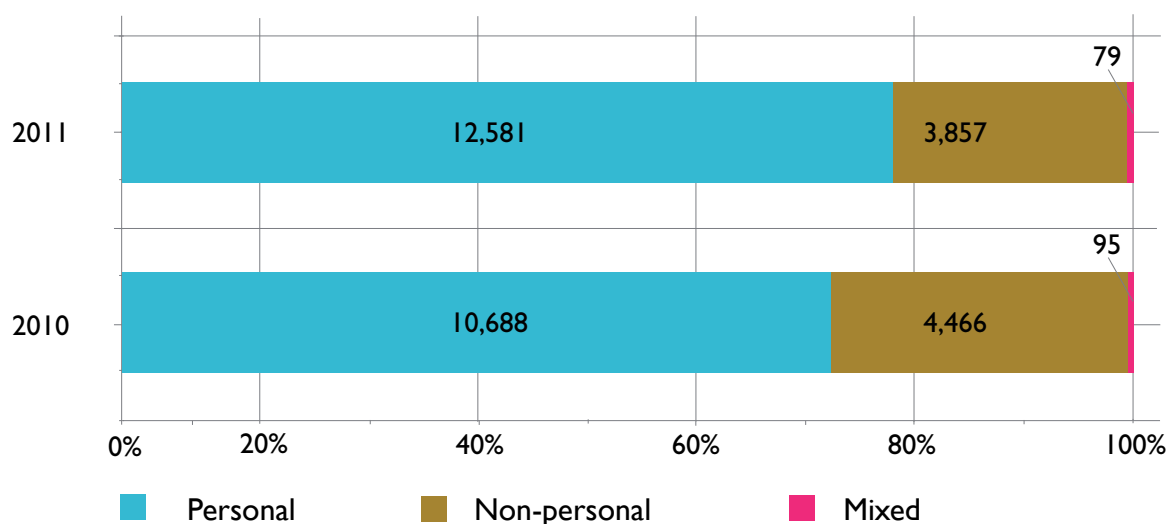
Type of requester to public bodies

- Client of public bodies 66%
- Staff of public bodies 2%
- Oireachtas members 1%
- Business 5%
- Journalists 10%
- Others 16%



The proportion of requests from different types of requester is very similar to the requests received in 2010.

Type of request to public bodies



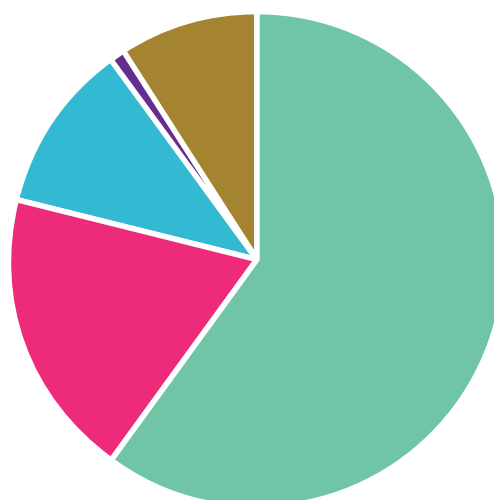
There has been an increase of 1,893 in requests for personal information which represents an increase of 17% on 2010, whereas the number of non-personal and mixed cases continues to decrease. Overall in 2011, 76% of requests relate to access to personal information, 23% to non-personal information and 1% to mixed information.

Rates of appeal

In 2011, internal reviews against decisions of public bodies were sought in 589 cases. This represents just over 3.5% of the overall cases dealt with by public bodies. My Office accepted 174 cases for review in 2011, which amounts to just over 1% of the decisions made by public bodies.

Release rates by public bodies

- Granted in full 58%
- Part-granted 20%
- Refused 11%
- Transferred 1%
- Withdrawn 10%

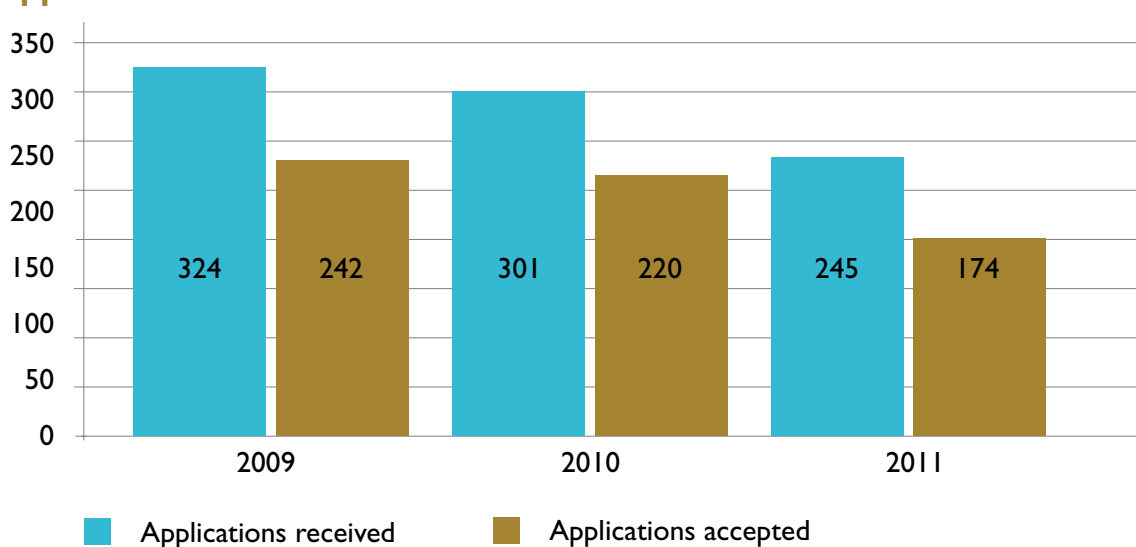


The differences between sectors in the rates of release are largely similar to previous years, although there was a reduction in release rates for the local authorities to 50% (from 57% in 2010) and a reduction in release rates for third level institutions to 40% (from 57% in 2010). The HSE release rate is just below 71% while the civil service remains the lowest sector at 37%. A detailed breakdown of the release rates in each sector is contained in [chapter 4](#).

Office of the Information Commissioner (OIC) caseload

Where a requester is not satisfied with the decision of the public body on his/her FOI request, he/she may apply to my Office for a review of that decision. In most circumstances, this review will constitute the third analysis and decision in that case. The decision which follows my review is legally binding and can be appealed to the High Court, but only on a point of law.

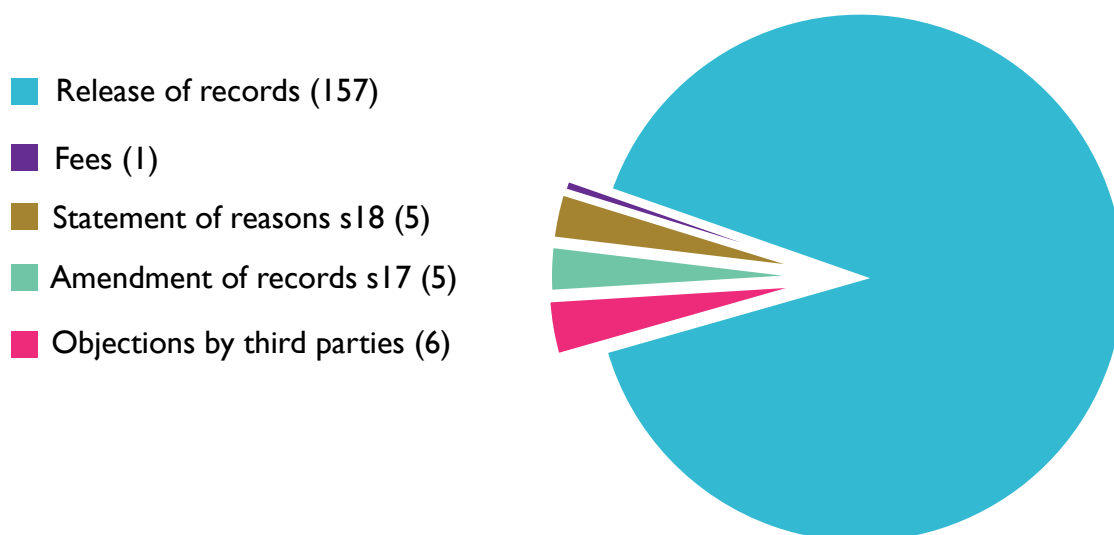
Applications to OIC 2009-2011



The diagram above shows that the number of applications to my Office in 2011 has decreased by 19% even though the overall number of FOI requests to public bodies increased by nearly 8% in the same period.

It can also be seen that a number of applications to my Office are not accepted for review. This is mainly due to applications being invalid or withdrawn by the applicant at an early stage.

Subject matter of review applications accepted by OIC



As can be seen from the chart above, the majority of applications accepted by my Office in 2011, concerned applicants seeking access to records, following refusal of access by the public bodies concerned.

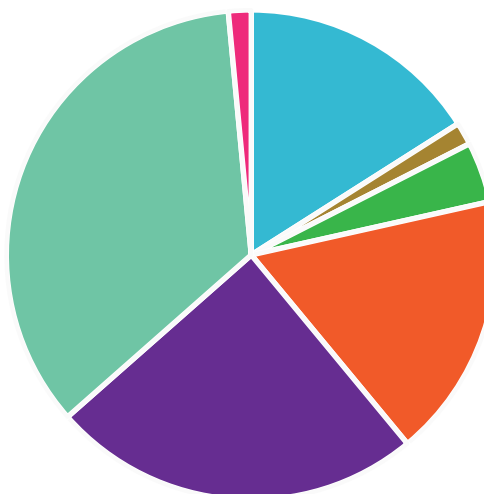
Applications accepted by OIC by type 2009-2011



The table above illustrates that there was a significant increase, over 2010, in the percentage number of cases accepted by my Office in which the applicant sought personal information, reflecting the increase in requests to public bodies for personal information. Again this year, I note that while 76% of overall FOI requests concern access to personal information, only 35% of applications accepted by my Office in 2011 concern requests for access to personal information.

Outcome of reviews by OIC in 2011

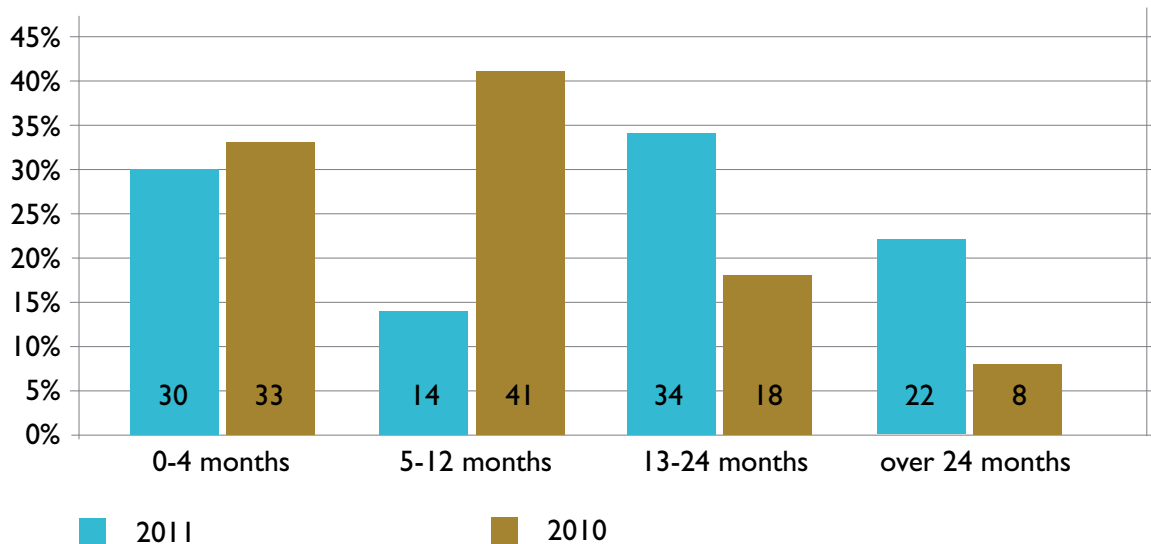
- Settlement reached 25%
- Withdrawn 35%
- Invalid 2%
- Decision affirmed 16%
- Decision annulled 1%
- Decision varied 4%
- Discontinued 17%



In 2011, I reviewed decisions of public bodies in 200 cases, compared with 228 in 2010 and 239 in 2009. Again I have to report that the number of reviews of a more complex and time consuming nature has continued to increase year-on-year; particularly, the reviews concerning non-personal information. There were 166 cases on-hand in my Office at the end of December 2011, compared to 192 at the end of 2010 and 200 at the end of 2009.

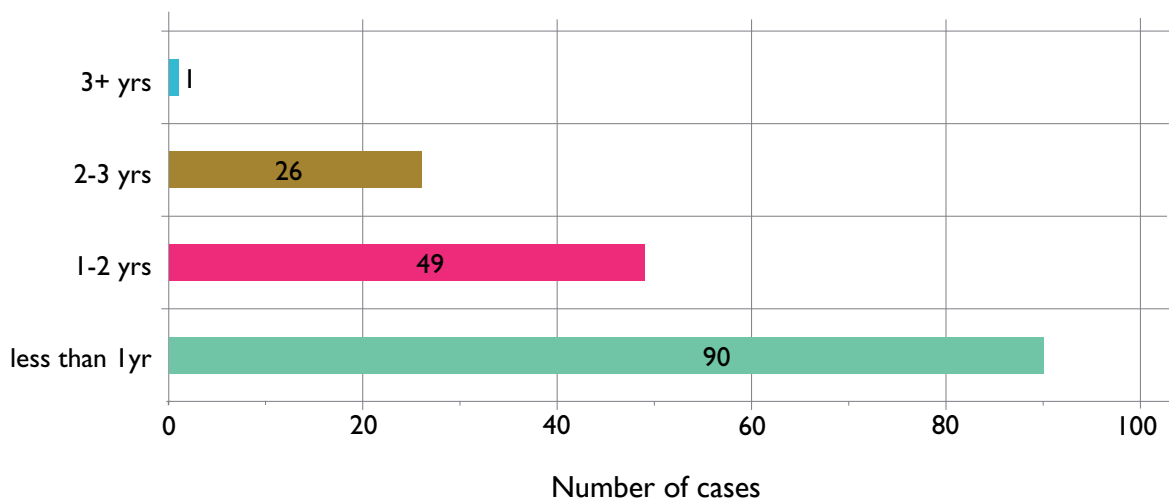
I note that additional records were released in approximately 31% of cases completed by my Office in 2011, compared with 43% in 2010 and 30% in 2009. A detailed analysis of the cases which went to formal decision is available in [chapter 3](#).

