



Review Application to Information Commissioner - Case Number 110115

Freedom of Information Acts 1997 & 2003 (the FOI Act)

Applicant: Mr Tom Lyons, The Sunday Independent, Independent House, 27-32 Talbot Street, Dublin 1.

Public Body: Department of Finance ("the Department").

Issue: Whether the Department was justified in its decision to withhold certain records in accordance with sections 21 and 26 of the FOI Act.

Review: Conducted in accordance with section 34(2) of the FOI Act by Stephen Rafferty, Senior Investigator, who is authorised by the Information Commissioner to conduct this review.

Summary of Decision: The Senior Investigator varied the Department's decision. He found that (1) the identified records should be released in full and (2) the Department was justified in its decision to refuse access to additional records under section 10(1)(a) of the FOI Act on the basis that no such records exist.

Right of Appeal: A party to a review, or any other person affected by a decision of the Information Commissioner following a review, may appeal to the High Court on a point of law arising from the decision. Such an appeal must be initiated not later than eight weeks from the date on which notice of the decision was given to the person bringing the appeal.

Background

On 02 March 2011, the applicant made a request to the Department of Finance under the FOI Act for various records under six different headings. His request was split by the Department and separate decisions issued. At item one of his request, to which this review relates, the applicant sought access to all records relating to the Wright Report. On 3 May 2011 the applicant indicated to the Department that he was particularly interested in *"interactions between the following two groups of people and the Wright commission. The first group relates to former Minister of Finance/Taoisigh namely: Bertie Ahern, Charlie McCreevy, Brian Cowen, and Brian Lenihan. The second group relates to senior Civil servants (assistant secretary or above) in the Department of Finance or in other Departments which interacted with it."* The Department identified 20 records as coming within the scope of the applicant's request and on 12 May 2011 it issued a decision in which it granted full access to 11 records and refused access to the remaining nine records. The applicant sought an internal review by letter dated 19 May 2011. In its internal review decision of 17 June 2011 the Department granted access to two further records and affirmed its original decision to refuse access in respect of the remaining seven records (Record Nos. 12,13,14,15,17,18 and 19 as per numbering system used in the Department's Schedule of Records). The applicant applied to this Office on 28 June 2011 for a review of the Department's decision.

I note that Ms Anne O'Reilly, Investigator, wrote to the Department on 12 March 2012, setting out her preliminary views on the Department's claims for exemption in respect of the remaining records. The Department subsequently released one further record (No.12) and parts of records 13, 15, 18 and 19. However, as is its right, it continued to maintain that the remainder of the records were exempt from release. Accordingly, I consider that this case should now be brought to a close by means of a formal, binding decision. In conducting this review, I have had regard to the submissions of the Department as well as those of the applicant. I have also had regard to the contents of the records at issue and to the provisions of the FOI Act.

Scope

In his application for review, the applicant queried whether the Department held specific records, apart from those already identified, in relation to meetings of the Wright Panel with named individuals. Accordingly the scope of this review is confined to the examination of:

- (1) whether the Department was justified in its decision to refuse access in whole or in part to records 13,14,15,17,18 and 19; and
- (2) whether it was justified in its decision to refuse access to further specific records on the basis that they do not exist or cannot be found.

Analysis and Findings

Before setting out my findings I believe it would be useful to give some background to the creation of the records and a general description of their contents. The Wright Panel (the Panel) was established by the Minister for Finance, Brian Lenihan, T.D. on 10 September, 2010, to examine the performance of the Department of Finance over the previous ten years and to advise how the Department might adapt to meet the challenges of the future. During the course of the Panel's review of the Department it met a large number of people from the

political system, officials from the Department, individuals from the broader Public Sector and those with an interest in, and interaction with, the Department. It invited and received submissions from the public and had access to departmental personnel and records. The Report of the Panel was published in March, 2011.

The records which are the subject of this review consist of notes of meetings held by the Panel with a former Minister for Finance, current and former senior Civil Servants, and current and former heads of publicly funded financial institutions.

Records 13, 14 and 15

The Department seeks to rely on section 26(1)(a) of the FOI Act as a basis for its refusal of these records. Section 26(1)(a) of the FOI Act provides that access to a record shall be refused where the record contains information which was

- given to a public body in confidence and,
- on the understanding that it would be treated by it as confidential and,
- its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and,
- it is of importance to the body that such further similar information as aforesaid should continue to be given to the body.

