

Statutory Instrument

S.I. No. 279 of 2005

European Communities (Re-Use of Public Sector Information) Regulations 2005

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(PRN A5/0876)

Price 3.05

European Communities (Re-Use of Public Sector Information) Regulations 2005

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European Communities (Re-Use of Public Sector Information) Regulations 2005.

I, Brian Cowen, T.D. , Minister for Finance, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972), and for the purpose of giving effect to Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003¹, hereby make the following regulations:

Citation and commencement

1. (1) These Regulations may be cited as the European Communities (Re-Use of Public Sector Information) Regulations 2005.
- (2) These Regulations come into operation on 1 July 2005.

Interpretation

2. (1) In these Regulations—

“Appeal Commissioner” means a person appointed as such under Regulation 11;

“body governed by public law” means a body, having legal personality, established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and financed for the most part by one or more of the following:

- (a) the State;
- (b) a regional authority;
- (c) a local authority;
- (d) any other body governed by public law;
- (e) a body that is subject to management supervision by one or more than one body referred to in paragraphs (a), (b), (c) and (d);
- (f) a body having an administrative, managerial or supervisory board, more than half of whose members are appointed by one or more than one body referred to in paragraphs (a), (b), (c) and (d);

“Directive” means Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003¹;

“document” means all or part of any form of document, record or data, whether in physical, electronic or other form and includes—

¹ OJ No. L 345, 31 December 2003, page 90

- (a) any memorandum, book, plan, map, drawing, diagram, pictorial or graphic work,
- (b) any photograph, and
- (c) any sound, visual or audio-visual recording;

“functions” includes powers and duties and references to the performance of functions includes, as respects powers and duties, references to the exercise of functions and the carrying out of duties;

“local authority” means a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001);

“Minister” means the Minister for Finance;

“personal data” has the same meaning as it has in the Data Protection Acts 1988 and 2003;

“public sector body” means—

- (a) the State,
- (b) a regional authority,
- (c) a local authority,
- (d) an other body governed by public law , or
- (e) an association formed by one or several bodies or associations referred to in this definition,

“regional authority” means a body established in accordance with section 43 of the Local Government Act 1991 (No. 11 of 1991);

“requester”, in relation to a request for the release for re-use of a document pursuant to these Regulations, means the person making the request;

“re-use”, in relation to a document held by a public sector body, means the use by an individual or legal entity of the document for commercial or non-commercial purposes other than the initial purpose within the public task for which the document was produced, but does not include the exchange of such document between public sector bodies solely for the purpose of performing their functions.

(2) In these Regulations, unless otherwise indicated –

- (a) a reference to a Regulation is a reference to a Regulation of these Regulations,

- (b) a reference to a paragraph or subparagraph is a reference to a paragraph or subparagraph of the provision in which the reference occurs.
- (3) A word or expression that is used in the Directive has, unless the contrary intention appears, the same meaning in these Regulations that it has in the Directive.

Limit on application, etc.

3. (1) These Regulations do not apply to—
- (a) documents, the supply of which is an activity falling outside the scope of the public task of the public sector bodies concerned as provided for—
 - (i) by law, or
 - (ii) otherwise in accordance with common administrative practice.
 - (b) documents in respect of which third parties hold intellectual property rights;
 - (c) documents that could be excluded from access under the Freedom of Information Acts 1997 and 2003, other than documents to which section 46(2) of the Freedom of Information Act 1997 (No. 13 of 1997) applies;
 - (d) documents held by public service broadcasters and their subsidiaries, and by other bodies or their subsidiaries for the fulfilment of a public service broadcasting remit;
 - (e) documents held by educational and research establishments, including schools, universities, archives, libraries and research facilities and, where relevant, organisations established for the transfer of research results;
 - (f) documents held by cultural establishments, including museums, libraries, archives, orchestras and establishments for the performing arts.
- (2) Nothing in these Regulations shall be read as—
- (a) affecting any right or function under the Data Protection Acts 1988 and 2003,
 - (b) permitting the release of information by a public sector body in a manner that is prohibited by law, or
 - (c) requiring the release of information that is legally privileged.

