



Freedom of Information
The First Decade



Oifig an Choimisinéara Faisnéise
Office of the Information Commissioner

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Introduction

This publication marks ten years of the operation of Freedom of Information (FOI) legislation in Ireland and ten years of the operation of the Office of the Information Commissioner.

Over the past 10 years Irish public bodies have processed 130,000 FOI requests from members of the public, from media people and from business and political interests. On average, 70 per cent of these requests have been granted either in full or in part. My Office has received 5,300 appeals, slightly more than 3 per cent of all FOI requests made, over the past ten years; of these, 4,058 were valid appeals. Of the valid appeals received, approximately 25 per cent (1,015 cases) have been decided or settled in favour of the appellant, either in full or in part; in approximately 41 per cent (1,584) of cases, the public body decision has been affirmed; in the remaining cases, the appeal was either discontinued or withdrawn.

Freedom of information has let the light shine in on many areas of public life over the past decade. In the case of personal information, FOI has been used extensively by individuals to acquire health records, child care records, industrial school records and personnel and job selection records. In terms of knowing what public bodies are doing on our behalf, FOI has been used extensively both by private individuals and by the media to see how public inspectorates

“Catholic bishops have welcomed the new model [of primary school], saying it is no longer realistic for their Church to be almost the sole provider of primary education in Ireland. But the Irish Independent has learned that they have listed a series of demands in private talks with the Department of Education [...] The Church’s demands are set out in a series of documents released under the Freedom of Information Act.”

John Walshe, *Irish Independent*, 25 March 2008

or regulatory bodies are performing - for example, in relation to private nursing homes, child care facilities and schools - or how our key public services are performing - for example, in relation to hospital waiting lists or the prevalence of hospital acquired infections or in the conduct of public procurement procedures. And in relation to developing public policy, FOI has helped shed light on virtually every aspect of public policy making - from taxation policy to regulation of the legal professions, and from pension planning to fisheries policy. One of the most recent FOI-based media stories, at the time of writing, deals with discussions between the Catholic Church and the Department of Education & Science on the issue of governance arrangements in a new model of primary school; it is a mark of how imbedded FOI has become that such records were released, as a matter of course, without resort to external appeal. Another recent FOI release to the media has shed considerable light on the decision of the Minister for Finance



not to increase taxes on alcohol where the Health Service Executive had sought such an increase as part of a wider public health strategy. It is absolutely the case that FOI has drawn public attention to, and has prompted debate on, many issues which prior to 21 April 1998 might have remained largely unknown and un-discussed.

One of the most interesting features of our FOI Act is the potential to access Cabinet records. However, this qualified right is confined to Cabinet records created more than ten years (five years in the original Act) after the commencement of the FOI Act on 21 April 1998. The impact of this provision will become apparent over coming months now that the Act has been in operation for more than ten years.

As regards the work of my own Office, I feel we can be pleased with the contribution it has made, notwithstanding the frustration endured by many appellants whose cases have been seriously, if

“... an Information Commissioner must be an advocate for openness and transparency in government ...this is a necessary element of the job - whether or not it is reflected in whatever statutory or other instrument establishes the office. It seems to me that the use of the term ‘Information Commissioner’ necessarily implies an advocacy role in support of openness and transparency. In this sense, the use of the term “Information Commissioner” carries the openness and transparency baggage with it just as much as the use of the term “Judge” carries with it a necessary commitment to seeing that justice is done.”

Emily O’Reilly, address to International Conference of Information Commissioners, Wellington, New Zealand, 28 November 2007

unavoidably, delayed. Unfortunately, virtually from the outset in 1998, appeal numbers exceeded staff capacity and it has taken quite some time to recover from the case backlogs which built up in the early years.

Later in this publication we deal in some detail with the way in which Information Commissioner decisions have promoted major changes of practice by public bodies. My Office’s appeal decisions have, I believe, set important precedents for FOI decision makers generally and have provided guidance and clarity in areas which are inevitably complex and difficult - areas such as confidence, legal privilege, privacy and state security and intelligence. Just as important is the fact that, arising from the work of my Office, some public bodies are now publishing as a matter of course information which hitherto

would have remained secret or, at best, would have required a specific FOI request in order to acquire it (for example, nursing home and school inspection reports).

CELEBRATING FOI?

I hesitate to use the term “celebrate” in relation to the past 10 years of FOI in Ireland; not because FOI has been ineffective or without impact but because “celebrate” may carry an inference of unbridled joy and acceptance and an accompanying reluctance to take a cold, hard look at what has been achieved in these 10 years. I am satisfied that FOI, and the related work done by my Office, has contributed significantly to our polity over 10 years. But I am realistic enough to know that there exists a spectrum of opinion on the usefulness and desirability of FOI and the assess-

ment to be made depends on where one sits on that spectrum. I think it is very important to recognise that there are different views on, and attitudes to, FOI in Ireland; to pretend that there is a consensus is unhealthy and unhelpful.

At the same time it is right that we should celebrate, 10 years later, the coming into effect of an Act which was truly radical in its consequences. In 1997-1998, we were among quite a small band of countries - no more than 20 or so - which had national FOI laws; now there are more than 70 countries with national FOI laws (not to mention many large countries which have FOI laws also at state or provincial level). This recent proliferation of FOI laws serves to remind us that the Oireachtas decision on FOI, more than 10 years ago, was in fact a brave and progressive decision.