However, as Ms O'Reilly explained to the Department in her letter of 12 March 2012, section 26(2) provides that section 26(1) shall not apply to a record which is prepared by a head or any other person (being a director, or member of the staff of, a public body or a person who is providing a service for a public body under a contract for services) in the course of the performance of his or her functions unless disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law and is owed to a person other than a public body or head or a director, or member of the staff of, a public body or a person who is providing or provided a service for a public body under a contract for services. I understand that the records at issue were created by Departmental officials in the course of the performance of their official functions. Accordingly, the question I must consider is whether disclosure of the information in the records would constitute a breach of a duty of confidence owed to a person other than a public body or head or a director, or member of the staff of, a public body or a person who is providing or provided a service for a public body under a contract for services.

The Department argues that section 26(1)(a) applies as the individuals who provided the information at issue in the withheld parts of records 13, 14 and 15 are former civil servants, a former Minister, and two former holders of prominent positions in certain financial institutions (which are not currently subject to the provisions of the FOI Act). The Department's argument is that it is likely that in years to come further enquiries will be held into the operations of the Department and that it is important that the individuals concerned can feel free to give their personal opinions without the fear that those opinions will be disclosed. The inference is that the disclosure of the information at issue would be likely to prejudice the giving to the Department of further similar information from those individuals in the future. This is an argument that section 26(1)(a) applies. However, the Department has made no specific argument as to how the disclosure of the information would constitute a breach of a duty of confidence owed to the individuals concerned.

Given that section 34(12)(b) of the FOI Act places the burden of proof on the Department to show to my satisfaction that its decision to refuse to grant the request is justified, it seems to me that the Department's failure to explain how disclosure would constitute such a breach of a duty of confidence owed is sufficient for me to find that the Department has not justified its decision to refuse access. Nevertheless, I have decided to consider whether disclosure would constitute a breach of a duty of confidence owed in this case.

Section 26(2) provides that a duty of confidence may be provided for by an agreement or statute or otherwise by law. The Department has not identified any agreement or statute which might be of relevance in this case, nor am I aware of any such agreement or statute. I have, therefore, considered whether or not there appears to have been an equitable duty of confidence (that is a "duty of confidence...provided for...by law") which was owed by the Department. The correct test to apply in deciding whether there is a breach of an equitable duty of confidence is set out in the case of **CoCo v. A.N. Clark (Engineers) Limited F.S.R. 415**. In order for an equitable duty of confidence to exist, three conditions must be met, viz;

- the information contained in the record must have the necessary quality of confidence and
- information must have been imparted in circumstances imposing an obligation of confidence and
- there must be an unauthorised use of that information to the detriment of the party communicating it.

I interpret the term "confidence" by reference to the following definition, which is derived from the law relating to a breach of a duty of confidence: "A confidence is formed whenever one party ('the confider') imparts to another ('the confidant') private or secret matters on the express or implied understanding that the communication is for a restricted purpose." ("*B*" v. *Brisbane North Regional Health Authority*, (1994) 1 QAR 279, at paragraph 45, quoting from F. Gurry "Breach of Confidence" in P. Finn (Ed.) *Essays in Equity*; Law Book Company, 1985, p.111.). The information at issue in these records comprises the views and opinions of a number of former civil servants and a former Minister about the performance of the Department generally. As I have explained above, the Wright Panel was established to examine the performance of the Department of Finance over the previous ten years and to advise how the Department might adapt to meet the challenges of the future. Given the nature of the Panel's remit and the fact that the Panel's Report was likely to be, and has been, published, I find it difficult to accept that the information at issue could be regarded as being concerned with private or secret matters and that it therefore has the necessary quality of confidence.

On the second requirement, while the Department considers that the people who met with the Wright Panel must have believed that their comments would be treated in confidence, it has presented no evidence to support this view. It is noteworthy that the Department accepts that the information provided by current civil servants to the Wright Panel is not exempt under section 26. It appears that the Department's reason for distinguishing between current and former civil servants stems solely from its argument that former civil servants will not continue to provide similar information in the future if the information at issue in this case is released, as opposed to an argument that the information was imparted in circumstances imposing an obligation of confidence. No evidence has been presented to me to suggest that the Wright Panel gave any assurances of confidentiality in its discussions with any of the wide

range of individuals with whom it held discussions or that it treated its discussions with former civil servants differently to those with current civil servants. Furthermore, I do not accept that the circumstances in which the individuals concerned, all of whom held important relevant roles during the period under review, provided the information at issue were such that an obligation of confidence was imposed.

On the matter of the third requirement, I fail to see how the release by the Department of information about its performance could reasonably be considered to be an unauthorised use of the information contained in the records or that its release could be considered to be to the detriment of the individuals who provided the information. Accordingly, I find that an equitable duty of confidence does not exist in this case and that section 26(1) does not, therefore, apply.

