

CASE NUMBER: OIC-120660-L7C1T5

Whether the Department was justified in refusing access to two reports relating to the St. Patrick's Festival on the basis of sections 29, 35, 36 and 37 of the FOI Act

29 August 2023

Background

In a request dated 2 February 2022, the applicant sought copies of "all correspondence with Dublin City Council and St. Patrick's Festival on governance issues in the St Patrick's Festival from January 2018 to date". He also sought copies of any governance reviews or reports on the festival, and referenced one report in particular which he believed was carried out.

Following an exchange of emails between the parties, the Department refused the request under section 15(1)(c) of the Act, which provides for the refusal of a request where the FOI body considers that granting the request would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of its work. The applicant sought an internal review of that decision following which the Department affirmed its refusal of the request.

On 14 March 2022, the applicant applied to this Office for a review of the Department's decision. In his application for review, he said the decision to reject his application for records on the grounds there were too many records was taken without adequate consultation. He said there was no proper attempt by the Department to advise him on how to reduce the number of records captured by his request. He also said that the Department had repeatedly indicated it was going to refuse to release two relevant specified reports because of ongoing deliberations. He said he did not believe this exemption could be applied indefinitely and would like to appeal that decision but that the Department had not made a formal decision on it.

During the course of the review, the applicant indicated that he was happy to narrow the scope of the request to two specific reports referenced by the Department in its decision-making records. The Investigator asked the Department to outline its position in respect of the two reports. On 17 August 2022, Department released redacted versions of the two reports to the applicant along with correspondence outlining its decision-making in respect of the reports. It redacted certain information under sections 29, 35, 36 and 37 of the Act. The

applicant confirmed that he wished the review to proceed in relation to the redacted information.

During the course of the review, and given the nature of the records in question, this Office notified a third party, the St Patrick's Festival Company (the Company), of the review and invited it to make submissions, which were duly received and which have been considered in full.

In the later stages of the review, this Office sought further submissions from the Department in respect of a particular exemption ground. In its response, the Department indicated that "given the passage of time and the evolved landscape", it no longer had an objection to one of the records and certain other information being released. However, in light of the submissions made by the Company, I deemed it appropriate to continue the review and consider the submissions made by the parties in turn.

I have now completed my review in accordance with section 22(2) of the FOI Act. In carrying out my review I have had regard to the submissions made by the applicant, the Department and the Company. I have also had regard to the contents of the records concerned. I have decided to conclude this review by way of a formal, binding decision.

Scope of Review

As I have outlined above, the Department redacted certain information from the two reports under sections 29, 35, 36 and 37 of the Act. While the Department had initially redacted names of staff members of FOI bodies under section 37, which is concerned with the protection of third party personal information, it subsequently said it was prepared to release this information on the basis that section 37 does not apply. Moreover, during the review, the applicant agreed to exclude from the scope of his request any other information that the Department redacted under section 37. Accordingly, I will not consider the remaining information to which the Department has applied section 37 in this review.

Accordingly, this review is concerned solely with whether the Department was justified in its decision to redact certain information from the two reports at issue under sections 29, 35, and 36 of the FOI Act.

Preliminary Matters

Section 18 of the FOI Act provides for the deletion of exempt information and the granting of access to a copy of a record with such exempt information removed. This should be done where it is practicable to do so and where the copy of the record thus created would not be misleading. However, the Commissioner takes the view that neither the definition of a record

nor the provisions of section 18 envisage or require the extracting of particular sentences or occasional paragraphs from records for the purpose of granting access to those particular sentences or paragraphs. Generally speaking, therefore, the Commissioner is not in favour of the cutting or "dissecting" of records to such an extent.

Although I am obliged to give reasons for my decision, section 25(3) of the FOI Act requires me to take all reasonable precautions in the course of a review to prevent disclosure of information contained in an exempt record. This means that the extent to which I can describe the contents of the records is limited.

Analysis and Findings

The records in question

While I am limited in the extent to which I can describe the contents of the records at issue, I believe it would be useful to provide a brief overview of same. In its submissions to this Office, the Department provided some background information in respect of the records and its role in their development.