Age profile of cases closed by OIC



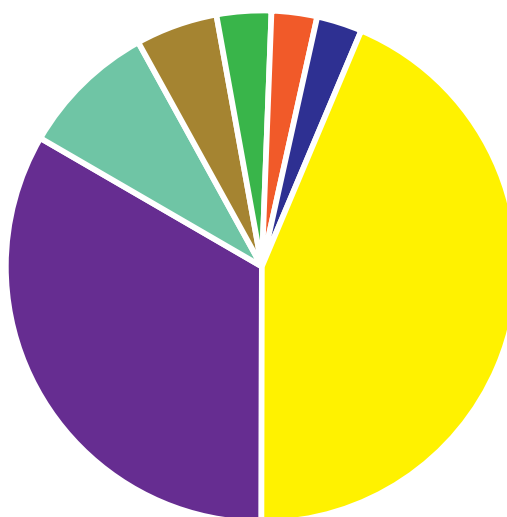
This table illustrates that my Office has maintained the 33% closure rate of cases within four months of receipt. It also indicates that 57% of cases closed last year were over 1 year old and it reflects specific initiatives aimed at closing older cases. Indeed, the number of cases on-hand which were more than three years old has been reduced from 30 at the end of 2010 to one at the end of 2011. My Office will continue to endeavour to close cases within four months while also concentrating on older cases.

Age profile of cases on hand in OIC at end 2011



Breakdown by public body of applications for review accepted by OIC

- Health Service Executive (58)
- Justice and Equality (15)
- Dublin City Council (9)
- Finance (6)
- Social Protection (5)
- RTÉ (5)
- Other bodies (76)



Breakdown of HSE cases accepted by OIC

- HSE Dublin Mid-Leinster (7)
- HSE Dublin North East (5)
- HSE National (26)
- HSE West (10)
- HSE South (10)



The above diagrams show a breakdown by public body of the cases which were accepted for review by my Office during 2011. Of the cases reviewed 58 cases or 34% relate to the HSE which is similar in number to the cases accepted in 2010. There were increases, on 2010, in the number of applications to my Office concerning Dublin City Council and RTÉ and a decrease in applications concerning the Department of Justice and Equality, the Department of Agriculture, Food and the Marine, the Department of Finance and the Department of Social Protection.

The second diagram shows a breakdown of the 58 applications to my Office concerning the HSE. There has been a significant increase in applications concerning HSE National from 6 in 2010 to 26 in 2011 and a decrease in applications from HSE South and HSE Dublin North East from 20 in 2010 to 10 in 2011 and from 11 in 2010 to 5 in 2011 respectively.

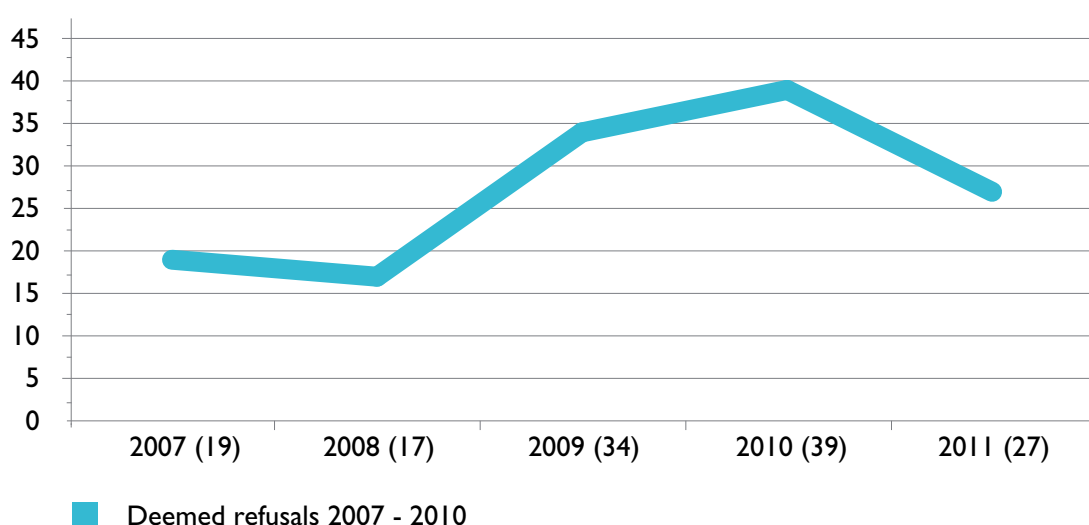
Settlements and withdrawals

A considerable number of cases referred to my Office for review are settled or withdrawn (59% in 2011). Settlements were achieved in 49 cases or 25% of cases closed during the year, while in a further 70, or 34%, the applicant withdrew his/her application.

Deemed refusals

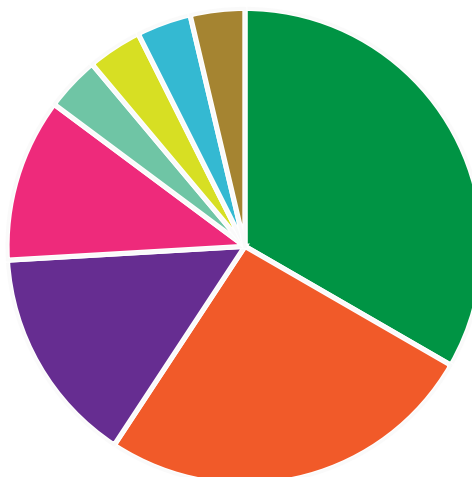
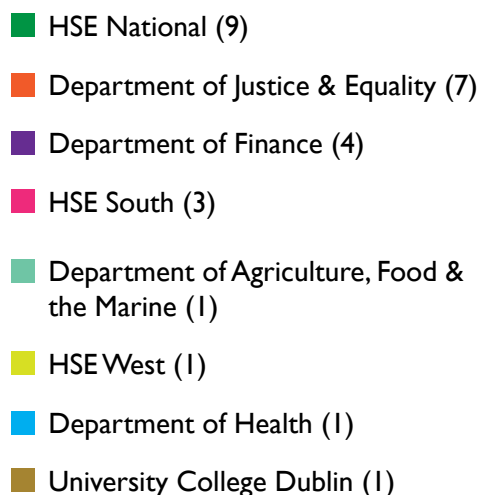
The FOI Act imposes statutory time limits on public bodies for the various stages of an FOI request, specifically, a decision on a request should issue within four weeks and, in the event of an application for internal review, a decision following internal review should issue within three weeks. A breach of these time limits (whether by means of no decision or a late decision at internal review stage) means that the requester has the right to take it as a deemed refusal of access, and is entitled to apply to my Office for review of any such deemed refusal.

Deemed refusals 2007-2011



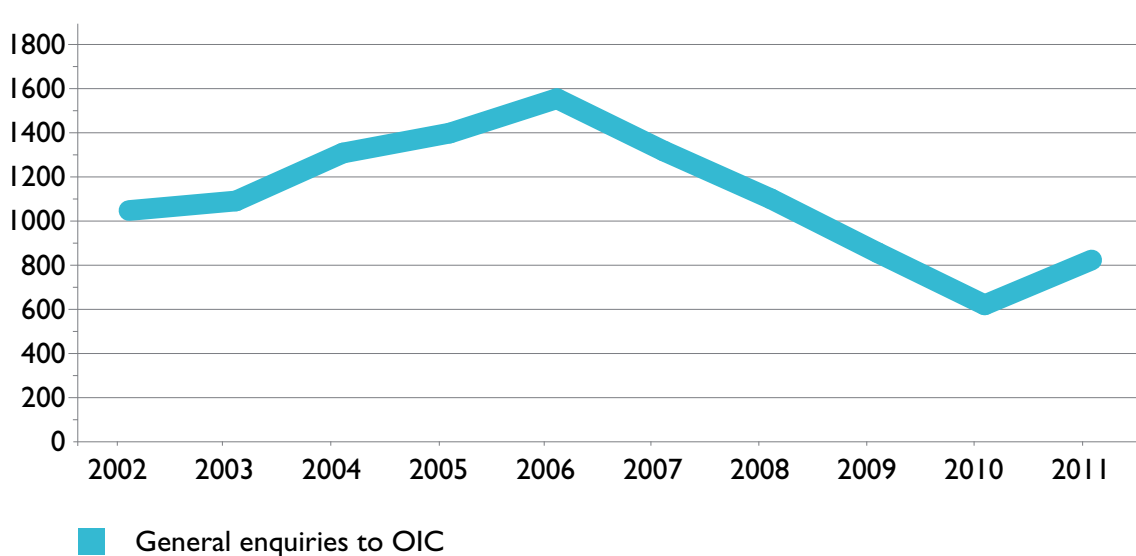
The chart above shows that the level of deemed refusals has fallen from 39 in 2010 to 27 in 2011. I welcome this decrease and hope that the instances of deemed refusals continues to fall in the coming years. The HSE was responsible for nearly 50% of the breaches in 2011, while receiving 37% of the FOI requests.

Deemed refusals



The HSE National and the Department of Justice and Equality had the highest incidences of deemed refusals with nine and seven breaches respectively. Breaches occurred in respect of eight public bodies in 2011 down from 21 in 2010. I welcome this general decrease but I am disappointed to note that the number of deemed refusals in respect of the HSE National has increased from five in 2010 to nine in 2011.

General enquires to OIC



In 2011, the number of enquiries made to my Office increased by 32% to 824, consisting of 633 telephone calls, 141 e-mails, 38 letters and 12 personal callers. These general enquiries do not relate to any particular review and typically involve requests for information about my Office or about the operation of the FOI Act, as well as matters outside my remit as Information Commissioner.

Fees received by OIC

Up-front application fees for certain FOI requests, internal reviews and applications for review by my Office came into effect on 7th July 2003. Where a request for information other than the personal information of the requester is made, the fees payable are:

- €15 for an FOI request (reduced to €10 for medical card holders and their dependants);
- €75 for a request for internal review of an FOI decision (reduced to €25 for medical card holders and their dependants);
- €150 for an application for review of an FOI decision by my Office (reduced to €50 for medical card holders and their dependants); and
- €50 for an application, by the third party to whom the records relate, for a review by my Office of an FOI decision to grant public interest access to records, following section 29 consultation procedures.

During 2011, my Office received 82 applications for review where a fee was paid. The total amount received in application fees by my Office in 2011 was €10,450. For various reasons €5,100 was refunded leaving a net amount received in 2011 of €5,350. Refunds were issued for the following reasons:

- €4,450 because the applications in question were either rejected as invalid, withdrawn or settled;
- €650 because the public body had not issued a decision or internal review decision within the time limits and was therefore of 'deemed refusal' status (section 41 of the FOI Act refers) which does not attract an application fee.

Statutory notices

This year, I again acknowledge the very high level of co-operation by public bodies in providing information in the form of submissions; records which are subject of review; statements of reasons for decision etc. I value this level of co-operation. There are specific provisions in the FOI Act concerning the production of records and information to my Office. These include:

- **Section 35 of the FOI Act** which empowers me to direct the head of a public body where I consider that the reasons given in support of a decision are not adequate, to direct that a full statement of reasons for the decision be provided to the requester concerned and my Office, and
- **Section 37 of the FOI Act** which empowers me to require the production of information and/or records, and to enter premises occupied by a public body for the purpose of acquiring any information which is required for the purpose of conducting a review.

In 2011, under section 37, I served one notice on a public body who had not co-operated with my Office following the normal issuing of correspondence. This notice was served on the Brothers of Charity Southern Services, Cork on 8 February 2011.

Brothers of Charity Southern Services, Cork.

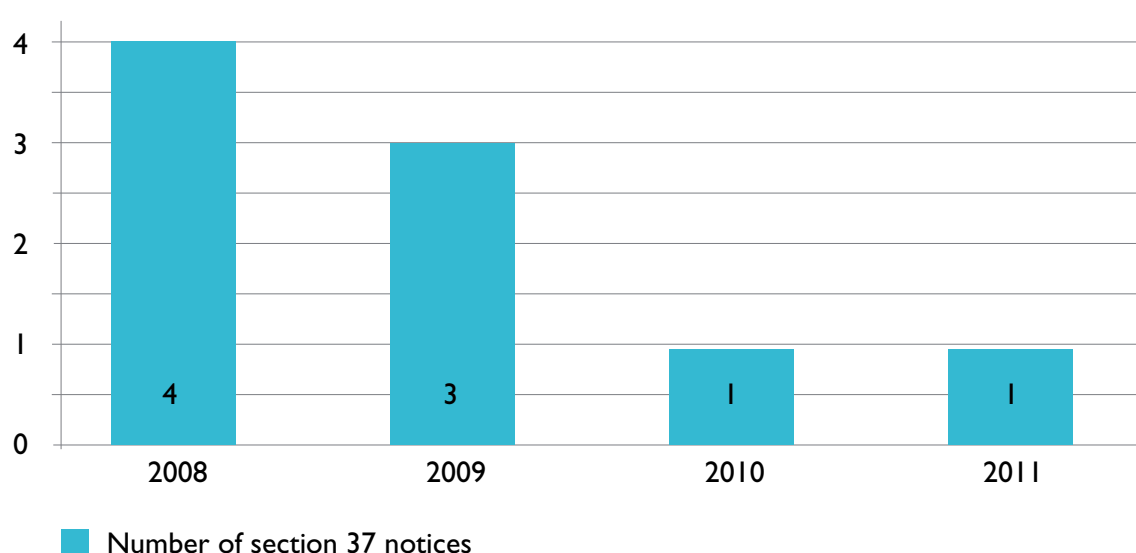
My Office requested records from the Brothers of Charity Southern Services, Cork, twice by email and five times by letter post. The Brothers were also contacted by telephone on three different occasions and were requested to clarify its position. As no response was received, I issued a notification under section 37 of the FOI Act to the Chief Executive on 8 February 2011. My Officials contacted the Brothers again on 1 March 2011, when no response was received to the section 37 notice. The Chief Executive contacted my Office and apologised for not responding to the section 37 notice. She reported that the FOI Coordinator was on long term absence which resulted in non-response to FOI correspondence and said that a replacement Records Manager was being recruited. She accepted full responsibility for ensuring that systems are in place to deal with FOI matters.

According to the Chief Executive, an internal review decision had already issued to the applicant on 25 May 2010, but the applicant had not advised the public body that she had not received that decision. As there was no documentary evidence to either substantiate or refute either party's contention, there was no further role for my Office.

I welcomed both the apology for non-reply to the section 37 notice and the assurance by the Chief Executive that steps are being taken to prevent a recurrence.

Public bodies have always co-operated to a high level with reviews by my Office over the years. I welcome the drop in the number of instances, as shown in the table below, in which I have had to use my formal powers under section 37.

Section 37 notices



I did not find it necessary to issue any section 35 notices in 2011.

Statutory certificates issued by Ministers/Secretaries General

The FOI (Amendment) Act of 2003 introduced provisions whereby certain records could be removed from the scope of the FOI Act by means of certification by a Minister or by a Secretary General of a Department. The relevant provisions are contained in sections 19, 20 and 25 of the FOI Act which also provide that a report specifying the number of such certificates issued must be forwarded to my Office.

