An Coimisinéir Faisnéise
Information Commissioner

Review Application to the Information Commissioner under the Freedom of Information Act 2014 (the FOI Act)

Case Number: OIC-142734-M5D6B4

Applicant: Mr. Ken Foxe, Right to Know CLG, [redacted]

Public Body: Irish Human Rights and Equality Commission (IHREC)

Issue: Whether IHREC was justified in refusing access to reports of its visits to Direct Provision Accommodation Centres

Review: Conducted in accordance with section 22(2) of the FOI Act by Anne Lyons, Investigator, who is authorised by the Information Commissioner to conduct this review

Decision: The Investigator affirmed IHREC's decision. She found that, in the particular circumstances of the case, the records are exempt under section 30(1)(a) of the FOI Act (investigations and investigation procedures) and that the public interest does not weigh in favour of their disclosure.

Right of Appeal: Section 24 of the FOI Act sets out detailed provisions for an appeal to the High Court by a party to a review, or any other person affected by the decision. In summary, such an appeal, normally on a point of law, must be initiated not later than four weeks after notice of the decision was given to the person bringing the appeal.

Background

Direct Provision (DP) is the term used to describe the various services given to international protection (IP) applicants while their applications are being assessed. Accommodation Centres (centres), which are often hotels or hostels, are paid to provide accommodation, food, etc. to IP applicants. International Protection Accommodation Services (IPAS) is responsible for the DP system. IPAS is part of the Department of Children, Equality, Disability, Integration and Youth.

Further to material released by IHREC under another FOI request, it is in the public domain that it has visited some centres. On 16 June 2023, the applicant made an FOI request for access to reports arising from these visits, dating from 1 September 2022. IHREC did not issue a decision on the matter within the timeframe set out in the FOI Act. This amounts to an effective refusal of the request.

On 1 September 2023, the applicant sought an internal review of IHREC's effective decision. On 21 September 2023, IHREC notified the applicant that it was refusing access to eight records under sections 29 (deliberative processes), 32(1)(b) (endanger life or safety) and 35(1)(a) (information in confidence) of the FOI Act.

On 29 September 2023, the applicant applied to this Office for a review of IHREC's decision. On 26 October 2023, this Office issued a notice to IHREC under section 23 of the FOI Act, requiring it to give adequate reasons for its refusal of the request. On 17 November 2023, IHREC provided reasons for its refusal to the applicant and to this Office. During the review, it also sought to rely on sections 30(1)(a) (inquiries of an FOI body) and 30(1)(c) (negotiations of an FOI body) of the FOI Act.

I have now completed my review in accordance with section 22(2) of the FOI Act and I have decided to conclude it by way of a formal, binding decision. In carrying out my review, I have had regard to the above exchanges, contacts between this Office, IHREC, various third parties, and the applicant, the contents of the records at issue, and the provisions of the FOI Act.

Scope of Review

The scope of the review is confined to the sole issue of whether the records are exempt under the provisions of the FOI Act.

Preliminary Matters

Section 25(3) of the Act requires me to take all reasonable precautions in the performance of my functions to prevent the disclosure of information contained in an exempt record or that would cause the record to be exempt if it contained that information.

Release of records under FOI is generally understood to have the same effect as publishing them to the world at large, given that the Act places no constraints on the uses to which the information contained in those records may be put.

IHREC's decision making
Finally, I will comment on IHREC's compliance with the FOI Act's requirements for the issuing of original and internal review decisions. In particular, section 13(1) requires FOI bodies to issue an original decision within four weeks of receipt of the FOI request. Furthermore, sections 13(2)(d) and 21(5)(c) require that, where an FOI body decides to refuse to grant a request, the notification of the decision shall specify various matters, including the reasons for the refusal and the findings on any material issues relevant to the decision.

As described in the Background section above, IHREC did not issue any original decision on the applicant's request. Furthermore, its letter to the applicant of 21 September 2023 did not explain why it considered the relevant exemptions to apply, or deal with the relevant public interest considerations. As noted above, this Office considered it appropriate to issue a notice to IHREC under section 23 of the FOI Act in relation to the matter.

IHREC may wish to have regard to the guidance for FOI bodies that is available on the website of the Department for Public Expenditure, NDP Delivery and Reform's Central Policy Unit (CPU) at foi.gov.ie. In addition, the Minister for Public Expenditure, NDP Delivery and Reform has published a Code of Practice (the Code) for public bodies pursuant to section 48 of the Act, which is also available on the CPU's website. The Code includes key details relevant to the processing of requests and the contents of decisions. Under section 48(3) of the FOI Act, public bodies must have regard to the Code in the performance of their functions under the Act.

Analysis and Findings

At the outset, I will examine the application of section 30(1)(a) of the FOI Act to the records. I informed the applicant of potential relevance of this provision. To date, I have received no comments from him on the matter.

Section 30(1)(a) – examinations and their procedures
Section 30(1)(a) of the FOI Act provides that a head may refuse to grant an FOI request if access to the record concerned could, in the opinion of the head, reasonably be expected to prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of an FOI body or the procedures or methods employed for the conduct thereof.

Section 30(1)(a) is what is known as a harm-based provision. The Commissioner accepts that the provision is not aimed solely at investigations etc. that are now in progress but that it may also cover similar exercises conducted in the future. He has also found that the use of the word "effectiveness" in section 30(1)(a) must be interpreted as the ability of the test, examination or audit to produce or lead to a result of some kind (e.g. Case 080099).