The Department said that the Company is an independent company and a registered charity. It said the Company was established by the Government in 1995 and that the first St Patrick's Festival (the Festival) organised by the Company took place in 1996. It said the Department has no oversight of the Company. It said the Company was established to leverage the Dublin parade/festival to promote the image of Ireland, both nationally and internationally, with a particular emphasis on Irish street theatre and related opportunities for education in, and appreciation and experience of, not just street theatre but also Ireland's arts and culture.

The Department said that in 2019, it appointed the consultancy company EY to review the annual Festival to assess the existing delivery model and other possible fit-for-purpose models for ensuring its successful annual delivery. It said the scope and key objectives of the review were to:

- present the benefits arising from the Festival (economy, social, tourism, community, culture, heritage, volunteering, nation branding, diplomacy);
- consider the current and future perspectives of key stakeholders;
- review the delivery of the annual festival including consideration of the cost, efficiency, effectiveness and sustainability of other models of delivery; and
- offer observations, conclusions and recommendations to ensure the sustainable delivery of an efficient, effective and impactful annual Saint Patrick's Festival (including funding, mode of delivery and a vision for the future of the festival).

The associated report comprises four parts: part 1 (executive summary), part 2 (review of status quo), part 3 (delivery model analysis) and part 4 (recommendations).

The Department said that it also commissioned the Institute of Public Administration (IPA) to undertake an independent review of the governance arrangements at the Company in relation to the Festival. It said that review commenced in 2020. The relevant record comprises a draft report of that governance review.

The Department granted partial access to the records in question, with redactions made under sections 29(1), 35(1)(a), 36(1)(b) of the FOI Act. It also referenced section 18 in its decision-making records and in submissions to this Office. I will consider the application of this section below. The information redacted from both reports essentially comprises findings and recommendations. The Company said it objects to the release of the information in question.

In the interests of clarity and consistency, I have adopted the record numbering system used by the Department in the schedule provided to this Office. The IPA report is record 1 and the EY report and its component parts are record 2, part 1, part 2, part 3 and part 4.

Section 29 – deliberative process

Section 29(1) provides for the discretionary refusal of a request if (a) the record concerned contains matter relating to the deliberative processes of an FOI body, including opinions, advice, recommendations and the results of consultations considered by the body for the purpose of those processes, and (b) the body considers that the granting of the request would be contrary to the public interest.

Section 29 also provides that, without prejudice to the generality of paragraph (b), the FOI body shall, in determining whether to grant or refuse to grant the request, consider whether the grant thereof would be contrary to the public interest by reason of the fact that the requester concerned would thereby become aware of a significant decision that the body proposes to make. Subsections (a) and (b) are two independent requirements and the fact that the first is met carries no presumption that the second is also met.

In order for section 29(1) to apply, the records must contain matter relating to the 'deliberative process' of an FOI body. An FOI body relying on this exemption should identify both the deliberative process concerned and any matter in particular records which relates to these processes.

A deliberative process may be described as a thinking process which informs decision making in FOI bodies. It involves the gathering of information from a variety of sources and weighing or considering carefully all of the information and facts obtained with a view to making a decision or reflecting upon the reasons for or against a particular choice. Thus, it involves the consideration of various matters with a view to making a decision on a particular matter. It would, for example, include some weighing up or evaluation of competing options or the consideration of proposals or courses of action. The fact that a deliberative process exists and is ongoing does not mean that the exemption automatically applies without consideration of all the provisions of section 29. Equally, the fact that a deliberative process is at an end does not mean that the exemption automatically does not apply.

The Department argued that all of the information redacted from both records that remains within scope is exempt under section 29(1), apart from the information redacted from page 30 of record 2, part 2. Its position is that the redacted information relates to matters currently under deliberation. It said the EY report makes many suggestions as to the potential future of the festival, who should manage it, format etc. and makes comparisons to international equivalents. It said these are the matters to be considered and a decision has yet to be made. It said that the deliberative process will involve the weighing up and evaluation of considerations made in the reports and that such determinations will affect the Department's course of action. It said the deliberations were delayed by the Department's need to address the global pandemic and its negative effects on the sectors under its remit. It said the information is largely made up of opinions, advice and recommendations. It added that the reports were drafted for internal consideration only and not for wider release. It said the reports are to be used by the Department in order to consider and draft, if required, an internal policy in relation to the Festival. It said that the overarching deliberative process which instigated the reports to begin with is still under review and while many recommendations were made it is a matter for the Department to ultimately determine if those recommendations are in fact sound in basis and whether such recommendations should be implemented taking into account the wider public's investment in this matter.