The past 10 years have, I believe, clarified one fundamental point: that is, that FOI is undeniably political in its impact. The fact that FOI has been the subject of political controversy since the legislation was amended in 2003 should come as no surprise. There was an apparent political consensus within the Oireachtas in 1996-1997 on the need for FOI legislation; indeed, the then Opposition argued that the legislation as initially enacted was too weak. In government since June 1997, the former Opposition then took the view that the legislation was too strong and required to be cur-

“I was there, as the White House press secretary, when President Lyndon Johnson signed the [FOI] act on July 4, 1966; signed it with language that was almost lyrical - ‘With a deep sense of pride that the United States is an open society in which the people’s right to know is cherished and guarded.’

Well, yes, but I knew that LBJ had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets and opening government files; hated them challenging the official view of reality. He dug in his heels and even threatened to pocket veto the bill after it reached the White House. ... He relented and signed “the damned thing,” as he called it. ...He signed it, and then went out to claim credit for it.”

Bill Moyers, former White House Press Secretary, Address to National Security Archive, 9 December 2005

tailed. This resulted in the FOI (Amendment) Act of 2003. The international experience with FOI legislation is that its cohabitation with government is generally uneasy. With an agenda to “keep government honest”, to ensure political accountability and to discourage corruption, it is easy to see that proponents of FOI may be written off by some in government (including some public servants) as zealots. Furthermore, in practice FOI is irksome and time consuming; FOI-released records sometimes expose government to a level of probing and investigation which is unwelcome or even embarrassing. There is no reason to believe that uneasiness with FOI (to put it mildly) is the pre-

serve of any one political party; rather, parties in power, whatever their complexion, are likely to be cautious in their real attitude to freedom of information. It is also important to recognise the extent to which FOI impacts on the administration and, equally, to recognise the extent to which senior civil servants in particular can influence governmental attitudes to freedom of information.

On a few occasions I have suggested publicly that there is a need for an honest and adult debate on FOI in Ireland. To have such a debate it is essential to recognise realities and to avoid posturing. Sometimes those in government are reluctant to come clean on their real



Kevin Murphy
Ireland’s First Information Commissioner
1998-2003

feelings about FOI as the well-known case of US President Lyndon B. Johnson illustrates. In 1966 President Johnson signed the FOI Act into law saying: “... a democracy works best when the people have all the information that the security of the Nation permits.” Privately, as we now know, and contrary to the public posture, LBJ was very hostile to FOI and had to be coerced almost into signing the FOI Act into law.

My predecessor Kevin Murphy, in reflecting on his period as Commissioner, has spoken of the “extraordinary change in the Government’s attitude to FOI which resulted in the Freedom of Information

“...I believe that the main reason for bringing in the amendments was to protect Ministerial decisions and more especially the process of making those decisions, from public scrutiny. The great political slogan of the 1990s - Openness, Transparency and Accountability - had become nothing but a shibboleth.”

Kevin Murphy, (former Information Commissioner), in *Freedom of Information: Law and Practice*, First Law, 2006

“History has shown that the care and nurturing of the [FOI] Act falls largely to Senators and MPs who are not in Cabinet. That is understandable. Governments of all political stripes find it a challenge to wield power (and keep power) without keeping secrets - or, at least, without maintaining control over the timing and ‘spin’ of information disclosures.”

Annual Report 2006-2007, Canadian Information Commissioner

(Amendment) Act 2003”; he concluded that this change of view, coming from a government which in opposition had argued that the FOI Act 1997 was not strong enough, could only mean that the government had stepped back from the ideal of open government. This is, by any reckoning, a most worrying assessment: coming from someone of the stature and experience of Kevin Murphy (who had decades of experience at the highest levels of government), it deserves very serious consideration.

For my own part I am aware of a view that, as a statutory office holder, I should not engage in public discussion on FOI matters in a manner which might be perceived as critical of, or at odds with, the Government. I think this view is based on a mis-understanding. In almost all jurisdictions which have an Information Commissioner (or equivalent) as part of its FOI infrastructure, there is an implicit understanding that the Commissioner’s functions include the promotion of transparency and openness in government and that the

Commissioner will necessarily engage in public debate, and engage with Parliament, whenever these matters arise. My reporting relationship is with the Oireachtas and, given that decisions on FOI legislation are ultimately a matter for the Oireachtas, it would be remarkable if I declined to offer my views to it. As I understand it, I am charged by the Oireachtas to (amongst other things) champion the cause of FOI and to seek to ensure that our FOI regime actually achieves its objectives. Sometimes this may involve disagreement with government. Ultimately, given the nature of our governmental arrangements, the Oireachtas will generally reflect the views of government; but so be it.

I am sure that FOI has played, and continues to play, a vital role in our democracy. Furthermore, I am sure that FOI is here to stay. At the same time there is a real danger of complacency regarding the value of FOI as part of that wider set of arrangements which are meant to promote and preserve an open, liberal

and democratic society. It strikes me that we are not particularly good in Ireland in articulating views on such issues and that, where expressed at all, it is done “for the record” or almost as a platitude. It is as if, in the world of *realpolitik*, the articulation of views on how to sustain an open, liberal and democratic society is, at best, academic or, at worst, simply irrelevant. At a time when we are facing into a period of further change, both nationally and globally, it may be wise to reflect on British Prime Minister Gordon Brown’s recent “Liberty” speech (25 October 2007) where he observed:

“In a world of increasingly rapid change and multiplying challenges - facing for example a terrorist threat or a challenge to our tolerance - democracies must be able to bring people together, mark out common ground, and energise the will and resources of all. It is the open society that responds best to new challenges ...”.

