

FOI Request 120/2015

9th October 2015

Mr Gavin Sheridan
[gavinsblog@gmail.com]

Dear Gavin

I refer to our recent e-mails in relation to the above FOI request and refining of same. Your latest text forwarded by e-mail dated 28 September@12.58 seeks access to the following:

- (a) Representations from NTMA/NAMA and An Garda Síochána in relation to the FOI Bill in the form of records of meetings between the Department and any of these three organisations from January 2013 to December 2013; and
- (b) Minutes of “internal meetings” (defined as meetings between DPER officials) in September, October and November 2013 that discussed the FOI Bill, either specifically or as an item on a broader agenda.

In relation to Part (a) of your request, the following is relevant:

- I did not limit my search to the period you requested but I searched back to the Programme for Government in 2011 when the commitment to extend FOI to all public bodies, including the administrative side of An Garda Síochána, was made;
- I interpreted meetings with An Garda Síochána to include meetings with the Department of Justice in relation to An Garda Síochána;
- Although your request was limited to records of meetings, I decided to include the submission made by D/Justice dated 23 December 2011 which sets out D/Justice case in relation to FOI and An Garda Síochána and is referred to in some of the minutes of meetings;
- In examining the records of meetings relating to NTMA/NAMA, I came upon some records relating to follow-up from meetings and I have interpreted your request as encompassing these records.

I have retrieved 10 records in relation to Part (a) of your request on the basis set out above and details are provided in the attached Schedule. I have decided to grant access to all of these records and copies are attached. The only text redacted from these records is text that is not relevant to your request.

In relation to Part (b) of your request, you are correct that there was only a small group of officials dealing with the FOI Bill, composed primarily of Emer Hogan, my Assistant Principal and myself as Principal Officer. We would have had interaction almost on a daily basis to progress drafting issues. These would not have been formal meetings and minutes would not have been kept. There would also have been meetings with my Assistant Secretary, William Beausang on FOI. Although we would not have formal minutes of these meetings either, I did take manual notes of these and of some meetings of the Unit and I am considering such notes as being comprehended by your request.

I have retrieved 8 records in relation to Part (b) of your request as set out above and details are provided in the attached Schedule. I have decided to grant access to all of these records and copies are attached.


Although your request in fact required in excess of 5 hours search, retrieval and copying time I decided, in view of the efforts made to refine your request, that I would process your request free of charge on this occasion.

Right of Appeal

Under the FOI Act I am required to inform you that if you are not satisfied with this decision you may appeal in writing to the Freedom of Information Unit, Department of Public Expenditure and Reform, Upper Merrion Street, Dublin 2. You must make this appeal within four weeks from the date of this notification (the making of a late appeal may be allowed in appropriate circumstances). The appeal process known as internal review, will involve a complete reconsideration of the matter by a more senior member of the staff of this Department. The decision on the internal review will be given within 3 weeks of receipt of your letter. Please note that there is a fee of €30 for making an appeal or €10 for medical card holders. The fee, which should accompany your appeal, can be paid by way of Bank Draft, Money Order, Postal Order or personal cheque made payable to the Accountant, Department of Public Expenditure and Reform.

If you have any queries regarding this correspondence you can contact me by telephone at 6045311 or by e-mail at Evelyn.O'Connor@per.gov.ie.

Yours sincerely


Evelyn O'Connor
Principal

SCHEDULE OF RECORDS

Gavin Sheridan 120/2015

- (a) Representations from NTMA/NAMA and An Garda Siochana in relation to the FOI Bill in the form of records of meetings between the Department and any of these three organisations from January 2013 to December 2013; and
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Record No	Brief description and date of record	File Ref	No. of pages	Decision: Grant/PartGrant/Refuse	Basis of Refusal: Section of Act	Reason for Decision	Public Interest Considerations (for and against release)	Record Edited/Identify Deletions
	<u>Part (a) of request – NTMA/NAMA</u>							
1	E-mail dated 17 July 2012 attaching issues paper prepared by D/PER following meeting with NTMA/NAMA on 16 July 2012			Grant				
2	E-mail dated 18 July 2012 from NTMA including NTMA comments on issues paper prepared by D/PER following meeting with			Grant				

	NTMA/NAMA on 16 July 2012							
3	Paper prepared by D/PER following meeting with NTMA on 8 November 2012.			Grant				
4	Note of meeting held with NTMA on 7 March 2013			Grant				
	<u>Part (a) of request – An Garda Siochana</u>							
5	Note of meeting held with D/Justice & Equality on 27/9/11			Grant				Only text redacted is text not relevant to request
6	Letter from D/Justice & Equality dated 23/12/11 setting out position re An Garda Siochana and FOI			Grant				Only text redacted is text not relevant to request
7	Note of meeting with D/Justice on 20 January 2012			Grant				Only text redacted is text not relevant to request
8	Note of meeting held with D/Justice & Equality on 2/3/12			Grant				Only text redacted is text not relevant to request
9	Manuscript note of meeting with D/Justice on 7 June 2012			Grant				
10	Manuscript note of meeting with D/Justice and An Garda Siochana on 11 November 2014			Grant				

	<u>Part (b) of request</u>							
11	Manuscript note of meeting with William Beausang (WB) on 5/9/13			Grant				
12	Manuscript note of meeting with WB on 16/9/13			Grant				
13	Manuscript note of meeting with WB on 24/9/13			Grant				
14	Manuscript note of Unit Meeting on 10/10/13			Grant				
15	Manuscript note of meeting with WB on 21/10/13			Grant				
16	Manuscript note of internal meeting 15/11/13			Grant				
17	Manuscript note of meeting with WB on 18/11/13			Grant				
18	Manuscript note of meeting with WB on 19/11/13			Grant				

Emer Hogan

From: Emer Hogan
Sent: 21 January 2015 11:34
To: Emer Hogan
Subject: FW: Meeting Tomorrow
Attachments: NTMA Group issues note.doc

-----Original Message-----

From: Beausang, William
Sent: 17 July 2012 17:28
To: 'Adrian O'Donovan'
Cc: Andrew O'Flanagan; Aileen O'Reilly; O'Connor, Evelyn; 'Richard Humphreys'
Subject: RE: Meeting Tomorrow

Adrian,

Following our discussion yesterday, please see 'non-paper' attached in which we tried to capture the issues we went through yesterday and identify in broad terms how we might to propose to address them.

As you will see the document is presented as a DPER paper but with the objective of setting out clearly the problems you identified and how we would propose to address them in the context of the public financial bodies participating in FOI.

I would be grateful therefore if you and your colleagues could review the note and let me have your obs. as appropriate both in overall terms as well as reflecting back any suggested drafting changes that you believe are necessary.

You will note that as a drafting convenience on our part we have set out in a number of places a view attributed to the NTMA on particular aspects of the issues we are reviewing. Where we did this we were relying on our recollection of yesterday's discussions but needless to say are entirely in your hands in terms of how you wish the agency's position on these issues to be represented (including if at all).

In any event as we agreed yesterday the whole paper is 'without prejudice' to formal positions and is intended to explore the potential for identifying a possible way forward in advance of Government consideration of our FOI proposals more generally.

The timeline on this is not that favourable given the Minister's plan to bring these proposals to Govt next week and consequently we would appreciate your early feedback on the approach, if at all possible

We are of course available to discuss any aspect over the phone or at a meeting if that would be helpful.

Many thanks

William

-----Original Message-----

From: Adrian O'Donovan [mailto:AODonovan@ntma.ie]

Sent: 13 July 2012 17:31

To: Beausang, William; O'Connor, Evelyn

Cc: Andrew O'Flanagan; Aideen O'Reilly; Petris, Nico; Phelan, Eamann; 'rfhumphreys@gmail.com'; O'Connor, Evelyn

Subject: RE: Meeting Tomorrow

Agreed. See you Monday

Adrian

-----Original Message-----

From: Beausang, William [mailto:William.Beausang@per.gov.ie]

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To: Beausang, William; Adrian O'Donovan; O'Connor, Evelyn

Cc: Andrew O'Flanagan; Aideen O'Reilly; Petris, Nico; Phelan, Eamann; 'rfhumphreys@gmail.com'; O'Connor, Evelyn

Subject: RE: Meeting Tomorrow

Adrian, could we meet on Monday at 6pm in 7-9 Merrion Row - Evelyn is interviewing until 5.30pm in the Custom House.

Thanks

william

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To: 'Adrian O'Donovan'; O'Connor, Evelyn

Cc: Andrew O'Flanagan; Aideen O'Reilly; Petris, Nico; Phelan, Eamann; rfhumphreys@gmail.com; O'Connor, Evelyn

Subject: RE: Meeting Tomorrow

Adrian

That would be great. Richard Humphreys is flexible on Monday.