Section 19

Section 19 is a mandatory exemption which provides protection for records relating to the Government or Cabinet. The definition of Government was amended by the 2003 Act to include a committee of officials appointed by the Government to report directly to it and certified as such by the written certification of the Secretary General to the Government.

I have been informed by the Secretary General to the Government that no section 19 certificates were issued by him in 2011.

Section 20

Section 20 of the FOI Act is a discretionary exemption which may protect certain records relating to the deliberative process of a public body. In the case of a Department of State, the Secretary General may issue written certification to the effect that a particular record contains matter relating to the deliberative process of that

Department. Where such a certificate is issued, the record specified cannot be released under the FOI Act. In effect, the exemption becomes mandatory. Any such certificate is revoked in due course by the issue of written certification by the Secretary General.

Having consulted with each Secretary General, my Office has been informed that no new section 20 certificates were issued during 2011.

I have also been informed that the certificate under section 20 issued by the Secretary General of the then Department of Justice, Equality and Law Reform on 11 August 2006, and referred to in previous Reports has not been revoked in line with the provisions of section 20(1A)(b). Therefore, it remains in force. A copy of the notification is attached at [Appendix I](#).

I have been further informed that the certificate under section 20 issued by the Secretary General of the Department of Defence on 4 March 2009, was reviewed in March 2011 and remains in force for a further two years. A copy of the notification is attached at [Appendix I](#).

Section 25

Where a Minister of the Government is satisfied that a record is an exempt record either by virtue of section 23 (law enforcement and public safety) or section 24 (security, defence and international relations) and the record is of sufficient sensitivity or seriousness to justify doing so, that Minister may declare the record to be exempt from the application of the FOI Act by issuing a certificate under section 25(1). Each year, the Minister(s) in question must provide my Office with a report on the number of certificates issued and the provisions of section 23 or section 24 of the FOI Act which applied to the exempt record(s) and I must append a copy of any such report to my Annual Report for the year in question.

Having consulted with each Secretary General, my Office has been informed that six new certificates were issued in 2011. Three new certificates were issued on 21 July 2011 by the Minister for Foreign Affairs and Trade. The remaining three new certificates were issued on 10, 22 and 25 June 2011 by the Minister for Justice and Equality ("the Minister"). Two certificates were renewed by the Minister on 19 February and 13 March 2010, respectively, for a period of two years and a new certificate was issued in 2010, as referred to in my 2010 Annual Report. This means that a total of six section 25 certificates were in force concerning the Department of Justice and Law Reform at 31 December 2011. A copy of the notification from the Secretary General is attached at [Appendix I](#) to this Report. The certificates issued above will fall for review under section 25(7) of the FOI Act in 2012.

I was notified by letter dated 6 March 2012 that, pursuant to section 25(7) of the FOI Act, the Taoiseach, the Minister for Public Expenditure and Reform and the Minister for Jobs, Enterprise, and Innovation, having reviewed the 12 certificates that were in operation for the period ended October 2011, were satisfied that the certificates should remain in force. I attach a copy of the notification at [Appendix II](#) to this Report.

Appeals to the Courts

A party to a review, or any other person who is affected by a decision of my Office, may appeal to the High Court on a point of law. Following the amendment of the FOI Act in 2003, the decision of the High Court can be appealed to the Supreme Court.

During 2011, the Supreme Court delivered a judgment on an appeal taken against a judgment of the High Court on a decision of my Office. The appeal against the judgment of the High Court was allowed and my decision was set aside as a result. An appeal to the High Court against a further decision of mine was settled between the parties and the High Court issued an order remitting the matter to me for determination in accordance with law. Summaries of these appeals can be found in [Chapter 2](#) of this Report.

Staffing matters

I would like to thank my staff and colleagues in the Office for their support during 2011. In particular, I wish to thank the Director General, Pat Whelan and the Senior Investigators, Fintan Butler, Elizabeth Dolan, Sean Garvey and Stephen Rafferty for their contribution and also Alison McCulloch, Melanie Campbell, Edmund McDaid, the staff of my Office and the staff of the Communications and IT Units for their help in compiling this Report.

There were a number of staffing changes in the Office during 2011. Senior Investigator Elizabeth Dolan availed of the career break scheme. Seán Garvey, Senior Investigator; Anne Moran, Investigator; Phyllis Flynn, Higher Executive Officer and Iris Kilbey, Clerical Officer moved to the Office of the Ombudsman and Ciarán O'Donohoe, Investigator joined Corporate Services Unit. I welcome Stephen Rafferty, Senior Investigator; Anne Garland and Maurice Kiely, Investigators, Edmund McDaid, Higher Executive Office and Denise Freeman, Clerical Officer, who joined my Office during the year. I would also like to thank Fintan Butler, Senior Investigator, who joined my Office for part of 2011.

Publication: Irish Times
Date: Tuesday, January 4, 2011

OPW history book to go €350,000 over budget

CARL O'BRIEN

A HISTORY of the Office of Public Works to be published this year will cost the taxpayer €350,000 more than was originally envisaged.

The OPW agreed a two-year contract in 2002 with a professional historian to write a history of the organisation at a total cost of €76,184.

However, when the full extent of archival work needed became apparent, the OPW agreed a further extension until January 2006 at a further cost of €78,470.

No signed contract went beyond this point. However the project has been continually extended by the OPW and will be finally completed this year.

Publication: Sunday Business Post
Date: Sunday, January 23, 2011

Former steel site has cost taxpayer €50 million

By John Burke

Public Affairs Correspondent

The state has spent €50 million clearing hazardous waste from the former Ispat Irish steelworks site in Cork harbour – almost twice the original estimate.

Publication: Irish Independent
Date: Friday, December 16, 2011

HSE spent over €1.3m to care for three teenagers

Gordon Deegan

THE HSE spent €1.32m caring for three troubled teenagers at a special-care unit in the first six months of this year.

At more than €440,000 per teen, the spend was a quarter of a million euro over budget. Coovagh House in Limerick is currently closed and is due to re-open later this month, after the HSE spends €650,000 on refurbishing the unit.



OVER BUDGET

OPW HISTORY BOOK TO
GO €350,000 OVER BUDGET

MORTGAGES

MINISTERS CONCERN ABOUT DANGER
OF 100% MORTGAGES WAS DISMISSED

CARE

HSE SPENT OVER €1.3M TO
CARE FOR THREE TEENAGERS

ABUSE

HEALTH BOARD CONSISTENTLY FAILED
TO LAUNCH FULL INQUIRY INTO CLAIMS

TAXPAYER

SITE HAS COST

TAXPAYER €50 MILLION

RENT

STATE TO PAY €1M IN RENT FOR
OFFICES OF DEFUNCT AGENCIES

CHAPTER 2

Chapter 2: Issues arising

The purpose of this chapter is to highlight issues relating to the operation of the FOI Act which arose over the last year. Some of the issues are operational and relate to particular public bodies, while others are matters which fall to be resolved at Government level or by the Department of Finance. I also include in this chapter details of judgments/orders delivered by the Courts in 2011.

The issues discussed are:

- Government plans for FOI
- Regulations under section 28(6) of the FOI Act
- Poor case handling by public bodies
- Section 29
- Splitting FOI requests
- Settled cases
- Judgments / orders delivered by the Superior Courts during 2011

Government plans for FOI

Another year has passed and once again I must report that no additional public bodies have been brought within the scope of the FOI Act. However, as stated in my previous Annual Report, I welcome the commitment shown by the current Government in the Programme for Government, Government for National Recovery 2011 – 2016, which promised legislation to restore the Freedom of Information Act to what it was before the 2003 amendments and also to extend its remit to other public bodies. I am also pleased that my Office was afforded an opportunity by the Department of Public Expenditure & Reform to provide a list of suggestions aimed at improving the operation of the Act and I am hopeful that the suggestions provided will be reflected in the amended Act. I understand that the legislation is in the drafting stage and I would urge that the changes be implemented as soon as possible.

Regulations under section 28(6) of the FOI Act

In my annual report for 2009, I welcomed the introduction of the Freedom of Information Act, 1997 (section 28(6)) Regulations, 2009, [S.I. No 387 of 2009](#) which were introduced on 23 September 2009 replacing the previous Regulations (S.I. No. 47 of 1999).

As a result of these revised Regulations decision makers can now take account of factors other than the relationship between the applicant and the person to whom the requested records relate when making decisions on deceased persons records. In addition to prescribing the classes of requesters to whom the records of deceased persons will be made available, the 2009 Regulations also require the application of a public interest test. The Guidance Notes which were published by the Minister for Finance pursuant to S.I. No. 387 of 2009 may serve as a useful tool for decision makers when dealing with the difficult question of what factors should be considered in determining where the balance of the public interest lies in any such FOI request.

I recently had the opportunity to review the first application to my Office having regard to the new Regulations and the relevant Guidance Notes. That decision is summarised in [Chapter 3](#) of this Report.

Poor case handling by public bodies

[Failure to recognise Internal Review request and poor scheduling of records](#) - Case 090041

In this case, my authorised official wrote to the Commissioners of Public Works to outline his concerns about how the case was processed. Firstly, the Office of Public Works (OPW) did not consider the applicant's letter of 31 December 2008 to represent an application for internal review of the OPW's decision on his request. My official noted that the letter of 31 December 2008 clearly referred to the applicant's earlier FOI request, included the relevant fee, and clearly disputed the adequacy of the OPW's searches for particular records of relevance to the request, as well as the application of legal professional privilege to certain of the withheld records. While I understand that the OPW's position is that the letter did not formally request an internal review, nonetheless the FOI Act places an onus on public bodies to assist requesters. As stated by my official, at the very least, one would have expected the OPW to have clarified with the requester whether or not the letter had been intended as a request for an internal review under the FOI Act.

On a separate matter, while my authorised official noted that the OPW, particularly the staff of Historic Properties, had spent much time in dealing with this case and were very willing to engage with my Office, a number of records initially considered by the OPW not to be relevant to the request were, having been requested and examined by this Office, found to be relevant. It was unclear to my official if this arose from the poor scheduling of the records, from a misunderstanding of the request, or for some other reason.

In his letter to the Commissioners, my official suggested that all staff dealing with FOI matters should be made aware of the importance of proper scheduling of records. In this case, proper schedules would have listed all records on the file, not just those considered by the OPW to be relevant to the request. In turn, the schedule should have listed all such records deemed not to be relevant to the request, as well as the OPW's decision to release or withhold the remainder. Copies of all records on these files should then have been provided to my Office for a review of whether or not the OPW's exclusion of particular records on the grounds of relevance was appropriate. Such an approach would have saved a lot of time in this case, for both our Offices. It was also suggested to the Commissioners that some refresher training in the requirements of the FOI Act could be necessary for all relevant staff.

The Commissioners have since acknowledged that a complete schedule of records should have been provided in this case and have confirmed that appropriate FOI training measures are now in place.

Section 29

Section 29 of the FOI Act sets out the procedures to be followed where the public body considers that although a record is exempt from disclosure because it contains information given in confidence (section 26), commercially sensitive information (section 27) or personal information relating to a third party (section 28), on balance, the record falls to be released in the public interest.

Where section 29 applies, the body is required to notify an affected third party before making a final decision on whether or not the exemption(s), otherwise found to apply, should be overridden in the public interest. The time limits provided for such consultation are:

- The person(s) to whom information in the records relates must be notified, within two weeks, that an FOI request has been made and that the request falls to be granted in the public interest.
- The two week notification period may be extended by a further two weeks [section 29(2A)] if the body considers that the number of records or the number of third parties to be notified is such that it is not reasonably possible to comply with the two week notification period. The requester must be notified of the extension before the expiration of the first two week period.
- The person to whom information in the records relates must make a submission to the public body in relation to the FOI request within three weeks of receipt of the notification referred to above.

During 2011, the consultation with the person to whom the information related was not carried out within the prescribed time limits in a number of applications to my Office for review to which section 29 applied. In one such case (case 110162), Cork City Council (the Council) applied for a review of the decision of Fáilte Ireland to grant access to documentation affecting the interests of the Council. The original request was received by Fáilte Ireland on 2 June 2011 with the Council being notified on 24 June 2011. The ten day period provided by section 29(2) expired on 17 June 2011. Fáilte Ireland confirmed that it did not notify the original requester of any extension of time before 17 June 2011. The requester was notified on 27 July 2011 of an extension of time due to the considerable number of records involved, but this was outside the period provided under section 29(2A)(b). Furthermore, the Council did not provide its submission to Fáilte Ireland within the 3 week period specified in section 29(2).

It is clear from the above that the section 29 requirements were not applied correctly in this case. Therefore, following careful consideration, I decided to annul Fáilte

Ireland's decision. As a consequence of my decision, Fáilte Ireland had to deal afresh with the original request, and apply the section 29 requirements correctly.

Splitting FOI requests

I am aware from reviews coming before me that there are instances where for administrative reasons it may be necessary to assign elements of an FOI request to more than one functional area of a public body for the purposes of issuing a decision to the requester. This is particularly the case with FOI requests to the HSE where FOI Liaison Officers may cover a number of functional areas. In such cases, it is important that the FOI Liaison Officer retains control of the FOI request for purposes of coordinating replies and ensuring that time limits are adhered to etc. It is undesirable that a number of decisions on an FOI request would issue in a haphazard fashion without any attempt to synchronise the process and make the decision/s as seamless as possible for the requester. While I accept that this may not be a widespread or even a frequent problem, I have seen it and I am concerned, given that less than 2% of all FOI requests reach my Office, that it may be an issue.

As a corollary, I should also say that the Central Policy Unit, Department of Public Expenditure and Reform, in its Notice No. 11, has instructed that, even where a request is split for administrative reasons the maximum up-front fee that may be charged is €15 and similarly for internal review where the maximum fee is €75. Again, I have seen one instance where each of five individual 'decisions' on one FOI request included notification that internal review would attract a fee of €75.

I would urge FOI Liaison Officers to pay due regard to CPU Notices generally and to manage FOI requests as seamlessly as possible from the perspective of the citizen.

Settled cases

I place considerable emphasis, as parts of my reviews, on resolving cases without the need for a binding decision. During the year a high percentage of reviews (60%) accepted in my Office were settled or withdrawn. There are many and multiple reasons why reviews are ultimately settled. The experience of my Office in respect of settlements reached suggests that there is significant scope for public bodies to take a more active approach in consulting with requesters to determine if their requirements may be met by narrowing the differences between the two parties and reaching agreement on an acceptable settlement.

I would also draw the attention of public bodies to CPU Notice No. 5 which provides guidance on the release of information outside of the FOI Act (available on the Unit's

website at www.foi.gov.ie). As the Notice suggests, administrative arrangements for the release of information outside of the FOI Act can work to the benefit of both the public body and the requesters as such release enhances the confidence of clients in the body.

