



**AN BILLE UM SHAORÁIL FAISNÉISE, 2013
FREEDOM OF INFORMATION BILL 2013**

EXPLANATORY MEMORANDUM

Purpose of Bill

The purpose of the Bill is to provide for the commitments in relation to freedom of information contained in the Programme for Government:—

- by removing the main substantive restrictions in access to official information introduced in 2003,
- extending FOI to all public bodies,
- providing a framework for the extension of FOI to non-public bodies in receipt of significant funding from the Exchequer,
- the legislation also provides an opportunity for a necessary consolidation modernisation and updating of the legislation.

Restrictions introduced in 2003

Amendments made in 2003 involving six sections of the FOI Act 1997 have been characterised as representing a significant curtailment of the principle of the right to access to records provided for in the original Freedom of Information legislation. This Bill essentially reverses those substantive restrictions. These relate mainly to the treatment of Government Records (Section 28), restrictions in relation to records under the deliberative process exemption (Section 29) and exemptions for categories of records relating to security, defence, international relations and Northern Ireland (Section 33). Details are contained in the individual section notes below.

Extension of Freedom of Information

The Bill provides for the extension of FOI to all public bodies subject to some exemptions and to all bodies significantly funded by the Exchequer. The approach adopted is that Section 6 contains a generic definition which will enable FOI to apply to all public bodies unless specifically exempt in whole or in part. Essentially, FOI is being extended to the widest possible definition of public bodies, including a number of significant high profile bodies which have been excluded since the legislation was first enacted. Provision is also being made in the Bill to allow for the application of FOI to non-public bodies which are in receipt of significant funding from the State. This will be progressed in due course by way of Ministerial

Order subject to consultation with the relevant Departments to agree on criteria to select bodies which are a priority for bringing within the FOI regime.

Proposed Exemptions

Certain exemptions will be provided for some bodies so as not to affect the ability of these bodies to perform their core functions or in the interests of the security or financial position of the State. The Bill as drafted exempts most commercial State bodies in full from FOI. Other bodies are provided with exemptions in part. These include An Garda Síochána, the National Treasury Management Agency Group, the Central Bank of Ireland, the industrial relations bodies, the Insolvency Service of Ireland and the various Ombudsmen. Details of the exemptions are set out in Section 42 and Schedule 1 to the Bill. Under the draft legislation, as new public bodies are established, they will automatically be subject to the terms of the FOI legislation but provision is made for the Minister to make an Order to specifically exclude them in whole or in part if required.

Consolidation and Modernisation

The legislation will replace the Freedom of Information Acts 1997 and 2003 which are being repealed under this Bill. The structure of the Bill is also being revised to seek to improve the accessibility and comprehensibility of the legislation for the benefit of FOI bodies and citizens alike. Section 11 sets out key principles to guide FOI bodies in the performance of their functions under the Act including the need to achieve greater openness and to strengthen the accountability of FOI bodies. Section 8 provides that each FOI body will publish a publication scheme to replace the section 15 and 16 manuals required under the 1997 Act. Given technological and ICT developments in the 15 years since FOI was first introduced, the migration of such information to websites and international best practice, these manuals are no longer considered “fit for purpose”. The publication schemes will specify the classes of information that the body holds and has published or intends to publish. This is intended to facilitate significantly greater recourse to publication by FOI bodies outside of FOI on an administrative basis to reduce the significant administrative burden of FOI.

SUMMARY OF PROVISIONS OF THE FREEDOM OF INFORMATION BILL 2013

PART 1

PRELIMINARY AND GENERAL

Section 1 sets out the short title of the Bill and provides for its commencement. In general, the Bill provides that a body which, immediately before the enactment of this legislation, was subject to FOI under the 1997 Act would continue to be subject to FOI under this legislation on enactment. The Bill provides a six month lead-in time for those public bodies proposed to be subject to FOI for the first time under the Bill. This period can be extended by the Minister by Order under the Bill, subject to a business case being made to the Minister by the responsible Minister.

