

Freedom of Information in Ireland: Five Years On

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The Origins of Freedom of Information in Ireland

The genesis of the Irish Freedom of Information Act can be traced back to the late 1980s, when allegations of improper relationships between politics and business in Ireland began to surface¹. One of the chief catalysts to the introduction of the legislation was the establishment of the Beef Tribunal Inquiry in 1991 to investigate allegations of irregularities in the export trade for beef and the possible involvement of politicians in such irregularities. Both houses of the Irish parliament passed resolutions to establish the Tribunal as a result of a major Dail (lower house) debate on an ITV *World in Action* programme broadcast in mid-1991, which added major television exposure to the many calls for investigating the close relationship between the government and a group of companies operating in the meat trade. Specific allegations revealed by the *World in Action* programme included the abuse by this group of companies of the EU export refunds scheme.

The Beef Tribunal took over three years to complete its work and has so far cost in the order of €26m². The Tribunal's proceedings showed that greater openness in government could have prevented many of the abuses developing to the extent they had and could also have contributed by obviating the need for a tribunal of inquiry. An oft quoted excerpt from the Tribunal's proceedings is the Chairman's³ remark that

‘if the questions that were asked in the Dail [the Lower House of Parliament] were answered in the way they are answered here, there would be no necessity for this inquiry and an awful lot of time and money would have been saved.’

¹ The Beef Tribunal was established in 1991 to enquire into allegations of improper practices within the beef industry in particular.

² Some costs issues are still outstanding.

³ Mr Justice Liam Hamilton.

Access to government information became an important issue in the general election of November 1992. The incoming government promised to ‘consider’ the introduction of freedom of information legislation⁴. The demise of that government in controversial circumstances then fuelled the demand for greater openness in government. The then-Attorney-General, Mr Harry Whelehan, had been appointed by the Government as President of the High Court although his office had been the subject of severe criticism as a result of delays in the extradition to Northern Ireland of a priest who was suspected of child abuse. Among other deficiencies, Mr. Whelehan’s office had failed to release information with regard to the processing of the extradition application. Widespread public comment on the appointment of Mr Whelehan as President of the High Court remarked on the variance with the government’s frequently expressed pledge to deliver openness, accountability and transparency. The refusal of the Taoiseach (Prime Minister) to back down on this appointment ultimately led to his own resignation and to the fall of the government. The manifest of the incoming coalition in December 1994 finally set out a firm commitment to the introduction of freedom of information legislation.

While at one level the introduction of freedom of information legislation in Ireland can be viewed as a response to the demand of the electorate for greater openness, it also formed part of a wider and longer-term programme of public service and Oireachtas (parliamentary) reform⁵. The genesis of these reforms can be traced back to developments in public sector reform internationally particularly in the UK, Canada and New Zealand.

As part of the process of developing the legislative proposal, the sponsoring Minister⁶ and a team of senior civil servants undertook a research tour of Australia and New Zealand to study the operation of Freedom of Information legislation in those jurisdictions. The influence of Australian legislation, in particular, is evident in the finished product. There was a delay of some two years between the announcement of the promise to introduce

⁴ *Fianna Fail and Labour Programme for a Partnership Government 1993 - 1997*, p.16.

⁵ A programme of public service reform entitled the Strategic Management Initiative commenced in the early 1990s. This led to the introduction of the Public Service Management Act 1997. Other relevant legislation introduced in the 1990s included the Ethics in Public Office Act 1995, the Committee of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 and the Electoral Act 1997.

⁶ Ms Eithne Fitzgerald T.D.

freedom of information legislation and the publication of the bill in December 1996. This delay is partly explained by the complexity of the legislation. Another reason for the Bill's long gestation was the extensive process of consultation undertaken with government departments, not all of whom would appear to have been wholehearted in their support of the proposals.⁷ The opposition of the Department of Justice to the legislation was particularly strong and the legislation bears the marks of its lack of enthusiasm for FOI. Despite comprehensive consultation within the public sector, there was very little debate surrounding the detailed contents of the Bill in the wider public arena. The Freedom of Information Act became law on 21st April 1997 and entered into force on 21st April 1998.