In a case involving the Department of Public Expenditure and Reform, my Office achieved a settlement without the need for a binding decision. Mr. Mark Tighe of *The Sunday Times* made a request to the Department (then the Department of Finance), for access to records relating to the PMDS evaluation programme. The requester specified that he sought access to:

1. All reports on the operation and effectiveness of the PMDS programme to date;
2. All submissions received on the same from 2007 to date;
3. A breakdown of the 2009 compliance rates.

The Department refused the request under section 20 (deliberations of public bodies) and section 21 (functions and negotiations of public bodies) of the FOI Act. The requester applied to this Office for a review of the Department's decision in a letter dated 5 May 2011.

At an early stage in the review, it became apparent that, where the numbers were small, the statistical returns from public bodies on PMDS ratings awarded to the different grades in the respective bodies could lead to particular officers being identified and that such identification would be personal to the officers concerned. Accordingly, the requester agreed to exclude the statistical returns of particular public bodies with specific breakdowns by grade from the scope of his request. Records containing composite figures of ratings awarded by grade for the civil service generally, as opposed to particular public bodies, remained within scope, however.

The records remaining within scope included a draft strategy document on the proposed development of PMDS which referred to feedback given by Secretaries General and Heads of Offices. On the face of it, this document and certain related records were exempt under section 20 of the FOI Act, provided that the deliberative processes concerned were still on-going. The remaining records at issue did not appear to be exempt on either of the grounds invoked by the Department. My Investigator therefore contacted the Department about the matter with a view to a possible settlement.

In response, the Department agreed to the release of the majority of the records covered by the request. The Department made the following submission pertinent to

the three records over which it continued to claim exemption: “The records comprise both the overall strategy of this Department to reform PMDS and a range of detailed proposals on how the issues involved can be tackled. The reform of PMDS, an ongoing process being undertaken on a phased basis, involves negotiation with the staff unions at the PMDS Subcommittee of General Council”. However, among the records subject to release with the Department’s agreement was a compilation of the results received from Departments and Offices showing compliance with PMDS for the year 2009. Moreover, the Department advised that the results in respect of 2010 were also available and, although outside the scope of the request, it proposed to release a compliance table for 2010 as well in the event of a settlement. My Investigator then contacted the applicant by telephone, and he agreed to the settlement proposal in the circumstances.

Court judgments

During 2011, the Supreme Court delivered a judgment on an appeal taken against a judgment of the High Court on a decision of my Office. The appeal against the judgment of the High Court was allowed and my decision was set aside as a result. An appeal to the High Court against a further decision of mine was settled between the parties and the High Court issued an order remitting the matter to me for determination in accordance with law.

The full text of the judgment of the Supreme Court is available on my website www.oic.gov.ie and the following is a summary of the main points in that judgment, along with a summary of the main points in the case which was remitted.

1. The Governors and Guardians Rotunda Hospital v. Information Commissioner [2011] IESC 26:

Background: A woman sought access under FOI on behalf of her father to a record of her grandmother’s age when she gave birth to him in 1922. The Hospital refused access to two records held - an extract from the Labour Ward Book and a record from the Porter’s Lodge Book – and the woman applied to my Office for a review of that decision. My Office’s decision (Case 050148) to annul the decision of the Hospital and to direct the release of the records was issued on 14 December 2007.

Issue: The Hospital appealed my decision to the High Court on a number of points of law. Although it had not done so in the course of

the review, it claimed that the FOI Act did not apply at all since the records came into existence prior to its enactment. It submitted that my Office had erroneously held that the prohibition on release to persons other than the applicant of personal information under section 28(1) of the FOI Act did not apply in the circumstances of this case. The Hospital contended that the age of the Applicant's grandmother at the time of her father's birth was information given to it in confidence.

High Court:

The High Court upheld the finding that the age of a person is personal information of a kind that is available to the public via the General Registration Office (GRO) and by virtue of section 28(2) (c) of the FOI Act, the provisions of section 28(1) do not apply to it. The High Court also found that because the age is publicly available information, it cannot be concerned with private or secret matters and so, cannot have the necessary quality of confidence required for the operation of the confidentiality exemption in section 26 of the FOI Act. The High Court dismissed the Hospital's appeal. The Judgment of the High Court was appealed to the Supreme Court by the Hospital.

Supreme Court

The Supreme Court delivered its majority judgment on 19 July 2011 where it upheld the appeal of the Hospital by a majority of four to one. The main elements of the judgment are summarised below.

The Supreme Court held that information may constitute personal information if it falls within any of the classes listed under the definition of personal information at section 2 subparagraphs (i) to (xii) of the FOI Act, and that it is not necessary for the information to also satisfy either of the over-arching requirements at sub-paragraphs (a) and (b).

The Supreme Court also found that the protection afforded to information obtained in confidence at section 26(1)(a) stems from the circumstances in which the information is given and not from the nature of the information itself. The protection applies to information given in confidence but does not require that information to be concerned with private or secret matters. The Supreme Court found that the age of the applicant's grandmother in 1922,

when she gave birth to her father; was given to the Hospital in confidence and in circumstances satisfying the terms of subsection 26(1)(a). The Supreme Court upheld the Hospital's appeal.

2. Ms X and Information Commissioner and the Health Service Executive (2010 221 MCA)

Background: Following a decision of the HSE to grant access to reports relating to inspection of a nursing home, the person to whom information in the reports related (Ms X) sought a review of the decision to my Office. Before issuing its decision to grant access, the HSE had engaged the consultation procedures provided for in section 29 of the FOI Act. The decision of my Office following review (Case 090314) affirmed the decision of the HSE to grant the requested access. That decision issued from my Office on 11 June 2010.

High Court: Ms X appealed the decision of my Office to the High Court on a point of law and sought an Order refusing access to the reports in their entirety. The grounds for the appeal included an assertion that, in including a reference in the decision to material published on the websites of the HSE and HIQA, my Office had considered material which was obtained subsequent to the conclusion of the submissions of Ms X to my Office. The grounds also included an assertion that my Office erred in law in not providing Ms X with an opportunity to address the exemption of the FOI Act which had been dis-applied by a determination to grant access in the public interest. My Office accepted the validity in law of the assertions of Ms X and, by Order dated 31 May 2011, the High Court remitted the matter to my Office for determination in accordance with law.

Publication: Medical Independent
Date: Thursday, December 1, 2011

Consultants claim Mercy ED is unsafe

JAMES FOGARTY

Two emergency consultants at the Mercy University Hospital Cork have said the emergency department (ED) is unsafe and should be closed at night, the *Medical Independent* can reveal.

According to documents released under the Freedom of Information Act, the Board of Governors at the hospital received emails in September 2010 from senior doctors outlining serious safety concerns about staffing levels at the ED.

Publication: Sunday Independent Business
Date: Sunday, August 14, 2011

Sunderland FC chief proposed €2bn bank fund

Irish-American billionaire
met officials over plan

NICK WEBB

ELLIS Short, the Irish-American billionaire who controls Premiership football club Sunderland, proposed a plan to raise a €2bn fund for Irish banks.

Publication: Evening Herald
Date: Saturday, November 19, 2011

Killer MacArthur took legal action to win his freedom

By **Charlie Mallon**

KILLER Malcolm MacArthur was granted a phased release programme as new High Court proceedings over his continued detention loomed.

MacArthur was preparing to make a new submission based on documents released to him under the Freedom of Information Act, the *Herald* can reveal.

Publication: Sunday Independent Business
Date: Sunday, July 10, 2011

EPA splurges thousands on opera, yo-yos, puppets and treasure hunts

Investigation reveals green quango's waste of 'taxpayers' money since beginning of the recession

Nick Webb
EXCLUSIVE

THE taxpayer-funded Environmental Protection Agency has splurged hundreds of thousands of our euros on corporate treasure hunts, cookery courses, sponsorship of opera, oil paintings and branded wooden yo-yos, a Sunday Independent investigation can reveal.

Since the recession began in 2008, the green quango, which is tasked with making sure that Ireland stops destroying the planet, has shovelled out taxpayer money on some goods and services that have a questionable impact on improving the environment.

Publication: Sunday Independent
Date: Sunday, July 17, 2011

Plum job at Red Cross for banker

Minister was not consulted about ex-AIB chief's €95,000-a-year role

HARRY LEECH

A SPOKESPERSON for the Department of Defence has confirmed that the Irish Red Cross did not consult with it or the then Minister for Defence over the appointment of former AIB Ireland managing director Donal Burke as general secretary of the Irish Red Cross at a salary of €95,000-a-year, most of which is paid from a government grant.

Publication: Irish Independent
Date: Monday, April 25, 2011

Hundreds of unqualified taking work off teachers

400 unskilled taught for 25pc of school year
Big numbers of graduates languish on dole

Katherine Donnelly

PRIMARY school children are being taught by hundreds of unqualified teachers, while graduates struggle to find work.

The scale of the scandal is underlined by the revelation that 400 people with no teaching qualifications worked for at least 50 days in primary schools in the current school year.

BANK FUND

SUNDERLAND FC CHIEF

PROPOSED €2BN BANK FUND

BANKER

LEGAL ACTION

**PLUM JOB AT RED
CROSS FOR BANKER**

UNSAFE

**CONSULTANTS CLAIM
MERCY ED IS UNSAFE**

SPLURGES

**INVESTIGATION REVEALS GREEN QUANGO'S
WASTE OF TAXPAYERS' MONEY**

UNQUALIFIED

**HUNDREDS OF UNQUALIFIED
TAKING WORK OFF TEACHERS**

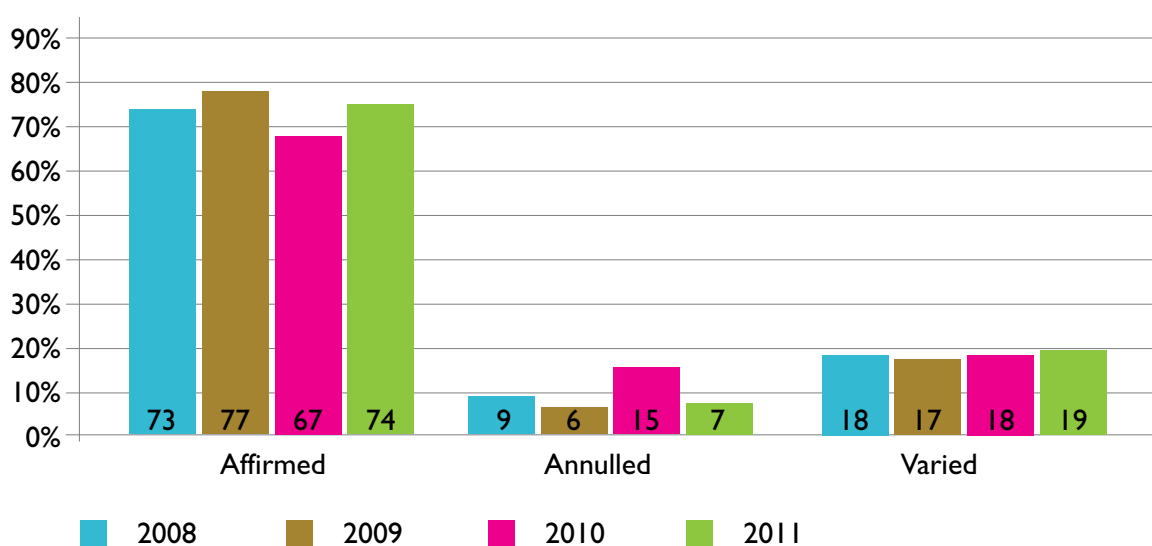
CHAPTER 3

Chapter 3: Decisions

Formal decisions

In 2011 a total of 200 cases were completed by my Office. This total is comprised of formal decisions, settlements, withdrawals, invalid and discontinued decisions. I will deal with the 22% of cases which went to formal decision in this chapter. The outcome of the reviews which went to formal decision in the years 2008, 2009, 2010 and 2011 is highlighted in the table below.

Percentage comparison of formal decisions 2008-2011



This table shows that, the Office annulled fewer decisions of public bodies in 2011 than in the previous year (15% in 2010 and 7% in 2011). It can also be seen from the chart that a greater number of decisions were affirmed by the Office during 2011 (74%) than in 2010 (67%).

Below I focus on a small number of decisions issued during 2011 to highlight points of interest to public bodies and FOI users alike. The full text of these decisions is available on my Office website (www.oic.gov.ie).

Significant decisions

Mr X and the Department of Communications, Energy and Natural Resources – Case 080184

The applicant in this case sought access to the “database of coverage information that informs the map entitled ‘Wireless and Broadband Coverage’”. The request dated 25 April 2008 stated that the information “should be current to date” and should include the data informing the map of March 2008. Previous decisions from my Office have generally taken the view that such a request would encompass only those records that had been created by the date of the request. The application in this case, dated 25 April 2008 was received by the public body on 28 April 2008. According to the Department, it was likely that changes would have been made to the database between 25 April and the date of receipt of the request 28 April. In such circumstances, the database as it stood on the date of the request would no longer have existed by the date of receipt. This case has led to a revision of my Office’s view as to what is the ‘operative end date’ in considering records of relevance to a request. Thus the appropriate date should actually be the date of receipt of a request.

The applicant’s request included access to the ‘map of March 2008’, however, according to the Department no backups existed for the map at that time. It was the applicant’s view that the map could be recreated by identifying and excluding or restoring all records subsequently added to or removed from the system. It could be argued that the Department should rebuild the database from scratch to how it stood on the relevant date. However, I am not persuaded that the FOI Act requires such steps to be taken. Previous decisions have set out my understanding that the FOI Act is concerned with records that exist, not with records that should exist. I do not consider that the FOI Act can be invoked to require that a public body attempt to bring a particular record back into existence by processing or manipulating information, whether on a database or as contained in other records in its possession. This is entirely different, however, from a scenario in which a public body can identify and extract an exact copy of a particular record, say from a backup tape.

I understand in this particular case, neither the Department nor the consultant company that was involved in producing the maps on behalf of the Department made backup copies or any other record of the details on the database on that particular date.

Therefore, the Department submitted that it was not possible for it to re-create the database along the lines suggested by the applicant. Thus I found that the record the subject of this request no longer exists and that section 10(1)(a) of the FOI Act applied.

Ms X and Department of Health & Children – Case 090315

Ms X applied for a review of the decision of the Department of Health and Children (the Department) to refuse access, under the FOI Act, to interim reports of a Commission of Investigation (COI) on the basis that, by virtue of section 40(1) of the Commissions of Investigation Act 2004, the FOI Act does not apply to such records.

The records to which access was sought by Ms X were five interim reports of a COI as provided to the Minister for Health and Children (the Minister) together with correspondence relating to time frames, copies of submissions made, transcripts of evidence, copies of records relating to complaints and other background information. The Department decided to grant access to some records in full, to others in part and refused access to other records including interim reports of the COI. The basis for the decision to refuse access was that they were outside the scope of the FOI Act because of the application of section 40 of the Commissions of Investigation Act 2004 (the COI Act).