The Department further said that because of the delays caused by the pandemic, the matter is currently in the early stage of deliberations and as such, it argued that the release of the information would be contrary to the public interest. It said it has a responsibility to consider the matters thoroughly to ensure any advice taken is in the public's interest. It said the current landscape needs to be considered as it is over two years since the reports were written.

Having considered the submissions made and having carefully examined the records, I am satisfied that the EY report (record 2) contains recommendations, advice and options that relate to the Department's deliberative processes as described above. I find that section 29(1)(a) applies to record 2 and its four component parts.

In respect of the IPA report, while I am satisfied that the record contains recommendations, advice and options, I am not satisfied that they relate to the deliberative process of an FOI body. In considering whether the matter in the records relates to a deliberative process, I have considered the FOI body's role with regard to the Company. The Commissioner has previously drawn a distinction between an FOI body being engaged in a monitoring or supervisory role and being engaged in a deliberative process.

The report constitutes a governance review of the Company, which is an independent company and registered charity. In its submissions, the Department said that it has no oversight role in respect of the organisation. While I am limited in the extent to which I can describe the contents of the record, I would note that the recommendations therein relate to the Company and are suggested actions for that entity to take. In its submissions, the Company provided detail in respect of the recommendations and its implementation of same. I note that the Company said that it considered that the recommendations of the EY report "are more properly for the Department to consider and action". It went on to outline the actions it had taken in respect of the IPA report.

This Office sought specific submissions from the Department on the question of whether a deliberative process is in train. In its response, the Department referred specifically to the EY report and did not reference the IPA report. In earlier submissions it said that it was considering recommendations made in relation to governance and examining actions taken by the Company to "ensure all recommendations were accepted and adopted". While noting that the Department commissioned the report in question, based on the submissions received and having reviewed the content of the record, it appears to me that the Department is undertaking what could be better described as a monitoring role, rather than engaging in a deliberative process. It does not appear to me to be involved in some weighing up or evaluation of competing options or the consideration of proposals or courses of action in respect of the governance of the Company. Accordingly, I find that section 29(1)(a) does not apply to the information redacted from record 1.

As I have found section 29(1)(a) to apply to the relevant information redacted from record 2, I must go on to consider subsection (b). The public interest test at section 29(1)(b) is a

stronger public interest test than the public interest test in many other sections of the Act (which require that, on balance, the public interest would be better served by granting than by refusing to grant the request). Any arguments against release should be supported by the facts of the case and it should be shown how release would be contrary to the public interest e.g. by identifying a specific harm to the public interest flowing from release.

There is nothing in the exemption itself which requires the deliberative process to be ongoing but this issue may be relevant to the issue of the public interest. The Commissioner has found that the Act clearly envisaged that there will be cases in which disclosure of the details of an FOI body's deliberations - whether before or, in some cases, after a decision based on those deliberations has been made - would be against the public interest. However, this was not to say that such disclosure is always, as a matter of principle, against the public interest.

The Department's position is that the release of the withheld information would be contrary to the public interest as the matter remains under deliberation by the Department. It said that the information contains opinions, advice and recommendations and that the Department has a responsibility to consider these matters thoroughly. It also noted that the overarching deliberative process to which the report relates is ongoing and that it is a matter for the Department to determine whether the recommendations made have a sound basis and should be implemented, taking account of the wider public interest in the matter. It said that release of the information at this time could limit the effectiveness and openness of discussions around the future strategic direction of the festival.

The Department also identified a public interest in it being able to make informed decisions in the course of carrying out its functions and said that release of the information at this time could contaminate the decision making process. It also said that premature disclosure would impair the integrity and viability of the decision making process to a significant degree without a countervailing benefit to the public. It also noted that there are broader community interests which must be considered, apart from those of the Festival.