I think it is only fair to declare that, from my perspective, our current amended FOI legislation marks a step backwards from the commitment to transparency and accountability, and the promotion of open government and an open society, which were the hallmarks of the FOI Act 1997. There is no reason to believe that the concerns which first prompted our FOI legislation are any less relevant today than they were ten years ago.

It is for the wider political process, in which we all have a role to play (and not just our elected representatives), to determine how our FOI legislation will develop in the years ahead. This publication, I hope, is a contribution to that wider process.

A handwritten signature in black ink, appearing to read 'Emily O'Reilly', with a long horizontal flourish extending from the end of the name.

Emily O'Reilly
INFORMATION COMMISSIONER
MAY 2008

“If it wasn't for the Freedom of Information Act, the State might now be locked into a contract to build a national stadium and a range of other sports facilities on the 500 acre Abbotstown site in North Dublin, exposing taxpayers to a bill exceeding euro 700 million...we know all of this, and much more, thanks to the Department [of Finance] supplying two boxes of documents in response to a request in January 2001 from the Irish Times under the Freedom of Information Act.”

Frank McDonald, *Irish Times* 12 March 2003.

Chapter 1:

Freedom of Information in Ireland

“Because liberty cannot flourish in the darkness, our rights and freedoms are protected by the daylight of public scrutiny as much as by the decisions of Parliament or independent judges.”

Gordon Brown, UK Prime Minister

25 October 2007 - Speech on Liberty, Westminster University

Freedom of Information in Ireland

Why FOI?

The rationale for FOI is essentially the same in most of the 70 or so countries which now have FOI laws. On the one hand, FOI reflects a rights-based approach where the legislation gives practical and legal effect to the people's democratic "right to know" what is being done by government in the people's name. On the other hand, FOI is generally seen as a governmental hygiene measure, one designed to keep government honest and to discourage corruption.

A clear statement of the value of FOI is contained in the Explanatory Report accompanying the Council of Europe's **Draft European Convention on Access to Official Documents:**

"Transparency of public authorities is a key feature of good governance and an indicator of whether or not a society is genuinely democratic and pluralist, opposed to all forms of corruption, capable of criticising those who govern it, and open to enlightened participation of citizens in matters of public interest. The right of access to official documents is also essential to the self-development of people and to the exercise of fundamental human rights. It also strengthens public authorities legitimacy in the eyes of the public, and its confidence in them. Considering this, national legal systems should recognise and properly enforce a right of access for everyone to official doc -

"The Bill I am presenting is an attempt to restore the confidence of citizens through measures which would improve a fundamental civil right. The term 'fundamental civil right' is not exaggerated in this context. As it stands, people's access to information which is held in public institutions is seen very much as a privilege, and it is that perception which breeds public suspicion and which is probably responsible for a good deal of the cynicism that exists in this State."

Senator Dick Roche, Seanad Éireann, 7 June 1995 - speaking on his Private Member's Freedom of Information Bill, 1995

uments produced or held by the public authorities."

Typically, the objectives of a well functioning FOI regime include:

- **helping to keep government honest and to discourage corruption**
- **helping to hold government accountable to the people**
- **helping to educate the public about government**
- **helping to improve the quality of decision making by public bodies**
- **acting as a check on the exercise of power by government and its agencies**
- **promoting citizen participation.**

In achieving these objectives, FOI regimes recognise that not all records of

public bodies are necessarily releasable; in fact, in some instances the release of records may be contra-indicated. Overall, the unifying theme in most FOI regimes is that records should be released where to do so best serves the public interest. Generally, there is a rebuttable presumption that release does best serve the public interest; though the typical FOI Act identifies scenarios (exemptions) in which that presumption may be rebutted. These exemptions in fact generally represent public interest considerations in their own right - for example, the protection of privacy, of confidentiality, of state security, of international relations and of business are all public interest categories. But in many cases these exemptions are subject to a wider public interest balancing test. In effect, the operation of FOI frequently involves a contest between competing public interest considerations - for example, the right to confidentiality versus the right to know how public money is spent - and the decision maker

“There is no doubt that the evidence thus far already suggests that dealing with FOI requests takes up a considerable amount of staff time. On occasions, the requests are of a wide-ranging and detailed nature that requires many hours of research, and are sent in by lazy journalists, who will not do any work, but who think that we should pay them and give them the information that they want. [...] If, in collating evidence on how the current procedures are working, the Departments discover that reform is needed - and I think they will - it will have to take place. The civil servants are not employed full-time to pursue the requests of enquiring minds. They are supposed to be serving the Departments that they are called upon to serve, and helping those who run those Departments.”

Dr. Ian Paisley, First Minister, Northern Ireland Assembly, 8 October 2007

seeks to strike a balance between these competing public interests. Properly operated, FOI decisions should always be in the overall public interest.

