



**Tithe an  
Oireachtais**  
Houses of the  
Oireachtas

Tithe an Oireachtais  
Teach Laighean  
Baile Átha Cliath 2  
Guthán: (01) 618 3851

Houses of the Oireachtas  
Leinster House  
Dublin 2  
Tel: (01) 618 3851

Mr. Ken Foxe,  
[REDACTED]  
[REDACTED]

Our Reference: FOI R 1066

05 April, 2016.

Dear Mr. Foxe,

I write in response to your request, dated 30 March, 2016 for an internal review of your request (FOI R1066) under the Freedom of Information Act 2014.

I note that the fee of €30 payable for this review has been received by the FOI section in the Houses of the Oireachtas Service.

### ***Request for Information***

In your initial request, which was received by email on 4 February, 2016, you sought access to the following information:

“Copies of all receipts/invoices held by the Oireachtas in relation to the 2014 audit of expenses conducted by Mazars

Copies of all receipts/expenses submitted for review by the members chosen for the 2014 audit.”

In a decision notice issued by email on 2 March, 2016, Mr. Stephen Mooney notified you that on the basis that the records sought were ‘private papers’ of members of the Oireachtas and based also on a restriction contained in section 42(l) of the Act, he had determined that the records are not releasable under the Freedom of Information Act 2014.

I am a more senior member of staff than Mr. Mooney, and arising from your request for an internal review, I have conducted a completely separate review of your request in accordance with the provisions of the Freedom of Information Act 2014.

### ***Schedule of Records***

In conducting my review of this request, I sought access to all of the relevant records. In most cases of internal review, this would include a schedule of all relevant records, but in this case, there was no such schedule. I have established that this is because the Service holds no such records. While a limited number of records are still held by Mazars, the external independent auditors who conducted the audit, and are therefore deemed under Section 11(9) of the Act to be held by the Service, these relate to ‘private papers’ of members, and they were retained by Mazars solely for the purpose of demonstrating compliance with their professional standards.

### ***Decision on Current Request.***

Today, the 5<sup>th</sup> day of April, 2016, I have concluded my review of your original request, and made a decision to refuse access to the records in question, on the same basis as was decided by Mr. Mooney, and also on a further basis. My decision on review arose from an entirely new and separate consideration of the matter, and my 'starting position' was that the records should be released unless an appropriate exemption or restriction of the Act existed.

In arriving at my decision, I have had regard, inter alia, to

1. the original request;
2. the appeal letter which you submitted, and the two grounds set out therein;
3. the Freedom of Information Act 2014;
4. the Information Commissioner's request in case 150073, which related to an almost identical request in respect of the same audit one year earlier, and
5. Standing Orders of both Houses of the Oireachtas, as they were on the date of your original request (4<sup>th</sup> February, 2016).

I noted your assertions (based on confirmation received from Nuala Walsh on 29<sup>th</sup> October 2015) that neither the Dáil nor the Seanad has appointed a committee to perform Part 10 functions, and I will respond to those assertions later in this letter.

In relation to Standing Orders, it's important to note that the Dáil adopted modifications to the 2011 Standing Orders on 17 December, 2015, when Standing Orders 114A, 114B, 114C, 114D, 114E and 114F and Schedule 1 were adopted as modifications. These modifications related to official documents, members' 'private papers' and confidential communications. Standing Orders were entirely reprinted following the Dáil's approval on 28 January 2016 of additional provisions to elect a Ceann Comhairle by secret ballot, and the renumbered provisions regarding official documents, members' private papers and confidential communications are now contained in Standing Orders 133 to 137 incl, and Schedule 1 of the current Standing Orders, which can be accessed at this link – <http://www.oireachtas.ie/parliament/media/about/standingorders/Standing-Orders-2016.pdf>

The Standing Orders of Seanad Éireann were modified by the Seanad on 21 January, 2016 to include identical provisions regarding official documents, members' 'private papers' and confidential communications, although the numbers of individual Orders differ in each House.

### ***Basis of current decision***

Despite the introduction of the new Standing Orders, the outcome of a consideration of your request remains the same, and for the same reason, although there is now also an additional reason to support that decision.

It is still the case that the records to which you have requested access are records falling within the scope of section 42(l) of the FOI Act 2014, for all the reasons set out in the Commissioner's decision in 150073. Nothing has changed in relation to the interpretation and applicability of Section 42(l) of the Freedom of Information Act 2014.

However, the Service can now rely on a further consideration. Since 17 December, 2015, explicit provisions exist in the Standing Orders of Dáil Éireann (specifically those in Standing Order 135, the text of which is below) to give effect to the enabling provisions of Article 15.10 of the Constitution. Since 21 January, 2016, identical provisions exist in the Standing Orders of Seanad Éireann. The restriction created under Section 42(k) of the Freedom of Information Act 2014 also now applies to the records to which you have sought access, and if for any reason the Information Commissioner were to change his view in relation to the findings in case 150073, he would have to consider this new protection of members' private papers before finding that the records should be released.