- (3) The obligations imposed by these Regulations apply only in so far as they are compatible with the provisions of international agreements on the protection of intellectual property rights, in particular the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

Obligation to supply information to Minister

4. (1) A public sector body shall supply the Minister with—
 - (a) in relation to documents made available by the public sector body for re-use, information relating to those documents, and
 - (b) such other information as the Minister may, from time to time, require for the purpose of enabling him or her to take all reasonable steps to ensure that practical arrangements are in place to facilitate a search for documents available for re-use
- (2) A public sector body shall comply with any other request from the Minister for information that may, from time to time, be made for the purposes of these Regulations or the Directive.
- (3) Information provided under this Regulation shall be in such format as the Minister may specify.

Release of documents

5. (1)
 - (a) An individual or a legal entity may make a request in a legible form to a public sector body to release documents for re-use.
 - (b) Every request under subparagraph (a) shall clearly indicate that it is being made for the purpose of the re-use of public sector information.
 - (c) Every request made in a language other than Irish or English shall be accompanied by a translation of the request into Irish or English.
- (2) Subject to paragraph (3), nothing in these Regulations obliges any public sector body to release documents for re-use.
- (3)
 - (a) Where a public sector body decides to make a document available for re-use, then the body shall, consequent on a request from a requester—
 - (i) process the request and deliver the documents for re-use to the requester, or

- (ii) if necessary, finalise the offer of a licence to the requester,

within—

- (I) 40 working days from receipt of the request, if the request is extensive or complex, or
 - (II) 20 working days from receipt of that request in any other case.
- (b) Where processing the request and delivering the documents concerned to the requester will exceed, or is likely to exceed, 20 working days from receipt of the request, then the public sector body concerned shall advise the requester accordingly within 3 weeks after the initial request was received.
 - (c) Nothing in this paragraph shall affect the granting, in accordance with Regulation 9, of an exclusive right to re-use a document where such grant is necessary for the provision of a service in the public interest.
- (4) (a) Where a request under this Regulation is refused by a public sector body, it shall communicate the grounds of the refusal to the requester, in particular and where appropriate by reference to the matters contained in subparagraph (a), (b) or (c) of Regulation 3(1) or paragraph (2) of this Regulation.
 - (b) Where the refusal is based on the intellectual property rights of a third party, the public sector body concerned shall include in the communication of the refusal to the requester a reference to the third party, where known, or alternatively to the licensor from which the public sector body has obtained the relevant material.
- (5) (a) Where a public sector body makes a document available for re-use it shall make the document available in any pre-existing format or language, including through electronic means, where possible and appropriate.
 - (b) Nothing in these Regulations requires a public sector body—
 - (i) to create or adapt any document in order to comply with a request,
 - (ii) to provide extracts from documents where this would involve disproportionate effort, going beyond a simple operation,
 - (iii) to continue the production of a certain type of documents with a view to re-use.

Charging for re-use of documents

6. (1) (a) A public sector body may charge for the re-use of documents.
 - (b) Where charges are made, they shall be calculated on the basis that the expected total income from supplying and allowing re-use of documents shall not exceed the estimated cost of collection, production, reproduction and dissemination, together with a reasonable return on investment.
 - (c) Charges should be cost-oriented over the appropriate accounting period and calculated in line with the accounting principles applicable to the public sector bodies involved.
- (2) Nothing in paragraph (1) shall be read so as to prevent -
 - (a) the exchange of information between public sector bodies free of charge for the exercise of public tasks even where, in any other case, a charge would be imposed in respect of the re-use concerned, or
 - (b) the adoption of a differential charging policy for commercial and non-commercial reuse.
 - (3) If documents which are, or may be, made available by a public sector body under these Regulations are re-used by another public sector body as input for its commercial activities which fall outside the scope of its public tasks, the same charges and other conditions shall apply to the supply of the documents for those activities as apply to other users.

