

**Review Application under the Freedom of Information Acts 1997 & 2003  
(the FOI Act) to the Information Commissioner**

**Case Number:** 100218

**Applicant:** Mr Gavin Sheridan, Business Incubation Centre, National College of Ireland, Dublin 1.

**Public Body:** FÁS

**Issue:** Whether FÁS was justified in its decision to refuse access to records sought by the applicant on the basis that the withheld records are exempt from release under the provisions of the FOI Act.

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

**Summary of Decision:** The Senior Investigator annulled the decision of FÁS. He directed instead that access be granted to all of the records with the exception of certain specified details.

**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**

The applicant made an FOI request on 8 March 2010 to FÁS in which he requested information under four headings. FÁS issued a decision on 8 April 2010 in relation to Item 1 of the request and this decision was not appealed to this Office and does not form part of this review. On 13 May 2010 a further decision was issued by FÁS in relation to the remaining three items. FÁS granted access to the records requested at Item 4 of the request and refused access to records in relation to Items 2 and 3 of the request. The exemptions cited were section 10(1)(e) (frivolous and vexatious) and section 28 (personal Information). The applicant sought an internal review of the decision to refuse access to records under Items 2 and 3 of his request. In its internal review decision, which issued on 1 July 2010, FÁS upheld its decision to refuse access and cited sections 26(1)(a) (information given in confidence) and 28 (personal information). On 09 September 2010 the applicant applied to the Information Commissioner for a review of the FÁS decision.

I note that Ms Anne O'Reilly, Investigator in this Office, wrote to FÁS on 14 September 2012 informing it that her preliminary view was that the records should be released with the redaction of any comments made about named individuals. FÁS responded and referred this Office to its submission of 27 October 2010 and asked that all aspects of that submission be taken into account in this Office's decision. Ms O'Reilly wrote to FÁS again on 25 March 2013 explaining her preliminary views in more detail and addressing all aspects of FÁS's submission. No response was received from FÁS to this letter.

In conducting this review, I have had regard to the correspondence between the applicant and FÁS, the submissions to this Office from FÁS and the applicant, the contents of the records at issue, and the provisions of the Freedom of Information Act 1997, as amended by the Freedom of Information [Amendment] Act 2003.

## **Scope of the Review**

The original request for records under Items 2 and 3 was as follows:

- (2) *A datadump (MySQL export) of the entirety of the internal PHP bulletin board located at this address : <http://intra.fasoffice.com/phpbb/>; and*
- (3) *A screengrab of the entire thread at <http://intra.fasoffice.com/phpbb/viewtopic.php?t=11270>.*

During the course of this Office's review the requester reduced the scope of his request to nine "threads" (discussion subjects) from the Bulletin Board. This review therefore extends solely to whether or not FÁS was justified, within the terms of the FOI Act, in refusing access to the records which contain the nine specified "threads".

## **Preliminary Matters**

Under section 34(12)(b) of the FOI Act, a decision to refuse to grant access to a record is presumed not to have been justified unless it is shown to the satisfaction of the Commissioner that the decision was justified. This provision has the effect of placing the burden of proof for refusing access on the public body. In its submission to this Office FÁS argue that the purpose of the Act is to allow members of the public to "*obtain access to official information* " and that the information contained in the records which are the subject of this request is not "

*official information"* . I must point out that there is no reference in the FOI Act to "official information" - the Act provides for access to "records" held by a public body and the information content of these records is considered by reference to the exemption provisions in the Act. Furthermore, in the Long Title to the FOI Act, which may be taken as a statement of the overall objectives of the Act, the reference there is to enabling "MEMBERS OF THE PUBLIC TO OBTAIN ACCESS, TO THE GREATEST EXTENT POSSIBLE... TO INFORMATION IN THE POSSESSION OF PUBLIC BODIES ...". The right of access is not confined to "official information" as stated by FÁS.

### **Analysis and Findings**

FÁS relied upon the provisions of sections 10(1)(e), 26(1)(a) and 28(1) to refuse access to the records in question.

#### ***Section 10(1)(e)***

Section 10(1)(e) provides that:

*"(1) A head to whom a request under section 7 is made may refuse to grant the request if-*  
*(e) the request is, in the opinion of the head, frivolous or vexatious, or forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the head, appear to have made the requests acting in concert....."*

There are three separate elements in section 10(1)(e) any one of which, by itself, could provide the basis for a refusal of access. In its initial decision, FÁS took the view that the request for Items 2 and 3 was both frivolous and vexatious; though this exemption was not relied upon by the internal reviewer subsequently. In the course of its submission of 27 October 2010, by linking this request to a previous request by a person known to be an associate of the applicant in this case, FÁS appears to argue that the request forms part of a pattern of manifestly unreasonable requests.

As regards its claim that the request was both frivolous and vexatious, FÁS has argued that it *"has not been made in order to ensure transparency in a public body or to examine the workings of a public body but to fuel a media frenzy involving FÁS"* and that *"access to the bulletin board was sought to undermine the staff of FÁS"*. While I accept that the release of these records **might** result in some comment in the media, the Information Commissioner cannot take into account what use may be made of the information, once released, as release of information under the FOI Act is regarded as release to the world at large.