Evelyn is interviewing on Monday pm but we can schedule for whenever she is freed up after five.

I will be talking to her in the early pm and will confirm a time.

Many thanks

-----Original Message-----

From: Adrian O'Donovan [mailto:AODonovan@ntma.ie]

Sent: 13 July 2012 10:42

To: Beausang, William; O'Connor, Evelyn

Cc: Andrew O'Flanagan; Aideen O'Reilly; Petris, Nico; Phelan, Eamann; rfhumphreys@gmail.com

Subject: RE: Meeting Tomorrow

William

Could do Monday, but due to prior commitments some people have it would have to be 5.00 or after. You might let me know if this suits.

Adrian

This message, including any attachments, is intended for the addressee only. It may be confidential or legally privileged.

If you have received this message in error, you should not disclose, copy or use any part of it - please delete it from your computer and contact ITSecurity@ntma.ie

Confidential Draft

Proposed Extension of Freedom of Information – Public Financial Bodies¹

1. Overview

1.1 Freedom of Information contributes to greater openness and transparency. It has been instrumental in underpinning greater accountability by facilitating the release of information needed to hold public bodies to account. International studies have highlighted the positive impacts of greater transparency on public governance

1.2 The limited application of Freedom of Information and the incomplete coverage of the public service is an important weakness in improving public access to official information particularly since gaps in coverage show little consistency and appear arbitrary in some respects. The Programme for Government, therefore, contains a commitment to extend Freedom of Information to all public bodies.

1.3 There is a requirement in the public sector that public bodies demonstrate that the use of public resources has been effective, economical, and efficient and that it complies with all law and meets community standards of probity and propriety. Such scrutiny is required because of the non-voluntary relationship between Government and taxpayers who finance government activities and the different rule of law which applies in the public sector as opposed to the private sector.

1.4 Freedom of Information legislation has, however, previously been applied to a quite limited extent to public bodies with significant commercial activities. In addition public financial bodies are currently operating in a hugely challenging commercial and financial / economic environment. Specific and targeted legislative change is, therefore, required to facilitate the extension of Ireland's Freedom of Information regime to encompass these bodies in order to pre-empt any significant risk of a serious competitive disadvantage arising which has the potential to give rise to substantial costs to the State and its citizens.

1.5 While some of the measures proposed may be exceptional in current circumstances the public interest is that every opportunity to attract investment in Ireland is maintained and no requirement is imposed on a public financial body that gives rise to serious or substantial competitive disadvantage notwithstanding that public bodies owing to their reliance on public funds are properly subject to higher standards of accountability and disclosure than apply to private bodies.

1.6 In this context, a particular priority is to strike a correct balance between the public interest in allowing access to official information held by these bodies and safeguarding highly commercially and market sensitive information (relating to the performance of their own statutory functions) against release.

¹ NTMA, NAMA, NPRF, NDFA

2. Investor Confidentiality

2.1 Absolute confidentiality of the engagement by the public financial bodies with potential investors in Ireland must be preserved

Assessment

2.2 In seeking to encourage and promote future interest in Irish Government Bonds the NTMA is currently operating in very challenging market conditions. Credit rating downgrades and the programme of international assistance has eroded much of the State's previous investor base. This had contributed to a requirement to engage with classes of potential investors (e.g. Sovereign Wealth Funds, Hedge Funds etc.) who required confirmation of the absolute confidentiality of any engagement with the Irish authorities (for reasons of market / commercial sensitivity of that information).

2.3 While the NTMA would believe that the exemptions available under the Act would in any event be protect this information from premature release, the potential for independent third-party review under the Act would prevent the NTMA from giving an absolute or categorical assurance of confidentiality.

2.4 In addition in view of the State's current financial circumstances progress towards the objective of restoring the State's re-entry to the capital markets depends to a much greater extent than in advance of the financial / banking crisis on the ability of the NTMA to secure and maintain interest among this investor group in participating in future market issuance given the availability of investment opportunities elsewhere.

2.5 Similar considerations arise in relation to the objectives of the other public financial bodies.

Proposal

2.6 It is proposed, therefore, that a mandatory exclusion should apply by way of an order made under the First Schedule in respect of the identity of commercial counterparties with whom the public financial bodies engage with in performing their functions in relation to Irish bond market, the Strategic Investment Fund, in PPPs and in other areas that these bodies have a legal mandate from Government to explore possible sources of external finance. Where transactions ultimately take place and the information is available to the relevant agencies it will be available for release into the public domain under Freedom of Information or otherwise.

3. Commercial Confidentiality Requirements – NAMA

3.1 Existing confidentiality requirement in the NAMA Act should not be superseded by the Freedom of Information Act.

Assessment

3.2 NAMA is currently subject to a detailed and onerous set of confidentiality obligations under its governing legislation. In addition to the common law duty of bank/customer confidentiality as a matter of contract law which it assumed from the legacy banks under section 99 of the NAMA Act, section 202 of the NAMA Act contains

comprehensive prohibitions on the release of confidential and commercially sensitive information other than when this is authorised by the NAMA Board (or the NTMA to do so).

3.3 No question arises of removing the blanket protection of customer information under section 99 of the Act as these requirements are equivalent to those which apply in a banking relationship and could result in NAMA being open to significant claims from its borrowers for breaches of confidence. The broader general confidentiality restrictions applying to NAMA under section 202 of the Act were put in place by the Oireachtas to underpin its statutory mandate of obtaining the best achievable financial return for the State.

3.4 The application of Freedom of Information to NAMA is a significant step in securing greater transparency regarding its activities complementing the significant information made available in the public domain through its Annual Reports and other publications, Parliamentary Questions, C&AG reports and appearance at Oireachtas Committees. Inclusion of provision prohibiting the disclosure of information in Schedule 3 of the Freedom of Information Act has the effect of removing the scope to refuse a Freedom of Information request on the basis that the disclosure of the record concerned is prohibited by any other enactment. Where confidentiality provisions from other Statutes are not included in Schedule 3, they are subject to periodic review by the Oireachtas under section 32 of the Act which provides the opportunity for the Oireachtas to assess taking into account the views of the relevant Minister and the Information Commissioner and make recommendations whether the specific confidentiality provisions should be amended, repealed or included in Schedule 3.

3.5 It should be noted that in the Post-Legislative Review of the UK Freedom of Information Act submitted by the UK Ministry of Justice to a parliamentary committee earlier this year, the Ministry reports on the impact of Freedom of Information on public bodies operating in a commercial environment. It concludes that while there is little evidence of the impact of Freedom of Information on commercially focused public authorities operating in competition with bodies not subject to the Act, the balance to be struck between their commercial and public status may be worthy of further consideration.

Proposal

3.6 It is not considered prudent to subordinate the existing confidentiality requirements in place under the NAMA to Freedom of Information legislation. This will be achieved by omitting reference to s 202 of the NAMA Act from the Third Schedule to the Bill.

4. Exemptions available to the public financial bodies for commercially sensitive information

4.1 Legal certainty is required that the public financial bodies have adequate protection under the Act against the disclosure of their own information they might cause a serious competitive or commercial disadvantage.

Assessment

4.2 Section 31 (2) (n) of the Act provides an exemption – subject to a public interest test – which relates to this specific risk. Further legal analysis is required to assess whether the level of protection provided by this provision is sufficient in light of the scale, extent and significance of the commercial activities that may be carried out by the public financial bodies and in particular to examine whether the provisions included in section 31 (1) (a), (b) and (c) reinforce (or alternatively may potentially obscure) the safeguards provided by 31 (2) (n). International precedents may be useful in further reviewing this issue.

Proposal

4.3 This legal issue can be examined further in the context of the drafting of the amending legislation.

5. Information on Remuneration

5.1 Specific arrangements are required to safeguard the confidentiality of information on remuneration for named individuals.

Assessment

5.2 Pay in the NTMA and the other agencies reflect individual contractual arrangements in all cases reflecting remuneration arrangements in the private sector. In contrast to the public bodies more generally, there are no pay scales or grading structure in place. In the normal course of events the NTMA etc. provides details of its CEO remuneration package in its annual reports. It has also in response to Parliamentary Questions etc. provided extensive disaggregated information on remuneration arrangements for all staff (within 50k pay categories).

5.3 The NTMA Advisory Board and the NAMA Board have a high level of concern that requests for information on specific pay levels for named individuals will have a potentially highly disruptive impact on the agencies' effectiveness and HR strategies. The availability of this information on a personalised basis in the public domain is likely to impact adversely on staff morale and organisational cohesion. It will also facilitate 'poaching' of skilled / expert staff by other financial institutions and weaken the agencies' negotiating position in relation to new hires.