Freedom of Information Amendment and Retrenchment in 2003

The most significant event in the history of FOI in Ireland since the introduction of the legislation in 1997 was the amendment of the Act in April 2003. The passing of the FOI Amendment Act was precipitated by the imminent arrival on the 21st April 2003 of the 5th anniversary of the original implementation of the Act. The significance of that date lay in a provision of the original Act which allowed for disclosure of certain cabinet records five years after the date of the Government decision to which they related. April 2003 would have been the first occasion on which records could be disclosed as a result of this provision. Since the political parties represented in the serving Government in 2003 were the same as those who were in power five years previously (and indeed some serving Government Ministers also served in the previous Government), the coming into operation of the provision had the potential to cause embarrassment to the Government.

The justification put forward by the Government for amendment of the Act was that leaving the provision as it was would lead to possible disclosure of sensitive material relating to the Northern Ireland peace process which could have been discussed at cabinet. This argument overlooked the fact that the Act already provided a separate exemption provision concerning matters relating to Northern Ireland. The Government also took the opportunity to introduce a range of other amendments to the Act on matters unrelated to the five-year cabinet records time limit. While concrete

⁷ See for instance 'Freedom of Information plans held up by Justice Department' *The Irish Times* September 16, 1995.

information on the reasons behind the introduction of these changes is sparse, two reports were influential. The first was a report on the operation of the FOI Act by a network of civil service users of the Act⁸ and the second a report on FOI by a group of top public servants⁹. The former referred to ‘abuse of FOI legislation’ and proposed amendments which included the introduction of an application fee and the introduction of measures to deal with ‘excessively large and disruptive requests’, while the latter focused its attention on recommending changes to the cabinet records exemption. Apart from these two examples of dissatisfaction on the part of public servants with the way in which FOI was operating, there were also a number of newspaper reports in which senior politicians expressed frustration at ‘abuse’ of the FOI Act and also at the restrictions which the Act imposed on decision making processes within government¹⁰.

While the passage of the original Act had given rise to little public debate, the move to amend it led to widespread comment in the media, most of which was unfavourable to the proposed amendments. The fact that the Minister for Finance who sponsored the amending Act was not present in the Dail when the legislation was being debated – favouring instead attendance at the Cheltenham Racing festival – gave rise to particular affront.

Wider legal context

Assessing the potential impact of the Irish FOI Act requires an appreciation of the legislative backdrop against which FOI operates in Ireland. Whilst a detailed exposition of this legislative landscape is beyond the scope of this paper, it is worth referring briefly to the main elements of the wider legislative context which include:

- European Union Access to Information on the Environment Regulations which since 1993 have conferred a right of access to information relating to the environment.
- Data Protection legislation which since 1988 has conferred a right of access to ‘personal data’ held by private or public sector bodies. While this access right has

⁸ Report by the FOI Civil Service Users’ Network, December 1999.

⁹ Report of the High Level Review Group on the FOI Act, March 2003.

¹⁰ See for example ‘Information Act is being abused’ *The Irish Times*, 7th October 1999.

been confined to automated data in the past, it has since July 2003 applied also in respect of personal data in manual files¹¹.

- Official Secrets legislation which is very broad in scope having been closely modelled on the UK Official Secrets Act 1912, and which in contrast to the UK statute has not been updated to limit its scope in any respect despite a Report of a Government Committee advocating important reforms to the law¹². The Report recommended that the Act be repealed and that it be replaced with a new piece of legislation which would apply only to certain 'sensitive' categories of information. It also recommended that a harm test be introduced with regard to prosecutions for disclosure of such information and that there should be a public interest defence for all such prosecutions.
- Archives legislation which regulates the preservation of archival material held by certain public bodies and provides for a system of access.
- Other sectoral access provisions such as those to be found in planning legislation.

