



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

Case Number: OIC-144824-Q2S2Y1

Applicant: Mr. Ken Foxe, Right to Know CLG

Public Body: RTÉ

Issue: Whether RTÉ was justified in withholding certain information relating to the purchase of items for the costume/wardrobe department for a specified period by virtue of the Freedom of Information Act, 1997 (Prescribed Bodies) (No. 2) Regulations, 2000 or alternatively, on the ground that some of the information is exempt under section 37(1) of the Act

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

Decision: The Senior Investigator annulled RTÉ's decision. He found that the records were subject to the FOI Act and he found none of the information was exempt under section 37(1). He directed the release in full of 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.

Background

On 15 September 2023, the applicant submitted a request to RTÉ for a datadump/record of its financial management system, where it relates to the purchase of items for the costume/wardrobe department, to cover the period from 1 January 2022 to the date of his request. In its decision of 31 October 2023, RTÉ granted access to limited excerpts of the records (spreadsheets). It redacted certain information under section 32(1)(a)(ii) of the FOI Act (compliance with any law), section 37(1) (personal information), and on the basis that certain information was not subject to the FOI Act pursuant to the Freedom of Information Act, 1997 (Prescribed Bodies) (No.2) Regulations, 2000 (the 2000 Regulations).

On 1 November 2023, the applicant sought an internal review of that decision. On 19 December 2023, RTÉ affirmed its decision on the request. It said the 2000 Regulations apply to all of the information requested as they relate to RTÉ's programme making function but notwithstanding that, access had been granted to certain details with appropriate redactions further to section 32(1)(a)(ii) of the FOI Act. It did not reference section 37 as a ground for redacting any information. On 20 December 2023, the applicant applied to this Office for a review of RTÉ's decision.

During the review, the Investigator queried a small number of items that do not, on their face, appear relevant to wardrobe. RTÉ says that it is unable at this remove to determine their purpose. It is no longer claiming that such details are programme related and "does not object to their release." It also clarified its position on the request. It contends that, further to the Regulations, the spreadsheets are not subject to FOI where "a specific programme or individual is identified (as they are linked to a particular programme or programmes e.g. news bulletins)." It clarified that it relies on section 37 only as an additional ground, and that it no longer relies on section 32(1)(a)(ii).

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, correspondence between this Office and both RTÉ and the applicant, to the contents of the records at issue and to the provisions of the FOI Act.

Scope of Review

The review is concerned with whether RTÉ was justified in withholding the remainder of the spreadsheets on the basis that they are not subject to the FOI Act pursuant to the 2000 Regulations and if not, whether it was justified in redacting certain information under section 37(1) of the Act.

Analysis and Findings

RTÉ's overarching position is that wardrobe purchasing arises directly from programme-related editorial decisions, such that the requested details comprise "programme related" information that is not subject to the FOI Act pursuant to the 2000 Regulations.

The records

RTÉ provided this Office with copies of spreadsheets in pdfs format, containing details of approximately 6,000 transactions. RTÉ said the information relates to expenditure incurred while purchasing, returning, or repairing clothing for programme use. Each transaction is categorised under 14 headings, some of which are for RTÉ's internal use such as transaction and account numbers, and includes details of the amount spent or refunded in respect of each unspecified item, the associated programme/event, and the identity of the supplier.

RTE has released limited details (including amounts) for a very small number of transactions, such as for "Culture Night", "Lyric FM", "RTÉ Investigations Unit", "Nuacht", etc. It said these transactions either do not relate specifically to one programme, or involve a group of individuals large enough for no single person to be identifiable. Overall, however, RTÉ has withheld the vast majority of details concerning its wardrobe transactions, including all supplier/vendor details.

The 2000 Regulations

RTÉ was prescribed as a public body for the purposes of the FOI Act 1997 under the 2000 Regulations, which continue in force further to section 54(2) and Schedule 5 of the FOI Act 2014. Schedule 2 of the 2000 Regulations provides that the FOI Act applies to RTÉ only in respect of the following functions:

1. Management.
2. Administration.
3. Finance.
4. Commercial.
5. Communications.
6. Making of contracts of or for services with any person, company or other body.

Article 2(3) of the Regulations further provide that "[f]or the purposes of these Regulations the functions specified in Schedule 2 to these Regulations shall be deemed not to include any of the matters specified in Schedule 3 to these Regulations." Amongst the matters excluded by Schedule 3 are:

"4. The process of making editorial decisions concerning programme or programme schedule content which, without prejudice to the generality of the foregoing, shall include preliminary programme proposal reviews, programme planning and final pre-transmission editorial decisions."

The applicant's arguments

The applicant says that RTE's arguments were dismissed in this Office's decision in Case No. OIC-110279. That case concerned a request for records regarding RTE's refurbishment of studios and the revamp of a particular programme. However, each case must be considered on its merits, and have regard to its particular facts and circumstances.