Section 2 defines certain terms used in the Bill. One of the important definitions relates to the “effective date”. In order to mitigate the administrative burden, it is not proposed to apply FOI from the effective date of 21 April 1998 in force for most public

bodies currently subject to FOI; rather the Bill proposes that retrospection will apply from 21 April 2008.

Section 3 provides the Minister with powers to make regulations under the Bill and provides for the laying of regulations made under the Bill before each House.

Section 4 states that any expenses incurred in the administration of the Act shall be paid out of monies provided by the Oireachtas.

Section 5 provides for the repeal of certain legislation dealing with freedom of information. Details are set out in Schedule 4.

PART 2

FOI BODIES

Section 6 contains a generic definition of “public body” which will enable FOI to apply to all public bodies unless specifically exempt. Bodies excluded from the application of FoI, either in whole or in part, are listed in Schedule 1 of the Bill. Section 6 also provides that the Minister may, by Order, specify the inclusion or exclusion of bodies or elements of bodies, whether new or existing, within the remit of FoI.

Section 7 provides that a non-public body, which receives significant funding from the Exchequer, may be prescribed by Order as an FoI body under this Act, either in whole or in part. These bodies are referred to in the Bill as prescribed bodies.

PART 3

RIGHTS IN RELATION TO RECORDS

CHAPTER 1

General rights in relation to records and decisions

Section 8 deals with the publication of information about FOI bodies. This section replaces Sections 15 and 16 of the existing 1997 Act which require that a public body must maintain manuals outlining its structures and functions, detailing the services it provides, indicating the types of records which it holds, decisions made, indexing precedents etc. Given developments since FOI was first introduced, these manuals are no longer considered “fit for purpose”.

Section 9 provides for the amendment of records relating to personal information and is similar in content to Section 17 of the 1997 Act. It confers a legal right on each member of the public to require that personal information relating to oneself and held by an FOI body be amended, where it is incomplete, incorrect or misleading. This Section is also updated to integrate provisions made by SI under the 1997 Act (S.I. No. 518 of 1998) which provided that similar arrangements should be made to provide assistance to requesters using this Section of the Act as currently apply to requesters using Section 12 (formerly Section 7) of the Act. It was considered more appropriate for this provision to be integrated in the new legislation.

Section 10 covers the rights of a person to information regarding an act of an FOI body affecting that person. This provision is similar to Section 18 of the 1997 Act. It confers a legal right on each person

to reasons for a decision on a matter particularly affecting that person. This Section is also updated to integrate provisions made by SI under the 1997 Act (S.I. No. 519 of 1998) which provided that similar arrangements should be made to provide assistance to requesters using this Section of the Act as currently apply to requesters using Section 12 (formerly Section 7) of the Act. It was considered more appropriate for this provision to be integrated in the new legislation.

CHAPTER 2

FOI Requests

Section 11 is similar to Section 6 of the 1997 Act in that it provides a legal right for the public to official information and imposes an obligation on FOI bodies to assist the public when making requests for such information but under this Bill the rights extend not only to public bodies but also to prescribed bodies and service providers. Section 11(3), sets out key principles to guide public bodies in the performance of their functions under the Act including the need to achieve greater openness and to strengthen the accountability of public bodies. An amendment has been made at section 11(7) to clarify that there is a general right of access to records and they should be released unless they are found to be exempt, and in applying these exemptions the right of access was only to be set aside where the exemptions very clearly supported a refusal of access. This amendment was considered necessary on foot of the important Supreme Court Decision on the Rotunda Hospital in *The Governors and Guardians Rotunda Hospital v Information Commissioner* [2011] IESC 26. Another important Section 11 provision is that Subsection (9) effectively repeals a provision in the 2003 Act which limited the potential for access to records relating to services provided under a contract for services to a public body, by a commercial State body or some private bodies.