Main provisions of the Act¹³

The Irish Act is modelled closely on its Australian counterparts, in particular on the FOI Acts of Queensland and Western Australia. In common with FOI legislation in most other jurisdictions, while the core of the Act is the right of access to government information, the Acts also has a number of other features. These include:

- active dissemination provisions which require public bodies (i.e. bodies covered by the Act) to publish information relating to their functions, activities and the rules by which they operate;
- a right of amendment of incorrect personal information held by public bodies;
- a right to reasons for decisions taken by public bodies which is exercisable by those who have a material interest in the subject matter of the decision.

The system of enforcement centres around the office of Information Commissioner. The Commissioner was conferred with the power to issue legally binding decisions on access requests which are in turn subject to appeal to the High Court and ultimately the Supreme

¹¹ Data Protection (Amendment) Act 2003.

¹² Dail Eireann, Select Committee on Legislation and Security, *Report on Review of the Official Secrets Act, 1963* (1997).

¹³ See, generally, McDonagh, M *Freedom of Information Law in Ireland* Round Hall, 1998.

Court on a point of law. The Act places the burden of proof firmly on the body or person opposing disclosure.¹⁴

The scope of the right of access is limited in some important respects. In the first place, it applies only in respect of records held by public bodies and does not therefore apply across the entire public sector. Secondly, it is limited in its retrospective effect as it applies only to records created after its commencement in April 1998¹⁵. There are however two exceptions to this rule. They are in respect of records relating to personal information of the requester, and records the disclosure of which is necessary in order to understand records created after the commencement of the Act¹⁶.

The Act originally permitted public bodies to impose charges for two activities associated with responding to FOI requests only, namely search and retrieval of records and reproduction of records¹⁷. The 2003 amending Act has provided for the levying of an application fee also which has been set by Regulation at €15. Special arrangements apply with respect to charging for requests for personal information. No charge may be levied for search and retrieval of personal information unless the request relates ‘to a significant number of records’, and no application fee can be charged. Reproduction charges for records containing personal information are subject to waiver in certain circumstances. Provision is made also for waiver or reduction of fees where the information contained in the record ‘would be of particular importance to the understanding of an issue of national importance’¹⁸.

In practice, Government agencies have tended to charge fees in only a minority of cases. The civil service review of the operation of the Act ascribed this reluctance to impose charges to difficulties encountered by public bodies in appropriately applying

¹⁴ s34(12) provides that a decision to refuse to grant a request shall be presumed not to have been justified unless the head of the public body concerned shows to the satisfaction of the Information Commissioner that the decision was justified.

¹⁵ April 21, 1998.

¹⁶ s6(5).

¹⁷ The search and retrieval charges are based on an hourly rate currently set at £16.50. The reproduction charge is 3p per sheet in relation to a photocopy, 40p in relation to computer diskettes and £8 in relation to a CD-ROM (Freedom of Information Act 1997 (Section 47(3)) Regulations 1998 (S.I. No.139 of 1998)), Regs 2 & 3.

¹⁸ s47(5).

the charging provisions which were referred to as “complex and confusing”¹⁹.

Evidence that the charging of fees has not yet given rise to difficulties are seen in the statistics regarding subject matter of appeals brought to the Information Commissioner. In the five years of operation of the Act, appeals relating to the charging of fees have represented less than 2% of all appeals to the Information Commissioner. A further important change introduced by the amending Act is the introduction in July 2003 of a charge for both internal appeal and appeal to the Information Commissioner, which have been set respectively at €75 and €150. The Information Commissioner²⁰ and various commentators have expressed concern at the likely disincentive created by such charges for the bringing of appeals.

The provisions relating to refusal of requests are among the most important in the Act. Refusal of access requests is provided for in three situations: on administrative grounds; where the requested records are excluded from the scope of the Act; and where the records in question are exempt from the right of access. Refusals of access on administrative grounds include such refusals as those based on the large volume of records requested²¹ or on the ground that the request is frivolous or vexatious²². A new administrative ground of refusal was introduced by the 2003 Act which allows for refusal on the grounds that a request ‘forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters, who appear to have made the requests in concert’. This new provision was added as a reaction to the activities of persons referred to by various politicians and public servants as ‘serial requesters’.

