



An Chartlann Náisiúnta
National Archives

Destruction of Freedom of Information (Fol) request case files on an ongoing basis as a category or class of records under Section 7 of the National Archives Act, 1986



The disposal of any departmental records, including FOI files, without prior consultation with the National Archives, including the issuing of a Certificate of Disposal of Departmental Records signed by the Director of the National Archives, is a breach of section 7 of the National Archives Act, 1986.

1. Background information on Freedom of Information

The Freedom of Information Act, 2014, confers rights of access for an individual to records held by government departments; other bodies within the civil service; local authorities; health boards; publicly-funded voluntary hospitals; other public and voluntary organisations in the health and social services sectors; universities; institutes of technology; other third-level colleges and some State-sponsored bodies in the broadcasting, cultural, enterprise and employment, local government and regulatory sectors (referred to as 'public bodies' in this report).

Under the FOI Act, every person has the right of access to records held by public bodies covered by the Acts and in the following manner:

- In cases where records contain personal information about the person applying for access, the right of access applies to all such records regardless of their date
- In all other cases, the right of access normally applies only to records created after 21 April 1998 (if the records are held by a government department, one of the other public bodies listed in the Act or one of the bodies to which the Act has subsequently been extended) or after 21 October 1998 (if the records are held by a local authority or health board)

The FOI Act also gives every person:

- The right to have personal information contained in records held by the relevant bodies altered, where it is incomplete, incorrect or misleading; and
- The right to be given reasons for decisions by the above bodies that have materially affected her/him

In all cases, the right of access must be exercised in accordance with procedures laid down under the Acts and is subject to any relevant exemption from access provided for in the Acts. For example, it may be necessary to exempt from release information in circumstances where a public body may consider that release would cause a harm or injury prejudicial to the functioning of the public body or would be contrary to the public interest.

In practical terms, this means that the key exemptions will relate to information in records relating to processes still in deliberation, to the performance of certain investigative functions and negotiations and the disclosure to third parties of personal information, commercially sensitive information or information obtained in confidence.

Publication Schemes

Under the FOI Act, public bodies must prepare and publish a ‘publication scheme’ in accordance with the “Model Scheme” provided for in the legislation or an amended version that the Minister may prescribe, following consultation with the Information Commissioner, for particular bodies to use as a basis for their own schemes. The Act sets out in broad terms what the publication scheme should contain at a minimum. It provides that the Commissioner may examine and report in his/her annual report as to whether bodies are in compliance with this requirement.

2. The process of responding to FOI access requests

When a request for access to information is received, a case file is opened relating to the processing of that request. This is standard practice throughout the civil service. Many public bodies subject to the Acts also have some form of FOI request register or case management tracking system and receipt of the request is usually recorded in this.

Receipt of the request is then acknowledged in writing by the public body and the requester is advised of the date by which s/he must, by law, be advised in writing of the final outcome of the request. In instances where the request would be more appropriate to another institution, the requester is advised of this and the request transferred.

If the request is appropriate to the public body, it is assigned to a decision-maker for consideration and decision on release of information to the requester. Within every public body, there will be at least one FOI decision-maker. A search is then initiated to identify records containing information needed to respond to the request. Once records have been identified, consideration is given to their release by the decision-maker, with due cognisance being taken of the exemptions specified in the FOI Act that might be invoked to refuse access to the information contained in the records in instances where necessary.

In addition to the consideration and consultation that may occur within a public body as part of the process of responding to an FOI request, there may be instances where it is necessary for the body to consult with third parties before information can be released. It is also the practice in instances to seek formal legal advice if necessary.

Once full consideration has been given to the FOI request, a decision-maker will finally

make a decision in relation to release of the information in the records. As a result of the decision-maker's deliberations, information may be released in full, in part or refused to the requester. In the event that third party consultation has to take place or if there is any other delay, the public body is obliged to contact the requester seeking an extension on the legal deadline.

Release of information to the requester can be by copying the records or by extracting the information sought. In some instances, the requester can be granted access to the original record where this is sought or necessary but this will inevitably entail inspection on site in the public body.

The requester must be provided with a schedule of the records of relevance to the request, regardless of whether or not the records/or copies/or information from the records have been released on foot of the request. The schedule must indicate where access to information in the records is being granted and refused and must cite the relevant provision of the FOI Acts under which the information is being exempted.

Where the FOI request has been for reasons for decisions by the public body that have materially affected the requester, these will generally be in the form of a letter to the requester outlining the reason for the decisions in a particular matter that have affected the requester.

If a requester is unhappy with any aspect of the outcome of the FOI request, there is a facility for appeal to a higher authority within the public body for review of the original decision. A requester can not only seek review of a decision to withhold information, but can also seek a review of aspects of the manner in which an FOI request was handled, for example, the fees imposed for responding to the request and/or providing the information requested. A review is conducted only on foot of a written request and when accompanied by the appropriate fee. In some instances, the review might result in the release of additional information previously exempted; in others, the review outcome might simply uphold the original decision by the public body.