Section 40(1) of the COI Act provides that the FOI Act does not apply “to a record relating to an investigation by a commission unless –

- (a) the record was created before the making of the order establishing the commission, or
- (b) the record relates to the expenses of the commission or the appointment of persons under section 7 or 8 or other matters concerning the general administration of the commission.”

It was established quickly that none of the records were created before the order establishing the COI was made; neither did the records relate to expenses or to the appointment of members or assistants to the COI. It was beyond doubt therefore that these were records “relating to an investigation by a commission”. As such, the FOI Act would apply to these records only if it were the case that they (or some of them) related to “other matters concerning the general administration” of the COI.

Following on from preliminary views of my Office, Ms X indicated that she had difficulties with my Office’s interpretation of the term “general administration”. She held that, because “general administration” was not defined in either the FOI or COI Acts, the rules of Common Law should apply and that my Office should have sought a definition of the term from the Courts.

My Office accepted the contention that the “ethos” of the FOI Act is one of providing access to information “to the greatest extent possible” - as set out in the Long Title to the FOI Act and that section 34(12) provides that a decision to refuse to grant a request for access to records is presumed not to have been justified unless the head (of the Department in this case) shows to the satisfaction of the Commissioner that the decision was justified. However neither the “ethos” of FOI, nor the provision of section 34(12) of the FOI Act, are particularly relevant where the first decision to be made is whether, in fact, the records sought are of a kind to which the FOI Act applies in light of section 40(1) of the COI Act.

The term “general “administration” is, obviously, a non-specific term. The adjective “general”, taken by itself, does not present a problem and is understood to mean, as in one definition, “not specialised or limited in range of subject, application, activity, etc.” The term “administration”, on the other hand, has a number of possible meanings including “the process or activity of running a business, organization, etc.” In this sense, “administration” is understood as a set of processes which enable an organisation to function and achieve its core objectives. However, it also has specific meanings in the contexts of law (administration of an estate), business (a company in administration) and government (the administration as opposed to the legislature). “Administration” is not a term where, for purposes of legal construction, the ordinary meaning of the words provide a clear understanding of what the legislature intended.

Hogan and Morgan’s *Administrative Law in Ireland* (Fourth Edition) comments (at P.4) as follows:

“Administration is one of those awkward words which takes its meaning from the word to which it is opposed, i.e. in this Part, to “policy”. Unfortunately for clarity, it can also be used in other senses as when it is opposed to legislation or when an administrative decision is contrasted with a quasi-judicial decision....”

To determine the meaning of “general administration” in the context of the COI Act, I considered it useful to identify the other term or process to which it is intended to be in opposition. Taking this approach, it is clear that the term “general administration” is intended to be understood as in opposition to the substantive investigative work of the particular commission. Taking the COI Act in its entirety, it is clear that the legislature intended that a high level of confidentiality would apply to the collection and assessment of evidence and to the thought processes of a COI generally. On this approach, the term “general administration” excludes anything which serves to disclose details of the collection and assessment of evidence or the thought processes of the COI more generally. On this approach also, any disclosure of how a COI does

its work (in terms of evidence gathering, assessment and thought processes more generally) would occur in the final report which (subject to some limited grounds) must be published by the “specified Minister”. Thus, in the context of this review, I considered that the term “general administration” includes matters of accommodation, provision of facilities, staffing, expenses, accounting and other practical aspects of how a COI conducts its business, but excludes anything which discloses details of the collection and assessment of evidence or the thought processes of a COI.

On this basis, and considering that it was not feasible to consider preparing redacted versions of a small number of documents from which information on the substantive work of the COI could be excluded, I found that the FOI Act did not apply to the records on the grounds that section 40(1) of the COI Act 2004 applied to them. Having found that the FOI Act did not apply to the records there was no basis for considering the relevance of any exemptions of the FOI Act. I issued my decision accordingly.

Mr A and the Health Service Executive (HSE) - Case 100151

The request in this case was received from solicitors, acting on behalf of their client who was seeking the medical records of his late wife. The HSE refused access to the records on the basis of section 28 of the FOI Act. Section 28(6)(b) of the Act provides that the Minister for Finance may make regulations for access by specific categories of requester to the records of deceased persons. The relevant regulations (S.I. No. 387 of 2009), were made by the Minister on 23 September 2009, replacing the previous regulations (S.I. No. 47 of 1999). The HSE refused access to the records.

Prior to her death, the deceased was referred to the mental health services and the records sought comprised of 16 pages created in the period from July 2008. At the time, the deceased gave her marital status as ‘separated’ and nominated a contact person other than her husband. The records recorded the patient’s background, family situation and her accounts of experiences and perceptions. Portions of the records contained sensitive information which she gave to the doctor. The notes also included the doctor’s impressions and medication details.

The 2009 Regulations introduced a public interest test and provided that regard should be had to all the circumstances and to any relevant guidelines published by the Minister. The Guidance Notes state that in relation to medical records, due regard should be had to the confidentiality of medical records in accordance with the Irish Medical Council Guide to Ethical Conduct and Behaviour.

I found that having regard to the content of the records, to all the circumstances and to the relevant guidelines published by the Minister, the public interest would not on

balance be better served by granting this request. I affirmed the decision of the HSE and my decision to refuse access to the records sought in this case has been appealed to the High Court. At the time of writing, a stay has been placed on the High Court proceedings pending the outcome of judicial review proceedings initiated by Mr A on the vires of the 2009 regulations.

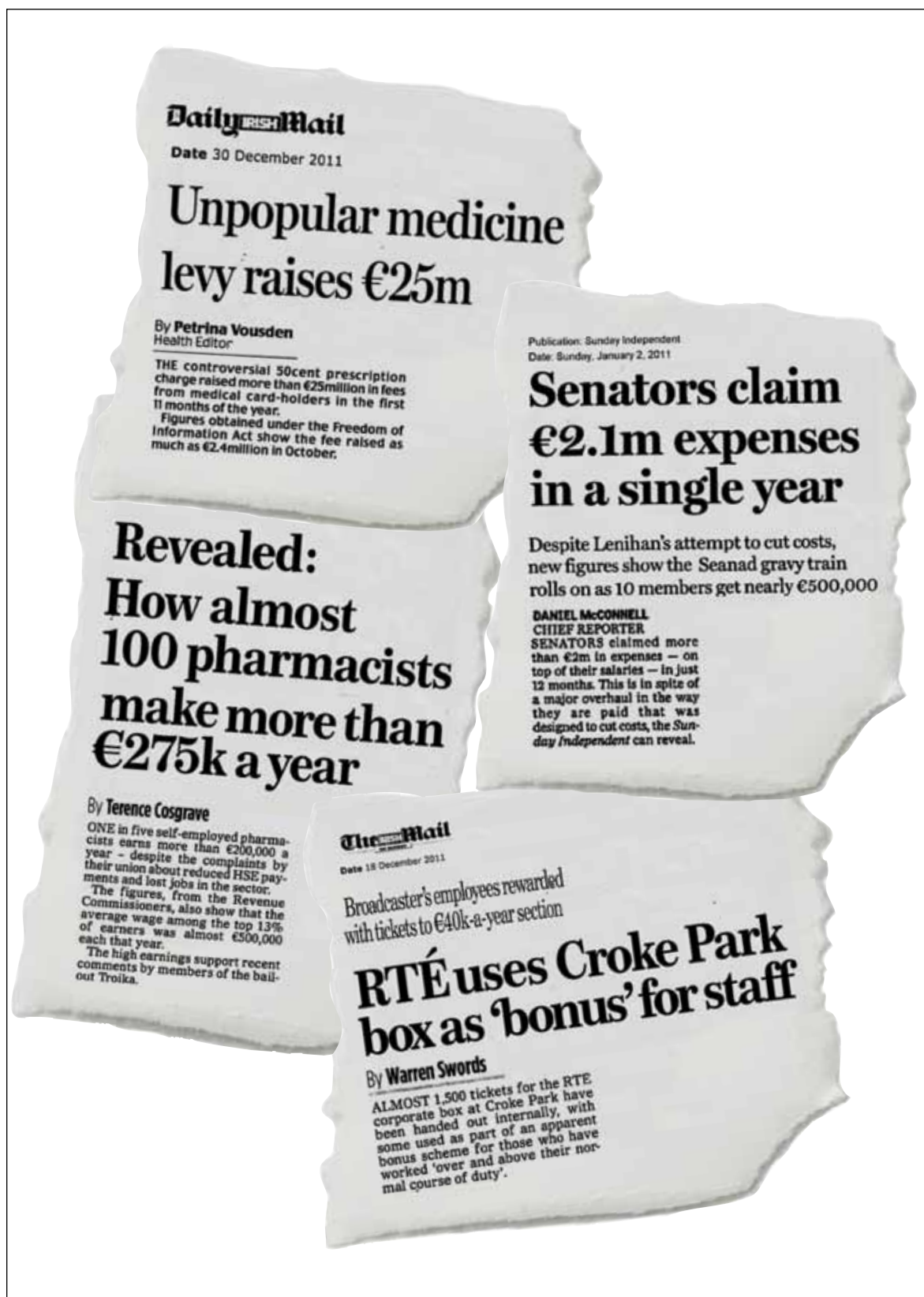
Sunday Times and the Department of Justice and Equality - Case 100263

During 2011, I issued a decision concerning the representations made to the Minister for Justice and Equality by political representatives on behalf of lawyers seeking judicial appointment. The applicant, a Sunday Times journalist, sought access to records of all representations received by the Department in relation to judicial appointments up to July 2010.

The Department claimed that the records contained personal information and refused access on the basis of section 28(1) of the FOI Act. Following consultation by my Office with the applicant, it was agreed to narrow the request to all representations made on behalf of lawyers who were subsequently appointed to the judiciary which reduced the request to six records of political representations.

The Department claimed that it was not in the public interest to release the records and could be detrimental to the wider public interest. It said that *'taken out of context, these records could be misrepresented and misused to undermine the judicial office and judicial functions of the individual judges concerned and the wider judicial body'*.

In my decision, I commented that the public interest is served where the process of judicial appointments is made as transparent as possible. It is not just the fact that judges are paid from public funds but more important perhaps is the fact that they are entrusted, on behalf of the people, with independent and far reaching powers. I found that the names (but not the home addresses) of the six judges concerned should be released in the public interest.



UNPOPULAR

UNPOPULAR MEDICINE

LEVY RAISES €25M

BONUS

RTE USES CROKE PARK
BOX AS 'BONUS' FOR STAFF

EXPENSES

THAN €275K A YEAR

PHARMACISTS MAKE MORE

REVEALED: HOW ALMOST 100

REVEALED

SENATORS CLAIM MORE
THAN €2M IN EXPENSES
IN A SINGLE YEAR

CLAIM

CHAPTER 4

Chapter 4: Statistics

Section I - Public Bodies - 2011

Table 1:	Overview of requests dealt with by public bodies
Table 2:	FOI requests dealt with by public bodies and subsequently appealed
Table 3:	FOI requests received - by requester type
Table 4:	Overview of FOI requests dealt with by public bodies
Table 5:	Analysis of FOI requests dealt with by public service sector
Table 6:	FOI requests received by Departments/Offices
Table 7:	FOI request received by local authorities
Table 8:	FOI requests received by the HSE
Table 9:	FOI requests received by Voluntary Hospitals, Mental Health Services and Related Agencies
Table 10:	FOI requests received by third-level education institutions
Table 11:	FOI requests received by other bodies
Table 12:	Fees charged

(Note: Figures for the above tables are supplied by the Civil Service Users Network, the HSE, the Local Authorities FOI Liaison Group, the Department of Health and Children, the National Federation of Voluntary Bodies and the Liaison Group for the Higher Education Sector and collated by the Office of the Information Commissioner.)

Section II - Office of the Information Commissioner - 2011

Table 13:	Analysis of applications for review received
Table 14:	Analysis of review cases
Table 15:	Applications for review accepted in 2011
Table 16:	Outcome of reviews - 3-year comparison
Table 17:	Subject matter of review applications accepted - 3-year comparison
Table 18:	Applications accepted by type - 3-year comparison
Table 19:	General enquiries
Table 20:	Deemed refusals due to non-reply by public bodies

Section I - Public Bodies - 2011

Table 1: Overview of requests dealt with by public bodies

Requests on hand - 01/01/2011	2,334
Requests received in 2011	
Personal	12,581
Non-personal	3,857
Mixed	79
Total	16,517
Total requests on hand during year	18,851
Requests dealt with	<u>16,472</u>
Requests on hand - 31/12/2011	2,379

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

	Number	Percentage
FOI requests dealt with by public bodies	16,472	100%
Internal reviews received by public bodies	589	4%
Applications accepted by the Commissioner	174	1%

Table 3: FOI requests received - by requester type

Requester Type	Number	Percentage
Journalists	1,737	10%
Business	903	5%
Oireachtas Members	52	1%
Staff of public bodies	356	2%
Clients of public bodies	10,876	66%
Others	2,593	16%
Total	16,517	100%

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

Request Type	Number	Percentage
Requests granted	9,631	58%
Requests part-granted	3,224	20%
Requests refused	1,744	11%
Requests transferred to appropriate body	212	1%
Requests withdrawn or handled outside FOI	1,661	10%
Total	16,472	100%

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

	%	%	%	%	%	%
	granted	part granted	refused	trans- ferred	with- drawn or handled outside of FOI	Total
Civil Service Departments	37	29	16	2	16	100
Local Authorities	50	27	15	1	7	100
HSE	70	15	8	1	6	100
Voluntary Hospitals, Mental Health Services and Related Agencies	77	5	6	2	10	100
Third Level Institutions	40	34	11	3	12	100
Other Bodies	55	23	11	1	10	100

Table 6: FOI requests received by Departments/Offices

Department/Office	Personal	Non-personal	Mixed	Total
Department of Education & Skills	1,028	140	2	1,170
Department of Social Protection	1,066	39	1	1,106
Department of Justice and Equality	492	105	0	597
Department of Finance	26	232	0	258
Office of the Revenue Commissioners	134	98	0	232
Department of Agriculture, Food and the Marine	117	108	0	225
Department of Health	15	135	0	150
Defence Forces	95	21	4	120
Department of Environment, Community and Local Government	16	84	0	100
Department of the Taoiseach	3	95	0	98
Department of Transport, Tourism & Sport	9	77	0	86
Houses of the Oireachtas Service	1	71	0	72
Department of Jobs, Enterprise and Innovation	21	49	0	70
Department of Foreign Affairs and Trade	6	62	0	68
Department of Communications, Energy and Natural Resources	2	52	0	54
Department of Defence	13	26	1	40
Department of Arts, Heritage and the Gaeltacht	1	26	0	27
Office of Public Works	0	25	1	26
Office of the Information Commissioner	9	7	2	18
Central Statistics Office	13	3	0	16
Office of the Director of Public Prosecutions	6	5	0	11
Public Appointments Service	6	2	3	11
Office of the Ombudsman	10	0	0	10