5.4 The NTMA etc. has no reservations regarding the continued provision of disaggregated information to the point that individuals cannot be separately identified but in light of the Information Commissioner's interpretation of section 26 (1) (b) of the Act (which relates to disclosure of information that would constitute a breach of duty of confidence) in relation to the disclosure of information on individual pay records believes that a specific safeguard is required.

Proposal

5.5 It is proposed that this matter would be examined further with a view to ensuring that the public interest test which overrides the contractual confidentiality in this case takes into account information disclosed on pay levels and the organisation's HR requirements.

6. State Claims Agency and Freedom of Information

6.1 In view of its specific legal role and responsibilities the State Claims Agency should be treated in an equivalent way to analogous public bodies such as Chief State Solicitors Office.

Assessment

6.2 Under the National Treasury Management Agency (Amendment) Act, 2000, the management of personal injury and property damage claims against the State and of the underlying risks was delegated to the NTMA. When performing these functions, the NTMA is known as the State Claims Agency (SCA). The Act sets out two objectives for the SCA:-

- To manage claims so as to ensure that the State's liability and associated legal and other expenses are contained at the lowest achievable level; and
- To provide risk advisory services to State authorities with the aim of reducing over time the frequency and severity of claims

The role carried out by the SCA would previously have been performed by the Chief State Solicitors Office which is a public body for the purposes of the Freedom of Information Act, 1997. However, it should be noted that under section 46 of the Act records created or held by the Chief State Solicitor's Offices other than records relating to the general administration of the Offices are not covered by the Act. This result is that the public has a right of access to records concerning the general administration of the Chief State Solicitor's Office but no others.

Proposal

6.3 It is proposed, therefore, that the application of Freedom of Information to the State Claims Agency should be restricted to its administrative records. This will be effected by an amendment to the scheme.

7. Implementation Date for Freedom of Information / Effective Date for Retrospection

7.1 Adequate time should be provided for the NTMA and the other public financial bodies associated with the agency to prepare for the application of Freedom of Information. Full retrospection to 1998 should not apply immediately on enactment.

Assessment

7.2 As is the case for all public bodies becoming subject to Freedom of Information, in light of the obligations under the Act, a significant programme of preparation, training and review of records management would be required for the NTMA etc. in advance of the implementation date of any legislation. In terms of the effective date for non-

personal records under Freedom of Information, in addition to the substantial practical administrative logistical challenges of full retrospection covering a 14 year period to 1998 there is a concern that 'retrospective' application of the legislation from 1998 and the release of third-party information that might arise in that context could be perceived or misrepresented as a breach of normal commercial practice particularly in circumstances that representations were not made that the information may be subject to release under Freedom of Information in the future. As against that, a good deal of the commercial sensitivity that might attach to records held by the NTMA group agencies is itself time-sensitive and therefore the difficulties in disclosing legacy records are in the main administrative rather than commercial.

Proposal

7.3 The proposed implementation date for Freedom of Information could be examined further by the NTMA and the Department. Further consideration is required of the extent to which the Act would apply retrospectively in light of the issues raised by the NTMA. The policy for other public bodies is in overall terms that the Act should apply with full retrospection to 1998. In the case of the NTMA etc. specific commercial concerns have been raised which need to be examined. It is envisaged that any easing of the retrospection to 1998 would be contained in an order under the First Schedule which would postpone the retrospection to 1998 over a lengthier period, so that, for example, initially the Act would not be retrospective as regards the NTMA group, but retrospection to 1998 would apply after a period of say 3 years from the enactment of the 2012 Bill.

**Government Reform Unit
Department of Public Expenditure and Reform
July 2012**

Emer Hogan

From: Adrian O'Donovan [mailto:Adrian.O'Donovan@per.gov.ie]
Sent: 18 July 2012 16:31
To: William Beausang
Cc: Andrew O'Flanagan; Aideen O'Reilly; Evelyn O'Connor; 'Richard Humphreys'
Subject: RE: Meeting Tomorrow
Attachments: NTMA Group issues note (with NTMA comments).doc

William

Thanks for this which we feel moves the matter on considerably. I have set out our comments on the proposals made in the attachment. You might give me a call at your convenience to discuss next steps.

I have a meeting in D Finance this evening at 6.00 and we have our annual report press conference tomorrow morning which means I'll be tied up from about 10.30 to 12.30. I'm free otherwise.

Regards

Adrian

Tel 6640818
Mob 087 9839692

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Sent: 17 July 2012 17:28
To: Adrian O'Donovan
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2.3 While the NTMA would believe that the exemptions available under the Act would in any event be protect this information from premature release, the potential for independent third-party review under the Act would prevent the NTMA from giving an absolute or categorical assurance of confidentiality.

2.4 In addition in view of the State's current financial circumstances progress towards the objective of restoring the State's re-entry to the capital markets depends to a much greater extent than in advance of the financial / banking crisis on the ability of the NTMA to secure and maintain interest among this investor group in participating in future market issuance given the availability of investment opportunities elsewhere.

2.5 Similar considerations arise in relation to the objectives of the other public financial bodies.

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NTMA Comment: What the NTMA is seeking here is a carve-out from the Act for records relating to all market participants with which it or associated bodies engage – similar to what was done with RTE in relation to programming – so that it can continue to give an assurance of absolute confidentiality to such market participants (investment managers, market counterparties, potential NAMA purchasers etc). This applies to records both before and after a transaction. Many investors will not wish to deal with an organisation where they will not have certainty as to the confidentiality of their information and the stronger investors who do not have any problems attracting

funds may choose to go elsewhere. In the NTMA's view, the exemptions provided for in the FOI Act are not sufficient for it to provide the level of confidentiality required or to protect information from premature release.

None of the above is intended to suggest that where an NTMA entity has made an investment with a counterparty the fact and value of that investment should not be released. However, information on individual investors in Government bonds – to the extent that it is possessed by the NTMA – should remain confidential.

Finally, we note that the DPER proposal is to address this issue by way of Ministerial Order. However, our understanding is that the proposal to extend the FOI to the NTMA and related entities is being made in the Bill itself. If this is the case, would this issue not be more appropriately dealt with in the Bill too?

3. Commercial Confidentiality Requirements – NAMA

3.1 Existing confidentiality requirement in the NAMA Act should not be superseded by the Freedom of Information Act.

Assessment

3.2 NAMA is currently subject to a detailed and onerous set of confidentiality obligations under its governing legislation. In addition to the common law duty of bank/customer confidentiality as a matter of contract law which it assumed from the legacy banks under section 99 of the NAMA Act, section 202 of the NAMA Act contains comprehensive prohibitions on the release of confidential and commercially sensitive information other than when this is authorised by the NAMA Board (or the NTMA to do so).

3.3 No question arises of removing the blanket protection of customer information under section 99 of the Act as these requirements are equivalent to those which apply in a banking relationship and could result in NAMA being open to significant claims from its borrowers for breaches of confidence. The broader general confidentiality restrictions applying to NAMA under section 202 of the Act were put in place by the Oireachtas to underpin its statutory mandate of obtaining the best achievable financial return for the State.

3.4 The application of Freedom of Information to NAMA is a significant step in securing greater transparency regarding its activities complementing the significant information made available in the public domain through its Annual Reports and other publications, Parliamentary Questions, C&AG reports and appearance at Oireachtas Committees. Inclusion of provision prohibiting the disclosure of information in Schedule 3 of the Freedom of Information Act has the effect of removing the scope to refuse a Freedom of Information request on the basis that the disclosure of the record concerned is prohibited by any other enactment. Where confidentiality provisions from other Statutes are not included in Schedule 3, they are subject to periodic review by the Oireachtas under section 32 of the Act which provides the opportunity for the Oireachtas to assess

taking into account the views of the relevant Minister and the Information Commissioner and make recommendations whether the specific confidentiality provisions should be amended, repealed or included in Schedule 3.

3.5 It should be noted in that in the Post-Legislative Review of the UK Freedom of Information Act submitted by the UK Ministry of Justice to a parliamentary committee earlier this year, the Ministry reports on the impact of Freedom of Information on public bodies operating in a commercial environment. It concludes that while there is little evidence of the impact of Freedom of Information on commercially focused public authorities operating in competition with bodies not subject to the Act, the balance to be struck between their commercial and public status may be worthy of further consideration.

Proposal

3.6 It is not considered prudent to subordinate the existing confidentiality requirements in place under the NAMA to Freedom of Information legislation. This will be achieved by omitting reference to s 202 of the NAMA Act from the Third Schedule to the Bill.

NTMA Comment: We agree with the proposal.

