

Ken Foxe

Dear Ms McCormack,

I refer to your letter dated 29 April 2016 inviting me to make a submission in support of my application to your Office for a review (Reference 160177).

**Procedure so far**

I made my request on 4 February 2016 for access to the following information:

- Copies of all receipts/invoices held by the Oireachtas in relation to the 2014 audit of public representation allowance conducted by Mazars
- Copies of all receipts/invoices submitted for review by the members chosen for the 2014 audit

The request was refused at first instance on the basis that the requested records were excluded from the Freedom of Information 2014 (the **FOI Act**) by section 42(l) because they related to private paper within the meaning of Part 10 of the Oireachtas (Inquiries, Privileges, and Procedures) Act 2013 (the **2013 Act**).

The request was refused at internal review stage on the same basis and also under section 42(k) because the request concerned access to private papers as that term is defined under Article 15.10 of the Constitution and Oireachtas standing orders.

I do not agree that the request relates to records excluded under section 42(k) or 42(l).

**Records are not held by the members**

The requested records are not held by the members since they were handed over to a third party contracted by the Houses of the Oireachtas to review the expense claims. In that case this automatically takes the request fully outside of the scope of sections 42(k) and 42(l). They are to all intents and purposes held by the Office of the Houses of the Oireachtas as a public body and not by the members.

**Section 42(k) – Article 15.10 of the Constitution**

Article 15.10 gives each house of the Oireachtas the power to protect the private papers of its members. This power is expressed in standing orders<sup>1</sup> 133 to 135 and in particular standing order 135(2) (emphasis added)<sup>2</sup>:

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<sup>1</sup> <http://www.oireachtas.ie/parliament/about/publications/standingorders/>

<sup>2</sup> I was informed that an identical amendment was made to the standing orders of the Seanad but this does not appear to have been published yet.

**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.

Receipts for expenditure are in the public domain since the vendor is obliged to keep a copy or counterpart of such receipts for the purposes of his accounts and is not generally under an obligation to the purchaser to maintain the confidentiality of the transaction. Similarly, a member of the Oireachtas cannot be considered to have a reasonable expectation of privacy in respect of these records. It is fairly well established that details of public expenditure including expenses are routinely released or are easily accessible under the FOI Act.

When you look at the substance of Article 15.10 - which protects freedom of debate in the Oireachtas and protects Oireachtas members against any person interfering or molesting or attempting to corrupt members in the exercise of their duties - it is impossible to see how any reasonable person could come to the conclusion that the Article 15.10 privilege gives rise to an expectation of privacy in respect of the requested records.

A similar conclusion was reached by a former Commissioner in *Mr Richard Oakley, The Sunday Tribune Newspaper and the Office of the Houses of the Oireachtas* (27 July 1999).

### **Section 42(I) – Private paper under the 2013 Act**

#### *A bit of background*

This is a new exclusion in the 2014 Act so it is worth describing its origins.

The 2013 Act brought in a qualified privilege for the "private paper" of Oireachtas members. This privilege is distinct from and without prejudice to any privilege arising out of article 15.10. It arose from the case of *Howlin -v- Mr Justice Morris* [2005] IESC 85 where a whistleblower provided information concerning Garda corruption in Donegal to two Oireachtas members. The Morris Tribunal wanted to know the whistleblower's identity and ordered discovery against the Oireachtas members of all related documents including telephone records.

This order was resisted *inter alia* on the basis of privilege under article 15.10. The Supreme Court ruled that article 15.10 did not envisage an *ad hoc* exercise of a power to impose a privilege and that the nature of the power should be formally defined in standing orders and thereafter automatically applied in particular situations. At the time neither house had made any rules relating to the private papers of members and accordingly there was no entitlement to plead any kind of privilege before the tribunal.