Section 12 is the section dealing with requests for access to records and is similar to Section 7 of the 1997 Act. It sets out how the right of access is to be exercised and also requires that FOI bodies acknowledge receipt of requests within two weeks. In the interests of minimising the cost to the requester and for administrative efficiency, a provision is included at Section 12(7) that an FOI body may advise a requester whether the records concerned may be accessed under the European Communities (Re-use of Public Sector Information) Regulations 2005 or the European Communities (Access to Information on the Environment) Regulations 2007 instead of under Freedom of Information legislation.

Section 13 deals with decisions on requests and notification of such decisions. This section is based on Section 8 of the 1997 Act. It requires that FOI bodies decide whether to accede to or refuse requests within four weeks of receipt and that they notify the requester accordingly. Where a request is being refused, reasons for refusal must be given, along with a statement setting out rights of review and appeal.

Section 14 is in relation to extension of time for consideration of FoI requests and is based on Section 9 of the 1997 Act. It allows the period within which a decision must be made on a request to be extended by up to four weeks if the request, or related requests, concern such a large number of records that compliance within the specified timeframe is not possible.

Section 15 provides for a refusal of an FoI request on

administrative grounds. It is based on Section 10 of the 1997 Act but adds some additional grounds such as (a) if the FOI body intends to publish the record concerned within 6 weeks after receipt of the request and (b) where the request relates to records already released to a requester. Under the current provision, a request may be refused on administrative grounds if granting the request would cause substantial and unreasonable interference with or disruption of the work of the body concerned. This provision is being amended to provide that a refusal on administrative grounds can be made on the basis of disruption to the work of a particular functional area (rather than to the body as a whole) and provides for greater communication with the requester in an effort to refine a request in that regard.

Section 16 permits deferral of access to a narrow range of records and is similar to Section 11 of the 1997 Act.

Section 17 covers the different ways in which access can be granted. This Section is similar to Section 12 of the 1997 Act but is supplemented by a provision at Section 17(4) which sets out the responsibility of FOI bodies in relation to requests for data contained in more than one record held electronically by the body. Bodies are required to take reasonable steps to search for and extract such data (analogous to the steps that would be considered reasonable if such a record was held in paper form), whether or not that would result in the creation of a new record. The body is not, however, required to take any steps that involve the creation of any program or code for the purpose of searching for or extracting the data. Neither is it required to carry out any manipulation, analysis, compilation or other processing of the data. It also provides that where records are available in such form, they may be released in electronic and searchable format.

Section 18 refers to requests where part of a record is exempt. It provides for access to the remainder, where this is practical and does not mislead. This is similar to Section 13 of the 1997 Act.

Section 19 provides that failure by an FOI body to reply to a request within the timeframe specified will be deemed to be a refusal and is similar to Section 41 of the 1997 Act. Following from this the requester can proceed further to appeal.

Section 20 provides for delegation of functions and is similar to Section 4 of the 1997 Act. This enables decisions on the release of information to be taken at lower levels in an FOI body and the operation of an effective internal review system.

CHAPTER 3

Internal Appeal

Section 21 — Review by heads of decisions under Chapters 1 and 2 is similar to Section 14 of the 1997 Act. It provides for internal review against an initial decision by an FOI body in a number of situations including refusal to grant a request; the provision of access in a form other than that requested; the granting of access to part only of a record etc. Such a review must be undertaken at a higher level than that at which the original decision was made, and completed within three weeks.

CHAPTER 4

Review by Information Commissioner

Section 22 — Review by Commissioner of decisions is based on

Section 34 of the 1997 Act. Under this Section, the onus is on the FOI body to show that its original decision to refuse information, etc. was justified and the Commissioner's decision are binding on the parties concerned, subject to appeal to the High Court under *section 24*. A number of changes are being proposed to the Section. In considering the review of a request to which Section 38 applies, the Commissioner will be enabled to consider the request afresh, rather than just considering the public interest basis for the refusal. The withdrawal of an application to the Commissioner for review of a decision can be done orally rather than just in writing as at present. The Commissioner who has received an application for review may, in forwarding it to the FOI body in question, remove any personal or confidential information therefrom. An additional power is being given to the Commissioner on her recommendation which will allow the Commissioner to discontinue a review or refuse an application for review in respect of some or all aspects of the overall case.