Office of the Attorney General	1	5	0	6
Ordnance Survey Ireland	0	6	0	6
Department of Children and Youth Affairs	1	5	0	6
Office of the Appeals Commissioners for the Tax Acts	2	3	0	5
Office of the Chief State Solicitor	0	4	0	4
Office of the Director of Corporate Enforcement	0	3	0	3
Valuation Office	0	0	2	2
Office of the Comptroller and Auditor General	0	2	0	2
Office of the Registrar of Friendly Societies	0	0	0	0
Total	3,093	1,490	16	4,599

Table 7: FOI requests received by local authorities*

Local Authority*	Personal	Non-personal	Mixed	Total
Dublin City Council	161	96	3	260
Cork County Council	10	84	0	94
Clare County Council	25	48	3	76
Fingal County Council	33	34	0	67
South Dublin County Council	20	41	0	61
Louth County Council	23	32	5	60
Galway County Council	1	55	0	56
Cork City Council	21	34	0	55
Donegal County Council	11	40	0	51
Dún Laoghaire-Rathdown County Council	23	24	0	47
Kerry County Council	7	27	10	44
Mayo County Council	6	37	0	43
Galway City Council	13	27	0	40
Limerick City Council	21	16	0	37
Meath County Council	5	32	0	37

Kildare County Council	9	23	0	32
Sligo County Council	9	23	0	32
Limerick County Council	2	26	2	30
Wicklow County Council	12	18	0	30
Laois County Council	13	13	0	26
Leitrim County Council	9	16	0	25
Roscommon County Council	3	20	2	25
Longford County Council	7	15	0	22
South Tipperary County Council	6	16	0	22
North Tipperary County Council	1	19	0	20
Wexford County Council	1	18	1	20
Waterford City Council	7	12	0	19
Cavan County Council	4	14	0	18
Carlow County Council	3	14	0	17
Monaghan County Council	0	17	0	17
Westmeath County Council	1	15	0	16
Kilkenny County Council	3	9	0	12
Offaly County Council	3	6	1	10
Waterford County Council	5	5	0	10
Total	478	926	27	1,431
Regional Authorities	0	3	0	3
Regional Assemblies	0	2	0	2

* County Council figures include any FOI requests received by Town and Borough Councils

Table 8: FOI requests received by the HSE

HSE area*	Personal	Non-Personal	Mixed	Total
HSE West	2,136	67	1	2,204
HSE South	2,114	36	3	2,153
HSE Dublin North East	831	40	0	871
HSE Dublin Mid-Leinster	669	21	0	690
HSE National Requests	5	218	0	223
Total received	5,755	382	4	6,141

* Figures represent the regional structure of the HSE

Table 9: FOI requests received by Voluntary Hospitals, Mental Health Services and Related Agencies

Hospital/Service/Agency	Personal	Non-Personal	Mixed	Total
Mercy University Hospital, Cork	502	4	0	506
St James's Hospital	389	15	0	404
Mater Misericordiae Hospital	264	15	0	279
Tallaght Hospital	220	11	0	231
Rotunda Hospital	192	24	1	217
Beaumont Hospital	135	21	0	156
St. Vincent's University Hospital	128	11	0	139
South Infirmary - Victoria Hospital, Cork	124	8	0	132
Children's Hospital, Temple Street	109	8	0	117
Our Lady's Hospital for Sick Children, Crumlin	105	9	0	114
Coombe Hospital	99	11	0	110
St. John's Hospital, Limerick	102	1	0	103
National Maternity Hospital, Holles Street	93	6	2	101
Royal Victoria Eye & Ear Hospital	41	0	0	41
National Rehabilitation Hospital, Dún Laoghaire	26	2	1	29
Health Information & Quality Authority	9	16	0	25
Mental Health Commission	16	7	0	23
Hospitaller Order of St. John of God	22	0	0	22
Other Hospitals/Services/Agencies	93	45	4	142
Total	2,669	214	8	2,891

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

Third Level Education Body	Personal	Non-Personal	Mixed	Total
Waterford Institute of Technology	8	82	0	90
University College Dublin	24	24	0	48
Galway-Mayo Institute of Technology	22	5	1	28
University College Cork	5	21	2	28
National University of Ireland Galway	10	17	0	27
University of Dublin (Trinity College)	5	17	0	22
University of Limerick	4	12	1	17
Dublin Institute of Technology	8	9	0	17
Dublin City University	5	8	1	14
National University of Ireland Maynooth	2	11	0	13
Institute of Technology Carlow	0	12	0	12
Other bodies	13	102	1	116
Total	106	320	6	432

Table 11: FOI requests received by other bodies

Public Body	Personal	Non-Personal	Mixed	Total
Social Welfare Appeals Office	176	2	0	178
RTÉ	10	77	0	87
Office of the Chief Medical Officer	36	0	0	36
Health & Safety Authority	0	33	1	34
Commission for Communications Regulation	14	5	4	23
Arts Council	9	11	0	20
National Roads Authority	0	19	0	19
Probation and Welfare Service	16	2	0	18
Fáilte Ireland	0	18	0	18
Legal Aid Board	14	3	0	17

National Council for Special Education	11	4	0	15
Irish Sports Council	0	14	1	15
IDA Ireland	0	13	0	13
Court Service	1	12	0	13
National Transport Authority	2	10	0	12
Inland Fisheries Ireland	3	8	0	11
Pobal	1	10	0	11
Board of National Library of Ireland	1	9	0	10
Blood Transfusion Service Board	7	3	0	10
Broadcasting Authority of Ireland	1	8	0	9
Enterprise Ireland	4	4	1	9
An Bord Pleanála	1	8	0	9
Environmental Protection Agency	0	9	0	9
Railway Procurement Agency	0	8	0	8
Teagasc	5	2	0	7
Sustainable Energy Authority of Ireland	1	6	0	7
Shannon Development	1	6	0	7
Irish Medicines Board	1	6	0	7
Standards in Public Office Commission	3	3	0	6
Bord Iascaigh Mhara	0	5	0	5
Marine Institute	2	3	0	5
Bord na gCon	0	5	0	5
Horse Racing Ireland	0	5	0	5
National Gallery of Ireland	1	3	1	5
Údarás na Gaeltachta	0	5	0	5
Citizens Information Board	2	2	1	5
National Sports Campus Development Authority	0	5	0	5
Other Bodies (121 bodies with less than 5 requests each)	31	166	5	202
Total	354	512	14	880

Table 12: Fees charged

	Original Request €	Search & Retrieval €	Internal Review €	Refunds €	Net Fees €
Government Departments and State Bodies	26,780	19,426	5,479	2,418	49,267
Local Authorities	13,362	4,922	4,600	203	22,680
Health Service Executive	5,115	990	1,000	1,350	5,756
Voluntary Hospitals, Mental Health Services and Related Agencies	2,920	2,059	250	47	5,182
Third Level Institutions	3,080	1,224	400	165	4,539
Other Bodies	15	0	0	0	15
Total	51,272	28,621	11,729	4,183	87,439

Section II - Office of the Information Commissioner - 2011

Table 13: Analysis of applications for review received

Applications for review on hand - 01/01/2011	25
Applications for review received in 2011	<u>245</u>
Total applications for review on hand in 2011	270
Discontinued	6
Invalid applications	53
Applications withdrawn	14
Applications rejected	2
Applications accepted for review in 2011	<u>174</u>
Total applications for review considered in 2011	249
Applications for review on hand - 31/12/2011	21

Table 14: Analysis of review cases

Reviews on hand - 01/01/2011	192
Reviews accepted in 2011	<u>174</u>
Total reviews on hand in 2011	366
Reviews completed	<u>200</u>
Reviews carried forward to 2012	166

Table 15: Applications for review accepted in 2011

Health Service Executive		58
HSE National	26	
HSE South	10	
HSE West	10	
HSE Dublin Mid-Leinster	7	
HSE Dublin North East	5	
Department of Justice and Equality		15
Dublin City Council		9
Department of Finance		6
Department of Social Protection		5
RTÉ		5
Others (bodies with less than 5 applications each)		76
Total		174

Table 16: Outcome of reviews - 3 year comparison

	2011	%	2010	%	2009	%
Decision affirmed	32	16	66	29	75	32
Decision annulled	3	2	15	7	6	2
Decision varied	8	4	18	8	16	7
Discontinued	35	17	2	1	5	2
Invalid	3	2	3	1	0	0
Settlement reached	49	25	63	28	49	21
Withdrawn	70	34	61	26	84	36
Reviews completed	200	100	228	100	235	100

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

	2011	%	2010	%	2009	%
Refusal of access	157	90	197	89	201	83
Objections by third parties to release information about them or supplied by them	6	3	8	4	17	7
Amendment of records under section 17	5	3	5	2	7	3
Statement of reasons under section 18	5	3	9	4	11	5
Decision to charge a fee	1	1	1	1	6	2
Applications accepted	174	100	220	100	242	100

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

	2011	%	2010	%	2009	%
Personal	61	35	45	20	63	26
Non-personal	86	49	136	62	123	51
Mixed	27	16	39	18	56	23
Total	174	100	220	100	242	100

Table 19: General enquiries

Year	Number
2011	824
2010	622
2009	857
2008	1,100
2007	1,315
2006	1,551
2005	1,396
2004	1,306
2003	1,090
2002	1,047
Total	11,108

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

	No original or internal review decision		
Public Body	2011	2010	2009
HSE National	9	5	1
Department of Justice and Equality	7	4	3
Department of Finance	4	1	1
HSE South	3	6	4
HSE West	1	2	3
Department of Agriculture, Food and the Marine	1	1	-
Department of Health	1	-	-
University College Dublin	1	-	-
Total 2011	27		

LANDSCAPE SAFETY
EMISSIONS PROTECTION
LEGISLATION
RESPONSIBILITY RADIATION
REGULATING
DIRECTIVE
CULTURAL SITES
ENERGY
HEALTH
WASTE
DIVERSITY

PART TWO

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

CHAPTER 1



Oifig an Choimisinéara um Faisnéise Comhshaoil
Office of the Commissioner for Environmental Information

Chapter 1: Introduction

The Access to Information on the Environment (AIE) regime is based on Directive 2003/4/EC. The Directive has, as its key provision, the establishment of a right of access to environmental information held by public authorities. The Directive was transposed into Irish law by the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007), which came into effect on 1 May 2007. In December 2011, the Regulations were amended by the European Communities (Access to Information on the Environment) (Amendment) Regulations 2011 (S.I. No. 662 of 2011).

The Office of the Commissioner for Environmental Information (OCEI) was established under Article 12 of the Regulations. I became the office-holder, as the Commissioner for Environmental Information, because Article 12(2) assigns this position to the person holding the Office of the Information Commissioner under the FOI Act. My role as Commissioner for Environmental Information, which is additional to and legally independent of the roles I have as Ombudsman and Information Commissioner, is to review decisions of public authorities on appeal by members of the public who are not satisfied with the outcome of their requests for environmental information. My decisions on appeal are final and binding on the affected parties, unless a further appeal is made to the High Court within two months of the decision concerned.

What is environmental information?

The definition of “environmental information” in the Directive and in the Regulations is broad. It covers information “*in written, visual, aural, electronic or any other material form on*” the following six categories:

- the state of the elements of the environment (e.g., air, water, soil, land, landscape, biological diversity),
- factors affecting or likely to affect the elements of the environment (e.g., energy, noise, radiation, waste, emissions),

- measures (e.g., policies, legislation, plans, programmes, environmental agreements) and activities affecting or likely to affect the elements and factors referred to above as well as measures or activities designed to protect those elements,
- reports on the implementation of environmental legislation,
- cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to above, and
- the state of human health and safety, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment.

What is a public authority?

Unlike FOI legislation, the Regulations do not prescribe a list of individual public authorities that are subject to the AIE regime. Rather, the Regulations broadly define the term “public authority” to mean –

- government or other public administration (including public advisory bodies) at national, regional or local level,
- any natural or legal person performing public administrative functions under national law, including in relation to the environment, and
- any natural or legal person having public administrative responsibilities or functions, or providing public services, relating to the environment under the control of a body or person encompassed by either of the first two categories.

The definition in the Regulations states that it includes certain types of entities. The Regulations, as amended, require the Minister to “*ensure that an indicative list of public authorities is publicly available in electronic format*”.

Where there is a dispute as to whether a body is a public authority, the person making the request has a right of appeal to my Office. I issued two decisions in 2011 dealing with the scope of the public authority definition; these decisions are summarised in [Chapter 2](#).

Facilitating access to environmental information

The expectation in the scheme of the Directive and the Regulations is that requests for environmental information will generally be granted. In order to facilitate access to environmental information, the Regulations require public authorities to inform the public of their rights and to provide information and guidance on the exercise of those rights. Public authorities are also required to “*make all reasonable efforts*

to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means”.

Additional requirements on public authorities have been introduced by the Amendment Regulations in order to comply with certain obligations under the Directive. Public authorities must now *“ensure that environmental information compiled by or for it, is up-to-date, accurate and comparable”*. Public authorities must also *“maintain registers or lists of the environmental information held by the authority and designate an information officer for such purposes or provide an information point to give clear indications of where such information can be found”*. In line with Article 7(4) of the Directive, a public authority is required, in the event of an imminent threat to human health or the environment, to *“ensure that all information held by or for it, which could enable the public likely to be affected to take measures to prevent or mitigate harm, is disseminated immediately and without delay”*.

Charges

Under the AIE regime, no upfront fee applies for making a request or for applying for an internal review of a decision to refuse a request. However, as a general rule, a fee of €150 must be charged for making an appeal to my Office. A reduced fee of €50 applies in respect of an appeal to my Office by a medical holder, a dependent of a medical card holder, or a relevant third party. The Regulations, as amended, now provide that I may waive all or part of the appeal fee where the original decision was untimely.

A public authority may charge a fee when it makes environmental information available, but any such fee must be *“reasonable having regard to the Directive”*. Where a public authority proposes to charge fees, it is obliged to make a list of the chargeable fees available to the public. There is a right of appeal (internal and external) on the grounds that the fee charged is excessive.

Refusal grounds

The Regulations set out certain mandatory and discretionary grounds for refusal that are designed, where appropriate, to protect:

- the confidentiality of personal information,
- the interests of a person who voluntarily supplied the information,
- the environment to which the information relates,
- the confidentiality of the proceedings of public authorities,
- Cabinet discussions,
- international relations, national defence or public safety,

- the course of justice,
- commercial or industrial confidentiality and intellectual property rights,
- material in the course of completion, and
- internal communications of public authorities.