RTÉ's arguments

RTÉ notes that the explanatory note to the 2000 Regulations says that the FOI Act applies only to its “non-programme related functions”, which it says is “an explicit description” of the how the legislature envisaged FOI applying to RTÉ. It says that this view was endorsed by the High Court (O’Caoimh J.) in *RTÉ v The Information Commissioner* [2004] IEHC 113 (the RTÉ judgment).

RTÉ refers also to O’Caoimh J.’s comments that Schedule 2 functions must be interpreted narrowly, and Schedule 3 functions given a broad interpretation. It refers to his comments that, if a function can be described as being a Schedule 2 matter (e.g. management) but involves a Schedule 3 function, then it is not subject to the FOI Act. It says that the RTÉ judgment makes it clear that Schedule 3.4. covers the entire process of programme planning and delivery to broadcast, which it says encompasses decisions on what to wear and purchase. It says that the Act does not require that a matter must be solely editorial in order for it to be considered as a Schedule 3 matter. It says also that the records do not become subject to FOI after an editorial decision has been made, and that it is irrelevant in this case whether the money spent came from licence fees or commercial revenues.

RTÉ seeks to define what is an editorial decision. It refers to its mandatory Journalism Guidelines. This provides that editorial responsibility within RTÉ rests with the editorial chain of management, and that those involved in the creation of RTÉ content are required to exercise editorial responsibility for it. It refers also to the European Media Freedom Act (EMFA), which defines an “editorial decision” as “a decision taken on a regular basis for the purpose of exercising editorial responsibility and linked to the day-to-day operation of a media service provider” (emphasis added by RTÉ). It says that it is clear from the foregoing that those who make programmes are responsible editorially for them.

RTÉ says that the BBC in the UK has a similar ‘programme making exemption’, such that the relevant FOI Act only applies to information “held for the purposes other than those of journalism, art or literature’. It provides excerpts of UK court judgments commenting on the close parallels between the relevant parts of the Irish and UK FOI regimes and finding that the costs of making programmes by the BBC was not subject to FOI. While I note the relevant excerpts, I do not propose to repeat them due to the non-binding nature of judgments from other common law jurisdictions.

RTÉ says that programme planning and pre-transmission editorial matters go far beyond deciding on a programme’s contents and the order in which items should appear, and includes wardrobe planning and purchasing. It says that the Wardrobe Department’s (Wardrobe’s) function is solely editorial in nature i.e. to match clothing to an individual, a character, a programme or a performance.

RTÉ says that that clothing is a strong visual indicator of tone and character, and also has to work with a set, lighting etc. It describes the planning process for various programmes, including factors that may impact on potential style and colour choices for programme presenters, politicians, etc. I do not intend to repeat all of the details, but I have had regard to them. I note in particular that once a programme and clothing budget has been established, Wardrobe purchases various potentially suitable items. An editorial group

(including Wardrobe) then considers which will actually be worn. RTÉ says that Wardrobe generally over-buys on the expectation that some items will be deemed unsuitable, as reflected in the high number of returns/refunds in this case (which I note amount to over 1,800 transactions, approximately). It says also that wardrobe purchases are also made for radio presenters because of live streaming from studios.

RTÉ says that the clothes remain RTÉ's property, and that items bought for one programme may be used in others if the producer decides they are appropriate.

Analysis

At the outset, while I have noted RTÉ's comments on the extent of the exclusion available to the BBC under UK FOI legislation and the views of the Courts in the UK as to the close parallels between the two regimes, I must interpret the 2000 Regulations based on the language contained therein. Similarly, while I note the EMFA definition of "editorial decision" and the relevant excerpts of RTÉ's Journalism Guidelines, these do not mean that the information under review must be deemed to concern the process of making editorial decisions concerning programme or programme schedule content.

Moreover, I fully accept, pursuant to the RTÉ judgment, that the Schedule 2 functions in the Regulations must be interpreted narrowly and the Schedule 3 functions given a broad interpretation. Bearing that in mind, I am satisfied that the information sought is captured by the functions set out in Schedule 2, including administration and/or finance. Accordingly, the question I must consider is whether the information concerns matters specified in Schedule 3.4. If it does, then it is deemed not to be included in the functions set out in Schedule 2 and the FOI Act does not apply.

The RTÉ judgement concerned data collected on the amount of broadcast time allocated to political parties during the 2002 election campaign, which fed into editorial decisions intended to ensure RTÉ's compliance with section 18 the Broadcasting Authority Act 1960 as amended (the 1960 Act). That section 18 requires RTÉ to maintain impartiality in broadcasting of certain matters. In his decision, the then Commissioner distinguished between the process of making editorial decisions and the data or information on which such a process relies.