Transparency

7. (1) Any applicable conditions and standard charges for the re-use of documents held by a public sector body shall—
 - (a) be pre-established, and
 - (b) where possible and appropriate, be published through electronic means.
- (2) On request, a public sector body shall indicate—
 - (a) the calculation basis for the published charge, and
 - (b) which factors will be taken into account in the calculation of charges for cases which are not typical.

- (3) Public sector bodies shall ensure that requesters for re-use of documents are informed of available means of redress relating to decisions or practices affecting them.

Licensing

8. (1) A public sector body may allow for re-use of documents without conditions or may impose conditions, where appropriate through a licence, dealing with relevant issues. Such conditions shall not unnecessarily restrict possibilities for re-use and shall not be used to restrict competition.
- (2) Subject to Regulation 6(2), any applicable conditions for the re-use of documents shall be non-discriminatory for comparable categories of re-use.
- (3) The Minister shall ensure that standard licences for the re-use of documents, which can be adapted to meet particular licence applications, are available in digital format and can be processed electronically.

Restriction on grant of exclusive rights

9. (1) (a) Contracts or other arrangements between a public sector body and a third party in respect of any document shall not grant exclusive rights to re-use the document, unless such a grant is necessary for the provision of a service in the public interest.
- (b) In deciding if—
 - (i) a grant of an exclusive right to re-use a document would be necessary for the provision of a service in the public interest, or
 - (ii) on any review of such a grant, its continuation would be necessary for the provision of a service in the public interest,account may be taken of circumstances where, upon such a review, no commercial publisher would publish information that is related to the document concerned without such a grant or its continuation.

- (2) A grant of exclusive rights in accordance with paragraph (1) to re-use a document shall —
 - (a) be subject to regular review at intervals of not more than 3 years, and
 - (b) cease to be a grant of exclusive rights where it is found not to be necessary for the provision of a service in the public interest,

and the public sector body concerned shall take all steps necessary for the purposes of this paragraph.

(3) Any public sector body which on or after 1 July 2005 grants exclusive rights to re-use any document shall ensure that the contract or other arrangement concerned is transparent and made public.

(4) Any contract or other arrangement—

(a) entered into before 1 July 2005 between a public sector body and a third party that grants exclusive rights to re-use a document, and

(b) that is not necessary for the provision of a service in the public interest,

shall be terminated on the date the contract or other arrangement ends, or shall cease to have effect after 31 December 2008, whichever first occurs.

Appeals

10.(1) Where a public sector body decides—

(a) to refuse to allow a requester to re-use a document,

(b) to refuse to grant an exclusive right to a requester to re-use a document,

(c) to allow the re-use of a document but subject to a proposed fee being paid which the requester believes does not accord with the requirements of these Regulations in setting the amount of the proposed fee, or

(d) to allow the re-use of a document subject to imposing conditions,

then, the requester may appeal against the refusal, the amount of the proposed fee or any condition so imposed, as the case may be.

(2) An appeal shall be sent to the Minister in a legible form.

(3) An appeal under paragraph (1) shall be made—

(a) not later than 4 weeks after the notification of the decision by the public sector body to the requester concerned, or

(b) in a case in which the Minister or, where the Minister leaves the matter to be decided by an Appeal Commissioner, the Appeal Commissioner is of opinion that there are reasonable grounds for extending that

period, the expiration of an additional period of such length as he or she may determine.

Appointment of Appeal Commissioner

11. (1) On receipt of an appeal under Regulation 10(2) the Minister shall, subject to Regulation 10(3), appoint a person to be an Appeal Commissioner for the purpose of conducting an appeal under these Regulations.

(2) The Minister shall only appoint a person as an Appeal Commissioner with his or her consent.

(3) The Appeal Commissioner shall be independent in the performance of his or her functions.

- (4)(a) Where the Minister appoints a person as an Appeal Commissioner for the purpose of conducting an appeal and the person—
- (i) is appointed by virtue of holding a statutory office (“office holder”) in respect of which the office holder is independent in the exercise functions under the enactments concerned, and
 - (ii) those enactments provide that the office holder may delegate any of his or her functions to a member of his or her staff,

then the office holder may delegate his or her functions as an Appeal Commissioner in respect of that appeal to a member of his or her staff.