The text of the Standing Order 135 of Dáil Éireann relative to Public Business is here for ease of reference –

**Private papers and the Constitution.**

**135.** (1) This Standing Order is made for the purposes of giving effect to Article 15.10 of the Constitution in so far as it provides for the protection of the private papers of members.

(2) For the purpose of this Standing Order, the private papers of a member are all documents concerning which the member has a reasonable expectation of privacy, and:

(a) which are prepared for the purposes of, or purposes incidental to:

(i) transacting any business of the Dáil or any Committee of the Dáil; or

(ii) the member's role as public representative; but

(b) which are not:

(i) where the member is an office-holder, documents relating to the member's functions as office-holder (whether those documents are held by the member, by the office-holder's Department or Office, by any of his or her special advisers, or by some other person); or

(ii) lawfully in the public domain.

(3) A reference to a member in this Standing Order includes:

(a) where the context admits, a former member in his or her capacity as a former member, and

(b) where the context requires, a deceased member, as well as his or her executors or administrators in their capacity as executors or administrators.

(4) A member is entitled to refuse a request for access to, or disclosure of, any of his or her private papers, and if the request is made in the first instance to the Dáil, to any of its Committees, or to the Clerk, the Clerk must refuse the request and without delay inform the member that it has been made.

(5) A member must not disclose in public the private paper of any other member or the contents of that private paper other than with the express consent of that other member. Disclosure by any member, in breach of this paragraph, of another member's private paper or its contents, is *prima facie* an abuse of privilege.

The Standing Orders of Seanad Éireann contain similar provisions.

**Precedent case – Information Commissioner case 150073**

In a previous application to the Service on 17 December 2014 you sought access to -

“Copies of all receipts/invoices held by the Oireachtas in relation to the 2013 audit of expenses conducted by Mazars.

Copies of all receipts/invoices submitted for review by the 22 members chosen for the 2013 audit.”

That request was identical in nature to your current request, and the only substantive difference between the two is that they relate to different years. The previous request was ultimately decided by the Information Commissioner in his case 150073 (see [www.oic.gov.ie](http://www.oic.gov.ie) at <http://www.oic.gov.ie/en/Decisions/Decisions-List/Mr-S-and-Houses-of-the-Oireachtas-Service-FOI-Act-2014-.html>) in which the Commissioner found that the Act does not apply to these records, and that no right of access exists.

The full text of the Commissioner's decision under the heading “Analysis and Findings – Section 42(1)” is relevant, but these two extracts are particularly salient.

“Having regard to the nature of the procedures that apply to the payment of PRA, as described by the Service, I accept that receipts and invoices are held by the members. I also accept that the members hold such records in their capacity as members. Accordingly, I find that such records are private papers within the meaning of Part 10 of the 2013 Act.”

and

“As for the records held by Mazars, which the Service accepts are under its control, such records are clearly not held by the members. However, for section 42(l) of the FOI Act to apply, it is sufficient that the records sought relate to private papers within the meaning of Part 10 of the 2013 Act. The records held by Mazars, being copies of records which I accept to be private papers, clearly relate to such private papers.

Accordingly, as it has not been argued before me that consent has lawfully been given for their disclosure, I find that with (sic) section 42(l) applies in relation to the records sought, the effect of which is that the FOI Act does not apply to the records and no right of access exists.”

### ***Issues raised in your request for an internal review***

I wish to address each element of your request for an internal review of your original request. Blue text below is from your letter, and I have tried to address each point in sequence.

“Firstly, there is no way in which these papers can be considered “private papers” when they clearly do not meet that definition under the legislation”.

I assume that you are referring to the definition contained in Part 10, Section 104, of the Houses of the Oireachtas (Inquiries, Privileges and Compellability) Act 2013, Section. I disagree with your assertion, and it appears that the Information Commissioner disagrees also, as in his decision in 150073, he stated

“Nevertheless, while it might be expected that information relating to expenses of members of the Oireachtas should be fully transparent and subject to public scrutiny under FOI, I must have regard to the prevailing legislation at the time of my decision. For the reasons set out above, I accept that the records sought by the applicant in this case are records falling within the scope of section 42(l) of the FOI Act 2014.”

The records sought in that case, and those sought in the case now under internal review, are identical in nature, save to the extent that they relate to different years, and there has been no change in FOI law which would support a different interpretation now.

You continued “They were not created or transmitted in confidence nor are they exclusively held in possession or control of that member in relation to his/her political role or capacity as a member.”

The records were transmitted to the Service and / or to Mazars in confidence, and on the understanding that they would be used only for the purposes of conducting the audit. The Act does not require that papers be “exclusively” in the possession or control of a member.

“They are invoices and receipts, which are provided by a third party, who is also by default a holder of the records”. I agree that the third parties are also in possession of the invoices / receipts, but that does not alter their status – the Act does not require that the documents be “exclusively” in the possession or control of the member.