However, the High Court found that compliance with section 18 of the 1960 Act necessarily involves the process of making editorial decisions concerning programme contents, and must include programme planning and final pre-transmission editorial decisions. It found that in so far as the information was gathered for RTÉ, this was a gathering of data for the purpose of achieving the impartiality required by the 1960 Act and that this, of itself, involves programme content purposes in so far as the impartiality in question was sought to be achieved. It further found that the process engaged in was one which can be stated to have included internal review and analysis of programmes or schedule of programmes. O'Caomh J. found that the Commissioner erred in law in his construction of the Regulations when applied to the facts of the case.

In this case, however, the type of information at issue is, in my view, wholly distinguishable from that which was considered in the RTÉ judgment. As I have outlined already, the

information at issue in this case concerns RTÉ's purchases and returns of unspecified items for various programmes. It is simply factual information relating to payments and refunds made and received by RTÉ in respect of unspecified wardrobe items. As I have said in previous recent decisions concerning expenditure incurred by RTÉ, if I was to accept its arguments that the exclusion in Schedule 3.4 should be given such a broad interpretation as to incorporate such financial information, then it would be very difficult to identify any information relating to the finance function that would fall to be considered as information concerning RTÉ's finance functions that is not excluded pursuant to Schedule 3.4. Moreover, given the breadth of functions included in Schedule 2, it seems to me that such broad interpretations of the exclusions in Schedule 3 would effectively place the vast majority, if not all, of RTÉ's operations beyond the reach of the FOI Act.

Matters excluded by Schedule 3.4 are the process of making editorial decisions concerning programme or programme schedule content, including preliminary programme proposal reviews, programme planning and final pre-transmission editorial decisions. The records at issue are not concerned with such processes. They are simply records of financial transactions in respect of wardrobe. In conclusion, I find that RTÉ was not justified in refusing the information at issue on the ground that it falls outside the scope of the FOI Act by virtue of the provisions of the 2000 Regulations. I will therefore proceed to consider RTÉ's reliance on section 37 of the FOI Act regarding what it describes as details relating to the identity of individuals for whom clothing was bought.

Section 37 – personal information

Section 37(1) of the FOI Act provides that, subject to the other provisions of the section, an FOI body shall refuse a request if access to the record concerned would involve the disclosure of third party personal information. Section 37(2) provides that section 37(1) does not apply in certain circumstances. Section 37(5) provides that a request that would fall to be refused under section 37(1) may still be granted where, on balance (a) the public interest that the request should be granted outweighs the right to privacy of the individual to whom the information relates, or (b) the grant of the request would benefit the person to whom the information relates.

Section 2 of the FOI Act defines personal information as information about an identifiable individual that, either (a) would, in the ordinary course of events, be known only to an individual or members of the family, or friends, of the individual, or (b) is held by an FOI body on the understanding that it would be treated by that body as confidential. Section 2 goes on to specify 14 categories of information which, without prejudice to the generality of the above definition, constitute personal information, including (iii) information relating to the employment or employment history of the individual.

RTÉ's arguments

RTÉ relies on section 37 in relation to details concerning "a small number of identifiable individuals". It says that "[r]ather than go through wardrobe, individual correspondents occasionally purchase wardrobe which is appropriate to their role or it is purchased for them on a trial basis". It says that such information is held by RTÉ on the understanding that it would be treated by it as confidential and is information directly relating to the employment or employment history of the individual.

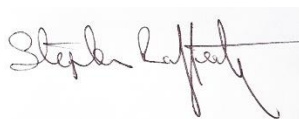
To qualify as personal information, the information must be information about an identifiable individual. I note that RTÉ's was asked to identify the excerpts that it considers to identify specific individuals and that it did not do so. The information at issue in this case comprises information on the amounts paid/refunded by and to RTÉ in respect of certain unspecified wardrobe items in connection with certain programmes/events. It discloses nothing about the nature of the items purchased or refunded. The expenditure has been incurred by RTÉ in respect of its wardrobe requirements. The fact that certain transactions refer to programmes that are closely identified with particular presenters and/or roles that are performed by specific individuals does not mean that expenditure incurred by RTÉ on unspecified wardrobe provisions for identifiable individuals is information about those individuals. It seems to me that the purchase of particular items is essentially linked to the particular programme or the role of the correspondent and is not concerned with the personal circumstances of any individuals. I certainly do not accept that details of amounts paid by RTÉ on unspecified wardrobe items comprises information relating to the employment or employment history of the individuals who may use those items. In all of the circumstances, I am not satisfied that RTÉ has justified its reliance on section 37(1) of the FOI Act to withhold any of the information at issue.

Decision

Having carried out a review under section 22(2) of the FOI Act, I hereby annul RTÉ's decision. I find that it was not justified in withholding certain information relating to the purchase of items for the costume/wardrobe department for a specified period by virtue of the Freedom of Information Act, 1997 (Prescribed Bodies) (No. 2) Regulations, 2000 or on the ground that some of the information is exempt under section 37(1) of the Act. I direct RTÉ to release the records at issue in full.

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.



Stephen Rafferty
Senior Investigator
10 December 2024