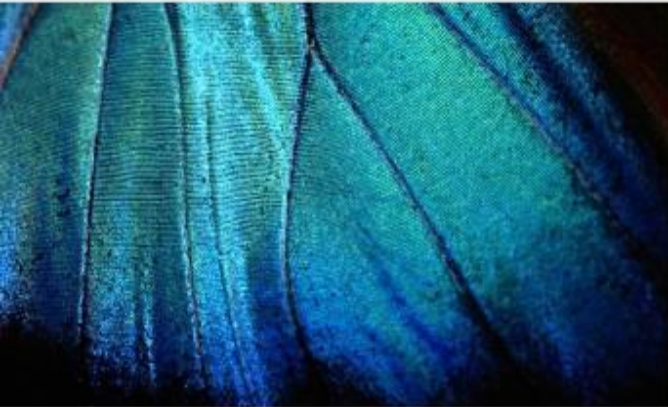


McCANN FITZGERALD



**National Roads  
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Paul Lavery, McCann FitzGerald

**Wednesday 23 September 2015**

# Freedom of Information Act 2014

- Enacted 14 October 2014, replacing the Freedom of Information Acts 1997 and 2003
- For FOI bodies who were in scope under the old FOI Acts:
  - applied from 14 October 2014
  - covers records from 21 April 1998 (or 21 October 1998 for local authorities)
- For new FOI bodies:
  - applied from 14 April 2015 (some exceptions)
  - covers records from 21 April 2008

# Scope of the FOI Acts

- Old FOI Acts applied to prescribed public bodies only
- 2014 Act applies to ‘FOI bodies’
  - ‘public bodies’ (as defined), unless exempted
  - ‘prescribed bodies’

# FOI and Public Authorities

- **Fully Subject** – TII/Local Authorities were prescribed bodies under the 1997 FOI Act and remains fully subject to FOI
- Applies to all TII records created on or after 21 April 1998
- Applies to all local authority records created after 21 October 1998
- Applies to personal records irrespective of when created
- Applies to any non-personal records created pre 21 April/October 1998 cut-off dates if they are necessary in order to understand later records

# Main Rights Under FOI

- Three main rights:
  - A general right of access to records held by FOI bodies (Sections 11 and 12)
  - Right to obtain reasons for an act of a FOI body that affects the person and in which the person has a material interest (Section 10)
  - Right to have personal information amended where incomplete, incorrect or misleading (Section 9)

# Applies to Records held by FOI body

- Access right applies to “records” not “information”
- “Record” is very widely defined – includes anything in physical or electronic form
- Records that are “held” by an FOI body are potentially subject to release on foot of an FOI request
- Reference to “held” includes a reference to records under the control of that body (Section 2(5))
- Records in the possession of service provider, that relate to a service provided to an FOI body, are deemed to be held by the public body (Section 11(9)) and are potentially subject to release under FOI
- No requirement to create a record in order to release information sought

## Main changes - Fees

- €15 upfront fee abolished
- Fixed hourly rate of €20 for search and retrieval
  - No charge where estimate < €100
  - Where estimate >€100 and < €700, charge applies (maximum €500)
  - Where estimate >€700, FOI body may refuse request or charge without limit

## Main changes – Policies and Codes

- Express reference in Act to have regard to need for openness, transparency, accountability, public scrutiny
- Obligation to have regard to Codes of Practice (Section 48)



# Main Changes – Publication scheme

- Section 8 Publication schemes to replace section 15 and 16 booklets
- To be published by 14 April 2016

## Section 8 Publication Schemes

- Publication scheme must comply with the Code of Practice
- Must include details of an FOI body's compliance with FOI obligations, including:
  - Classes of information that the FOI body has published or intends to publish
  - Terms on which information will be made available
  - Details of organisational structure
  - Details of the classes of records held
  - Details of rules, practices and procedures used in connection with the administration of enactments or schemes which relate to rights, benefits, penalties or sanctions to which members of the public may be subject or entitled
  - Details of the address to which requests should be sent

## Main changes – Enforcement

- Commissioner may apply to High Court for order to compel compliance with decision
- New offence of deliberately destroying records
- Potential personal liability for senior personnel



# Procedures and Timeframes

- Generally the same time frames
- Access delayed is (as good as) access denied



# Grounds for Refusing FOI Requests

## ▪ **Administrative exemptions (Section 15):**

- compliance would cause an unreasonable interference with the work of the FOI body
- record does not exist or cannot be found
- the request did not comply with the formal requirements set out under the FOI Act
- the information is already in the public domain
- the information is required to be published by law within 12 weeks, or the FOI body intends to publish it within 6 weeks
- the request is frivolous or vexatious

# Grounds for Refusing FOI Requests *contd.*

- Exemptions based on **subject matter** that may apply include that the information is:
  - **confidential** to a third party (other than service provider)
  - **commercially sensitive** to the FOI body or a third party
  - **personal information** relating to a person other than the requester
  - concerned with the **functions and negotiations** of the FOI body
  - concerned with the on-going **deliberations** of the FOI Body
  - subject to **legal professional privilege**