However, requests relating to emissions into the environment cannot, in most cases, be refused. All requests are subject to consideration of the public interest under Article 10(3) of the Regulations. Moreover, Article 10(4) provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest.

Where no decision is notified by the public authority, the Regulations provide for a right of appeal on the basis of a deemed refusal.

Guidance

Guidance Notes relating to the implementation of the Regulations have been published by the Department of the Environment, Heritage and Local Government (the Department). The Notes, which include the text of the Regulations and Directive, are available on the Department's website at www.environ.ie and on my Office's website at www.ocei.gov.ie. Although public authorities are required to have regard to the guidelines published by the Department in performing their functions under the Regulations, the guidelines do not purport to be a legal interpretation of the Regulations.

Appeals received in 2011

During 2011, thirteen appeals were received by my Office. Fourteen appeals were closed during the year. Seven formal decisions were issued; relevant summaries are set out in the chapter following. One case was deemed to have been withdrawn as settled once the records were released following my Office's intervention. One other case was also withdrawn following contacts with my Office. A further five appeals were deemed to be invalid, primarily because no internal review request had been made or because the appeal fee had not been paid. Fourteen cases were on hand at the end of the year. My staff recorded 22 general enquiries about the Regulations.

While most of the appeals arose from requests to local authorities and government departments, other public authorities whose decisions were appealed were the Central Bank of Ireland and the Health Service Executive. Among the issues still under consideration is the scope of the definition of "environmental information" in the context of a request for a full copy of the contract for the construction and operation of the Poolbeg incinerator.

As a general rule, appeal decisions are published in full on my Office's website at www.ocei.gov.ie. In two unpublished cases, however, no further issue remained to be determined by my Office; formal decisions were issued purely as an administrative measure in order to bring the cases to closure.

Issues arising in 2011

Level of activity during 2011

I have previously observed that the level of activity under the Regulations has been low. In 2011, the level of appeals showed a decrease of 43.5% from the high of 23 appeals received in 2010 and is comparable to the number of appeals received in 2008, when my Office was newly established. Of the 13 appeals received in 2011, four were from persons who had previously made appeals to this Office. These four appellants accounted for seven of the appeals in 2011.

I consider that the level of the fee for making an appeal to my Office (normally €150) is discouraging potential appellants. Moreover, despite the general duties placed on public authorities to facilitate access to environmental information, a general lack of awareness seems to persist among the public regarding their rights under the Regulations. My staff continue to be in communication with the Department in relation to the operation of the Regulations and have noted in particular that it is of some considerable concern to me that the level of awareness both by the public and public authorities remains very low.

Notice under Article 12(6) of the Regulations

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

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

I invoked this provision on one occasion in 2011. The case, CEI/10/0023, which is currently under investigation, involves a request made to Dublin City Council (the Council) for a full copy of the contract for the construction and operation of the Poolbeg incinerator. My Office made two requests for a full copy of the record concerned for the purposes of the review; however, the Council had concerns relating to a confidentiality agreement. Ultimately, I considered it necessary to issue an Article 12(6) notice in the case. The Council complied with the notice by providing a full copy of the contract to my Office before the deadline expired.

Practical difficulties relating to the operation of the Regulations

Since its inception, my Office has encountered practical difficulties arising from the operation of the AIE regime. One problem is the matter of resources. Although the OCEI is a legally independent Office, to date, it has not received any funding allocation from the State and must rely entirely on the resources that can be made available from the very limited resources available to the Office of the Information Commissioner. Related to the problem of resources, until 19th December 2011, had been the absence in the Regulations of any explicit provision allowing for the settlement or discontinuance of reviews, which meant that certain cases required a formal decision even where no further issue between the parties remained to be determined by my Office. Two such cases are referred to above.

Another matter of concern to me, which I have commented on previously, is the lack of training and awareness among the staff of public authorities. A particular difficulty is the regular failure of public authorities to adhere to the relevant time limits set out in the Regulations for issuing decisions and to advise applicants properly of their rights of appeal. Other issues of concern relating to the handling of AIE requests by public authorities include:

- confusion as to who is responsible for coordinating requests in public authorities,
- failure to designate Internal Reviewers,
- failure of decision makers to have regard to the provisions of Article 10 of the Regulations, including the public interest considerations,
- confusion between the exemption and timeframe provisions of the FOI Act and the AIE Regulations, and
- the absence of a standard schedule of fees applicable to AIE and clarity as to what public authorities may charge applicants for under AIE.

My Office has been in communication with the Department about these and other matters of concern to me relating to the operation of the Regulations. Some of my concerns have been addressed in the Amendment Regulations that were signed by the Minister on 19 December 2011. For instance, I may now deem an appeal to be withdrawn in the event of the full or partial release of the requested information by the public authority prior to a formal decision. In such circumstances, I may waive or refund all or part of the appeal fee.

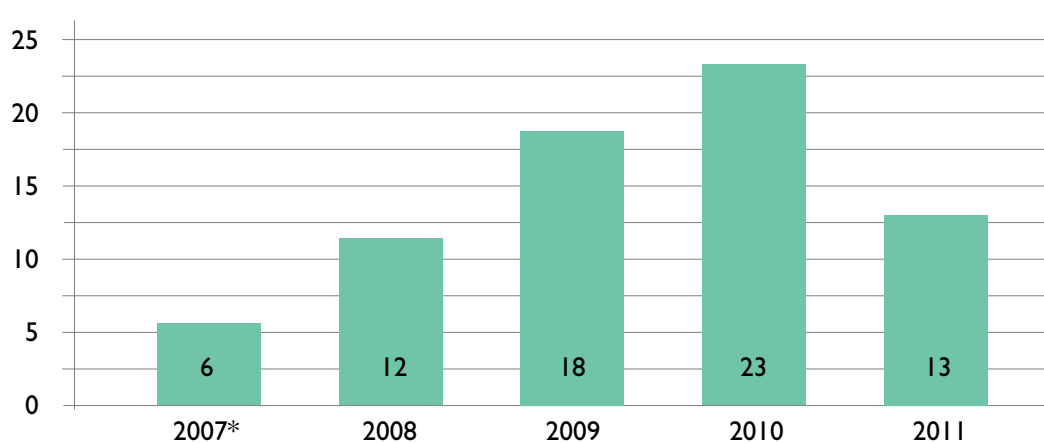
High Court and Supreme Court judgments

A party to an appeal to my Office or any other person affected by my decision may appeal to the High Court on a point of law from the decision. My decisions in two similar cases dealing with the scope of the public authority definition, CEI/10/0005 – Mr. Gavin Sheridan and National Asset Management Agency, and CEI/10/0007 – Mr. Gavin Sheridan and Anglo Irish Bank, were appealed to the High Court in November 2011. In order to reduce the potential costs involved, the proceedings brought by the Irish Bank Resolution Corporation Limited (IBRC) (formerly Anglo Irish Bank) have been stayed by agreement pending the outcome of the appeal by the National Asset Management Agency (NAMA). Meanwhile, the NAMA appeal has been listed for hearing on 17 May 2012, for two days.

There were no High Court judgments delivered in 2011 on cases taken against decisions of my Office. My Office's appeal to the Supreme Court against the judgment of Mr. Justice O'Neill in *An Taoiseach v. Commissioner for Environmental Information* (Case CEI/07/0005) is still pending.

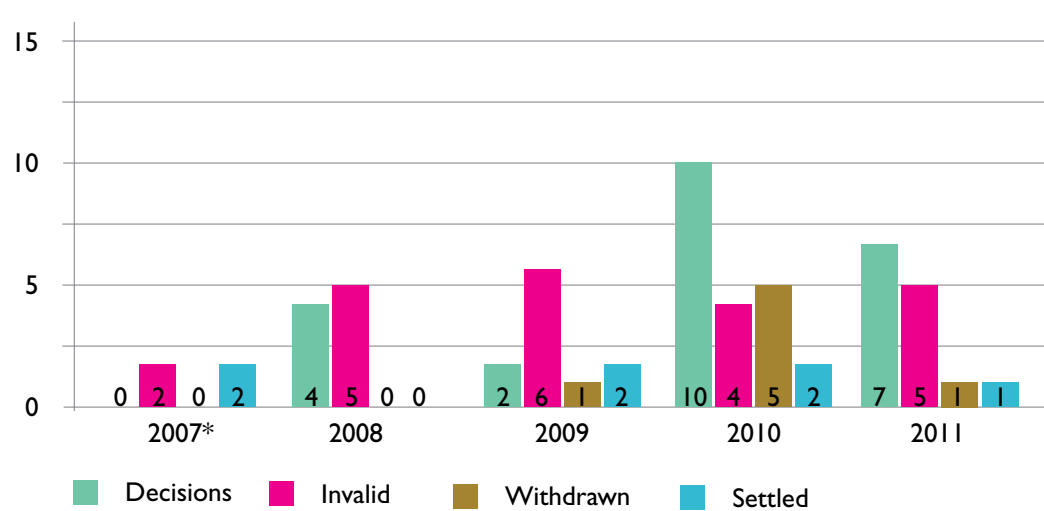
Statistics

Appeals received



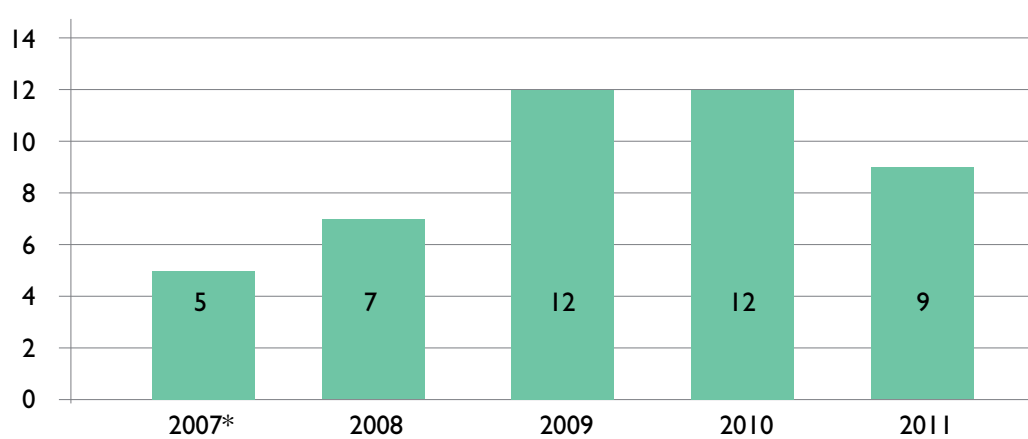
* This Office was established with effect from 1 May 2007

Outcome of CEI appeals by year



* This Office was established with effect from 1 May 2007

Appellants to CEI



* This Office was established with effect from 1 May 2007

LANDSCAPE SAFETY
EMISSIONS PROTECTION
LEGISLATION RESPONSIBILITY RADIATION
REGULATING DIRECTIVE
CULTURAL SITES
ENERGY
HEALTH
WASTE
DIVERSITY

PART TWO
COMMISSIONER FOR
ENVIRONMENTAL
INFORMATION
CHAPTER 2

Chapter 2: Decisions

In this chapter, I provide summaries of five decisions made in 2011. The full text of these decisions can be found on my website at www.ocei.gov.ie.

Case CEI/10/0018 – Mr. Cian Ginty and Irish Rail – Decision of 24 June 2011

Whether Irish Rail was justified in its refusal of access to environmental information sought by the applicant

In a request dated 11 June 2010, the applicant sought access to *“a list of all current speed restrictions in the Irish Rail network, and any reports directly related to these speed restrictions”*. Irish Rail refused the request in its original and internal review decisions on the basis that the requested information was not “environmental information” and therefore not subject to the Regulations. In its internal review decision, Irish Rail described the information as being *“purely of an operational nature, and by definition . . . of a transient nature”*.

During the course of the review, my Office took the view that the speed of a train is a “factor” which affects or is likely to affect the elements of the environment. My Office also considered that the impact of environmental factors could require the imposition of temporary speed restrictions, though it was acknowledged that this would be unusual. In my decision, I found that the information sought was environmental information in accordance with the Regulations. Moreover, I found no basis for withholding the information sought, particularly as information on train speeds could be said to relate to emissions into the environment.

I concluded that Irish Rail was not justified in refusing access to the information sought. I therefore annulled the decision of Irish Rail and directed the release of the information.

Case CEI/10/0016 – Mr. Pat Swords and Department of Environment, Heritage and Local Government (the Department) – Decision of 29 July 2011

Whether the Department was justified in its refusal of access to environmental information relating to foreshore licensing

In a request dated 27 June 2010, the applicant sought access to two items of information relating to a foreshore licence for the Dublin City Waste to Energy Project. The Department refused the request on 28 July 2010. The applicant made a request for internal review in relation to the second part of his original request, which was for *“the official position of the Department with regard to the processing of licences and permits, such as a foreshore application, within an appropriate timeframe and the Prevention of Corruption (Amendment) Act, 2001”*. The applicant later clarified that his request *“related to the timeframe for processing a foreshore licence”*. On 30 August 2010, the applicant appealed to my Office on the basis of the Department's failure to reply to his internal review request.

It was not in dispute that the information sought, if held, would come within the definition of environmental information. However, during the course of the review, the Department issued a statement to the applicant explaining, in relation to the time limits for processing an application for a foreshore licence, that *“the Foreshore Act 1933 does not specify time limits within which licence applications must be processed and accordingly there are no records available which address this issue”*.

Article 7(5) of the Regulations is the relevant provision that applies where a public authority does not hold the requested information. I found no reason to doubt the Department's assurances that it did not create or receive the information sought by the applicant in relation to the timeframe for processing licenses. In the circumstances, I found that the information sought was not held by the Department and that Article 7(5) of the Regulations applied. I affirmed the Department's decision accordingly.

Case CEI/11/0003 – Mr. Pat Swords and Department of Communications, Energy and Natural Resources (the Department) – Decision of 28 October 2011

Whether the Department was justified in its refusal of access to environmental information sought relating to Minister Ryan's appearance on RTÉ's *Prime Time* programme on 14 December 2010 and his remarks on wind energy

The request in this case, dated 23 December 2010, was for environmental information relating to comments on wind energy made by the then Minister for Communications, Energy and Natural Resources, Eamon Ryan T.D. during his appearance on RTÉ's *Prime Time* programme on 14 December 2010. The Department identified four reports and provided a copy of these to the applicant. The applicant made a request for internal review on the basis that he was not satisfied that the information provided supported the remarks made by the Minister with regard to the price of electricity for consumers. In its internal review decision, the Department affirmed its original decision, saying that it had provided the applicant with the relevant material and had no further relevant information available.

Again, it was not in dispute that the information sought, if held, would come within the definition of environmental information. However, I found no reason to doubt the Department's assertions that all information relevant to the request had been identified and made available to the applicant. I observed that, while the information provided may not have met with the requirements of the applicant, the Department could not be expected to create information for this purpose under the Regulations.