Records 17,18 and 19

The Department seeks to rely on section 21(1)(a) and (b) of the FOI Act as a basis for its refusal of these records. Section 21(1) provides:

"A head may refuse to grant a request under section 7 if access to the record concerned could, in the opinion of the head, reasonably be expected to-

(a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of a public body or the procedures or methods employed for the conduct thereof,

(b) have a significant, adverse effect on the performance by a public body of any of its functions relating to management (including industrial relations and management of its staff),

In the case of *the Sunday Times Newspaper & Others and the Department of Education and Science* (case number 98104 on this Office's website) the previous Information Commissioner, Mr. Kevin Murphy, explained the approach which he adopted to applying this exemption - an approach that the current Commissioner has also adopted. In summary, the exemption is dependent on whether or not the decision maker's expectation is reasonable. Therefore, in arriving at a decision to claim a section 21 exemption, a decision maker must firstly identify the potential harm to the functions covered by the exemption that might arise from disclosure and having identified that harm, consider the reasonableness of any expectation that the harm will occur.

Section 21(1)(a)

The Department argues that release of the records could prejudice the outcome of similar reviews in the future as the people invited to speak to a review panel *"may refuse to do so because of a fear of what they say being published"*. I take it that this is a claim for exemption under section 21(1)(a) of the Act. I consider it appropriate here to refer to the Supreme Court judgment in *Sheedy v Information Commissioner* [2005] IESC 35, in which Mr. Justice Kearns stated, in relation to section 21(1), that "the onus to produce evidence of prejudice fell on the Department and in the absence of same the Commissioner was entitled, under s. 34 of the Act of 1997, to hold against the Department. A mere assertion of an expectation [of prejudice] ... could never constitute sufficient evidence in this regard...". In the present context, it is clear that the Department must show some evidence of prejudice if its

reliance on section 21(1)(a) is to be justified.

The Department's argument is that the release of the records could prejudice the effectiveness of similar reviews in the future. I accept that this is an argument that the release of the records could reasonably be expected to prejudice the effectiveness of examinations or inquiries conducted by or on behalf of the Department. In its submission to this Office, the Department explained that its *"concern about releasing these records is not the publication of the actual contents of the records"*, but rather, if *"the records were released it would send a message to people who shared their thoughts with future groups such as the Wright Group, not to be forthcoming if they did not want their thoughts to be published"*. I note, however, that this would appear to be an argument for protecting all records containing details of information provided during the course of similar reviews as a class. Section 21 of the FOI Act is a harm based exemption and cannot be applied to particular records simply as a result of their falling within a particular class of records. For the exemption contained in section 21(1) to apply, the public body must be satisfied that disclosure of **the record in question** would result in the occurrence of the harm which the exemption seeks to guard against.

The Department also argues that the people who spoke to the Panel must have believed that their comments would be treated in confidence, that the records contain "opinions, perceptions and views" as opposed to hard facts and if certain individuals believed that their perceptions would be published they would not have expressed their perceptions to the Panel. As with records 13 to 15, the Department has presented no evidence to suggest that the providers of the information at issue in these records were given assurances of confidentiality. Having examined the records, it is clear that the information at issue consists of factual information together with views and comments of a number of named individuals on the past performance of the Department and suggestions for the future operation of the Department. The individuals in question comprise former and currently serving senior civil servants, and senior members of a number of named organisations. The Department's arguments for the protection of the records at issue is similar to that advanced for the protection of records 13 to 15.

As I have already explained, it does not appear that the Wright Panel gave any assurances of confidentiality in its discussions with any of the wide range of individuals with whom it held discussions. I have also explained that given the nature of the Panel's remit and the fact that the Panel's Report was likely to be published, I find it difficult to accept that the individuals concerned, all of whom held important relevant roles during the period under review, would have expected that any information they provided to the Panel would have been treated as having been given in circumstances imparting an obligation of confidence. For this reason, I find it difficult to accept as a reasonable proposition the Department's expectation that the release of the records at issue in this case could prejudice the effectiveness of future such reviews as a result of non-cooperation of the individuals concerned or individuals holding similar important positions. Accordingly, I find that section 21(1)(a) does not apply. However, even if I had found that section 21(1)(a) applies, the consideration of the public interest balancing test, as provided for at section 21(2) remains.