Seven categories of record are the subject of mandatory exclusion from the scope of the Act²³. These exclusions generally relate to records held by certain office holders such as the office of the President. The most significant exclusion is that relating to confidential information concerning criminal law enforcement. The exclusion, as

¹⁹ See above, n.7.

²⁰ Information Commissioner, Press Release, 1st July 2003 available at http://www.oic.gov.ie/2576_3c2.htm.

²¹ s10(1)(c) allows for refusal where ‘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 the other work of the public body concerned’.

²² FOI Act, s.10(1)(b).

²³ s46.

opposed to exemption of such records from the scope of the Act, is one example of the influence of the Department of Justice on the shaping of the legislation. The practical effect of excluding rather than exempting material is that material referred to in exemption provisions may, in certain circumstances, be disclosed while excluded records can never be.

Twelve grounds for exemption are provided for in the Irish Act. They are in respect of: meetings of the government²⁴; deliberations of public bodies²⁵; functions and negotiations of public bodies²⁶; parliamentary, court and legal professional privilege²⁷, law enforcement and public safety²⁸; security, defence and international relations²⁹; information obtained in confidence³⁰; commercially sensitive information³¹; personal information³²; research and natural resources³³; financial and economic interests of the State and public bodies³⁴; and enactments relating to non-disclosure of records³⁵.

Generally it can be said that the range of exemptions in the Irish Act is broad when compared with its overseas counterparts. The scheme of exemption is complex with the detail of the exemptions varying in five main respects namely:

1. Whether the exemption is expressed in mandatory or discretionary terms.
2. Whether or not it is subject to a harm test.
3. Whether or not it is subject to a public interest test.
4. Whether or not it requires consultation with third parties prior to disclosure.
5. Whether or not it is subject to a ministerial veto.

The application of just over half of the exemptions is discretionary which means that a public body may choose to refuse access on the grounds set out in the exemption provision, but is not obliged to do so [Table 1].

²⁴ s19.

²⁵ s20.

²⁶ s21.

²⁷ s22.

²⁸ s23.

²⁹ s24.

³⁰ s26.

³¹ s27.

³² s28.

³³ s30.

³⁴ s31.

³⁵ s32.

Again over half of the exemptions rely to some extent on a harm test, the effect of which is that records to which they apply will only be withheld where disclosure would be likely to harm a particular interest [Table 1]. The nature of the harm required varies between the exemptions. Some exemptions refer to the harm in terms of prejudice, while in others the injury is phrased in terms of the occurrence of adverse effects, or impairment, or exposure to serious disadvantage. There are also variations in the degree of injury provided for. The phrase ‘adversely effect’ for example, appears in various states of intensity ranging from mere ‘adversely affect’ through ‘serious adverse effects’ to ‘significant adverse effects’. Different standards of proof are found in the harm tests provided for in the various exemptions and, indeed, different standards are applicable in respect of different limbs of the same exemption. The standards range from a requirement that disclosure of the record ‘would be likely to’ to result in the injury described in the exemption through ‘could reasonably be expected’ to ‘could’. The ‘could reasonably be expected to’ standard is the standard most commonly relied upon.

The scope of a number of the exemption provisions is limited through the use of a public interest test or public interest override. Such tests allow for the disclosure of records which come within the terms of an exemption, in circumstances where the public interest would be better served by granting, than by refusing the request for access. Public interest tests are a feature of just over half of the exemption provisions [Table 1].

The confidentiality, personal information and commercially sensitive information exemption provisions oblige the head of a public body to consult with third parties before deciding whether or not to disclose records.