4. Exemptions available to the public financial bodies for commercially sensitive information

4.1 Legal certainty is required that the public financial bodies have adequate protection under the Act against the disclosure of their own information they might cause a serious competitive or commercial disadvantage.

Assessment

4.2 Section 31 (2) (n) of the Act provides an exemption – subject to a public interest test – which relates to this specific risk. Further legal analysis is required to assess whether the level of protection provided by this provision is sufficient in light of the scale, extent and significance of the commercial activities that may be carried out by the public financial bodies and in particular to examine whether the provisions included in section 31 (1) (a), (b) and (c) reinforce (or alternatively may potentially obscure) the safeguards provided by 31 (2) (n). International precedents may be useful in further reviewing this issue.

Proposal

4.3 This legal issue can be examined further in the context of the drafting of the amending legislation.

NTMA Comment: We agree with the proposal.

5. Information on Remuneration

5.1 Specific arrangements are required to safeguard the confidentiality of information on remuneration for named individuals.

Assessment

5.2 Pay in the NTMA and the other agencies reflect individual contractual arrangements in all cases reflecting remuneration arrangements in the private sector. In contrast to the public bodies more generally, there are no pay scales or grading structure in place. In the normal course of events the NTMA etc. provides details of its CEO remuneration package in its annual reports. It has also in response to Parliamentary Questions etc. provided extensive disaggregated information on remuneration arrangements for all staff (within 50k pay categories).

5.3 The NTMA Advisory Board and the NAMA Board have a high level of concern that requests for information on specific pay levels for named individuals will have a potentially highly disruptive impact on the agencies' effectiveness and HR strategies. The availability of this information on a personalised basis in the public domain is likely to impact adversely on staff morale and organisational cohesion. It will also facilitate 'poaching' of skilled / expert staff by other financial institutions and weaken the agencies' negotiating position in relation to new hires.

5.4 The NTMA etc. has no reservations regarding the continued provision of disaggregated information to the point that individuals cannot be separately identified but in light of the Information Commissioner's interpretation of section 26 (1) (b) of the Act (which relates to disclosure of information that would constitute a breach of duty of confidence) in relation to the disclosure of information on individual pay records believes that a specific safeguard is required.

Proposal

5.5 It is proposed that this matter would be examined further with a view to ensuring that the public interest test which overrides the contractual confidentiality in this case takes into account information disclosed on pay levels and the organisation's HR requirements.

NTMA Comment: Our concerns here arise from the definition of personal information in the Act which specifically excludes the terms on which an individual occupies a position in the staff of a public body. We would propose that the definition of personal information as it applies to the NTMA should include terms of employment.

6. State Claims Agency and Freedom of Information

6.1 In view of its specific legal role and responsibilities the State Claims Agency should be treated in an equivalent way to analogous public bodies such as Chief State Solicitors Office.

Assessment

6.2 Under the National Treasury Management Agency (Amendment) Act, 2000, the management of personal injury and property damage claims against the State and of the underlying risks was delegated to the NTMA. When performing these functions, the NTMA is known as the State Claims Agency (SCA). The Act sets out two objectives for the SCA:-

- To manage claims so as to ensure that the State's liability and associated legal and other expenses are contained at the lowest achievable level; and
- To provide risk advisory services to State authorities with the aim of reducing over time the frequency and severity of claims

The role carried out by the SCA would previously have been performed by the Chief State Solicitors Office which is a public body for the purposes of the Freedom of Information Act, 1997. However, it should be noted that under section 46 of the Act records created or held by the Chief State Solicitor's Offices other than records relating to the general administration of the Offices are not covered by the Act. This result is that the public has a right of access to records concerning the general administration of the Chief State Solicitor's Office but no others.

Proposal

6.3 It is proposed, therefore, that the application of Freedom of Information to the State Claims Agency should be restricted to its administrative records. This will be effected by an amendment to the scheme.

NTMA Comment: We agree with the proposal. However, we are not clear what is meant by saying it "will be effected by an amendment to the scheme". If the NTMA is to be specifically mentioned in the Heads of Bill, should the carve out for this type of information not be included there – as per the approach adopted with the AG's Office?

7. Implementation Date for Freedom of Information / Effective Date for Retrospection

7.1 Adequate time should be provided for the NTMA and the other public financial bodies associated with the agency to prepare for the application of Freedom of Information. Full retrospection to 1998 should not apply immediately on enactment.

Assessment

7.2 As is the case for all public bodies becoming subject to Freedom of Information, in light of the obligations under the Act, a significant programme of preparation, training and review of records management would be required for the NTMA etc. in advance of the implementation date of any legislation. In terms of the effective date for non-personal records under Freedom of Information, in addition to the substantial practical administrative logistical challenges of full retrospection covering a 14 year period to 1998 there is a concern that 'retrospective' application of the legislation from 1998 and the release of third-party information that might arise in that context could be perceived or misrepresented as a breach of normal commercial practice particularly in circumstances that representations were not made that the information may be subject to

release under Freedom of Information in the future. As against that, a good deal of the commercial sensitivity that might attach to records held by the NTMA group agencies is itself time-sensitive and therefore the difficulties in disclosing legacy records are in the main administrative rather than commercial.

Proposal

7.3 The proposed implementation date for Freedom of Information could be examined further by the NTMA and the Department. Further consideration is required of the extent to which the Act would apply retrospectively in light of the issues raised by the NTMA. The policy for other public bodies is in overall terms that the Act should apply with full retrospection to 1998. In the case of the NTMA etc specific commercial concerns have been raised which need to be examined. It is envisaged that any easing of the retrospection to 1998 would be contained in an order under the First Schedule which would postpone the retrospection to 1998 over a lengthier period, so that, for example, initially the Act would not be retrospective as regards the NTMA group, but retrospection to 1998 would apply after a period of say 3 years from the enactment of the 2012 Bill.

NTMA Comment: Our view is that the Act should be applied from a current date only and not retrospectively (other than in relation to personal records). While we are aware that the Act was applied to a number of State bodies retrospectively, to the best of our knowledge the time-gap between this application and the commencement of the Act was much less than what would be the case here.

When the FOI Act was applied originally to Government Departments it was (other than in relation to personal records) applied only to records created after the commencement of the Act. Given the activities in which the NTMA is engaged and the volume of records going back to the Act's commencement in 1998 it could create severe logistical difficulties and adversely impact on the day to day functioning of the NTMA if the Act were to be retrospectively applied.

Government Reform Unit
Department of Public Expenditure and Reform
July 2012

Follow up to meeting with NTMA on FOI
8th November 2012

NTMA Remuneration

The Government Memo and draft Heads approved by Government on 24th July noted that case was made by the NTMA in relation to remuneration and highlighted that an assessment would be made in the context of the drafting of the Bill and in consultation with the D/Finance and the NTMA, the legislative options for mitigating the risk identified would be explored. The Department advised that its responsibility is to assess the case made by the NTMA on the risks associated with the disclosure of the remuneration of individual staff and to make a recommendation to the Minister.

The Department advised that in our view the case made wouldn't stand up objectively as a robust basis for not publishing pay information in light of the principle that all public sector pay details should be published. Following discussion, it was agreed that the Department would set out its expectations in response to the NTMA. The risks as set out by the NTMA are as follows:

Analogous to a commercial organisation carrying out commercial and market functions and operating along private sector lines with employees employed on the basis of individual confidentially negotiated contracts with no general pay grades.

- The Department requires confirmation that such contracts are confidential and that 'confidential' is written on the top of each contracts.
- The Department contends that contracts of at least the administrative staff may have been individually negotiated but it was likely to be within a band of €5,000 and as such some staff pay details could be released
- All 473 staff can't be experts. How many expert staff have such sensitive salary levels? How many is it absolutely essential to protect?
- Are such staff all in the NTMA or how many, if any, are in the individual bodies within the NTMA group?

If the NTMA had to release remuneration details in respect of individual employees, the organisation would be at a competitive disadvantage in recruiting and retaining the expert staff necessary. People wouldn't join if they thought their remuneration details would be released.

- The Department would argue that this is not necessarily true particularly in the current environment and seeks evidence and at least an independent opinion that such is the case
- The Department asked if the argument is that the salaries in the NTMA are below market price given the stated belief that it would be difficult to recruit people if their remuneration levels would be disclosed? What evidence is there of this?

Staff would leave if they thought their pay details would be disclosed

- Has this been tested – what evidence is being relied on that this is the case
- What has been the turnover of staff in recent years?
- Is the argument that staff only remain with the organisation purely because of the salary level and the non-disclosure of same? Is the experience of working there of no value, are they not likely to staff for that?
- Are the staff on short term or long term contracts – where is the greater risk of someone leaving? Where is the greater cost to the organisation?