“Furthermore, the member is obliged to give these “private papers” to an independent audit agency Mazars and are under instructions to retain them for a set period of time without destroying them.

Therefore, it is impossible to see how they are in the possession or control of that member when they can be compelled by an outside agency to hand them over, and compelled by the Oireachtas to hold those records for a set period of time.”

That members are 'compelled' to retain these receipts, and to submit them to auditors, does not alter the status of the documents as 'private papers'. The auditors may use them only for audit purposes, and their privacy is thus not undermined. No other compulsion arises, and members may do with these records whatever they wish once the retention period has expired, but they remain 'private papers', unless the member publishes them.

"Secondly, the definition of "private papers" is not an arbitrary one, which can be used at the whim of the Houses of the Oireachtas Service to withhold documents of considerable public interest from the public domain."

There is nothing arbitrary in the manner in which the Service has interpreted the concepts at issue here. The Information Commissioner recognised this in his decision in 150073. Further, a definition of 'private papers' was adopted in the Standing Orders of both Houses prior to the date on which you submitted your original request, but after the Information Commissioner concluded his consideration of your earlier request. I'm not aware that any 'whim' influenced the decision in relation to your original request.

Instead, as outlined by Minister Brendan Howlin in June 2013, such documents have to be designated and regulated so that it can be determined that they constitute "private papers".

This designation and regulation occurred in Dáil Eireann on 17 December, 2015, and in Seanad Éireann on 21<sup>st</sup> January, 2016 when the new Standing Orders were adopted and Part 10 Committees were appointed.

"This process was explained in response to a parliamentary question by Mr Howlin (Ref: 31442/13):

"In the first instance, it is a matter for the Houses to regulate which documents will be designated as private papers. Section 107 of the Bill provides that a member may at any time apply to the committee designated for this purpose (the "Part 10 committee") for a determination as to whether a document is a private paper.

"Additionally, Section 108 of the Bill empowers a House to prepare and issue guidelines to provide practical guidance for members including protocols to be followed relating to maintaining a document as a private paper."

It's important to note that Section 108 of the Bill empowers, but does not require or direct. The issuing of guidelines and protocols is therefore a discretionary matter, and the absence of such guidelines does not undermine the protections afforded to members' 'private papers' by Standing Orders, by the Constitution or by the Houses of the Oireachtas (Inquiries, Privileges and Compellability) Act 2013.

"As you might be aware, I submitted a press query to the Houses of the Oireachtas Service on October 29, 2015 seeking the following:

- Has either House, or a Committee of either House considered or passed a resolution regarding members private papers for the purposes of Article 15 of the constitution, or for the purposes of Section 42(k) of the FOI Act 2014. If so, can I get details of that resolution.
- Has a Part 10 Committee been appointed in either House, and if so, has the committee met? If a Part 10 Committee has been appointed, who are its members, what are its terms of reference, and what guidance, if any, has it received in relation

to its role and procedures. I also wanted to find out how exactly members were chose, or will in future, be chosen to sit on a Part 10 committee.

On October 29, Nuala Walsh of the Oireachtas press office responded to say that neither the Dail nor the Seanad had appointed a committee to perform those functions.”

It is unfortunate that you relied on a conversation with Ms. Walsh which occurred three months before you submitted your original request. On 29 October, Ms. Walsh’s statement was correct, but with the modifications to Standing Orders introduced on 17 December 2015 in Dáil Éireann, and on 21 January in Seanad Éireann, the situation in each House changed both in respect of the passing of a resolution and the appointment of a Committee for the purposes of Part 10 of the Act. The Committee on Procedure and Privileges of each House stands appointed as that committee since 17 December, 2015 in the case of the Dáil (see Dáil Standing Order 137(2)) and since 21 January 2016 in the case of the Seanad.

“I am given to understand that no such guidelines or protocols have issued to members regarding procedures for maintaining a document as a private paper.” Your understanding is correct. As I indicated above, it is not a requirement that such guidelines or protocols be issued – the Act merely states that “A House may prepare and issue guidelines....”

In the absence of any determination, regulation, guidelines or protocols on what constitutes a “private paper”, I therefore can see no grounds by which the Oireachtas can maintain the records requested constitute “private papers”.

I hope that my reply has adequately outlined the grounds on which I have reached my decision, and has also provided an insight to the modifications to Standing Orders.

### ***Right of Appeal***

You may appeal this decision by writing to the Information Commissioner at 18 Lower Leeson Street, Dublin 2.

There is a fee of €50 for such appeals. A reduced fee of €15 applies if you hold a medical card.

If you wish to appeal, you must usually do so not later than 6 months from the date of this notification. Should you write to the Information Commissioner making an appeal, please refer to this letter.

If an appeal is made by you and accepted, the Information Commissioner will fully investigate and consider the matter and issue a fresh decision.

Should you wish to discuss the above, you may reach me at [REDACTED]

Yours sincerely,

Charles Hearne  
Principal Officer