The Act allows for the issuing by a Minister of a certificate declaring that a record is exempt by virtue of section 23 (law enforcement or public safety), or section 24 (security, defence and international relations)³⁶. The Minister must be satisfied that the record is of ‘sufficient sensitivity or seriousness’ to justify the issue of the certificate. The effect of the issuance of such a certificate is to establish, conclusively, that the

³⁶ s25(1)(a).

record is exempt and it cannot, therefore, be subject to internal review or to review by the Information Commissioner. There is, however, provision for appeal against the issue of a certificate to the High Court on a point of law³⁷. Certificates remain in force for two years but they can, subject to some restrictions, be renewed. The Act establishes a formal system for review of the issuing of such certificates by the Taoiseach (Prime Minister) and other Ministers as well as a system for the making of reports to the Information Commissioner on the operation of the ministerial certificates mechanism. Very few such certificates have been issued to date and none have been appealed to the High Court³⁸.

³⁷ s42(2)(a).

³⁸ The Information Commissioner's Annual Reports reveal that in 2000, two such certificates were issued, in 2001 only one was issued while in 2002 the number was again 2.

Table 1: Main features of the exemption provisions in the Irish FOI *Act*

	Govt. Meetings	Deliberations of pub. Bodies	Functions/ Negots of pub. Bodies	Parl./Court/ Legal prof. Privilege	Law Enfo-rcement	Security/ Defence/ Int'l Rels	Confidence	Commercial Info.	Personal Info.	Research/ Nat'l Resources	Fin/Inter- of the State
Mandatory	√	-	-	√	-	√	√	√	√	√	√
Harm test	-	-	√	-	√	In part	In part	In part	-	√	√
Public interest test	-	√	√	-	In part	-	√	√	√	√	√
Consultation required	√	-	-	-	-	-	√	√	√	-	-
Incorporates existing legal concept	-	-	-	√	-	-	√	In part	-	-	-
Ministerial veto	-	-	-	-	√	√	-	-	-	-	-

The 2003 Amendment Act introduced some significant changes to the exemption provisions. The exemption provisions most affected by these changes were those relating to cabinet records; records relating to the deliberations of public bodies; and security, defence and international relations. Amongst the changes were the making of the exemption relating to all cabinet records mandatory and the extension of the five year time limit for the withholding of certain cabinet records to ten years. The scope of the cabinet records exemption was also significantly extended: first, to include within its scope communications between ministers relating to matters under consideration by cabinet or proposed to be submitted to the cabinet; and second, to broaden the definition of cabinet to include committees of officials appointed by the cabinet for the purpose of assisting the cabinet in relation to matters that have been submitted to cabinet. Such committees, as well as including civil servants, may also include ministerial advisors and any other person who may be prescribed. These provisions were the subject of widespread adverse comment – the Information Commissioner even referred to the new definition of cabinet as ‘constitutionally unrecognisable’.

The changes to deliberative processes exemption were no less dramatic. They allow the public servant who heads a Government Department to issue a certificate to the effect that the deliberative processes are ongoing. The effect of the granting of such a certificate is that access to records concerning the process must be refused. There is no appeal against the granting of such a certificate. Another important change to this exemption is that the public interest protection in the exemption is weakened. Under the original Act, access to a record concerning deliberative processes could only be refused if its disclosure could be shown by the government department of agency concerned to be contrary to the public interest. This has been changed to allow for refusal unless in the opinion of the head of the public body concerned the public interest would, on balance, be better served by granting than by refusing access.

The version of the security, defence and international relations exemption contained in the original Act had been harm based – access could only be refused where access to the requested record ‘could reasonably be expected to affect adversely’ the interests protected under the exemption. The exemption also contained a list of the categories

of information to which the exemption might apply – but inclusion in this list did not mean that the record would be exempt, it was always necessary to meet the requirements of the harm test which were that disclosure could reasonably be expected to adversely affect either the security of the State, the defence of the State, the international relations of the State or matters relating to Northern Ireland. The effect of the 2003 amendment was to leave in place the harm based provision but to supplement it by adding a second mandatory limb to the exemption which requires that access be refused to anything coming within the scope of the list of categories of information referred to above, regardless of whether disclosure would result in any harm or not. For example, one item on the list is ‘communications between a Minister and a diplomatic mission of the State’. This means that access to a communication of this kind on any topic, sensitive or not, will have to be refused.