In further submissions, the Department said that it needs time to consider the reports, particularly the EY report, to "allow for due diligence to occur" and to "permit an honest and open deliberation process to take place". It said that premature release of the reports may prevent this from happening. It said that the release of the reports out of context has the potential to cause significant harm to the Festival and the organisation tasked with its arrangement, particularly in respect of negotiations with private sponsors. It said that the potential harm could be greatly reduced by allowing the process to be completed and a

policy decision to be made to ensure the public and potential sponsors have confidence in the security of the future direction of the festival and its organiser.

The Department said that it no longer has an objection to the release of certain information in the EY report relating to governance. It said that there have been substantial developments in this area since the FOI request was received and that the public interest now outweighs the potential harms in relation to this element of the report.

In essence, the Department's arguments appear to be that the premature release of information from the reports before the deliberative process has concluded could result in harms to the Festival and the Company. It said that allowing the process to conclude would ensure that stakeholders have confidence in the festival and those involved, therefore implying that such confidence would be undermined should the information be released at this time.

In addition to the submissions received, I have carefully considered the content of the records in question. I would note that the public interest in the enhancement of the transparency and accountability of the Department has already been served, to some extent, by the partial release of the records in question. I further note the Department's submissions in respect of delays to the deliberative process. Generally speaking, it is in the public interest to ensure that appropriate decisions are made by FOI bodies. I accept that the Department must have the necessary time and space to engage in deliberative processes that enable proper consideration of all relevant issues in order to achieve such an outcome. It seems to me that, in general, undue or unreasonable interference with those processes would be contrary to the public interest. I accept that the nature of the information and recommendations contained in the records is such that their release before a policy decision is made in respect of same could negatively impact certain stakeholders. I accept that release at this time could result in negative speculation without the mitigation which could be provided by a policy decision and direction.

In light of the Department's revised submissions, I am not satisfied that the release of certain information relating to governance in the records would be contrary to the public interest test in section 29. However, I will consider this information in the context of other exemption provisions.

Having considered the position of the Department and the contents of the record, I am satisfied that release of the majority of the withheld information at this time would be contrary to the public interest. I find that section 29(1) applies to information withheld from record 2 apart from the following information relating to governance:

- Record 2, part 1, page 5, governance questions and areas for action
- Record 2, part 1, page 10, governance areas for action and possible options
- Record 2, part 2, page 5, redactions under “governance model”
- Record 2, part 2, pages 21-24 inclusive

Section 29(2)

Section 29(2) provides that subsection (1) does not apply to a record if and in so far as it contains any or all of the following:

- a. matter such as rules, procedures, guidelines, interpretations and precedents used, or intended to be used, by an FOI body for the purpose of making decisions, determinations or recommendations;
- b. factual information;
- c. the reasons for the making of a decision by an FOI body;
- d. a report of an investigation or analysis of the performance, efficiency or effectiveness of an FOI body in relation to the functions generally or a particular function of the body;
- e. a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise or a report containing opinions or advice of such an expert and not being a report used or commissioned for the purposes of a decision of an FOI body made pursuant to any enactment or scheme.

The Department made submissions in respect of the application of section 29(2). In relation to subsection b), it noted that, while the reports contain factual information, this is contained in the information which has been released and much of the factual information is publically available. Having reviewed the records, it seems to me that certain information in the record, particularly in part 2 (review of the status quo), comprises factual information.

However, I am satisfied that the release of such information would be contrary to the provisions of section 18 of the FOI Act. Section 18(1) of the FOI Act provides for the release of non-exempt material from an otherwise exempt record “if it is practicable to do so”. Section 18(2) provides that subsection (1) shall not apply in relation to a record if the copy provided would be misleading. The information in question relates to EY’s findings as part of the review process which in turn inform recommendations made. It seems to me that the release of such factual information in this particular case would, of itself, serve to undermine the protection afforded to the confidentiality of the deliberative process by section 29(1).

In relation to section 29(2)(c), the Department stated that no relevant decision has been made. In relation to subsection (d), the Department said that reports do not relate to an FOI

body. I accept the Department's submissions in this regard and am satisfied that none of the other subsections of section 29(2) apply to the withheld information.

In summary, I find that the Department was justified in applying section 29(1) to information withheld from record 2 (parts 1, 2, 3 and 4) apart from certain information relating to governance which I have identified above.