In many cases, FOI is introduced because public trust in government has decreased to such an extent that some antidote is needed; and FOI is often seen as that antidote. In the US, its FOI Act of 1966 was enacted in the context of the failure of government to account to Congress for the conduct of the Vietnam War. In Ireland, perhaps the single biggest contributory factor in the drive for FOI legislation was the conclusion of the Beef Tribunal, which made some quite unsavoury findings about the behaviour of certain Ministers and their Departments in relation to the beef industry - favourable treatment given to a particular operator at the expense of other operators and, more particularly, at the expense of the taxpayer.

Having weathered the immediate storm, of course, the temptation is for governments to dismantle or undermine the FOI edifice so recently created. In practical terms, and given the extent to which the FOI concept has become part of the democratic currency both at country level and within international governmental bodies (e.g. within the UN and its agencies, the Council of Europe and the EU institutions), rescinding FOI laws is not a realistic option. But there are many other ways

in which governments can, and do, effectively undermine the operation of FOI: for example, by amending FOI laws in a manner which reduces requesters rights; by imposing burdensome fees; by failing to insist that public bodies make decisions within the prescribed time limits. Even in the case of long established FOI regimes, Canada and Australia for instance, there appears to be an on-going tension between FOI and government. In Northern Ireland, where the UK FOI Act has been in full operation since 2005, there are rumblings already of possible restrictions. It is precisely because of the temptation to row back on FOI that there is a need for a “champion”, outside of government, to defend and promote FOI principles.

Background to Irish FOI Act

Interestingly, one of the earliest supporters of FOI legislation in Ireland was the Association of Higher Civil Servants (AHCS), the union representing the key grades of Principal Officer and Assistant Principal Officer in the Irish civil service. At its annual conference for 1983, the AHCS chairman is reported to have supported the enactment of a Public Information Act which “might dispel the mystery and secrecy which often surrounded the working of the civil service and would bring a new openness into government”; he is also reported to have suggested that such legislation “would function as a brake against any

excess or improper seeking of personal gain or advantage” and, furthermore, would protect civil servants against improper pressure exerted by Ministers. (Source: Irish Times, 30 May 1983). At about the same time, also, the Irish Association of Civil Liberties and the Irish Council for Civil Liberties began to take an interest in the possibility of having an FOI Act for Ireland.

In June 1985 the Oireachtas Joint Committee on Legislation, at the proposal of Alan Shatter TD, agreed to seek submissions on the desirability of FOI legislation in Ireland. While this initiative appears not to have advanced matters greatly, in October 1985 independent Senator Brendan Ryan introduced a private member’s Bill on Freedom of Information. At the time, Senator Ryan confessed that his hope in introducing the Bill (which did not get past second stage in the Seanad) was that it might push “government in a direction in which it might otherwise be reluctant to move”. In 1992 the incoming Fianna Fáil/Labour Party government promised, in its agreed Programme for Government, to “consider” FOI legislation; and recently appointed Taoiseach, Albert Reynolds, promised in an interview to “let in the light” on Irish society. Indeed, this very phrase provided the call to arms for the *Let in the Light Campaign*, founded in 1993 by (as it described itself) “a disparate, small group of journalists, academics, lawyers and trade unionists” whose objective

“The struggle for freedom of information in Ireland, in all its facets, is a key to the process of exposing humbug and hypocrisy and empowering citizens to create a new society, above all a society in John Major’s words, ‘at ease with itself’. That spirit of change was aptly summed up by Albert Reynolds ... shortly after he was appointed Taoiseach when he promised to ‘let in the light’ on Irish society.”

Let in the Light - Censorship Secrecy and Democracy, Brandon, 1993

was to draw together and focus attention on issues of censorship and secrecy in Irish society. The Campaign was reacting, again in its own words, to the “seemingly never-ending succession of revelations about dubious business practices and golden circles” and described these and other negative issues it identified as “symptoms of a closed society, of a society that didn’t trust its own people to make decisions for itself.” The Campaign saw FOI legislation as an essential component in any solution to the societal and governmental practices which it sought to banish.

By December 1994, when the Rainbow Government of Fine Gael, Labour and Democratic Left took office, its programme included a positive commitment to introduce FOI legislation. This commitment was based on a recognition that “the relationship between Government and the people it serves has been damaged by a lack of openness” and FOI was part of the remedy for this state of affairs. Two years later,

in December 1996, the Rainbow Government’s FOI Bill was published and it was finally enacted in April 1997. In the meantime, in June 1995 then Senator Dick Roche (Fianna Fáil) had introduced a private member’s Freedom of Information Bill to the Seanad which was overtaken by the Government’s Bill. Interestingly, at the time, Senator Roche and others of his party argued that the Government Bill (which became the FOI Act 1997) was more restrictive, and less radical, than his Bill.

It must also be said, though, that senior public servants were arriving at the same conclusion at about the same time. Within the public service there was a

growing realisation that public service reform could be achieved only in a context of greater openness and, above all, of accountability. The Co-ordinating Group of Secretaries General of Government Departments, in its 1996 report *Delivering Better Government*, (which was endorsed by the Government), saw the enactment of a Freedom of Information Act as the key to delivering openness and transparency in Government. It argued that to retain confidence in the institutions of the State there must be a free flow of information between Government and the citizen. The Group saw this information as allowing the State “*to remain relevant in the eyes of the citizen and offering an unprecedented opportunity to enhance Ireland’s democracy*”.