- (b) Where a delegation has been made under subparagraph (a), references elsewhere in these Regulations to the Appeal Commissioner shall be read, where appropriate having regard to the delegation, as including references to any person to whom functions stand delegated by the delegation.
- (c) Where under subparagraph (a) an office holder has delegated his or her functions as an Appeal Commissioner in respect of an appeal and, subsequently, the office holder ceases for any reason to be an Appeal Commissioner, then such ceasing shall not affect the continued exercise of the functions so delegated in respect of the appeal.
- (5)(a) An Appeal Commissioner may resign by so informing the Minister in writing and the resignation shall take effect upon the Minister being so informed.
- (b) A person exercising functions by virtue of a delegation made under paragraph (4)(a) shall cease to exercise those functions—

- (i) if the delegation is revoked by the Appeal Commissioner, or
- (ii) if the person ceases to be a member of the staff of the Appeal Commissioner,

and, consequentially, those functions are exercisable by the Appeal Commissioner or by such other person as the Appeal Commissioner may delegate those functions to under paragraph (4)(a).

(6) In this Regulation—

- (a) a reference to a member of staff includes, where appropriate, an employee, officer or servant, and
- (b) a reference to a member of the staff of an office holder or to a member of staff of the Appeal Commissioner includes, where appropriate, a member of staff of the body concerned.

Review of decision by Appeal Commissioner

12. (1) This Regulation applies to a decision by a public sector body to which Regulation 10(1) relates.

(2) The Appeal Commissioner shall—

- (a) review in accordance with these Regulations a decision to which this Regulation applies, and
- (b) following the review, may, as the Appeal Commissioner considers appropriate decide—
 - (i) to affirm or vary the decision, or
 - (ii) to annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper,

in accordance with these Regulations.

(3) A decision by the Appeal Commissioner under paragraph (2) shall be made as soon as may be and, in so far as practicable, not later than 3 months after the receipt by the Appeal Commissioner of the application for the review concerned.

(4) (a) A person who makes an application under paragraph (2) may, by notice in writing given to the Appeal Commissioner, at any time before a notice under paragraph (9) in relation to the application is given to the person, withdraw the application.

- (b) The Appeal Commissioner shall cause a copy of any notice given to him or her under this paragraph to be given to the public sector body concerned and to any other person to whom, in the opinion of the Appeal Commissioner, it should be given.
- (5) As soon as may be after the receipt by the Appeal Commissioner of an application under paragraph (2), the Appeal Commissioner shall—
- (a) cause a copy of the application to be given to the public sector body concerned, and
 - (b) if he or she proposes to review the decision concerned, cause the public sector body concerned and any other person who, in the opinion of the Appeal Commissioner, should be notified of the proposal to be so notified.
- (6) Where an application under paragraph (2) is made, the Appeal Commissioner may at any time endeavour to effect a settlement between the parties concerned of the matter concerned and may for that purpose, notwithstanding paragraph (3), suspend, for such period as may be agreed with the parties concerned and, if appropriate, discontinue, the review concerned.
- (7) In relation to a proposed review under this Regulation—
- (a) the public sector body concerned, and
 - (b) any other person who under paragraph (5) is notified of the review,
- may make submissions (in writing or orally or in such other form as may be determined by the Appeal Commissioner) to the Appeal Commissioner in relation to any matter relevant to the review and the Appeal Commissioner shall take any such submissions into account for the purposes of the review.
- (8)(a) The Appeal Commissioner may refuse to grant an application under paragraph (2) or discontinue a review under this Regulation if he or she is or becomes of the opinion that—
- (i) the application aforesaid or the application to which the review relates ("the application") is frivolous or vexatious,
 - (ii) the application does not relate to a decision specified in paragraph (1), or
 - (iii) the matter to which the application relates is, has been or will be, the subject of another review under this Regulation.