Section 36 – commercially sensitive information

In correspondence issued to the applicant, the Department said that it was withholding information from both reports on the basis of section 36(1)(b). In submissions, the Department also referenced section 36(1)(c) as applying to information in the records. I propose commencing my analysis with section 36(1)(b). As I have found that section 29(1) serves to exempt information from record 2, I will consider the application of section 36(1)(b) to the remaining information withheld from that record.

Section 36(1)(b)

Section 36(1)(b) provides that an FOI body shall refuse to grant an FOI request if the records concerned contain financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation.

The essence of the test in section 36(1)(b) is not the nature of the information, but the nature of the harm that might be occasioned by its release. The harm test in the first part of section 36(1)(b) is that disclosure "could reasonably be expected to result in material loss or gain". This Office takes the view that the test to be applied is not concerned with the question of probabilities or possibilities but with whether the decision maker's expectation is reasonable. The nature of the harm envisaged and a basis for a claim that such harm could reasonably be expected to result from disclosure of the particular information in the records at issue should be shown by an FOI body or a third party relying on this provision.

The harm test in the second part of section 36(1)(b) is that disclosure of the information "could prejudice the competitive position" of the person in the conduct of their business or profession. While the degree of harm required to meet the harm test in the second part of this provision ("could prejudice") is lower than that required to meet the test in the first part,

the Commissioner takes the view that, in invoking the phrase "prejudice", the damage which could occur must be specified with a reasonable degree of clarity.

In the High Court case of *Westwood Club v The Information Commissioner* [2014] IEHC 375, Cross J made it clear that it is not sufficient for the party relying on section 36(1)(b) to merely restate the provisions of the section, list the documents and say that they are commercially sensitive. The FOI body or the third party opposing release should explain why disclosure of the particular records could prejudice the competitive position of the third party concerned. When considering the application of section 36(1)(b) in other cases, factors that have been taken into account by the Commissioner and that may be relevant include: the availability otherwise of the information and whether it is in the public domain; the passage of time; and the broader context in the relevant industry.

Section 36(2) provides for a number of exceptions to section 36(1), while section 36(3) provides that a record to which section 36(1) applies may be granted if the public interest would, on balance, be better served by granting than refusing to grant the request.

In its submissions, the Department said that the records contain details which are technical and commercial in nature. It referenced the Company and said that release could result in substantial financial loss to the company. It said that the festival is not solely funded by government bodies or agencies and relies on sponsorship and funding from the private sector. It said that the release of the records, if the information is taken out of context, has the potential to cause reputational damage to the festival. It argued that release of the withheld information could prejudice the competitive position of the festival when seeking investment or sponsorship from the private sector. It said that neither report highlighted any serious irregularities in relation to governance but identified a need to update some aspects of governance to bring it into line with current company law. The Department said that relevant documents, both past and present, are available online through the Companies Registration Office (CRO). However, it said that information in the records, if taken out of context, has the potential to cause reputational damage and financial loss. The Department said that it undertook a verbal consultation with the Company and that its concerns were similar to that of the Department.

In further submissions, as noted above, the Department said that it "in principle" no longer has an objection to the release of the IPA report or information in the EY report relating to governance. It said that there have been substantial developments in respect of governance since the request was received and that the potential harm of reputational damage has been

limited, though not negated entirely. It said that the balance has shifted to a place where investment “may not be as significantly affected” by release.

Given the nature of the records, this Office sought and received written submissions from the Company as an affected third party. The Company’s position is that section 36(1)(b) applies to the records in question.

It said that both reports contain sensitive commercial information the release of which would potentially harm its business interests as an independent company. It said that the IPA report contains information which provides insights into the internal operations, strategies and decision-making processes of the organisation. It said that disclosure of information in the reports could potentially result in the loss of revenue, sponsorship and commercial interest in the company. It provided its reasoning in respect of this position which I will not repeat in full as doing so would risk disclosing information contained in the reports. It referenced the potential for negative framing and said that release could affect sponsorship opportunities, business relationships and could provide competitors with valuable insights. It said that the EY report contains propriety information that the Company identifies as trade secrets. However, I note that it has not identified any specific such information. It said that release of the reports could have long-term implications on the Company’s ability to action planned initiatives.