Publication of pay details would make it easier for other organisations to headhunt NTMA staff

- Headhunting takes place irrespective – as stated in the case made. There is nothing to prevent staff from stating to other organisations what their salary levels are (or stating they are higher than they are) to seek higher remuneration from a competitor. Disclosing the information may help retain staff as the other organisations may not offer anything higher (or significantly higher).
- How many competitor organisations are there – how big is the pool of expert staff in the individual areas?
- Regarding the information that is published, €50,000 a span between each band is extremely large

Inclusion of the NTMA in the Act


The Department advised that either the NTMA would be brought in as part of the First Schedule using the mechanism in the Ombudsman Act with a Part II setting out the excluded elements or an Order may be made in advance of the Bill being enacted given the current delays due to the workload of the OPC. The NTMA was satisfied that its concerns would be addressed by either of these mechanisms.

Retrospective application

The Department understood the concerns raised including the lack of administrative expertise in the NTMA, the significant timespan since 1998, the costs, the huge volume of records given the 'keep everything policy'. The last time bodies were brought in was in 2006 which wasn't quite such a long timeframe. The Department advised that a case should be made in this respect proposing a date from which it might be appropriate to come under the Act.

Section 31

Some amendments were proposed by the Department which would deal with some concerns of the NTMA. However the NTMA seeks that a number of additional categories be added to protect the economic interests of the NTMA itself and pointed out that the title of section 31 includes public bodies (thought the title in itself has no legal standing). The Department has to consider this further.



NewERA

The NTMA advised that the NewERA would hold significantly more information about commercial State bodies than Departments are likely to hold and seeks that such information held by NewERA be excluded in the same way it has been agreed that information relating to market counterparties would be excluded. It would require amending the draft Heads/Schedule/Order but seems feasible.

Section 42 of the NAMA Act

As advised by the AGO, the Department confirmed that statements of interests, assets and liabilities comprise personal information and are not required to be disclosed under FOI.

Section 99 of the NAMA Act

As advised by the AGO, the Department confirmed that section 26(1)9b) of the FOI Act would cover a situation where NAMA refused a request because disclosure would breach the duty of confidence owed to a NAMA borrower (assumed by NAMA from the legacy bank under section 99).

D/PER Note of Meeting
7 March 2013
NTMA and FOI

Attendees:

D/PER

William Beausang
Evelyn O'Connor
Emer Hogan

NTMA

Andrew O'Flanagan
Adrian O'Donovan
Niall ?

1. Non-Disclosure Provisions

NTMA asked position re non-disclosure provisions in other legislation. D/PER indicated that they did not have resources to examine all non-disclosure provisions and that the Act provides a mechanism for such review. On that basis, for new bodies, non-disclosure provisions will stand until next review.

2. Remuneration

The NTMA requested an exemption from FOI in respect of salary details of individual staff.

NTMA Case

- Staff could all be on different salaries (not scales as in civil service);
- Staff not aware of salaries of fellow staff;
- 90% of staff are from private sector;
- Difficulty in recruiting/retaining staff from private sector;
- Turnover is already high (32 staff have left NAMA recently);
- Turnover will increase if salary details made public;
- Salary scales for 3 CEOs already provided;
- Other salary info provided on basis of €50k bands;
- More detail given to PAC in past.

D/PER Position

- This would be significant exemption;
- Other commercial bodies are subject to FOI. Same arguments would be applied to them;
- SG view is that where people paid by Exchequer their salary details should be available;
- How do salaries compare to private sector? Where is turnover high? NAMA only or whole Group?

- Would require business case to be examined.

Outcome

D/PER will set out our analysis of NTMA business case for exemption for submission to Minister for consideration. If approved by Min, will also need Govt approval. Will share text with NTMA for their information.

3. Retrospection

NTMA Case for shorter retrospective period

- 5,200 boxes of files in storage (50,000 files), plus 1.3m electronic files and e-mails
- 35/40 PQs per week
- Could be overwhelmed during early stages of FOI
- Purely volume issue

D/PER

- Draft Bill currently provides for retro back to 2008 (not 1998)
- Any new bodies added under 1997 Act had retro to 1998.
- Minister will have power to adjust period of retrospection by order.

Outcome

NTMA can make business case which will be considered on its merits.

4. New Era

NTMA raised case re release of sensitive material in possession of New Era under FOI.

If commercial SSB are not subject to FOI, and New Era is, it might prove difficult to get certain info from commercials.

D/PER indicated that NTMA should identify the particular functions of New Era that would require exemption, rather than exemption for company as a whole

Would it be possible to exempt records that were received from commercial bodies exempt from FOI?

It was agreed that this would be considered.

5. Miscellaneous

Issue re Section 3 of NDFA Act in terms of the financing of public investment projects and the release of certain info that might be detrimental to financial and economic interests of the State. To be considered further.

E.R.

Note of meeting with Dept of Justice and Equality 27 September 2011

Attendance:

Dept of Public Expenditure and Reform

William Beausang A/Sec Reform Unit

Finbarr Kelly PO Reform Unit

Joe Langan AP (FOI CPU) Reform Unit

Dept of Justice

Michael Flahive A/Sec Garda Division

John Roycroft, Garda Division

Michael Kirrane, INIS

1. William Beausang set out the work of the reform Unit in relation to Reform of the FOI Act as set out in the programme for Government. He invited the Dept of Justice officials to outline their full range of concerns and their assessment of the work involved in extension of FOI to An Garda Síochána.
2. Michael Flahive in response outlined their commitment to the programme for government while at the same time acknowledging that it is a big step extending the act to An Garda Síochána. The extension of the Act will be to specific administrative activities such as HR and procurement with operational aspects of the work of the force remaining outside FOI. The extension will need to be very precise and there are certain procurement functions that need to be protected from release such as information relating to the procurement of security sensitive equipment. They will wish to tease out these issues with us when drafting the legislation.
3. They also expressed some concern over the power of search and inspection for records by the Information Commissioner. They agreed to outline these concerns in detail in the submission that they undertook to supply to the Reform Unit on the matter in early November.
4. John Roycroft raised the issue of the training of staff and also the need to prepare records systems for FOI given that there is no central filing system in the operation by the force. Dept of Justice and senior Gardai have been engaged in consultations with their counterparts in the UK police forces to establish their FOI experience and seek their advice on this issue. They will develop proposals on this in their submission.

[REDACTED]

6. William Beausang impressed upon the meeting the importance of returning the submission detailing issues and concerns so that they can be fully considered by our Minister.

7. An undertaking was given at the meeting to return the submission in early November.

Joe Langan AP
3 October 2011

23 December 2011

The Secretary General,
Department of Public Expenditure and Reform.
ATT: Mr Finbarr Kelly, PSMD

Re: Freedom of Information Act and Related Matters

Dear Finbarr,

The Department of Justice and Equality has been asked to give its views on the proposal in the Programme for Government to extend the remit of the Freedom of Information Act "*to ... the administrative side of An Garda Síochána, subject to security exceptions*".

The views of the Department in respect of both areas are provided below. You may wish to note that the view below have been considered in detail by our Minister and reflect his position.

1. Background to Extension of Freedom of Information to the Garda Síochána

The Department acknowledges the commitment made in the Programme for Government. However, there are compelling reasons of public policy and national security, particularly as they relate to policing and intelligence and resource implications, which must be taken into account when considering any extension of FoI to the Garda Síochána.

The current situation is that all Garda records are exempt. In introducing FoI to the Garda Síochána there are a number of issues that will need to be addressed across the organisation. The FoI culture is one of openness and transparency and there is obviously a tension between this and the obligations of the Garda Síochána to protect confidential and sensitive information. Raising awareness and training across an organisation of approximately 16,000 people will present significant challenges.

2. Method of Extending FoI to the Garda Síochána

If FoI is to be extended to certain administrative functions of the Garda Síochána, the Department would propose that it be extended to the following areas only:

- Finance
- Procurement
- Human Resources (excluding resource allocation functions)

It must be recognised that the above administrative functions to which it is proposed to extend FoI are likely in some instances to be connected to matters which have significant security, intelligence or operational aspects. Certain exemptions will need to be provided

within the functions specified above. For example, procurement or financial information may relate to the purchase, use or specification of sensitive intelligence or operational equipment which it may not be desirable to place in the public domain. Human resource information could reveal the identity of personnel involved in sensitive operational, security or intelligence functions.

Recommendation: However, the Department is of the strong view that having regard to the nature of the issues arising (see below), primary legislation may well be required if FoI is to be extended to the Garda Síochána. The Department is aware that Section 3(5)¹ of the FOI Act, as amended, may be used to selectively extend the legislation to the above areas but this mechanism will not address the other concerns which uniquely arise for the Garda Síochána.