Section 23 — Requests for further information by Commissioner relates to Section 35 of the 1997 Act. It allows the Commissioner to require an FOI body to provide more detailed reasons for refusal to grant a request where he or she is of the view that the details given in a notice under *section 13* is inadequate. Such additional information may include particulars taken into account by the FOI body pertaining to public interest.

CHAPTER 5

Appeal to High Court

Section 24 is similar to Section 42 of the 1997 Act. Where previously it provided for appeal to the High Court on a point of law against a decision of the Information Commissioner, or in relation to a matter the subject of a Ministerial Certificate, the grounds for an appeal have been broadened to allow an appeal to the High Court on a finding of fact set out in the decision in a case where a person contends that the release of a record would contravene a requirement imposed by EU law. In addition, the timescale to initiate an appeal to the High Court is being reduced from the 8 weeks to 4 weeks on the recommendation of the Information Commissioner but where a request is granted only in part by the Commissioner the time limit for a requester to make an appeal to the High Court will be 8 weeks.

CHAPTER 6

Miscellaneous

Sections 25 and *26* set out precautions against the disclosure of exempt information and stay on certain decisions which may be subject to appeal. These provisions appeared as Sections 43 and 44 of the 1997 Act.

Section 27 relates to fees. The provision remains unchanged from that set out in Section 47 of the 1997 Act. It was agreed by Government that there should be a reduction from €75 to €30 in the fee for internal review and from €150 to €75 in the fee for an appeal to the Information Commissioner. These changes will be effected by way of Order following the enactment of this Bill. The review of FOI which is ongoing is considering options for a reform of the search and retrieval fees regime which is not believed to operate properly or on a consistent basis across FOI bodies. Any legislative change required to implement a new model will be introduced at Committee stage of the Bill.

PART 4

EXEMPT RECORDS

Section 28 — The protection of records relating to meetings of the Government are restored to what they were at Section 19 of the 1997 Act. For example, the mandatory power of the head of a public body to refuse an FOI request relating to Government records or records to be submitted to Government, introduced in 2003, is removed in this Bill and the discretionary power contained in the original Act is restored. An exemption may apply if records are solely, rather than primarily, for the purpose of the transaction of Government business. Section 28(3) provides for the restoration of the period during which records of Government are exempt from FOI from 10 to 5 years (this had increased to 10 years under the 2003 Act). The original definition of Government contained in section 19(6) of the 1997 Act, which had been expanded in 2003 is restored at Section 28(6). The potential exemption no longer applies to records which contain factual information already in the public domain and communications between members of the Government are also no longer exempt.

Section 29 — Deliberations of FOI bodies is Section 20 of the 1997 Act. As in the case of Section 28 above, the protections in this Section were made stronger under the 2003 Act but this Bill, as drafted, will substantially return it to its 1997 state. The effect of this is that documents in relation to the deliberative process may be refused but only where disclosure would be contrary to the public interest. The public interest consideration had been weakened in 2003. The power of a Secretary General to issue a certificate stating that a particular record contains matters relating to the deliberative processes of a Department of State, introduced in 2003, is being removed.

Section 30 — Under Section 30 (Section 21 of the 1997 Act), records may be protected where disclosure could prejudice the effectiveness of certain operations of an FOI body. Such operations would include audit, control, examinations or investigative functions of the body. In addition, this provision offers protection in respect of industrial relations functions and negotiating positions of Government and state agencies. Information may be released where the public interest would on balance, be better served by granting than by refusing the request.

Section 31 (Section 22 of the 1997 Act) exempts from disclosure matters relating to the proceedings of the Oireachtas and records which would be in contempt of court, or protected on the grounds of legal professional privilege. The private papers of elected representatives of the European Parliament and of Local or Regional Authorities are also protected.

Section 32 — Law enforcement and public safety is based on Section 23 of the 1997 Act. It provides that information may be protected where its disclosure could prejudice or impair law enforcement functions. This protection does not extend to information concerning the performance of a body or the success or otherwise of a law enforcement programme or policy where the public interest would be served by such disclosure.