In her "preliminary views" letter, dated 25 March 2013, Ms. O'Reilly of this Office set out the approach to section 10(1)(e) of the FOI Act as adopted by the Information Commissioner in some previous cases. I do not intend to repeat this account though these previous decisions are relevant for the purposes of this decision. In particular, Ms. O'Reilly's letter drew attention to the view of the Commissioner that abuse of the right of access may warrant reliance on section 10(1)(e); and she cited a non-exhaustive list of relevant factors to consider in determining whether a pattern of conduct amounts to an abuse of the right of access, as identified in the *RTÉ* decision (case no. 020375, available at [www.oic.gov.ie](http://www.oic.gov.ie) );

- "(1) The actual number of requests filed: are they considered excessive by reasonable standards?*
- (2) The nature and scope of the requests: for example, are they excessively broad and varied in scope or unusually detailed? Alternatively, are the requests repetitive in character or are they used to revisit an issue which has previously been addressed?*
- (3) The purpose of the requests: for example (a) have they been submitted for their "nuisance" value, (b) are they made without reasonable or legitimate grounds, and/or (c) are they intended to accomplish some objective unrelated to the access process?*
- (4) The sequencing of the requests: do the volume of requests or appeals increase following the initiation of court proceedings or by the institution or the occurrence of some other related event?*
- (5) The intent of the requester: is the requester's aim to harass government or to break or burden the system? "*

This was a single FOI request and it is relevant to point out that the applicant agreed to narrow the range of his original request at the stage when it was still being considered by FÁS; that he agreed to the deletion of any material which might serve to identify any particular individuals; and that, in the course of this review, he further reduced the range of material being sought in order to make the review more manageable. This approach by the applicant is hardly consistent with a charge that his request was "unreasonable". There is no evidence to suggest that the purpose of the request was to cause a nuisance, or to harass government or burden the system. I agree with Ms O'Reilly's view that none of the factors set out above apply to this request. I have no evidence to support a view that the request was made in "bad faith" or could be considered frivolous or vexatious within the meaning of the Act. Accordingly, I find that section 10(1)(e) does not apply.

## **Section 26**

Section 26(1)(a) provides that a head shall refuse to grant a request for a record if:

1. the record at issue contains "information given to a public body in confidence"; and
2. "on the understanding that it would be treated by it as confidential ..."; and,
3. "in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons"; and
4. "it is of importance to the body that such further information as aforesaid should continue to be given to the body ...".

As pointed out by Ms O'Reilly in her preliminary views letter, FÁS suspended the Bulletin Board in November 2009 and in its submission of 27 October 2010 FÁS stated that *"It is not necessary for FÁS to operate a bulletin board for the purpose of fulfilling its statutory functions or for conducting its day to day business. There is no reference in any enactment or legislation to a bulletin board and FÁS has in fact been conducting its business normally without the bulletin board since November 2009. "*

In these circumstances it is clear that the test listed at 4 above has not been met. I have not considered the other three tests as, in order for the exemption to apply, all four tests must be met. Accordingly, I find that section 26(1)(a) does not apply to exempt the records at issue.

## Section 28

Section 28(1) provides that:-

*"...a head shall refuse to grant a request under section 7 if, in the opinion of the head, access to the record concerned would involve the disclosure of personal information (including personal information relating to a deceased individual).*

Personal information is defined in the Act as "information about an **identifiable individual** ..." (my emphasis). I have examined the records in question and I find that they consist of contributions by staff members to the FÁS Bulletin Board on a range of topics. However the contributors to the bulletin board are not identified in the records. With some small exceptions, this information does not constitute personal information for the purposes of the FOI Act. In addition, the applicant, in his application for internal review, stated that he had *"no issue with the true identities of persons being removed."* Accordingly, the question of personal information does not arise. Subject to some small redactions to protect the identities of identifiable individuals, I find that section 28(1) does not apply to these records.

### **Decision**

Having carried out a review under section 34(2) of the FOI Act, I find that FÁS has not justified its reliance on sections 10, 26 and 28 for its decision to refuse access to the records in question. I hereby annul the decision of FÁS in this case and direct instead that the records in question - as identified in the "Scope of the Review" section of this decision - be released to the requester. In releasing these records, FÁS must delete certain details which identify specific individuals. The details to be deleted are identified in the Annex to this decision.

### **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.

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**Fintan Butler**  
**Senior Investigator**

**6 August 2013**

## **Annex**

### **Material to be redacted on release of records**

#### **Record 1- Half Day of Action**

##### **Redactions:**

Page 4, Para 4, Sentence between sentence ending with "views" and next sentence beginning "We would;  
Page 4, Para 4, name in last sentence;  
Page 4, Name in last sentence on page;  
Page 5, name at top of page.

#### **Record 2 - 24 Nov Strike Day - Release in full**

#### **Record 3- Office Communication Skills MAP - Release in Full**

#### **Record 4 - part time training - Release in full**

#### **Record 5- Shorter working week - Release in full**

#### **Record 6 - Employee Assistance Programme - Release in full**

#### **Record 7 - Payroll - Release in full**

#### **Record 8 - FAS rotten from top to bottom**

##### **Redactions:**

Page 1, Name on 2nd last line;

#### **Record 9 - FOI**

##### **Redactions:**

Page 1 of 8, line 2, after "information to" to end sentence;  
Page 1 of 8, Name in 4th para.;  
Page 4 of 8, Name in 3rd para.  
Page 6 of 8, Name in 5th para.  
Page 6 of 8, 5th para, words between "interested in" and " Am I";  
Page 2 of 10, last two paras;  
Page 3 of 10, from top of page "Dublin View"  
Page 2 of 3, Name in two places in 1st para.