Freedom of Information Act 1997

The 1997 Act was clearly within the mainstream of FOI regimes internationally, as described above. The sponsoring Minister, Eithne Fitzgerald, spoke of the Act as one which “will turn the culture of the Official Secrets Act on its head” and, while respecting the need to pro-

“Open government goes to the heart of a democratic society. Information is power. Freedom of information is about sharing that power. [...] Access to information will be a right, not a privilege.”

Eithne Fitzgerald TD, Minister of State at the Office of Tánaiste, Address to Seminar on Freedom of Information, 24 April 1996.

“[The FOI Bill] is a grave disappointment. It is a minimalist, carefully hedged in Bill which, if interpreted in a certain way will make very little practical difference to the administration of this country. The long list of exemptions and cop-out clauses are so vague and imprecise that they can be interpreted as the bureaucracy wishes. [...] A much more radical approach is needed, otherwise there is a grave danger that, despite this minimalist attempt, secrecy and obfuscation will continue to flourish. Whose interests will be served by that?”

Willie O’Dea TD, Dáil Éireann, 11 March 1997 - speaking on the Freedom of Information Bill, 1996 (which was subsequently enacted).

protect certain sensitive areas, the ultimate decision on whether or not to release a record would be “whether the balance of the public interest lies in disclosure or in withholding the information concerned”. At a philosophical level, Minister Fitzgerald presented FOI in Ireland as being about shifting, permanently, “the balance of power between the citizen and the state.”

Within the media, there was a warm welcome for the new legislation which appeared to answer many of the requirements identified by the *Let in the Light Campaign* and other FOI lobbyists. Writing when the FOI Bill was published, Fintan O’Toole of *The Irish Times* concluded: “it looks as if something genuinely radical is about to happen” while going on to comment: “*The pane of glass behind which John Bruton promised to run the country may remain somewhat misty, but at least the steel shutters in front of it seem to be coming up.*”

The 1997 Act was predicated unequivocally on the notion of what best serves the public interest. All of the objectives of the FOI regime - deterring corruption, promoting citizen involvement,

ensuring governmental transparency and accountability - are public interest categories. The Long Title to the Act, which is generally seen as the equivalent of a purposes clause, provides that access to information is to be given “TO THE GREATEST EXTENT POSSIBLE CONSISTENT WITH THE PUBLIC INTEREST AND THE RIGHT TO PRIVACY”. Several of the exemptions in the Act - sections 20, 21, 26, 27, 28, 30 and 31 - are themselves subject to a public interest override. In practice, this means that in the majority of cases where a request falls to be refused on the basis of a particular exemption, there is a requirement to consider whether that exemption should be set aside in the public interest. Indeed, while it is perceived as an Act which creates a right to information for individuals, and this is the case, in many instances, this individual right is vindicated only because to do so serves the public interest. In fact, in these cases it is the public interest primarily which is being served; the individual right is vindicated only because to do so also serves the public interest.

Our FOI Act does not define the term

“public interest” and in this it is in line with most other (if not all) FOI Acts from other jurisdictions. The Queensland FOI Act of 1992 - on which our Act draws to a considerable extent - does not define the public interest but it does give some more guidance than does our own Act. Section 5 of the Queensland Act specifically recognises “*that in a free and democratic society... the public interest is served by promoting open discussion of public affairs and enhancing government’s accountability...*”. This represents only one facet of the public interest. However, the concept has been developed on a pragmatic basis in many of the decisions of the Information Commissioner over the past ten years. These decisions make clear that the overall public interest is not necessarily to be equated with the interests of government or of any particular public body.

FOI - Early Years

The FOI Act was enacted in April 1997 with an in-built provision for its commencement one year following the date of enactment. By the date of its commencement on 21 April 1998, there had been a change of government; happily, the new Fianna Fáil/PD Government appeared to embrace the launch of FOI enthusiastically and the “open government” agenda remained on track. Speaking on commencement day, Taoiseach Bertie Ahern made clear that

“The Government must go about its work without excess or extravagance and as transparently as if it were working behind a pane of glass. The same holds for national policy.”

John Bruton TD, Taoiseach - speaking in Dáil Éireann, 15 December 1994

“Government institutions must command the full confidence and support of the people they serve. Otherwise democracy loses out. Members of the public must know that they are seen and respected as stakeholders in government bodies ... All of us have seen the endless problems which arise where the public perceive that government institutions are not accountable and operating instead to their own rules and priorities.”

Bertie Ahern TD, Taoiseach - speaking on 21 April 1998 to mark the commencement of the FOI Act 1997

his Government subscribed to those principles which FOI seeks to respect and have applied.

In the lead-in period (April 1997 - April 1998), a great deal of preparatory work was undertaken by Departments both individually and collectively. Each Department established its own internal FOI Working Group and, at the wider level, an Inter-Departmental Working Group had been in place since July 1996. The FOI Act, at section 15(5), places the responsibility on the Minister for Finance to ensure that public bodies are equipped to operate FOI in terms of having properly trained staff and appropriate organisational arrangements generally. In June 1997 the FOI Central Policy Unit (CPU) was established within the Department of Finance with a brief to assist, advise and oversee arrangements for the introduction and operation of the FOI Act. A programme of training for all Departments, both familiarisation training and decision-making training, was organised and delivered by CPU in conjunction with the Centre for Management and Organisation Development. Subsequently, similar preparatory work and training was undertaken with the local authorities and health boards in advance of their becoming subject to FOI in October 1998. From the outset, also, consultation on the operation of FOI and monitoring of actual performance were

addressed with the establishment by CPU of a Citizens Advisory Group and a Business Advisory Group. And for the public bodies themselves, FOI Networks were established on a sectoral basis. On any reckoning the preparations for, and monitoring of, FOI in the early years were most impressive.