In considering section 30(1)(a), it is necessary to identify the potential harm or prejudice to the effectiveness of the relevant test, examination etc., and explain how disclosing the particular contents of each record could reasonably be expected to prejudice the

effectiveness of tests, examinations etc., having regard also to the relevant facts and circumstances of the case.

Relevant facts and arguments

As the applicant is aware, IHREC says that its visits were of an observational, preliminary, fact-gathering nature. In particular, it says that it has no formal inspection role or specific statutory function in relation to the centres, and that the visits were facilitated by the centres and IPAS. It says that the visits were intended to examine general conditions in the centres in the context of residents' human and equality rights, and to identify any particular issues that would feed into its overall strategy, policy and work. It says that, accordingly, it did not issue any reports or findings following its visits or give the centres any right of reply.

IHREC contends that the records contain information given to it by staff of the centres on the understanding that such details would be treated as confidential. It indicates that it may carry out further visits to the visited centres, or to other centres. It says that disclosure of the records at issue would be likely to prejudice the giving to it of similar information by the same staff, or by other staff in comparable institutions. It says that it needs this information in order to perform its functions as the national human rights body, and to perform its designate function under upcoming UN Optional Protocol to the Convention Against Torture (OPCAT) legislation.

Analysis

I have carefully examined the contents of the records. Bearing in mind the requirements of section 25(3), I am satisfied that the records reflect various frank responses and other information provided to IHREC staff by staff of the centres. They also contain IHREC's findings and observations on the adequacy of the accommodation and facilities within the centres. The reports contain no recommendations.

It is particularly relevant in this case that IHREC currently lacks a specific statutory role in relation to the centres (for instance, as a regulator, a provider of funding etc.), and that its visits were facilitated by the centres. As I have noted above, the records indicate that the centres and their employees engaged fully and frankly with IHREC personnel. I also note that IHREC did not give the centres any details of the reports or any rights of reply. In all of these circumstances, I am of the view that the relevant centres would have a reasonable expectation that IHREC would not disclose the contents of the records to the world at large.

I note that IHREC has not ruled out carrying out further fact-gathering visits. It seems reasonable to me to accept, in all of the circumstances, that disclosure of the records at issue could reasonably be expected to prejudice the willingness of centres to facilitate and engage with IHREC on further visits, which would impact on the effectiveness of those visits, and/or the procedures IHREC uses accordingly.

In all of the circumstances, I am satisfied that disclosure of the records could reasonably be expected to prejudice the effectiveness of IHREC's inquiries, and/or the methods etc. that it uses to carry out such inquiries. I find that section 30(1)(a) applies to the records.

Section 30(2) – the public interest

Section 30(2) provides that subsection (1) shall not apply in a case in which in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the FOI request concerned. In other words, any decision to grant access under section 30(2) would be on the basis that there is an overriding public interest in the release of the records, effectively to the world at large, that outweighs the public interest in withholding the records.

In considering where the balance of the public interest lies in this case, I have had regard to section 11(3) of the Act which provides that in performing any functions under the Act, an FOI body must have regard to, among other things, the need to achieve greater openness in the activities of FOI bodies and to promote adherence by them to the principles of transparency in government and public affairs and the need to strengthen the accountability and improve the quality of decision making of FOI bodies. However, in doing so, I have also had regard to the judgement of the Supreme Court in *The Minister for Communications, Energy and Natural Resources and the Information Commissioner & Ors*, [2020] IESC 5 (the eNet judgment). In that judgment, the Supreme Court found that a general principle of openness does not suffice to direct release of records in the public interest and "there must be a sufficiently specific, cogent and fact-based reason to tip the balance in favour of disclosure". Although the Court's comments were made in cases involving confidentiality and commercial sensitivity, I consider them to be relevant to the consideration of public interest tests generally.

In relation to the matter of the public interest in general, IHREC says the reports are concerned with the conditions within the centres and whether IP applicants' human rights, in terms of their accommodation, are being met. It acknowledges that there is a public interest in revealing such matters.

In my view, disclosure of the records will enable insight into, and an assessment of, IHREC's performance of its functions relating to the protection and promotion of human rights and equality. Furthermore, disclosure would add considerably to the public understanding of the standard of the facilities and services provided to IP applicants. Ultimately, these services are provided on behalf of, and funded by, the State. It seems to me that these factors add considerable weight to the public interest in disclosing the records.

On the other hand, however, I consider that it is very important to ensure that IHREC can continue to properly observe conditions in centres, so that it may identify issues relevant to the performance of its functions as the national human rights body. In turn, I am satisfied that there is considerable weight to the public interest in not causing harm to the effectiveness of IHREC's fact-gathering visits to centres, and/or its processes for doing so.

Having considered the matter very carefully, I find that the public interest would, on balance, be better served by fully withholding the records. In the circumstances, there is no need for me to consider the other exemptions relied on by IHREC in this case, or the various third party arguments.

Decision

Having carried out a review under section 22(2) of the FOI Act, I hereby affirm IHREC's refusal of the records, on the basis that section 30(1)(a) of the FOI Act applies to the records.

Right of Appeal

Section 24 of the FOI Act sets out detailed provisions for an appeal to the High Court by a party to a review, or any other person affected by the decision. In summary, such an appeal, normally on a point of law, must be initiated not later than four weeks after notice of the decision was given to the person bringing the appeal.

Anne Lyons
Investigator
24 September 2024