Section 33 — Security, defence and international relations is based on Section 24 of the 1997 Act but makes some amendments. In overall terms the absolute exemption for records relating to the tactics, strategy or operations of the Defence Forces and certain

diplomatic communications is removed and made subject to a harm test. The mandatory exemption remains for highly sensitive confidential communications relating to for example negotiations between the State and international organisations; negotiations between States where such disclosure is prohibited, diplomatic communications intended to be restricted to Government Ministers containing analysis, opinions or advice etc where disclosure could be expected to disclose positions, plans or instructions to be used for the purpose of State negotiations; and for information relating to intelligence in respect of security or defence of the State.

Section 34 — Conclusiveness of certain decisions pursuant to sections 32 and 33, is similar to Section 25 of the 1997 Act. It outlines the procedures in relation to the issue of Ministerial certificates declaring a record to be an exempt record by reference to sections 32 and 33.

Section 35 provides that information may be protected which has been given to an FOI body and is subject to an obligation of confidence. It is similar to Section 26 of the 1997 Act, although a current anomaly in the legislation is being removed by allowing a note of information received in confidence over the phone or in person to attract the same protections as information received in writing or electronic means.

Section 36 provides that an FOI body may refuse to grant access to commercially sensitive information to persons other than the individual or company to whom the information relates. This provision is contained in the 1997 Act as Section 27.

Section 37 (section 28 of the 1997 Act) protects personal information held by an FOI body against third party access. A definition of “personal information” is included at *Section 2* of the Bill and has been aligned with the Data Protection Commissioner’s definition. The head has discretion to consider release of the information to a third party where, on balance, he or she is of the opinion that the public interest in disclosure outweighs the right to privacy of the individual.

Section 38 (Section 29 of 1997 Act) outlines consultation procedures to be followed if a head proposes to release, in the public interest, information referred to in Sections 35, 36 or 37.

Section 39 (section 30 of the 1997 Act) deals with information relating to research and natural resources. Information in relation to research may be withheld by an FOI body if premature disclosure of the information would be likely to expose the body concerned or the persons engaged in the research to serious disadvantage. Information may also be protected where its release could reasonably be expected to prejudice the well-being of a cultural, heritage or natural resource or the habitat or species of flora or fauna. Information may be released where the public interest would on balance, be better served by granting than by refusing the request.

Section 40 protects information where its disclosure could reasonably be expected to have serious adverse effects on the financial interests of the State or the ability of the Government to manage the economy. It is based on Section 31 of the 1997 Act but an additional three types of records are added to the classes of records covered by the provision at Section 40(2)(p), (q) and (r) to cover records relating to investment by or on behalf of the State or a public body, records relating to liabilities of the State or a public body and records advising on or managing PPP projects. Section

40(2)(i) was also amended to provide for “assets” to be included as a category to which an exemption could apply.

Section 41 as contained in Section 32 of the 1997 Act upholds the operation of specific secrecy provisions in other enactments unless such provisions are listed in Schedule 3 in which case they are subordinate to FOI. This section further provides for periodic review of secrecy provisions in other enactments by a Committee of the Oireachtas from time to time with a view to recommending whether they should be amended or repealed. If it is recommended that they should continue in force, the Committee has the power to recommend whether they should override FOI or whether they should be included in Schedule 3.

PART 5

RESTRICTION OF ACT

Section 42 sets out the areas where freedom of information does not apply and where that situation is unlikely to change in the future. Section 46 of the 1997 Act contained a similar provision but this Bill updates the provision to take account of exemptions being provided for An Garda Síochána, the Criminal Assets Bureau and the Defence Forces. Access to records which are subject to professional secrecy obligations under the Rome Treaty, the European System of Central Bank (ESCB) statute or any of the Supervisory Directives are excluded in respect of the Central Bank of Ireland. Tribunals of Inquiry and Commissions of Investigation were already excluded in part from the remit of FOI but the relevant provisions which were previously contained in sectoral legislation are being integrated into Section 42 of this legislation. Full details are given in Section 42.