- (b) In determining whether to refuse to grant an application under paragraph (2) or to discontinue a review under this Regulation, the Appeal Commissioner shall, subject to the provisions of these Regulations, act in accordance with his or her own discretion.
- (9) Notice, in writing or in such other form as may be determined, of a decision under paragraph (2)(b), or of a refusal or discontinuation under paragraph (8), and the reasons therefor, shall be given by the Appeal Commissioner to—
 - (a) the public sector body concerned,
 - (b) the person appealing to the Appeal Commissioner against the decision of the public sector body concerned, and
 - (c) any other person to whom, in the opinion of the Appeal Commissioner, such notice should be given.
- (10) The notice referred to in paragraph (9) shall be given as soon as may be after the decision, refusal or discontinuation concerned and, if it relates to a decision under paragraph (2), in so far as practicable, within the period specified in paragraph (3).
- (11) A decision of the Appeal Commissioner following a review under this Regulation shall, where appropriate, specify the period within which effect shall be given to the decision and, in fixing such a period, the Appeal Commissioner shall have regard to the desirability, subject to any appeal to the High Court from the decision, of giving effect to such a decision as soon as may be after compliance in relation thereto with paragraph (10).
- (12) Subject to the provisions of these Regulations, a decision under paragraph (2) shall—
 - (a) in so far as it is inconsistent with the decision to which Regulation 5(3) relates have effect in place of the decision to which that Regulation relates, and
 - (b) be binding on the parties concerned.

Request for further information

13.(1) Where—

- (a) an application is made under Regulation 10 for the review by an Appeal Commissioner of a decision by a public sector body, and
- (b) the Appeal Commissioner considers that the statement of the reasons for the decision referred to in Regulation 5(3) is not adequate,

then the Appeal Commissioner shall direct the public sector body concerned to furnish to the requester concerned and the Appeal Commissioner a statement, in writing or such other form as may be determined, containing any further information in relation to those matters that is in the power or control of the public sector body.

(2) A public sector body shall comply with a direction under this Regulation as soon as may be, but not later than 3 weeks, after its receipt, or such longer period or periods as the Appeal Commissioner considers appropriate in the circumstances.

Powers of Appeal Commissioner

14.—(1) The Appeal Commissioner may, for the purposes of a review under Regulation 12—

- (a) require any person who, in the opinion of the Appeal Commissioner, is in possession of information, or has a record in his or her power or control, that, in the opinion of the Appeal Commissioner, is relevant to the said purposes to furnish to the Appeal Commissioner any such information or record that is in his or her possession or, as the case may be, power or control and, where appropriate, require the person to attend before him or her for that purpose, and
- (b) examine and take copies in any form of, or of extracts from any record that, in the opinion of the Appeal Commissioner, is relevant to the review or investigation and for those purposes take possession of any such record, remove it from the premises and retain it in his or her possession for a reasonable period.

(2) The Appeal Commissioner may for the purpose of such a review enter any premises occupied by a public sector body and there—

- (a) require any person found on the premises—
 - (i) to furnish the Appeal Commissioner with such information in the possession of that person as the Appeal Commissioner may reasonably require for that purpose, and
 - (ii) to make available to the Appeal Commissioner any record in that person's power or control that, in the opinion of the Appeal Commissioner, is relevant to that purpose,

and

- (b) examine and take copies of, or of extracts from, any record so made available or found on the premises.

- (3) Subject to paragraph (4), no enactment or rule of law prohibiting or restricting the disclosure or communication of information shall preclude a person from furnishing to the Commissioner any information or record to which paragraph (2) relates.
- (4) A person to whom a requirement is addressed under this Regulation is entitled to the same immunities and privileges as a witness in a court.
- (5) The Appeal Commissioner may, if he or she thinks fit, pay to any person who, for the purposes of a review under Regulation 12, attends before the Appeal Commissioner or furnishes information or a record or other thing to him or her—
 - (a) sums in respect of travelling and subsistence expenses properly incurred by the person, and
 - (b) allowances by way of compensation for loss of his or her time,

of such amount as may be determined by the Minister.