It is proposed that further discussions take place between our Departments on these matters following consideration by the Department of Public Expenditure and Reform of these issues which are elaborated upon below.

3. Review of the Issues particular to the Garda Síochána

Potential Impact on Security and Intelligence Functions

The Garda Síochána is the State security and intelligence service as well as the police service. Having one police force in Ireland with a built in intelligence service makes sense in such a small country. However, when it comes to FoI, having both policing and security functions in the one organisation presents particular difficulties. While some European police forces participate in FoI schemes, as far as can be ascertained no security or intelligence service in the EU is subject to FoI for reasons of the primacy of the protection of citizens and the State itself.

The intelligence service works because of information sharing and trust. If other intelligence and security services considered that there was any possibility that information would be released into the public domain under FoI, they would be unwilling to share information with the Irish Intelligence Service, thereby making it impossible to function. It is clear from the Programme for Government that it is not the intention that records relating to operational policing or the security and intelligence functions of the organisation should be subject in any way to FoI. However, the extension of FoI to the Garda Síochána raises issues which are quite unique for the reasons set out at 1 and 2 above and below in more detail.

Issues of Certification of Security and Intelligence Records

It is the strong view of the Department that there must be a power to certify certain records as exempt if the release of same would pose a risk to national security.

Under the present legislation, the Secretary General's Certificate is issued in accordance with Section 20 of the FoI Act, as amended. The Certificate states that the record concerned is part of the deliberative process of the Government Department and is deemed to be exempt. The Department of Justice and Equality have one such certificate which was issued in 2006 and relates to our Risk Register. The Certificate is not reviewed. It may be revoked at any point by the Secretary General once it has been deemed that the deliberative process has ended.

Equally, the Ministerial Certificate is issued in accordance with Section 25 of the FoI Act, as amended. This Section allows the Minister to state that the record is exempt in that it relates

to law enforcement issues and the security, defence of the State. This Department has 6 such certificates. The certificates are for a period of two years and are reviewed annually by a sub committee of the Cabinet, Taoiseach, Tánaiste and Minister for Finance.

Where one of the above certificates has been issued, the requester cannot seek a review by the Information Commissioner. In the case of the Ministerial Certificates, the requester can appeal the decision to the High Court. This occurred in 2009 when two of this Department's Ministerial Certificates were challenged. The High Court upheld the Ministerial Certificates.

Any extension of FOI to the Garda Síochána must include the power to certify operational, security and intelligence related material as beyond the remit of the Information Commissioner. Legal advice from the Attorney General will be required on this point and on issues related to the powers of the Information Commissioner, particularly in the context of the proposal to effectively repeal the FOI Amendment Act. The Department proposes that discussions take place between our respective Departments as to how the proposed certification process might be achieved.

Recommendation: The Department considers that in order for the Garda Síochána to be included under the FOI Act, Section 25 or an equivalent in the form of amending legislation, must allow the Garda Commissioner, as head of the security service, to certify certain records as exempt if he feels that to release same would pose a risk to national security. If, however, it is the strong view of the Department of Public Expenditure and Reform that a form of external oversight of such certification is required then it is the view of this Department that the amending legislation should provide that the Secretary General of the Department of Justice and Equality, or the Minister for Justice and Equality, on foot of a request from the Garda Commissioner, should be able to certify that a record is to be exempt where s/he is satisfied that the record is of sufficient sensitivity or seriousness to justify such exemption.

Requirement for Exempt Categories

The Department consider that administrative records relating to the Criminal Assets Bureau and the Witness Protection Programme must be exempt. Where the release of an administrative record could have an impact on an operational matter or threaten the security of Garda members, the Gardaí must have the scope to refuse such requests. For example, details of hotel records for CAB officers in Limerick would present a security risk.

The precise nature of how such a refusal might arise, who would have the authority to make such a determination and the role of the Information Commissioner needs to be considered between our Departments.

Recommendation: Administrative records relating to the Criminal Assets Bureau and the Witness Protection Programme must be exempted.

Potential Impact on Public Support and Information given in Confidence by the Public

The Garda Síochána requires the support of the public to report crime. As an organisation they still enjoy widespread public confidence which greatly facilitates the willingness of the public to provide the information which remains the bedrock of good policing. In order to carry out its core functions effectively, the Garda Síochána need to be able to ensure absolute confidentiality on all operational, investigative, intelligence and security matters. Given the sensitivity of the information held by the Gardaí and the reputational damage that would be

caused by a breach of confidentiality, robust structures will need to be in place to ensure that such breaches cannot take place.

In addition, in announcing the extension of FoI to the Garda Síochána great care must be taken to ensure that the public do not interpret this to mean that information that they give in confidence can be disclosed either deliberately or inadvertently under the new regime. Such a misunderstanding, should it arise, could prove calamitous and prove very difficult to undo. In practical terms the Department fully understands that the extension of FOI in the manner proposed will have no impact on the confidentiality of such information but great care needs to be taken to ensure that the public are not given any impression to the contrary.

Implications for Records Management, Training & Lead-In

The Department proposes that the Garda Síochána should be given a lead-in time of at least two to three years. The Garda Síochána are likely to need a longer lead-in to the commencement of any provisions than most organisations due to (a) the sheer scale and geographical dispersion of the organisation (b) the fact that their records management system is designed for operational policing and not the processing of FOI requests.

- The Garda Síochána employ approximately 16,000 personnel (about half the size of the entire civil service). These personnel will require extensive awareness raising and country-wide training will be required. This training will need to embrace those creating records, decision makers and record managers. The logistics of how FoI requests are to be handled will need to be very carefully considered in order to avoid an adverse impact on operational policing. The establishment of a centralised unit is likely to be required. Procedures and processes will need to be drafted and FoI Information Officers will need to be selected and trained. An FoI policy and FoI manuals (especially Section 15 and 16 manuals i.e. reference book setting out categories of information available under the Act and the decision making rules) will also need to be drafted. It must also be noted that Garda stations in many rural locations have very limited staffing and that the administration of FOI could potentially have a serious adverse impact on operational policing if proper procedures are not in place.
- Many serving members of the Garda Síochána are deployed on a shift system with a seven day liability and specialist units exist with different operational patterns. Care must be therefore taken in extending FOI that account is taken of these organisational issues and characteristics.
- The hierarchical structure and the widespread locations for records (approximately 700) present the Gardaí with unique difficulties in retrieving records and achieving the time restrictions laid out in the Freedom of Information Act as well. An audit of the entire information and data structure will be needed to determine the extent and nature of the records retained. Only then will it be possible to determine the precise record management system that is required. Additional IT requirements are likely to arise in this context. Serious consideration may need be given to the extension of the statutory deadlines where the administrative records are held in Garda Stations as opposed to the Garda national or regional Headquarters.

Training on FoI will be required for all 16,000 staff as it could be argued that all Garda stations and buildings will contain administrative records. Extensive training will be required

to ensure that staff do not inadvertently release records to the Information Commissioner that are administrative in nature but may still have security/intelligence or operational consequences. In addition, new centralised structures to process requests are likely to be required. It is the strong view of the Garda Síochána that only officers with the necessary professional background and training are in a position to make such a determination.

Recommendation: A lengthy lead in time should be allowed for the Garda Síochána. Extensive training in FoI, the drafting of new procedures, policies and manuals will be required and there are likely to be requirements for new record management systems. An extension of the standard times allowed in current legislation for record retrieval may also be required in certain situations.

Resource Implications

The extension of FoI will have resource implications for the Garda Síochána. The Minister is very anxious to limit the impact of FoI administration on serving members of the Garda Síochána particularly at a time when the number of serving officers is falling and Garda resources are under increasing and severe pressure. While there is little doubt that civilian staff can be deployed by the Garda Commissioner to assist in this area there is also little doubt that given the other considerations outlined above there will be a requirement to deploy attested members of the Garda Síochána.

It is also the view of the Department that the extension of FoI to the Garda Síochána is likely to give rise to a significant number of inadmissible applications under the legislation which will have to be processed. In addition, it is highly likely, given the experience of this Department, that there will be a significant volume of requests for personal records (e.g. personnel files) from serving and retired members of the organisation. Given that full retrospectivity applies under the current legislation in respect of requests for personal records this is likely to prove very resource intensive particularly if the records contain information which is regarded as containing data on operational deployment or intelligence or security matters. These implications will have to be considered and it may be necessary for the Garda Síochána to redact information from certain personnel files. In light of these factors, the Department considers no retrospectivity should apply in respect of personal information. In addition, Section 18 requests are likely to arise and such requests, as you are aware, are very time consuming and will have a significant impact on resources in organisation of the size and scale of the Garda Síochána.