Before commencing my analysis, I want to address the parties’ submissions that the release of the records, when taken out of context or framed negatively, could cause harm. This Office does not generally accept that the possibility that released information will be used in some particular way, or will be misinterpreted, or will not be properly understood, is a valid reason for refusing access to the information, nor does the FOI Act provide for the withholding of information on the grounds that it is factually inaccurate. Apart from anything else, such arguments appear to be based on an assumption that public bodies are incapable of explaining their records to the public and are unable to present information to the public in a way which will allow any objective observer to draw accurate and balanced conclusions. However, in this case, it is relevant to note that the records relate to the Company which is not an FOI body.

I have carefully examined the content of the records and taken into account the submissions made by the parties. While I note the Department’s revised position in respect of the IPA report and certain other information, I am satisfied that the release of the information in question could reasonably be expected to result in a material financial loss to the Company,

or could prejudice its competitive position. While noting that the information contained in the IPA report is a number of years old and while also noting the third party's submissions that actions have been taken in respect of findings therein, given the level of detail and analysis included in the document I am satisfied that the release of the information could give rise to reputational damage and prejudice the competitive position of the company in its engagement with potential sponsors or investors. I am also satisfied that the relevant harms could flow from the release of governance and commercial supplier information from record 2.

However, I am not satisfied that the relevant harms could be expected to flow from the release of limited information relating to the board activities of the Company contained in record 2, part 2, page 21. The information in question is high-level and relates to the typical activities of the board; the number of meetings and the types of decisions reserved. I do not accept that the release of this information could reasonably be expected to result in a material financial loss to the Company, or prejudice its competitive position.

Having carefully considered the information for which section 36(1)(b) has been claimed and the submissions of the parties, I find that section 36(1)(b) applies to the withheld information in record 1 and to the remaining withheld information in record 2 (parts 1 and 2) apart from the limited information relating to the Company board referenced above.

As I have found section 36(1)(b) to apply to the information above, I must go on to consider the other provisions of section 36 to which subsection (1) is subject.

Sections 36(2) and 36(3)

Section 36(2) provides for the release of information to which section 36(1) is found to apply in certain circumstances. I am satisfied that none of the circumstances identified at section 36(2) arises in this case.

Section 36(3) provides that section 36(1) does not apply to a case in which the FOI body considers that the public interest would, on balance, be better served by granting than refusing to grant the request. In carrying out any review, this Office has regard to the general principles of openness and transparency set out in section 11(3) of the FOI Act. That section recognises the need to enhance public scrutiny and accountability of government and public affairs, particularly the activities and decision making of FOI bodies. However, in a judgment delivered on 25 September 2020 (*The Minister for Communications, Energy and Natural Resources and the Information Commissioner & Ors*, available on our website), the Supreme Court held that general principles of openness and transparency do not provide a sufficient basis for directing the release of otherwise exempt information in the public

interest. Rather, a “sufficiently specific, cogent and fact-based reason” is required “to tip the balance in favour of disclosure”.

In its submissions, the Department outlined the public interest factors it considered in its decision-making. It said that there is a public interest in the relevant company not being “unduly impeded” in the effective pursuit of its business. It said that there is also a public interest in the Department being able to make informed decisions and maintain the confidentiality of information given to it. It referenced the public interest in safeguarding the commercial interests of companies and maintaining the confidentiality of commercial information held by the Department. It said that large portions of the reports refer to governance and it stated that relevant documentation in this regard is publically available from the CRO. In further submissions in support of its revised position in respect of the IPA report and other information, the Department said that the balance has shifted to a place where investment “may not be as significantly affected” by release. It said that the public interest outweighs the potential harms.

The Company also referenced the public interest test in its submissions and said that it is a charitable organisation that operates on a not-for-profit basis. It said that its positive impact on tourism, employment in the arts and cultural sectors and civic and community engagement is “tangible and substantial”. With regard to the IPA report, it said that “no serious misconduct or scandal was unearthed” and it said that it has resolved and addressed recommendations. It said that the material under consideration would be out of date and irrelevant to the current structure and governance of the company. It said that given the Company’s contribution to the economy and Irish public, the potential harms outweigh the public interest in releasing the requested information.

In correspondence with this Office, the applicant argued that redactions should be removed due to the public interest in transparency in respect of the use of public funds. The applicant also referenced the public interest in good management and governance being applied in respect of a high profile festival.