In the event that a requester is dissatisfied with the outcome of the review, s/he can make an appeal for further review to the Information Commissioner. If the Commissioner decides to accept the appeal, a public body's direct interaction with the requester in relation to the request usually ceases.

Where a valid appeal to the Information Commissioner is made and accepted, the

Information Commissioner advises the public body and will provide it with a copy of the application for review received (this is a requirement under the FOI Act). The public body itself will then be required to provide the Information Commissioner with copies of the requester's original request to the public body, its original decision, the requester's internal review request and the public body's internal review decision (where decisions issued). The Commissioner will also notify any other person who should be notified of the intention to review the decision, for example, third parties.

To facilitate the investigation of an appeal case, the Commissioner will request the relevant records from the public body and will invite it to make a submission as to why it decided as it did. The Commissioner will also invite the requester/appellant to make a written submission and, while not obliged to be provided with one, it can assist the Commission in concluding the case. When an application for an appeal is accepted, an investigator is assigned to the case and will be the principal point of contact point between the requester and the Commissioner.

The investigator will generally:

- Try to establish all the relevant facts in relation to the decision made by the public body
- Ask for submissions from the parties to the review and consider any arguments put forward
- Write to the requester with his/her preliminary view on the case where this is appropriate
- See if it is possible to effect a settlement between the parties
- Where a settlement cannot be reached, make a recommendation to the Information Commissioner on the case

The FOI Act provides that the Commissioner should operate in as informal a way as possible. In many cases the Commissioner will settle the matter by agreement between the requester and the public body rather than issue a formal, binding decision.

Where the appeal requires the Commissioner to issue a binding decision, the original decision may be upheld or may be changed. Alternatively, the original decision may be annulled and a new binding decision made. The Commissioner's decision usually issues in the form of a letter. Generally, where the Commissioner makes a decision directing a public body to release information in records, it will not be released until the 8 week appeal period has expired.

Reviews are generally completed as far as is practicable within four months of the date of

receipt of the application. Some cases take longer if they are very complex or involve a large number of records. At any stage during the appeal process, a requester can withdraw his or her application.

The Commissioner's final, binding decision can be appealed only to the High Court and only on a point of law where the requester considers that the Commissioner has interpreted the law incorrectly. An appeal to the High Court must be made not later than eight weeks after the date of the notification of the decision.

3. Records generated by responding to an FOI access request

The processing of an FOI request by a public body, including Departments of State, generates a certain amount of routine records. Procedures relating to the processing of requests are highly regulated and therefore requests are handled in a uniform manner and the records generated tend to be uniform in nature as a consequence. These recommendations will apply to FOI case files to be found in Departments of State subject to the National Archives Act, 1986 and not the full range of public bodies subject to the jurisdiction of the FOI Acts.

When an FOI request is received, the usual procedure is for a Department of State to open a dedicated file. This can be either in paper form or electronic or it can be a hybrid. The file will typically contain the written application for access to information (as all requests must be in written form) together with a standard letter of acknowledgement from the public body's FOI Unit advising the requester of the due date for responding to the request. Where the nature of the request is not clear, there may be correspondence between the public body and the requester to clarify matters and where the public body wishes to focus or define more clearly the scope of the request, this will result in a certain amount of correspondence with the requester.

The receipt of an FOI request is likely to generate a certain amount of internal documentation within a Department of State, possibly commencing with some form of written communication within the body to a head of a functional unit or a circular to several persons, seeking to establish the existence of records containing information of relevance to the request. This will elicit replies confirming the existence of records which may also be contained on the FOI case file.

The FOI case file is also likely to contain a schedule of records of relevance to the request since correct procedures under the Acts dictate the creation of a schedule of all

records containing information of relevance to the request for eventual issue to the requester. This schedule lists the records and indicates the instances if any, where relevant records aren't being released and the provision of the Acts under which they are being exempted from disclosure.

The process of considering the content of the records by a decision-maker is also likely to generate documentation such as internal communications within a Department of State, as a decision-maker might seek more information about the records under consideration, legal advice on the operation of exemptions in certain instances and correspondence with third parties where necessary and in accordance with the Acts.

There is also likely to be correspondence between the FOI Unit and the decision-maker concerning the processing of the request. In most instances, FOI case files will contain copies of the records under consideration in connection with the access request. These are usually made to allow for ease of evaluation and when a decision has been reached on the records for release, they form a useful record of what has been released to the requester, particularly if there is a later request for review of the original decision or in the event of an appeal to the Information Commissioner.

Finally, the file will contain a copy of the final letter to the requester advising of the outcome of the FOI request.

There may be follow-up correspondence of clarification between the requester and the FOI unit or decision-maker. Where it has been necessary to extend the timeframe in order to process the request, there will be copies of this correspondence.

Where a requester is dissatisfied with the outcome of the request, then an FOI case file will include further correspondence where a review is sought, including the review application, acknowledgement and fee receipt. It may also have additional internal communications generated by the FOI Unit's need to correspond with the reviewer.