Recommendation: At a time of severe financial and human resource cutbacks in the Garda Síochána the resource cost of the extension of FoI to the organisation must be determined and the necessary additional resources provided by the Department of Public Expenditure and Reform to administer FoI. An estimate of these costs, to include likely human resource, financial and IT costs, will be prepared early in the New Year and can be discussed once available. However, unless these costs are met, it is considered that frontline policing will be adversely impacted. No retrospectivity should apply to personal information (see also next section below).

Issues around Retrospectivity

The Department considers that given the scale and dispersed nature of the organisation full retrospectivity should not apply when FoI is extended to the organisation. When the FoI regime was commenced no retrospectivity applied. As organisations are added many years

after the passage of the original legislation the burden placed on them by retrospectivity is increasingly significant. If the application of the Act is made retrospective then it will force the Garda Síochána to focus very limited resources on the problems arising in that context. As it is likely that it will be at least 2014 before the legislation can be applied to the organisation, then this would mean that the a further 16 prior years would have to made "FoI proof". In the context of diminishing resources and the commitment to protect front line policing, this is not considered credible. The emphasis should instead be placed on focussing limited Garda resources on future proofing the application of the legislation.

It should be noted that prior to the coming into force of the Garda Síochána Act 2005 the Secretary General of the Department of Justice and Equality was the Accounting Officer for the Garda Síochána and FoI applied to relevant administrative records of the Force held by this Department. However, the range of records to which FoI applied was much more limited than the functions of the Garda Síochána to which is now proposed to extend FoI e.g. HR records were not held by the Department nor were many detailed procurement records. Hence, the impact of the extension of FoI to the Garda Síochána will have much more serious resource implications than the system which applied pre-2005.

Recommendation: FoI should only apply to the Garda Síochána only from the date of extension of FoI to the Force. Any other position would have immense resource implications for the Garda Síochána and for front line policing.

4. Role and Power of the Information Commissioner

The powers of the Information Commissioner are set out in Section 37¹ of the FoI Act. The unrestricted power of entry and the power to take copies and examine records found on Garda premises raises very significant concerns in the context of the Garda Síochána. While in the experience of the Department the OIC has always behaved in a most reasonable fashion in examining sensitive records, the implications of extending such powers, in their current form, to Garda stations and areas where highly sensitive security/intelligence and operational files are stored are very considerable.

The point has already been made that the administrative crosses over into the area of security/intelligence and operational. If an official of the OIC has the power to enter any Garda premises and remove records, which could potentially be of great sensitivity,

¹ 37 (2) The Commissioner may for the purposes of such a review or investigation as aforesaid enter any premises occupied by a public body and there—

- (a) require any person found on the premises to furnish him or her with such information in the possession of the person as he or she may reasonably require for the purposes aforesaid and to make available to him or her any record in his or her power or control that, in the opinion of the Commissioner, is relevant to those purposes, and
- (b) examine and take copies of, or of extracts from, any record made available to him or her as aforesaid or found on the premises.

(3) Subject to *subsection (4)*, no enactment or rule of law prohibiting or restricting the disclosure or communication of information shall preclude a person from furnishing to the Commissioner any such information or record, as aforesaid.

(4) A person to whom a requirement is addressed under this section shall be entitled to the same immunities and privileges as a witness in a court.

unquantifiable security risks arise. If it became known to other national and international bodies which routinely share intelligence and security information with the Garda Síochána that their information could be inadvertently compromised in such a fashion significant impediments may be placed in the way of the transfer of sensitive information. Information flows of this nature are central to the intelligence, security and operational policing functions of the Garda Síochána and must be protected.

Recommendation: The Department is of the view that the current powers of the Information Commissioner as set out in Section 37(2) of the Act raise significant concerns and proposes that discussions take place between our respective Departments with a view to identifying the public, private and national security considerations involved.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6. Conclusion

The above represents the views of the Department of Justice and Equality following detailed consideration of the issues arising and consultation with the Garda Síochána and the Director General of INIS. The Department proposes that following consideration of these issues by your Department a meeting might be held between officials at which you could respond to the concerns expressed with a view to reaching agreement between us on how the commitment in the Programme for Government can be progressed taking account of competing public policy concerns.

Yours sincerely,

John Roycroft,
Principal Officer,
Corporate Affairs Division.

From: Kelly, Finbarr
Sent: 20 January 2012 15:02
To: Beausang, William
Cc: Langan, Joe; O'Meara, Jacinta
Subject: Meeting with Justice William,

My short summary of the meeting this morning is attached below.

Finbarr

Department of Justice mentioned 13 points in total in regard to the Garda.

1. Tension between the culture of FOI and the necessity for secrecy in relation to security, intelligence etc. operational functions of the Garda;
2. Inclusion of specified areas of administration only;
3. Preference for primary legislation;
4. The nature of the Irish Police Force – fusion of Intelligence and normal policing functions.
5. Operational Policy – no interference;
6. Certification necessary;
7. Exemptions of CAB and other bodies (wanted an additional flexibility of inclusion by regulation in the future for unspecified bodies)
8. The issue of Public Support when the announcement would be made and the sensitivity required;
9. Lead in time;
10. Retrospectivity;
11. Resources;
12. Role of the Information Commissioner;
13. Mosaic Request

I indicated this

1. Our Departments acknowledged the difficulty with the tension caused but it had to be accepted and operated in practice.
2. Our Departments agreement to the inclusion of administration only but exactly what that covered would have to be worked out in conjunction with them.
3. Our Department agreed that primary legislation was necessary and the route to go;
4. Our Department fully understood and acknowledged the fusion of intelligence functions within the normal policing activities of An Garda and that this raised operational issues
5. Our Department's intention and policy that nothing that would be done under FOI should in any way with the proper functioning of the Garda in its core operational areas, like policing, criminal investigation security and intelligence;
6. Any certification necessary would be provided through the Minister following a request from the Garda Commissioner;
7. There was an inconsistency in regard to their wish to have certain of the bodies included by regulation in the future. Basically I suggested that the primary route given the exceptional nature of the work of the Garda was the way to go and we were not favourable to the secondary approach in regard to some of the most important bodies in the fifth against crime.
8. I indicated that they could expect that our Minister and our Department at every level would ensure that nothing we would do would impact in any negative way on the standing of the Garda in public opinion and that we would go out of our way to ensure that;

9. I mentioned 6 months to a year; Our guests were not happy with that (Three years mentioned on their side.)
10. Retrospectivity. I indicated that full retrospection was envisaged. Joe outlined the full implications of what that meant, in particular for personal records. They were even unhappy.
11. Resources; I outlined the Department's position. Our guests were not at all pleased with that.
12. Our approach that no special rules could be made for the Garda in that regard. D. Justice was alarmed, in particular, on this issue stating that it would have the most profound implications for the police.
13. We fully acknowledge the necessity to have effective mechanisms to deal with mosaic requests. We did not see legislation as the appropriate mechanism to deal with that.

Both sides listened attentively and acknowledged their respective positions. I indicated that a memorandum for Government (and draft Heads of Bill were in preparation) and would be circulated very shortly. I acknowledged that Ministers might have to reach agreement on certain issues during the consultation process. Our colleagues left in the full understanding that the commitment in the PfG in relation to the application of FOI to the administration of the Garda would be included in the Memorandum and draft Bill. I requested that they would consider drafting an appropriate head in relation to the administrative aspect of a Garda which should be included. In this regard I mentioned that it would be as important to define what was to be included as it was to define what was not included. D. Justice stressed that were more or less, that unless they got all the concessions they wished for it would have the most profound consequences for Garda operations.

[REDACTED]

I think that was it!

Best regards,

Finbarr Kelly,

Department of Public Expenditure and Reform,

01 604 5311

087 94 61910

Meeting with Dept of Justice 2 March 2012 to discuss extension of FOI to An Garda Siochana and ORAC and RAT

Attendance: Dept of Justice and Equality – Michael Flahive A/Sec, Deirdre O’Keeffe A/Sec, John Garry PO , John Roycroft PO, Michael Kirrane PO
Dept of PER – William Beausang, A/Sec and Joe Langan AP

William Beausang (WB) welcomed the opportunity to tease through the issues and report back to the Minister. Michael Flahive (MF) welcomed the opportunity to narrow the gap on outstanding issues. WB acknowledged that there is further work to be done on the heads.

WB then went down through the issues paper that had been forwarded by John Roycroft (JR) at the end of last year.