I found that the information sought by the applicant was not held by the Department and that Article 7(5) of the Regulations applied. I affirmed the Department's decision accordingly.

Cases CEI/10/0005 and CEI/10/0007 – Mr. Gavin Sheridan and National Asset Management Agency, and Mr. Gavin Sheridan and Anglo Irish Bank – Decisions of 13 September 2011 and 29 September 2011, respectively

Whether the bodies concerned are public authorities within the meaning of the Regulations

The applicant made certain requests to the National Asset Management Agency (NAMA) and Anglo Irish Bank (the Bank) that were refused on the ground that the body concerned did not consider itself to be a “public authority” within the meaning of the Regulations. As noted in Chapter 1, where there is a dispute as to whether a body is a public authority, the person making the request has a right of appeal to my Office. Accordingly, the applicant appealed to me against the respective decisions of NAMA and the Bank.

The term “public authority” is defined in Article 3(1) of the Regulations and Article 2(2) of the Directive. Paragraphs (a) to (c) of Article 3(1) correspond to the definition in the Directive, but unlike the Directive, Article 3(1) then adds: “*and includes*” certain entities listed at subparagraphs (i) to (vii). At subparagraph (vi) is “*a board or other body (but not including a company under the Companies Acts) established by or under statute*”. Subparagraph (vii), in turn, includes “*a company under the Companies Acts, in which all the shares are held-(l) by or on behalf of a Minister of the Government*”.

Neither NAMA nor the Bank considered itself as meeting the criteria under paragraphs (a) to (c). In this context, the primary argument presented by the bodies was, in essence, that paragraphs (a) to (c) must be treated as qualifying conditions for meeting the public authority definition notwithstanding the use of the phrase “and includes” in the Regulations.

I noted that “includes”, when used in a statutory definition, is ordinarily a word of expansion under Irish law. Thus, in light of the Irish case law on the matter, I found that the ordinary (or literal) meaning of “includes” has an extensive or expansive connotation requiring that what is governed by “includes” is to be added in or included. I also found that giving this meaning to “includes” results in the definition of public authority being entirely plain and unambiguous. I concluded that, in applying the Regulations, effect should be given to the plain meaning of “includes”. Accordingly, I found that I must necessarily interpret the term “public authority” as defined in the Regulations as extending to all of the types of entities included in the list at

subparagraphs (i) to (vii) regardless of whether such entities would also be captured by the categories at paragraphs (a) to (c).

Moreover, I was not persuaded by the arguments of NAMA and the Bank that reliance on the plain meaning of the word “includes”, as used in the public authority definition in the Regulations, would give rise to an outcome at odds with the Directive. I noted that it is very arguable that the Directive encourages and enables Member States to take an expansive approach to what constitutes a “public authority”. In the circumstances, I did not accept that paragraphs (a) to (c) of the public authority definition in the Regulations should be interpreted as restrictive criteria where a Member State has apparently chosen to take an expansive approach to the definition.

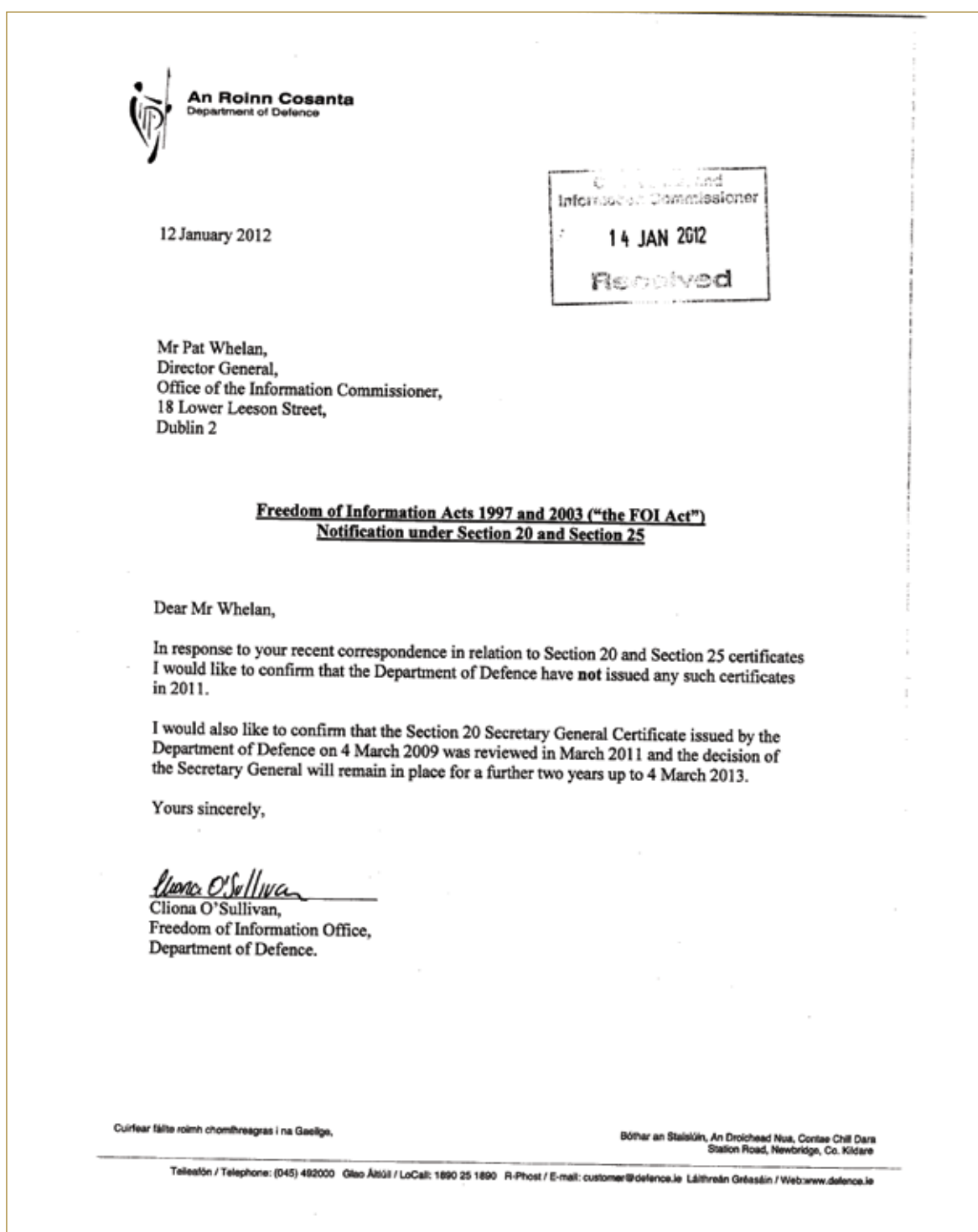
I found that NAMA is a public authority on the basis that it fits the criterion at subparagraph (vi) of the list of entities numbered (i) to (vii) which the definition of public authority “includes”. Similarly, I found the Bank is a public authority on the basis that it fits the criterion at subparagraph (vii)(l) in the list of entities numbered (i) to (vii) which the definition of public authority “includes”. I did not consider it necessary to determine whether NAMA or the Bank is captured also by any of the categories at paragraphs (a) to (c) of the definition. I annulled the respective decisions of NAMA and the Bank.

As noted in Chapter 1, my decisions have been appealed to the High Court.

APPENDICES

Appendix I

Certificates issued under section 20 and section 25 of the FOI Act





OIFIG AN ARD-RÚNAÍ, AN ROINN DLÍ AGUS CIRT, COMHIONANNAIS AGUS ATHCHÓIRITHE DLÍ
OFFICE OF THE SECRETARY GENERAL, DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM

Mr Pat Whelan
Director General
Office of the Information Commissioner
18 Lower Leeson Street
Dublin 2

**Notification under Section 20 and Section 25 of the
Freedom of Information Acts, 1997 and 2003**

Dear Mr Whelan

I refer to your letter dated 6 January 2012 in relation to certificates issued by Secretaries General and Ministers under Sections 20 and 25 of the Freedom of Information Acts, 1997 and 2003.



Please note that a certificate under Section 20 was issued by my predecessor on 11 August, 2006 in relation to Risk Registers. This Department has a total of six Section 25 Ministerial Certificates. Three certificates were renewed by the Minister last year. Please find enclosed a copy of all three certificates as referred to above.

Yours sincerely,

Brian Purcell
Secretary General

13 January 2012



AN ROINN GNÓTHAÍ EACHTRACHA
DEPARTMENT OF FOREIGN AFFAIRS
BAILE ÁTHA CLIATH 2
DUBLIN 2

12 January 2012

ACKNOWLEDGED
18 JAN 2012
Office of the Ombudsman

Mr Pat Whelan
Director General
Office of the Information Commissioner
18 Lower Leeson Street
Dublin 2

Information Commissioner
18 JAN 2012
Received

Notification under Sections 20 and 25 of the Freedom of Information Acts, 1997 and 2003

Dear Mr Whelan

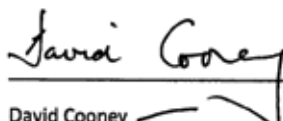
I refer to your recent letter on the above subject.

I confirm that, during 2011, I did not issue any certificates under Section 20 of the Freedom of Information Acts.

On 21 July 2011, the Tánaiste and Minister for Foreign Affairs and Trade issued three certificates under Section 25 of the Freedom of Information Acts, by reference to which the records requested are exempt under Section 23 and 24.

Please find enclosed copies of the certificates issued in 2011.

Yours sincerely



David Cooney
Secretary General

07 MAR 2012

Received

ACKNOWLEDGED

07 MAR 2012

Office of the Ombudsman

Ms. Emily O'Reilly
Information Commissioner
18 Lower Leeson Street
Dublin 2

Yours sincerely,

Mary Murphy

Tithe an Rialtais, Baile Átha Cliath 2.
Government Buildings, Dublin 2.

Appendix III

Annual Energy Efficiency Report 2011

Energy usage for 2011 decreased by 10.8% from the same period in 2010, which resulted in a reduction of CO₂ emissions of 7.5%. Staff of the Office met regularly with the Office of Public Work's energy consultant during 2011. These meetings developed an awareness of the efforts required to continue the reduction in the Office's energy consumption. Further meetings are planned for 2012 and more initiatives will be introduced to ensure the overall target of a 20% reduction in energy usage is realised. Additionally, the Office will receive a Display Energy Certificate indicating its current rating in the scheme. Overall our efforts have been noted positively by the energy consultant.

The reduction in energy usage is illustrated by the below charts which display a comparison between December 2010 and December 2011 as well as a full year comparison between 2010 and 2011. The charts show favourable reductions in energy usage resulting from a more optimal approach to energy usage throughout the Office. Energy usage was as follows for 2011:

Electricity: 267,081 KWh

Gas: 140,100 KWh

Monthly Energy Report

Office of the Ombudsman

Office of the Ombudsman

Dec 2011

Summary

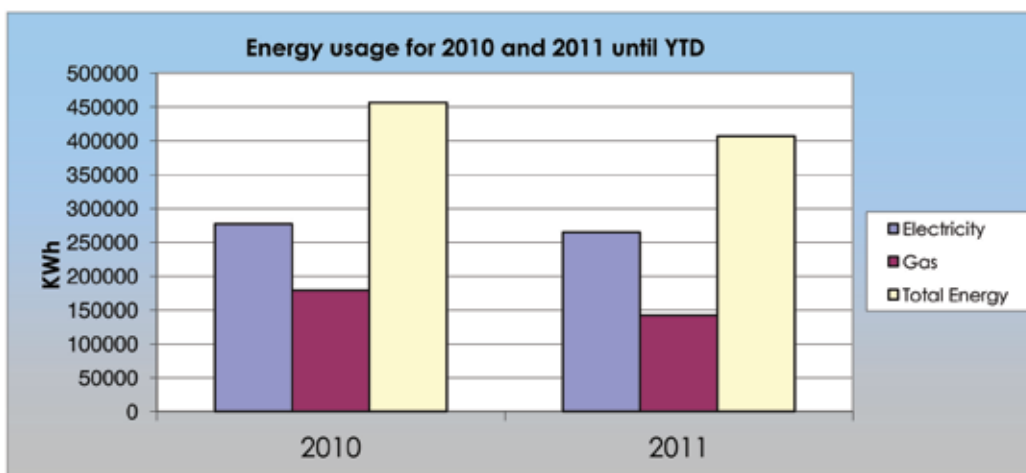
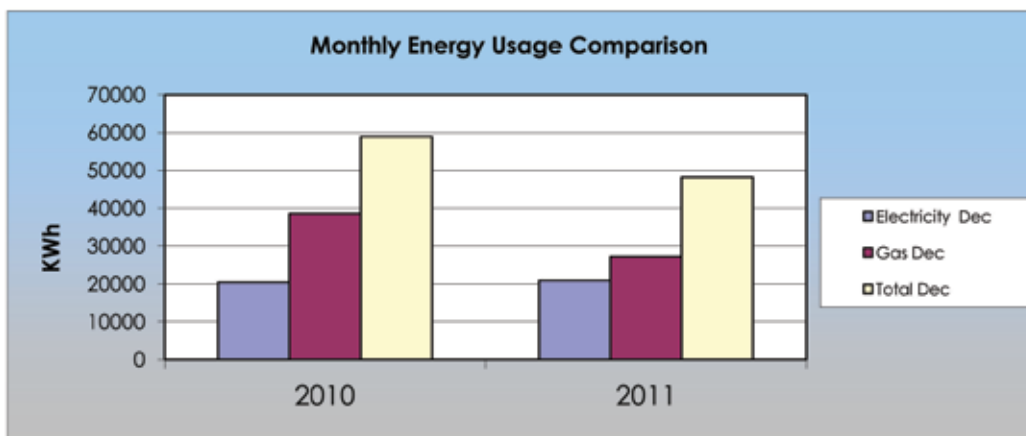
Month to month

Energy usage has decreased by -18.3% from 58,955KWh in Dec 2010 to 48,174kWh in Dec 2011. As a result, CO2 emissions for this period have decreased by -9.9% from 20,155kg to 18,168kg. (-1987Kg)

Annual

2011 year to date energy consumption is 407,181KWh which has decreased by -10.8% on the same period of last year (456,634KWh). This equates to a -49,453KWh difference between the periods. In terms of total CO2, production has decreased by -7.5%, so the year to year comparison figures are 203,439Kg for 2010 & 188,266Kg for 2011 Which is a difference of -15,173Kg.

Energy Use



Organisation Chart

Senior Investigator



Stephen Rafferty

Investigators

Melanie Campbell
Anne Garland
Maurice Kiely
Brenda Lynch
Brian Murnane
Alison McCulloch
Marie O'Brien
Anne O'Reilly
Colin Stokes

Support Unit

Edmund McDaid
Anne Harwood
Bernie Kelly
Robert Cullen-Jones
Denise Freeman