# Access Requests

- Requester entitled to “fishing expedition”
- Public bodies cannot take into account motives of requester – Section 13 (4)
- Overlap with Data Protection Acts
- Overlap with Access to Information on the Environment Regulations

## Overlap with Discovery

- In circumstances where a discovery order has been made, the same records will not be released under FOI
- Discovery – release with implied or express confidentiality obligation to use solely for the purposes of litigation
- FOI – regarded as release to the world at large
- Discovery and FOI incompatible



# Action Points

- Review policies and procedures
- Ensure that fees practices are inline with the levels of fees and charges set out under the Freedom of Information Act 2014 (Fees) (No. 2) Regulations 2014
- Publish Section 8 Publication Scheme by 14 April 2016

## FOI - Recommendations

- FOI provides right to access records, not information
- No requirement to create a record in order to provide information under FOI – If record does not exist, rely on exemption under section 15(1)(a)
- Take care with written records, are they written in a way that would be embarrassing if released?
- Remember that confidentiality exemption does not apply to (i) confidentiality obligations owed to TII or local authorities or (ii) confidentiality obligations owed to service provider

# FOI - Recommendations

- Record Retention – Consider to what extent records need to be retained – Implementation of Record retention and deletion policy
- No express exemption for “Drafts” – Consider to what extent drafts (rather than final version) should be retained
- Records held by service providers

## Discovery – General

- Once litigation threatens obligations arising include:-
  - (1)not to destroy documents
  - (2)to preserve documents
  - (3)to make full disclosure
  - (4)not to withhold relevant items

# Discovery – General

- Identify all potential sources of relevant hard copy and electronic data
- Identify and list all employees who may have created or stored relevant material
- Locate all hard copy files
- Correspond with all agents who may hold relevant material
- Collate in conjunction with IT professionals all potentially relevant electronic data
- If a full review of all scanned documents is not feasible due to volume or time constraints and applying search terms, seek to agree these with the other side or seek court approval

# Document Handling

- Original discovery documents must be preserved in their original form without altering them in any way
- Each item represents a separate document for the purposes of discovery, *eg* post-it notes should be copied and recorded in their own right
- Staples and paper clips should be kept in place (or carefully replaced if removed for copying) and documents should be replaced and retained in the order in which they appeared on the file

# Commercially Sensitive Information

- May be possible to secure agreement to restrictions on handling of commercially sensitive, relevant documentation or an order imposing such restrictions
- Confidentiality not a bar to discovery
- Redaction?
- Agree or ask Court to include directions when order being made
- Koger Inc and anor –v- O’Donnell and ors [2009] Judge limited access to confidential discovery materials to the plaintiffs’ lawyers, experts and one named individual representative of the plaintiffs

# Privilege

- What is privilege?
  - entitlement to withhold discoverable documents from inspection (and so their content from disclosure)
  - right to claim privilege is client's
  - protection is absolute unless waived by client, or is being used to conceal fraud, or is over-ridden by express statutory provision
  - purpose to enable party consult lawyer freely and take advice in confidence



# Privilege

## Main Types

- Legal Advice Privilege
- Litigation Privilege

## In Practice

- Always be cautious and use prudent language
- Emails can easily be forwarded on, and even if deleted can be restored
- Email should be regarded in the same way as paper correspondence
- “Strictly Confidential and Privileged” Highlights possible protection, not conclusive
- Only essential personnel included in regular updates about strategy, the search for evidence or conduct of the case

## In Practice – *cont'd*

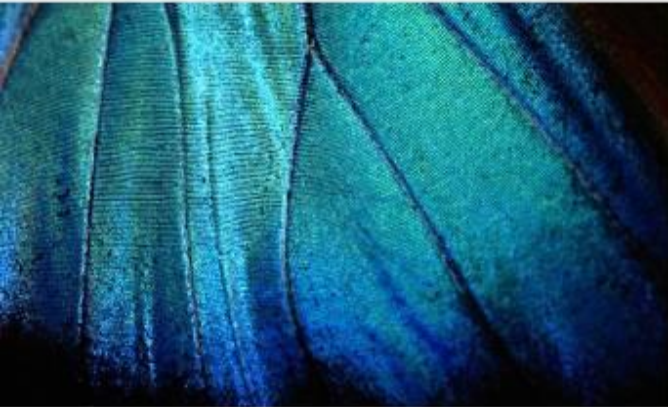
- Discussion with non essential personnel about legal advice sought or received should be discouraged to avoid any later suggestion that privilege was waived
- Do not use strings, but produce a fresh email. Helps reduce unnecessary responses, flippancy
- Keep a hard copy of correspondence for ease of legal review by legal advisors

# Discovery

*“The English invented discovery while casting about for a substitute for torture for parties unwilling to reveal the facts at issue in a law suit. Their idea was a good one; but the way it is carried out causes the litigants less torment only in the sense that their agony is mental, not physical”*

William Spawn American Bar Association President 1977

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