Implementation

At first, the scope of the Act was quite limited in that it applied only to central government departments and a list of about 60 agencies of central government. Provision was made in the Act for its extension by means of ministerial regulations and since 1998 it has been extended to over 400 bodies including health boards, local authorities, hospitals, state funded bodies working with people with physical and intellectual disabilities, the industrial development agencies, the public broadcasting company and the Universities. Important bodies which remain outside the scope of FOI include the police force, schools and many commercial semi-state bodies.

The Irish FOI Act has attracted extensive use. In 2002 there were over 17,000 access requests. This constitutes an increase of nearly 50% over the number of requests in 1999, the first full year of operation of the Act³⁹. Amongst the more controversial revelations which have come about as a result of the Act are those relating to:

- the disclosure of tensions between the Ministers of Finance and Health over health spending⁴⁰;

³⁹ Statistics on the number of requests made each year are available in the Annual Reports of the Information Commissioner published on the Commissioner’s website at <http://www.oic.gov.ie/default.htm>.

⁴⁰ Mark Hennessy, “Health services the loser after Ballymascanlon meeting, says Mitchell” The Irish Times, 15th May 2001.

- the spiralling costs of a proposed new national stadium⁴¹;
- the state of the public finances before the last election⁴²;
- the handling of the government's controversial attempt to appoint to the European Investment Bank a former Supreme Court judge who had been forced to resign in controversial circumstances⁴³;
- church/State negotiations over compensation for clerical abuse victims⁴⁴; and
- inconsistencies between draft and final reports of a consultant on the issue of rail safety⁴⁵.

One interesting aspect of Irish use of FOI is that the rate of requests for personal and non-personal information is roughly even. In Australia, by contrast, personal requests tend to outnumber non-personal requests significantly. In 2001-2002, 90 % of all requests were for personal information in the case of the Commonwealth FOI Act⁴⁶. This figure is somewhat skewed by the fact that Australia operates under a federal system of government and many of the large government agencies holding personal information are federal agencies. However at state level, the demand for personal information is higher than that for non-personal also e.g. in 2001-2002, 73% of requests in Western Australia were for personal information⁴⁷.

Over two-thirds of requests made under the Irish Act come from the general public. Use of the FOI Act by journalists was running at a rate of approximately 20% in 2000 and 2001 but in 2002 this fell to 12%. This figure is likely to decrease further as a result of a controversial new practice introduced by one government department which is likely to be adopted by others. This involves the publication on the departmental website of details of all FOI requests as soon as they are received. Disclosure of such information has the effect of alerting competitors of the requesting journalist to the

⁴¹ Mark Brennock, "Stadium costs will rise further, Ahern is warned", The Irish Times, 24th January 2001.

⁴² John McManus, "Yes Minister' approach lives on in Merrion Street", 11th November, 2002.

⁴³ Mark Brennock, "President of EIB warned McCreevy of damage to bank", The Irish Times, 2nd September 2000.

⁴⁴ Mark Brennock & Emmett Oliver, "Religious paid half of State's initial demand", The Irish Times, 7th March 2003.

⁴⁵ Joe Humphries, "Consultancy denies any pressure to water down rail safety report", The Irish Times, 19th January 1999.

⁴⁶ Commonwealth Attorney General's Department FOI Act Annual Report, 2001-2002.

⁴⁷ Western Australia, FOI Annual Report, 2002.

story under investigation and thus removes the potential for ‘scoops’ to result from FOI requests⁴⁸. Business is not a major user of FOI, since the level of use has been running at approximately 10% since the Act came into force. Finally, staff requests make up approximately 7% of requests while a mere 1% of requests come from members of parliament.

In terms of release rates, the annual report reveals that 46% of requests were granted in full with 21% part-granted and 19% refused. The rate of appeal to the Information Commissioner against refusal of access has been running at approximately 4% since the Act came into force.