It is relevant to note that it is the Department that is subject to the FOI Act and not the Company. The Act was designed to increase openness and transparency in the way in which FOI bodies conduct their operations and, in general terms, it was not designed as a means by which the operations of private enterprises were to be opened up to scrutiny. The information at issue is concerned with the affairs of the Company. I do not accept that its release would enhance the transparency or accountability of the Department to the extent that it would outweigh the public interest in protecting commercially sensitive information of a

private enterprise. I note that the records in question have been part-granted and that information regarding the Festival's funding model has been released. I also note that certain information in respect of the Company and its finances is available via its website and the CRO.

Having carefully considered the matter, I find no relevant public interest in granting access to the withheld information which, on balance, outweighs the public interest in protecting its commercial sensitivity. I therefore consider that the public interest would be better served by refusing access to the information in question.

Other exemptions claimed

As I have found that sections 29(1) and 36(1)(b) do not apply to limited information in record 2 relating to the board of the Company, I will briefly consider the application of other relevant exemptions to this information.

Section 36(1)(c)

The Department applied section 36(1)(c) to the information in question and this position was supported by the Company in its submissions. Subsection (c) provides for the refusal of a request where disclosure of the record could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates. I again note the revised position of the Department in respect of information relating to governance. The Company said release of information in the reports could impact its bargaining position, giving other parties an unfair advantage and undermining the company's ability to negotiate favourable terms. It also said that disclosure might affect how the company is perceived by potential sponsors and clients. It also said that partners have an expectation that commercial arrangements will be treated with confidence. It said that release may raise concerns about the company's ability to handle confidential matters.

I have considered the above submissions and the specific information in question. Given the high-level nature of the detail provided and the fact that it relates to typical board activities, I am not satisfied that the relevant harms could flow from release. I do not accept that section 36(1)(c) serves to exempt limited information relating to the board activities of the Company contained in record 2, part 2, page 21.

Section 35(1)

In its submissions, the Company also said that section 35(1) applies to the records. Section 35 is concerned with the protection of information obtained in confidence. Section 35(2)

provides that subsection (1) does not apply where a record is prepared by a member of staff of an FOI body or a service provider, unless disclosure would constitute a breach of a duty of confidence which is owed to a person other than an FOI body, a member of staff of an FOI body or service provider. The record at issue was created by a service provider appointed by the Department. I note that the Department has not claimed the application of this exemption in respect of the information in question.

The Company made submissions in respect of the application of section 35(1)(a). Its submissions largely relate to the IPA report but it also stated that “given the commercially sensitive nature of some of the material being provided to the reviewing bodies, [the Company] sought assurances that the information given by interviewees and through desk research would be treated as confidential”. In order to establish that an equitable duty of confidence exists, it should be shown that the information has the necessary quality of confidence. Factors relevant for consideration in this regard include, for example, whether the information is confidential or secret or concerns private matters. Having considered the limited information in question, I am not satisfied that the information has the necessary quality of confidence about it. As I have outlined above, it is high-level information relating to the typical activities of the board; the number of meetings and the types of decisions reserved. I find that the release of the relevant part of the record would not constitute a breach of an equitable duty of confidence owed to the Company. Accordingly, I find that, pursuant to section 35(2), section 35(1) does not serve to exempt limited information relating to the board activities of the Company contained in record 2, part 2, page 21.

Summary of Findings

In summary, I find that the Department was justified in refusing access to information in record 2 (parts 1-4) under section 29(1) of the FOI Act. I find that section 29(1) does not apply to information withheld from record 1 or certain information in record 2 (parts 1 and 2). I find that section 36(1)(b) applies to the information withheld from record 1 and certain other information in record 2 (parts 1 and 2). I find that the Department was not justified in refusing access to certain limited information in record 2 (part 2, page 21) and I direct the release of same.

Decision

Having carried out a review under section 22(2) of the FOI Act, I hereby vary the Department's decision. I find that the Department was justified in refusing access to certain withheld information on the basis of sections 29(1) and 36(1)(b). I find that it was not justified

in refusing access to the information redacted from page 21 of record 2, part 2 and I direct its release.

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 by the applicant not later than eight weeks after notice of the decision was given, and by any other party not later than four weeks after notice of the decision was given.

Stephen Rafferty
Senior Investigator