There may be additional legal advice. Finally, the file will contain a copy of the reviewer's decision on access – either upholding the original decision or altering it – and a copy letter to the requester advising of the review outcome.

Where a requester is still dissatisfied, appeals to the Information Commissioner and has the appeal accepted, the file will also have documentation generated by contact between a department and the Office of the Information Commissioner. This documentation will take the form of a letter from the OIC investigator advising of the appeal, providing a copy of the requester's application for review by the OIC and seeking the department to make a submission on its handling of the request and why it decided as it did.

A copy of this submission will be on file, together with any other correspondence relevant to the review by the OIC. Where possible, the OIC attempts to resolve the matter informally by agreement between the requester and the department, there may be correspondence relating to this between the OIC and the department on file, possibly together with internal memoranda or notes.

Finally, where the matter is fully investigated and results in the issue a formal binding decision by the Information Commissioner, there will be the letter from the Information Commissioner to the department informing it of the decision.

4. Conclusions and recommendations

In reviewing FOI case files the National Archives noted the following:

Firstly, processing of FOI requests is undertaken in response to legal obligations under the FOI Act and is therefore a compliance activity. It is not an activity associated with a core function of a Department of State and preservation of the full quantity of records generated tells us little about the functions, structures and activities of a department.

Secondly, FOI requests are either requests for access to information held in a Department of State or are else requests for reasons for decisions. The information that is used to respond to FOI requests is information that is generally already to be found in the records of the department itself and this information is usually extracted from or copied from the records and placed on the FOI case file as part of the work of processing the request. Where the request is for reasons for decisions made by a department that have materially affected an individual, then the reasons will simply be an explanation of existing policy and/or procedures or the reasons for decisions are likely to be documented in another information source within the department.

The information in FOI files is therefore duplicated from another source. The only unique information is that relating to the actual handling and processing of the request and this tends to take the form of applications from requesters, routine letters of acknowledgement, internal communications seeking records and possibly, discussing the request, schedules of relevant records, letters to third parties (only where relevant), and the final decision letter to the requester. If the requester seeks an internal review of the decision or seeks

review by the Information Commissioner, then there will be unique documentation relating to this on the FOI case file.

Thirdly, while FOI case files serve as evidence of individuals exercising an entitlement to access official information, the files themselves do not need to be preserved in order to uphold the rights and/or entitlements of those individuals.

Fourthly, the sheer volume of FOI case files likely to be in existence in Departments of State makes it impossible for the National Archives to preserve all such records. Although, the volume of requests to Departments of State has declined since the introduction of FOI in 1998, largely due to amendments to the legislation in 2003, the volume of requests is still likely to range between 2,500 and 3,000 per annum. The abolition of fees in the new Act is expected to see an increase in the number of requests.

Finally, it is the practice of archives in other countries that are subject to FOI legislation not to seek the preservation of FOI case files.

For example:

1. The National Archives of the United Kingdom
2. The National Archives of New Zealand
3. Library and Archives Canada

Ultimately, an FOI case file provides information about the processing of an access request and about a decision to release information already elsewhere in the records of a Department of State. Its subject matter is primarily about the process of reaching a decision on access rather than being about the information itself that is the subject of the request.

The disposal of any departmental records, including FOI files, without prior consultation with the National Archives, including the issuing of a Certificate of Disposal of Departmental Records signed by the Director of the National Archives, is a breach of section 7 of the National Archives Act, 1986.

The National Archives therefore issues the following guidelines and direction in relation to the disposal of FOI files in Departments of State:

1. Where an FOI request has been processed to completion and the requester responded to and no request for internal review received, the individual FOI case file should be destroyed once no longer required in connection with the administration of the department.
2. Where an FOI request has been processed to completion but a request for internal review has been received and responded to and not subsequently appealed to the Information Commissioner, the individual FOI case file should be destroyed once no longer required in connection with the administration of the department.
3. Where the processing of an FOI request prompted a Department of State to seek legal advice, the FOI case file must be retained in that department in accordance with the provisions of the National Archives Act, 1986.
4. Where an FOI request has been processed by a Department of State and as a result of the outcome, the requester has appealed the decision to the Information Commissioner and this has resulted either in the resolution of matters by informal agreement or by the issuing of a formal decision by the Information Commissioner, the FOI case file held in a Department of State must be retained by that department in accordance with the provisions of the National Archives Act, 1986.
5. Where an FOI request is the subject of legal proceedings ie where the Commissioner's final, binding decision has been appealed to the High Court, either by the requester or a Department of State, then the FOI case file held in a Department of State must be retained by that department in accordance with the provisions of the National Archives Act, 1986.

It is considered that retaining FOI case files that document interaction between a Department of State and the Information Commissioner and files that contain any legal advice received by a Department of State in connection with the processing of an access

request, will provide sufficient information relating to the operation of FOI legislation in Ireland. This appraisal strategy for the selection of FOI case files in Departments of State may have to be reviewed if ever records of the Office of the Information Commissioner are made subject to national archival law.

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