The Ombudsman, Mr. Kevin Murphy, was appointed as the first Information Commissioner and he acted in both roles from the date of his appointment as Information Commissioner in 1998 until he retired on 1st June 2003. He has been replaced as both Ombudsman and Information Commissioner by Ms. Emily O’Reilly, a former journalist and political correspondent. The outgoing Commissioner, a former senior public servant, won respect for having implemented the Act effectively and in a manner which accorded with its purpose. He did not shy away from making decisions which were unpopular with politicians, most notably when he ordered disclosure of the details of expense claims submitted by members of parliament. These expense claims were found to constitute personal information, but the Commissioner held that it was in the public interest that they nonetheless be disclosed. Other notable decisions of the Commissioner included:

- the granting of access to information relating to the performance of individual schools in the Leaving Certificate examination, a decision which was subsequently overturned on appeal by the High Court;
- the granting of access to the names of bodies treated as charities for tax purposes;
- the granting of access to applicants for public sector position to the notes taken by interview boards;
- the disclosure of certain tender related records;

⁴⁸ See Mark Brennock “Journalists’ exposes the only competition discouraged”, The Irish Times, 5th July 2003.

- the disclosure of records relating to the expenditure of health boards and hospitals;
- the granting of access to salary scales of employees of the national television station (although access to the specific salaries of such employees was denied);
- the granting of access to reports of the inspectorate of nursing homes; and
- the granting of access to a list of politicians who had petitioned the Minister for Justice on behalf of members of the public for clemency in relation to court penalties.

In deciding whether the Irish Act has been a success or not, the level of use is certainly one indicator. But it is more important to determine whether the operation of the FOI Act has led to a change in culture within the public sector. This is something which is extremely hard to measure. Many requests lead to the disclosure of information on a one-off basis. It is however possible to point to some more general developments which have come about as a result of the introduction of FOI. These include routine disclosures of documents such as reports of nursing home inspections, medical records, feedback to public servants concerning interview and performance processes, feedback on tender processes, and disclosure to students of examination scripts. While it is clear that some public servants remain unhappy with certain aspects of FOI, others view it as a development which contributes to better information handling practices and more generally to improved public sector management. The report on the operation of the FOI Act by senior public servants referred to FOI legislation in Ireland as playing ‘an important role in promoting openness, transparency and accountability in Government’⁴⁹.

Certain problems have however emerged in the operation of FOI in Ireland. Delays, particularly in the handling of appeals by the Information Commissioner’s Office, have undermined the system. Certain important bodies continue to remain outside the scope of the Act, the police force being the most important of these. Another issue to emerge is that of compatibility of the FOI Act with other legislation. This is an issue which has not been properly addressed in Irish law. There are two problems here.

⁴⁹ Report of the High Level Review Group on the FOI Act, 2003.

First, that of compatibility of FOI with other access regimes such as those found in data protection, environmental information and archives legislation. The second problem is that of compatibility with legislation, the aims of which may conflict with FOI, such as data protection and official secrets legislation. Very little effort has been made to develop a coherent statutory code for access to public sector information. The result is confusion and contradiction.

A related area in which Irish law is inadequate is that of setting standards for records management. While the FOI Act contains a provision⁵⁰ which gives the Minister the power to make regulations regarding records management, this has never been exercised. While some limited provisions regarding records management is to be found in the Archives Act, this Act does not apply to all public bodies. In fact, very few of the bodies to which the FOI has been extended in the past year or two are governed by the Archives legislation. The inadequacy of Irish law in this area has in fact been highlighted by the introduction of the FOI Act since the operation of FOI legislation depends on records being

‘properly created, properly indexed and filed, readily retrievable, appropriately archived and carefully assessed before destruction to ensure that valuable information is not lost.’⁵¹

On the important issue of the impact on the Irish FOI Act of changes in public sector structures, an effort has been made to address the issue of the availability under FOI of records held by contractors undertaking services for public bodies. Section 6(9) of the Act provides that records in the possession of those providing services for a public body under contract shall be deemed to be held by the public body for the purposes of the FOI Act insofar as they relate to the service and there shall be deemed to be included in the contract a provision that the contractor shall pass on the record to the public body on request. However it is not clear that this provision will suffice to ensure that all relevant records of contractors will be accessible under FOI. In the first place, there is scope for disagreement as to whether the record relates to the service. Secondly, the effectiveness of the provision will depend on the public body ensuring

⁵⁰ s.15(5).