Minister Howlin, referring to his experience in the above case, moved the 2013 Act to strengthen the ability of members of the Oireachtas to “receive communications from citizens without putting those citizens under hazard unless that communications interferes with the administration of law or criminal proceedings or is required by an investigation ... It establishes the legal right to implement the protection of papers of members of either house of the Oireachtas.”<sup>3</sup>

In the same debate Deputy Sean Fleming<sup>4</sup> asked specifically if the privilege amounted to a blanket exemption from FOI for members of the Oireachtas and in particular with respect to “[records of] our attendance, gained from the fobs or electronic attendance papers, which record our mileage and every time we use the fobs.”

The Minister replied: “That is procedural and those are not private papers. It is up to the Oireachtas to determine what qualifies as private papers but there will be communications that should be privileged, as well as some that should not be determined to be private papers. The Oireachtas will set those rules.”

The duty of the Houses to regulate the privilege under the 2013 Act was confirmed by Minister Howlin in response to PQ No. 142 on 27 June 2013<sup>5</sup>:

*“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.”*

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<sup>3</sup> Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2013: Committee Stage 5 June 2013, Minister Howlin <https://www.kildarestreet.com/committees/?id=2013-06-05a.8#g526>

<sup>4</sup> Exchange between Deputy Sean Fleming and Minister Howlin <https://www.kildarestreet.com/committees/?id=2013-06-05a.8#g626>

<sup>5</sup> Question 142 posed by Deputy Andrew Doyle to Minister Howlin on 27 June 2013 <https://www.kildarestreet.com/wrans/?id=2013-06-27a.354>

## What rules have the Oireachtas made in respect of the 2013 Act?

The short answer is none really.

Dáil standing order 137 is the only relevant rule<sup>6</sup> and it merely empowers the Dáil Committee on Procedure and Privileges to determine what constitutes “private paper” for the purposes of the 2013 Act:

- 137.** (1) This Standing Order is made to give further effect to Part 10 of the 2013 Act in respect of the private papers and confidential communications of any member.
- (2) On the approval of this Standing Order by the Dáil, the Committee on Procedure and Privileges stands appointed as the Part 10 committee provided for in Part 10 of the 2013 Act.
- (3) The Part 10 committee may prepare guidelines and protocols as contemplated by section 108 of the 2013 Act and recommend their adoption by the Dáil.

It seems, therefore, that the Oireachtas has not made any determination as to what is a private paper for the purpose of the 2013 Act and on that basis the exclusion in the FOI Act cannot be relied upon.

The Commissioner has no power to determine what is privileged and what is not. The reasoning of the Supreme Court in *Howlin -v- Mr Justice Morris* equally applies here and the privilege embodied in the 2013 Act cannot be used in an *ad hoc* way. It must be based on general rules promulgated by the Oireachtas and applied in each case. Since no such rules have been made the exclusion doesn't apply.

If it were otherwise there would be an inevitable tendency for this exclusion to be used by the Houses of the Oireachtas to arrive at the result Minister Howlin specifically excluded, i.e. a blanket exclusion for all non-public Oireachtas records from the scope of the FOI Act.

### Section 42(l) - Three important points

There are three important conclusions to draw from this.

1. The privilege in Part 10 of the 2013 Act is meant to protect the ability of Oireachtas Members to communicate with the public without putting them under hazard;
2. The Oireachtas will set the rules (presumably in a way analogous to the article 15.10 privilege) but hasn't yet done so; and

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<sup>6</sup> I was informed that an identical amendment was made to the standing orders of the Seanad but this not appear to have been published yet.

3. The privilege was never intended to extend to procedural matters such as attendance, mileage and expenses and was certainly never intended to be used as a general exclusion of the FOI Act for the Oireachtas.

### **Conclusion**

To conclude, my submission is that the records are held by the Oireachtas as a public body via Mazars and not by the members. They are in the public domain and in any event the members have no reasonable expectation of privacy in respect of them and so section 42(k) does not apply. In respect of the 2013 Act the Oireachtas has not made rules to define the scope of the definition and therefore this privilege has not been activated and so section 42(l) cannot be relied upon.

Yours Sincerely,

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Ken Foxe