The First Anniversary of FOI in Ireland was marked with a function in Dublin Castle hosted by Martin Cullen TD, Minister of State at the Department of Finance. In his remarks, Minister Cullen spoke enthusiastically about FOI and, while recognising that it presents (and will continue to present) challenges for government, said that experience in the first year showed that FOI was serving to:

- **uphold and strengthen individual citizens’ rights in their dealings with the State,**
- **deepen democracy by providing access to information on decision making and administrative processes,**
- **support and promote public service reform.**

Minister Cullen pointed out that, even after one year, FOI had brought about significant changes in practices, in the direction of greater openness, on the part of public bodies. Interestingly,

these changes were about anticipating what information or records people would want to have and providing them without the need to rely on the FOI Act. Examples here included publication of the Budget-related Tax Strategy Papers, access to Leaving Certificate Examination scripts, and access to submissions made under public consultation processes. It is worth saying that, in the meantime, this type of approach has been maintained; to take a very recent example, the Commission on Taxation has invited submissions from interested parties on the basis that submissions received are likely to be published on the Commission’s website.

This rather positive assessment of FOI was one shared generally by users and commentators alike. Writing in his 2001 Annual Report, with four years of FOI experience under his belt, Information Commissioner Kevin Murphy asked: “*Can it truthfully be said that the introduction of the Act has led to a better understanding of the business of government? Have we now a public service which is more accountable, more open in its dealings with the citizen and more willing to explain its actions and activities?*” The Commissioner responded himself, saying that “the answer to all of these questions is yes, albeit a qualified yes.” The Commissioner was satisfied that “*citizens are now better informed than ever before about how government works and*

“This Bill does not seek to amend all areas of the system or those which pertain to the media. It examines what is enshrined in the Constitution with regard to the collective responsibility of Cabinet to deliver the process of government. ... There are a few other technical areas which also fall to be considered. The principles involved are features of legislation world-wide and I see nothing wrong with what we are doing. [...] There were no changes whatsoever in the other aspects of the Act because the main principles of the Act are not being changed. We were looking at Cabinet collective responsibility and deliberative process because that process has been damaged in the past five years. We are trying to protect that process. It is a constitutional process and it should be protected.”

Bertie Ahern TD, Taoiseach, Dáil Éireann, 11 March 2003 - speaking on the Freedom of Information (Amendment) Bill 2003

how decisions are made” and that the culture within public bodies was changing “to one where they are more comfortable in dealing openly with their clients and citizens in terms of explaining their actions and activities.” His reason for giving a “qualified yes” to his own question was that the pace of change, and of FOI compliance, was uneven. The Commissioner was concerned that some public bodies were reluctant to embrace change while others, which had been enthusiastic in their approach, might “now be beginning to feel symptoms of FOI fatigue in terms of resources”. What was clear from the Commissioner’s assessment was that, while a very good start had been made with FOI in Ireland, it was vital that this progress be sustained and extended.

The radical nature of our FOI legislation was recognised at an early stage by the Courts. Decisions of the Information Commissioner carry a right of appeal, on a point of law, to the High Court; and in their judgments on these appeals, judges of the High Court have on occasion reflected on the nature and significance of the FOI legislation. One of the first to do so was Mr. Justice McKechnie, in *Deely v. The Information Commissioner* (2001) IEHC 91, where he commented in relation to the FOI Act that “*its passing, it is no exaggeration to say, affected in a most profound way, access by members of the public to records held*

by public bodies...”; he went on to say that the “*purpose of its enactment was to create accountability and transparency and this to an extent not heretofore contemplated let alone available to the general public.*” Mr. Justice McKechnie further described FOI as “*on any view, a piece of legislation independent in existence, forceful in its aim and liberal in outlook and philosophy.*”

Subsequently, the Supreme Court endorsed these views generally with Fennelly J. in particular commenting [in his minority judgment in *Sheedy v. The Information Commissioner & Ors.* (2005) IESC 35]: “*the passing of the Freedom of information Act constituted a legislative development of major significance ...[b]y it, the Oireachtas took a considered and deliberate step which dramatically alter[ed] the administrative assumptions and culture of centuries ... replac[ing] the presumption of secrecy with one of openness ...[and] open[ing] up the workings of government and administration to scrutiny*”.

Not surprisingly, the Information Commissioner was called on to adjudicate on many sensitive issues during the initial few years of FOI in Ireland. Some of these issues, and the impact of the Commissioner’s decisions in relation to them, are dealt with in some detail later in this publication.

Freedom of Information (Amendment) Act 2003

Undoubtedly, the amendment of the FOI Act in 2003 represented a step back from the commitment to openness, transparency and accountability which was the key factor in the enactment of the 1997 Act. Regrettably, also, the debate surrounding the Amendment Act and subsequently has become polarised along party political lines. From a situation in 1995-1996 where all of the parties supported it and the debate centred on whose proposed legislation best served the cause of FOI, the debate since 2003 has been divisive and acrimonious.