- (6) Subject to these Regulations, the procedure for conducting a review under Regulation 12 shall be such as the Appeal Commissioner considers appropriate in all the circumstances of the case and, without prejudice to the foregoing, shall be as informal as is consistent with the due performance of the functions of the Appeal Commissioner.
- (7) (a) A person who fails or refuses to comply with a requirement under this Regulation or who hinders or obstructs an Appeal Commissioner in the performance of his or her functions under this section commits an offence and is liable on summary conviction to a fine not exceeding €2,500 or to imprisonment for a term not exceeding 6 months or to both.
- (b) Where an offence under this paragraph is committed by a body corporate or by a person acting on behalf of a body corporate and is proved to have been so committed with the consent, connivance or approval of, or to have been facilitated by any neglect on the part of any director, manager, secretary or any other officer of such body or a person who was purporting to act in any such capacity, such person also commits an offence and is liable to be proceeded against and punished as if he or she had committed of the first-mentioned offence.

Appeal to High Court, etc.

- 15. (1) A party to a review under Regulation 12 or any other person affected by the decision of the Appeal Commissioner following such a review may appeal to the High Court on a point of law from the decision.
- (2) The requester concerned or any other person affected by—

- (a) a decision by the Appeal Commissioner under Regulation 12(2), or
- (b) a direction by the Appeal Commissioner under Regulation 13(1),

may appeal to the High Court on a point of law against such decision or direction or from such decision or direction.

- (3) An appeal under this Regulation shall be initiated not later than 8 weeks after notice of the decision or direction concerned was given to the person bringing the appeal.
- (4) The Appeal Commissioner may refer any question of law arising in a review under Regulation 8 to the High Court for determination, and the Appeal Commissioner may postpone the making of a decision following the review until such time as he or she considers convenient after the determination of the High Court.
- (5)
 - (a) Where an appeal under this Regulation by a person is dismissed by the High Court, that Court may, if it considers that the point of law concerned was of exceptional public importance, order that some or all of the costs of the person in relation to the appeal be paid by the public sector body concerned.
 - (b) The High Court may order that some or all of the costs of a person in relation to a reference under this section be paid by the public body concerned.
 - (c) The Supreme Court may order that some or all of the costs of a person in relation to an appeal to that Court from a decision of the High Court under this Regulation be paid by the public sector body concerned if it considers that a point of law of exceptional public importance was involved in the appeal and, but for this paragraph, that Court would not so order.
- (6) A decision of the High Court following an appeal under paragraph (1) or (2) shall, where appropriate, specify the period within which effect shall be given to the decision.

Precautions by Court and Appeal Commissioner against disclosure of certain information

- 16. (1) In proceedings before a Court under or in relation to these Regulations, the Court shall take all reasonable precautions to prevent the disclosure to the public or, if appropriate, to a party (other than the public sector body concerned) to the proceedings of—
 - (a) information contained in any record which is an exempt record for the purposes of the Freedom of Information Acts 1997 and 2003, or

- (b) information as to whether a record exists or does not exist in a case where the head of the public body concerned (being such a head for the purposes of the Freedom of Information Acts 1997 and 2003) is required by those Acts not to disclose whether the record exists or does not exist.
- (2) Without prejudice to the generality of paragraph (1), precautions under that paragraph may include—
- (a) hearing the whole or part of any proceedings before a Court otherwise than in public,
 - (b) prohibiting the publication of such information in relation to any such proceedings as it may determine, including information in relation to the parties to the proceedings and the contents of orders made by the Court concerned in the proceedings, and
 - (c) examining a record or a copy of a record without giving access or information in relation to it to a party (other than the public sector body concerned) to the proceedings.
- (3) In the performance of his or her functions under this Act, the Appeal Commissioner shall take all reasonable precautions (including conducting the whole or part of a review under Regulation 12 otherwise than in public) to prevent the disclosure to the public or, in the case of such a review, to a party (other than the public sector body concerned) to the proceedings concerned of information specified in paragraph (a) or (b) of paragraph (1) or matter that, if it were included in a record, would cause the record to be an exempt record for the purposes of the Freedom of Information Acts 1997 and 2003.

GIVEN under my Official Seal,

16th June 2005.

L.S.

Brian Cowen T.D

Minister for Finance.