The Public Interest

The Department's arguments for refusing access to the records at issue are based principally on a view that their release would prejudice the ability of investigative groups such as the Wright Panel to obtain such forthcoming comments and opinions as those received in this case. In my view, however, this argument fails to take account of the particular circumstances in which the

review at issue in this case took place and of the roles of the individuals whose comments and opinions are contained in the records. Having carefully examined the contents of the records, I find it difficult to accept that the individuals in question would be reluctant to provide similar information in the future in similar circumstances. For this reason, I do not consider that there are strong public interest factors for withholding the records at issue. On the other hand, there is a significant public interest in optimising transparency and accountability in relation to such an important issue as an assessment of the performance of the Department of Finance and advice as to how it might face future challenges in light of the unprecedented economic circumstances facing the State. Accordingly, while it is not strictly necessary for me to do so, in the absence of clear evidence of specific harm arising from the release of the records at issue, I find that the public interest would, on balance, be better served by the release of records 17 to 19 in this case.

Section 21(1)(b)

In its original decision, the Department also relied on section 21(1)(b) in refusing access to these records. As I have indicated above, section 21(1)(b) provides for the protection of records whose disclosure could reasonably be expected to have a significant, adverse effect on the performance by a public body of any of its functions relating to management (including industrial relations and management of its staff). However, the Department has not explained in any of its submissions to my Office how such harm might arise from the release of the records at issue. Therefore, having regard to the provisions of section 34(12)(b) of the FOI Act, I find that the application of this subsection has not been justified and I will not consider it any further.

Do Other Records Exist?

In his FOI request the applicant focussed in particular on records of meetings/interactions between the members of the Wright Panel and specific politicians viz. Bertie Ahern T.D., Charlie McCreevy T.D., Brian Cowen T.D. and Brian Lenihan T.D. In addition, during the course of the review, the applicant asked if there were any records of meetings between the Panel and the Secretary General of the Department Kevin Cardiff and a former Secretary General David Doyle. The Department has informed this Office as follows:

1. The Panel did not meet Mr. Bertie Ahern;
2. The Panel did meet Mr Brian Cowen and Mr Brian Lenihan but no Department officials were present at these meetings. The Department have checked with the panel members who confirmed that they hold no records of any of the meetings which took place.
3. The Panel met with Mr McCreevy and the note of that meeting is contained in record 14.
4. The Panel met with Mr David Doyle and the note of that meeting is contained in Record 13.
5. The only record of a meeting between the Panel and Mr Kevin Cardiff is one which took place on 10 September 2010 and this record (No. 12) has been released to the applicant in the course of this review. The Department has stated, following an examination of the schedules of planned meetings, that Mr Cardiff was due to meet Mr Wright on 9 and 10 August 2010 before the Panel was appointed. The Department has recently checked with Mr Cardiff who replied that he had no formal meetings with the Wright Panel. Mr Cardiff stated that the Chairman of the Panel did speak to him from time to time on administrative matters and to fill him in on progress, and that he would have met the Panel members to welcome them and to

thank them for their efforts.

Section 10(1)(a) of the FOI Act provides that access to a record may be refused if "the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken". In cases such as this, the role of the Commissioner is to decide whether the decision maker has had regard to all the relevant evidence and to assess the adequacy of the searches conducted by the public body in looking for relevant records. The evidence in "search" cases generally consists of the steps actually taken to search for the records along with miscellaneous other information about the records management practices of the public body insofar as those practices relate to the records in question. On the basis of the information provided, the Commissioner forms a view as to whether the decision maker was justified in coming to the decision that the records sought do not exist or cannot be found. It is not normally the Commissioner's function to search for records.

In implementing the terms of the FOI Act, the Commissioner is primarily concerned with ensuring public access to existing records in accordance with the provisions of the Act. The Act does not provide for a right of access to records which ought to exist. Therefore, the Commissioner does not have the authority to require a public body to create records where such records do not exist or are not held by it. It is also outside the remit of the Information Commissioner to adjudicate on how public bodies perform their functions generally.

The position of the Department is that all relevant records have been identified in the schedule of records supplied to the applicant and that no further records exist - this amounts to a refusal of the request by reference to section 10(1)(a) of the FOI Act. Having reviewed the steps taken by the Department to locate all relevant records, I am satisfied that it is reasonable to conclude that the Department has taken all reasonable steps to locate all relevant records coming within the scope of the applicant's request and I find that section 10(1)(a) of the FOI Act applies.

Decision

Having carried out a review under section 34(2) of the FOI Act, I hereby vary the decision of the Department and direct that records numbered 13, 14, 15, 17, 18 and 19 be released in full.

Right of Appeal

A party to a review, or any other person affected by a decision of the Information Commissioner following a review, may appeal to the High Court on a point of law arising from the decision. Such an appeal must be initiated not later than eight weeks from the date on which notice of the decision was given to the person bringing the appeal.



Stephen Rafferty
Senior Investigator

27 August 2012