PART 6

THE INFORMATION COMMISSIONER

Section 43 provides for the continuation of the office of the Information Commissioner. It is similar to the provision for the establishment of the office of the Information Commissioner contained in Section 33 of the 1997 Act but this Section also provides that the Commissioner will be a corporation sole with power to sue and be sued and to acquire, hold and dispose of land etc.

Section 44 (Section 36 of 1997 Act) provides that the Commissioner shall keep the Bill under review and may carry out investigations into the practices and procedures adopted by FOI bodies for the purpose of compliance with the provisions of the Bill.

Section 45 — Functions of Commissioner is based on Section 37 of the 1997 Act relating to Powers of the Commissioner. It sets out powers of the Commissioner to examine documents and summon witnesses. A new provision is also included (at Section 45(8)) to allow the Commissioner to apply for a court order to oblige an FOI body to comply with a binding decision of the Commissioner where the FOI body has failed to do so. Amendments are made which provide, inter alia, that the Commissioner may not enter Garda premises subject to Regulations to be made under the Garda Síochána Act 2005 (similar to Garda Ombudsman), and to ensure that the Commissioner must comply with professional secrecy obligations in dealing with information being reviewed in relation to the Central Bank.

Section 46 (Section 39 of the 1997 Act) enables the Commissioner to make available information on the practical application of the Bill, including on particular provisions.

Section 47 is based on Section 40 of the 1997 Act and provides for the preparation of annual and special reports by the Commissioner. This Section adds two additional provisions requiring the Commissioner to publish any decision in relation to a review under Section 22 and a summary of any appeal to the High Court under Section 24, once those proceedings have been concluded.

PART 7

MISCELLANEOUS

Section 48 — Code of Practice and Guidelines is a new Section. It provides the Minister with the power to draw up and publish a code of practice and guidelines to assist FOI bodies and provides that the bodies shall have regard to the code and any guidelines in the performance of their functions.

Section 49 sets out legal protections for the granting of access to a record in accordance with the provisions of the Bill, or in the reasonable belief that its provisions were complied with. It is based on Section 45 of the 1997 Act, updated to represent current wording and legal immunity requirements.

Section 50 is a new Section which amends the Central Bank Act 1942 to allow the Bank to furnish information to the Commissioner in the performance of her functions.

Section 51 (Section 48 of the 1997 Act) amends the Official Secrets Act, 1963, by providing that a person is deemed to be duly authorised under that Act to release official information, where they do so on the basis of being so authorised under this Bill, or in the reasonable belief that he or she is so authorised. This section also provides defence against prosecution under the Official Secrets Act.

Section 52 — Offence and Penalty is a new Section which provides that it will be an offence under the Act to wilfully and without lawful excuse either destroy or alter a record that is the subject of an FOI request and sets a Class B fine on summary conviction.

Section 53 — Proceedings for Offences. This is a standard provision. It sets out timelines for commencing proceedings for offences as well as clarifying that a director or a member of management may be guilty of an offence if an offence was committed with their consent or through wilful neglect.

Section 54 — Saver is a new provision so that regulations made under the 1997 Act, other than those listed in Schedule 5, will cease to be in operation on the commencement of this Act.

Section 55 is another new Section providing for transitional arrangements for actions commenced but not completed under the 1997 Act.

SCHEDULES

Schedule 1 — Part 1 includes details of the bodies included, in part, under FOI and the elements of those agencies which are included or excluded, as appropriate.

Schedule 1 — Part 2 is a list of bodies exempted from FOI in full.

Schedule 2 details the terms relating to the Information Commissioner.

Schedule 3 sets out and updates the non-disclosure provisions of enactments excluded from the application of the non-disclosure provisions of Section 41.

Schedule 4 details the repeals of both primary and secondary legislation effected under this Bill

Schedule 5 lists the Statutory Instruments made under the 1997 Act which are to continue in force following the enactment of this legislation, notwithstanding the repeal of the 1997 Act.

Department of Public Expenditure and Reform,
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