⁵¹ Information Commissioner of Canada, Annual Report, 1999-2000,

that the contract places appropriate record-keeping obligations on the contractor. Even if the contract does contain appropriate record keeping obligations, these may not be whole-heartedly enforced by the public body. Finally, even if the information in question is deemed to come within the scope of the FOI Act, the exemptions may operate to deny access to such information: The requirements of the commercial confidentiality exemption in the Irish Act are very easy to meet. Evidence from overseas suggests that in the context of the contracting out of government services, public bodies have a tendency to defer too readily to arguments against disclosure based on commercial confidentiality.

Another challenge for public sector information law and policy in Ireland is the extent to which public sector information should be made available for exploitation by the public sector. While the FOI Act provides a right of access to information, it does not confer rights on the requester in relation to the use of that information for other purpose and, in particular, for its commercial exploitation. One of the major legal barriers to use of public sector information in Ireland is that of copyright. In Ireland, as in the case of its European neighbours and in contrast to the United States there is copyright in public sector information. The FOI Act expressly provides that the granting of an FOI request shall not be taken as constituting an authorisation or approval of any activity of the requester which would be in breach of copyright. This means that due to copyright restrictions, requesters cannot themselves publish or otherwise exploit information to which they have gained access under FOI.

The issue of commercial use of public sector information was explored in a Green Paper issued by the European Commission in 1999 and activity in this area has culminated in the publication of a proposed Directive on Commercial Use of Public Sector Information⁵². The aim of the Directive is to introduce consistency in the rules for commercial exploitation of public sector information in order to promote the development of information products and services. The Proposed Directive, which was first published in June 2002, seeks to establish a minimum set of rules governing commercial exploitation of documents held by public sector bodies of the member states.

⁵² COM(2003)119.

The interaction between the Irish Act and EU access rules is another area which requires clarification. While the EU stands out from other supranational institutions in terms of seeking to address the issue of transparency in a relatively meaningful way, it has adopted a policy on access which is far from radical and which has the potential to undermine the access regimes of more progressive member states such as Ireland. Problems are most likely to arise in the context of requests for access to community records which are made to Irish public bodies which happen to hold those records. The approach of the Information Commissioner to this question has been that European Community records held by Irish public bodies would not necessarily be exempt from disclosure under the Irish FOI Act even where the Community institution object to the disclosure.⁵³ However the impact of the 2001 Regulation on the granting of access to community documents⁵⁴ has not yet been considered. It provides that where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not ‘jeopardize the attainment of the objectives of this Regulation’. It provides also that Member State may instead refer the request to the institution. The objectives of the Regulation are set out in the Recitals. They include Recital 15 which states that even though it is neither the object nor the effect of the Regulation to amend national legislation on access to documents

‘it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member State, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions’.

It is not clear how this provision will work in practice. Another factor to be taken into account is the 2003 amendment of the Irish FOI Act which provides that the withholding of records concerning international relations is no longer subject to the operation of a harm test.

⁵³ Decision No.98060 Re McAleer and Department of Justice, Equality and Law Reform, 22/6/2000.

⁵⁴ Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents OJ 2001 L 145/43.

Conclusion

While the Irish FOI Act has had a relatively good reception in terms of the level of use of the Act, there has clearly been a certain degree of disquiet at the political level with regard to its operation. The 2003 Amendment represented a significant step back from the Act's original aspirations. Likewise, the Act faces a number of challenges to its operation in the future both in terms of the interpretation of its amended provisions and in terms of its place in the wider context of Irish information law and policy. The new Information Commissioner will likely play the crucial role in meeting these challenges.