Agreement was reached on the best way to bring the GS in under the act is through primary legislation. MF indicated that it would be important that the legislation targeted out particular categories of administrative records that should be excluded from FOI e.g., payments from the secret service fund. JR added that he did not believe that bringing in the GS under the act by SI could accommodate their concerns. WB suggested that a catch all provision in the legislation that the reform unit would be more comfortable with that approach. MF agreed as long the provision is effective.

WB added that there is always the fall back of the Ministerial certificate process to protect highly sensitive material. MF sought assurance on the right of appeal to the High Court on a Ministerial certificate and that the substance of the matter certified would not be disclosed. Joe Langan pointed to a High Court decision on a Minister for Justice Certificate appeal last year which was upheld and the Judge held that he was only empowered to adjudicate on the process of certification and not on the sensitivity of the content of the record covered by the cert.

Other issues discussed at the meeting related to the following:

The Power of the Information Commissioner to call to locations and inspect records on site. The Department are not happy with this particular power of access as they are concerned that it could lead to highly sensitive material being seen by the staff from the IC’s office.


They suggested an approach similar to that set out in the Garda Act 2005 in relation to the powers of the Garda Ombudsman in relation to accessing highly confidential material. John Garry indicated the provisions of the act and it was agreed that CPU would look at these to see whether the approach offered an acceptable solution.

Lead in time for preparation for FOI.

Minimum a two year preparation period. WB responded that this is ultimately a political decision however the Dept of Justice need to provide detail on the Garda plans and preparation so far.

Resources and Application date.

The Dept also needs to provide detail on the resources issue and likewise on the application date; the Dept needs to produce a suggested date and arguments backing this up. MF agreed to provide detail on the challenges to be faced.



[REDACTED]

The Dept undertook to come back to the CPU on the above issues with in two weeks.

Joe Langan 5/3/12

7th June 2012

Meeting with D/Justice
D. Kenny, Ken O'Leary, Mr. Fuhue, W. B. + EOIC

Lead in time, retrospectivity

Clarification

restoration agenda concerns across Dept. Political v admin. view it is both etc. on board - Threadbare. Political
Get to Min. in next wk or two + try to get st. to Govt.
Techn. not a hugely complex issue. Keep them updated.

WB look them through the issues.

① Prop. approach on Admin reds set out on the Memo. **OIC** view is that gen admin reds shd be across the board. eg Bids + accounted. and they be captured. We will go to OPC + sort out defn. In context of drafting **DIT** will look at it.

② Extended list.
specific Units (Emerg. Resp. Unit, Surveillance Unit)
Exclusion for - Criminal Assets Bureau. Has sep legal standing under leg. Techn. shdnt be exempt under Garda
can give **reasoned** arguments as to why they shd. be ext.
a) v sensitive + b) regime of regulation governing it.

③ Sachin 25 cards
Cons. shd have the same capacity to go to Govt.
If there was a multiplicity of cards it wd. be an issue.
Get tons of PM irt Garda. Responses can be crafted. Can be a lot of requests for reds on sensitive issues.

Power of Info Comm 537(2) → search power

Garda Omb GSOIC can by reg be prevented from going to certain parts. Can't have > powers for OIC.

Hugh Brady

GSEP GHIS Protocol in place in circles can get access to data on British informants. Protocol may need to be revised. It separate issue.

The substantive issue - in intellig. world, to get intell. from other sources, have to have control over data. To have perception that OIC can go anywhere, OIC has never used the power.

WB Because they know she has the power, they comply. Being able to give categorical assurances that reds won't be accessed.

KO/L Even the theoretical - if other intellig. agencies ^{agencies} ~~refuses~~ look at your intell. report. Regs haven't been made but will be. What guards and like + what GSEP wd like. Regs won't exclude all Garda staff but maybe parts of Garda staff.

WB level playing field what GSEP can access + what OIC can access. To be clear its the 37(2) power →

eg certain reds are outside the scope. OIC can request them + take them away. Its the integrity of reds she cd take away.

Restrict the power in a focused targeted way.

M/F No reflection on integrity of OIC. Not want OIC to review a doc relating to FOI & satisfy herself. - not happy with that.

37(1) & 37(2) → happy to talk to us during drafting. Block exemption of particular activities.

⑤ Section 24 ^{Defence} agree with obs of D/Defence.

NO/L The gen. point shd be same intellig. protections

WB Is the structure of the Dept such that you wd have Units that wd eg Military Intellig. Bureau - there is an army Intellig. Unit - involved in dealing with internat sec. threat + domestic threat. Couldn't say how that info is disseminated.

Is the info shared between Garda sec. + intellig. people. There may be broader defence stuff they get from other countries.

Internat terrorism - cd have a lot of shared info

Some cases for historical reasons - Middle East connections - language

They are involved in monitoring domestic threat too

MI Fluhve - doesn't think 524 makes sense.

⑥ Admin Burden

2 yrs is long. - think not unreasonable given what UK had.

Asked them to put gen question that might be open to FOI + gen. access
A request cd involve Garda HQ sending a req. to each division in each district.

Unthinkable - retrospective,

Practical workload. The estab of whether there are reds in the first place
Poss. reds there is full backh. anyway. A sig. vol of
reqs wd be former guards looking for their reds.

Balance between lead in time + retrospection issue. If 2005 cd
lead in time be shorter.

MLF will try to put some quantum on it. There is a connection.

2005 Comm. became an Accounting Officer - provide a basis.

Other one when present Govt came in, cd lead in time be shorter.
What Flex. is required? Will get us what applied in UK.

Meeting with AGS & Justice

11th Nov 2014

- 1) Lead-in time
- 2) Retrospection

Impl. Group in place since about 6 mths Put us together.

HR

Fin

Structural implic.

Whats in the report. Business case rpt

Crime Investig.

Most guards resp. for investig. crime. 7 Garda Districts.

Guards deployed within districts - resp for own red & file keeping

how manage business

IT implications

Finance will hinge → cost of schs prog. - comm policy
Costs relative to all those

Director of Fin at central level → each superint are
resp for admin

- part of money for repair of a door

- purch of facilities
sanction obtained over a sum

109 Districts
sub-district level

storage → in older stations

6 Garda regions at Asst Comm.
subdivided into Divisions in Districts (superintendent +)
charged with running

larger projects dealt with centrally
Run procurement competitions →

forming services locally

storage + retrieval → proper + robust system to addr FOI requests

FOI officers + team

key points of contact HR, fin, procurement

FOI officer set standards for records mgmt.

Prelim. meetings with OIC + asst Coms in NI.
Putting thought

Info Tech system.

Travel & sub claim. - global figure ok. If drill down - hide into
about particular

Service Provider → to site

force → 16,000, 60 people for FOI need.

state of charge

24/7 → services to community

Data records system

CAD system in some parts

Business case for software
reaches to capacity → impl.

Meeting with Job 05/03/13
set it to be by sub line

or where there is an estab. approach
arrangmt needs to be formalised + monitored by FOZ unit
to ensure effective

complexity
If vol. of regs are such that FOZ officer wdn't be
equipped.

find out what UK do

Options on fees

- Apply fees stay
- Cap - see that UK approach is
- 1st couple of hrs wdn't be chargeable
-

Meeting with W & P's

16th Sept 1963

FOI Bill — amendments
§ 17(4)
FOI reg.
brief — review material + speech

POZ

- 8/7(4)
- speeches
- Comm stage brief
- Reps + meeting Med. Council
- S&B Res issue
- * - will I try to sch. Comm stage?

Code

- await SC
- * - para re Comm stage amendments?

Whistleblowing - Comm stage

* - Amendments

OGP

- Action plan / sch.
- Memo for Govt
- RFT
- meeting with DER.

①

Unit Meeting

10 Oct 2013

14

Eric Bill

- Second stage
- 20 Comm. stage amendments
- Go to Govt with some
- Comm. stage
- Rips x other issues

Meeting with WB + POs

21 Oct. 2013

15

POI Bill - amendments - frank
- brief
- Reps + bu backs
- Bus. cases for net resp.
Code - Memo → 5th Nov
- Code
- Submission
- Bill amendments - 12th Nov.

15th Nov 2013

Meeting with U + E + E + M

1. Applic. Fees + S&R fees → say what the law is
→ Corp. side Assoc

Code - if st. exceeds the max,

other than v sig. no. of rcds and also having regard
to the means of the requester.

Order →

Code MF, Voluminous Cap
S&R fees have to be charged

* provision in the Bill - public bodies shall
qualifier public interest have consideration + est. total admin cost
Open data partial of fees charged + total cost
on a monthly basis
Open Data Partial

- Deploy + org. yourselves - needs to be clearly around S&R
around each.

Guidance → ready reckoner

Annex must do once you receive it