The Amendment Act was represented, essentially, as the implementation of the recommendations of a High Level Review Group; though in reality the amendments actually made went beyond what this Group recommended. The Review Group consisted of four Secretaries General under the chairmanship of the Secretary General to the Government and, remarkably, conducted its review in secret; it did not seek the views of the public, of any of the parties with a particular interest (such as the media) nor of the Information Commissioner. The review process was the very antithesis of the process which preceded the drafting of the original legislation. The Group members “*drew upon their own experiences and experiences of others of which*

they were aware, including that of their respective Ministers.” The primary urge to amend arose from the fact that, with effect from 21 April 2003, some Cabinet records would have become potentially available under the FOI Act. However, the Amendment Act covered a number of other matters also, pulling back on access to Government records while remaining relatively unchanged in relation to access to personal information.

In the period March-April 2003 when the Amendment Bill was being dealt with in the Dáil and Seanad, the proposed amendments drew a great deal of reaction both inside and outside of the Houses of the Oireachtas. The Amendment Bill was the subject of discussion over several days at the Joint Oireachtas Committee on Finance and the Public Service with written and oral submissions being made by a wide range of bodies, including by the Information Commissioner, the National Union of Journalists, the National Newspapers of Ireland group, the One in Four organisation, the Irish Council for Civil Liberties and others. Virtually all of the external submissions were, to a greater or lesser extent, critical of the contents of the Amendment Bill. Following these deliberations, the Joint Committee sent a statement to the Dáil saying significant changes to the Bill would be required and asking for additional time in which to consider it “*as important areas have been*

“I suggest that we lay a report before the Dáil as quickly as possible saying that the High Level Group has appeared before the committee, has acknowledged that its input into the overall legislation was minor, has endorsed the Information Commissioner's presentation and has supported him in what he said. The report should also comment on the NUJ, the newspapers' association and the other organisations which appeared today”

Seán Fleming TD, Chairman, Joint Committee on Finance and the Public Service, 19 March 2003 - following the Joint Committee's consideration of the Freedom of Information (Amendment) Bill 2003

identified in the legislation which the Joint Committee agrees will need further significant amendment”. However, the additional time sought did not materialise and, with the exception of some provisions in relation to personal information, the Bill was enacted.

The amendments which have attracted most attention and comment are those which have had the effect of limiting the potential for public access to records relating to the thought process in and around government actions.

The key changes made here included:

- **the potential right of access to records of Government was restricted to those records created since the commencement of the FOI Act on 21 April 1998 but which are at least 10 years old (five years in the original Act);**

- **all Government records (other than those described immediately above) shall be refused as opposed to *may be* refused;**
- **communications between Ministers relating to a matter before Government are now fully protected; previously, these were potentially releasable provided they did not reveal a statement made at a Government meeting;**
- **the protection given to advice for the purpose of Government business was broadened in that the previous exemption required that the record contained information for use *solely* for the purpose of Government business at a meeting of the Government whereas now it is sufficient that the record be used primarily for this purpose;**

- where appropriate, a committee of officials may be deemed to be “the Government” for the purposes of the Act (the definition of “officials” includes civil servants and special advisers).

Significant changes were made also in the case of records which capture the advice, opinions, consultations and negotiations leading up to decision making by public bodies. The key changes in this area are:

- where appropriate, the Secretary General of a Department of State, may certify that particular records form part of the deliberative process of a Government Department and this certification effectively puts these records beyond the scope of FOI;
- records can be protected from release if they relate to the deliberations of *any* public body as opposed to *the* public body the subject of the request.

Very significant changes were made in the case of records relating to state security, defence and international relations. There is now a mandatory class exemption for records which concern security, defence or international relations of the State or matters relating to Northern Ireland; this eliminates the need for a public body to identify a specific harm caused by release of the

particular record. For example, a record containing a communication between a Minister and a diplomatic or consular post must now be refused without reference to the effect (if any) of its release.

Finally, the change with most repercussions for the average user of the FOI Act was the provision enabling the Minister for Finance to prescribe fees for the making of a request for access to non-personal records and for any subsequent application for internal review and or review by the Information Commissioner. Under Regulations made in July 2003 a range of “up front” fees was introduced:

- E15 for a request
- E75 for an internal review application, and
- E150 for an application to the Information Commissioner to review the decision of a public body.

The impact of the “up front” fees, in particular, has been very significant. As the Table below shows, there has been a major drop in FOI usage since 2003 and this is primarily attributable to the imposition of fees:

TEN YEARS OF FOI: 1998-2007

Year	Requests - to Public Bodies	Internal Review Applications - to Public Bodies	Appeals Accepted by Information Commissioner - excluding invalids
1998	3,699	458	179
1999	11,531	1,107	443
2000	13,705	919	422
2001	15,428	1,274	387
2002	17,196	1,755	585
2003	18,443	1,580	922
2004	12,597	783	333
2005	14,615	581	285
2006	11,804	706	254
2007	10,704	592	248
TOTAL	129,722	9,755	4,058

In particular, the imposition of fees has impacted negatively on the use of FOI by journalists. In the early years of FOI, media requests typically accounted for 15 per cent of all requests made; the highest level of media usage was in 2001 when 20 per cent of FOI requests came from journalists. Following the introduction of fees in July 2003, the percentage of FOI requests coming from journalists in 2004 dropped to 6.9 per cent; to 6.5 per cent in 2005; up to 10 per cent in 2006; and down to 8 per cent in 2007. In terms of actual figures, journalists made 3,123 FOI requests in 2001 but made only 885 requests in 2007. However, FOI remains a significant media source and our newspapers, radio and TV regularly carry stories/pieces based on FOI-acquired information.

In 2005, two years following their introduction, the Joint Oireachtas Committee on Finance and the Public Service considered the impact of fees on the operation of the FOI Act. The Committee took the view that the fee for an appeal to the Commissioner is “excessive” and, in any event, recommended that the fee be refunded where the appeal is successful. The Committee wrote to the Minister for Finance seek-

“I have been requested by the Joint Committee to advise you that the Joint Committee during a discussion subsequent to its meeting on the Annual Report of the Information Commissioner 2004 on 13th July, 2005, agreed unanimously that the cost of instigating a Freedom of Information denial appeal to the Information Commissioner was excessive. In particular, where such an appeal was successful, the fee should be refunded. The Joint Committee agreed that I ask that you have the matter addressed by way of legislation at the first available opportunity.”

Seán Fleming TD, Chairman, Joint Committee on Finance and the Public Service - letter of 22 September 2005 to Brian Cowen TD, Minister for Finance

ing to have “the matter addressed by way of legislation at the first available opportunity”. At the time of writing, almost three years later, the FOI fees regime remains unchanged.

Interestingly, the UK Government in 2007 proposed to use cost restrictions as a device to “ration” FOI usage but, in the end, decided against such an approach. As Prime Minister Gordon Brown explained on 25 October 2007:

“When anything is provided without cost, it does risk being open to abuse. However, the Government does not believe that more restrictive rules on cost limits of FoI requests are the way forward. ... We do

this [drop restrictions proposal] because of the risk that such proposals might have placed unacceptable barriers between the people and public information. Public Information does not belong to Government, it belongs to the public on whose behalf government is conducted. Wherever possible that should be the guiding principle behind the implementation of our Freedom of Information Act.”

Chapter 2:

Freedom of Information Makes a Difference...

“It is clear that any right of privacy in this area [TD’s and Senators’ expenses] has to be greatly circumscribed by one essential component of the public good viz. accountability for the use of public funds in a democracy.

There are existing mechanisms designed to ensure accountability in relation to the expenditure of public funds ... On a general level, I do not accept that the existence of current safeguards in relation to public expenditure means that there is no public interest in creating further safeguards. The very existence of secrecy carries with it the scope for abuse. In contrast, openness in relation to public expenditure is an important additional safeguard against abuses of all kind. I consider that the public interest in openness about public expenditure is of very great significance.”

Freedom of Information Makes a Difference...

At an academic level, it is easy to see that FOI is intended to promote openness, transparency and accountability (OTA) in government. But to give real life to OTA, it is instructive to look at hard everyday examples of how FOI, supported by the decisions of the Information Commissioner, has actually made OTA more of a reality than, perhaps, many people will realise. For some, FOI has brought about a very belated degree of openness: since 1998 several thousand former industrial school inmates have used FOI (and, where necessary, the right of appeal to the Information Commissioner) to access the Department of Education's records of their institutionalisation. As regards accountability, these former inmates have been able to use their FOI-acquired records to support their cases to the Commission to Inquire into Childhood Abuse and to the Residential Institutions Redress Board. Without proof of having been in an industrial school, which the FOI Act helped provide, many of these people would not have been able to take a case to the Redress Board.

In the case of the examples set out in this chapter, it is worth considering whether the greater degree of OTA they disclose could ever have come about were it not for the existence of FOI and of decisions under the Act since 1998. Where appropriate, the examples cited below are accompanied by a reference to a relevant Information Commissioner

“Hundreds of former inmates of the [industrial school] system have availed of their rights under the 1997 Freedom of Information Act, and are now demanding access to any records which the Department [of Education] holds on their own individual cases.”

Mary Raftery & Eoin O'Sullivan, *Suffer the Little Children - The Inside Story of Ireland's Industrial Schools*, New Island, 1999 [p.330]

decision; in each case, the decision is published on the Information Commissioner's website <www.oic.gov.ie>.

Public Spending

Decisions of the Information Commissioner have played a major role in gaining acceptance for the fact that wherever public money is spent there must be the greatest degree possible of openness and accountability regarding: how much was spent, for what purpose, based on which procedures and with which recipients. While the public audit system, principally the Comptroller & Auditor General, may provide a very worthwhile assurance in relation to the monitoring of how public money is disbursed, the Information Commissioner from an early stage has taken the view that release of public spending details under FOI is very desirable; the fact that spending may be audited does not mean that direct provision of information, under FOI, is not also highly desirable.

Oireachtas Members' Expenses - Case No. 99168

In 1999 the Information Commissioner overturned the decision of the Office of the Houses of the Oireachtas (the Office) and directed the release of the total expenses paid to each member of the Oireachtas. In its initial decision, the Office had released details of certain fixed expense items (e.g. secretarial assistance costs) but refused to release details of other variable expense items (e.g. official travel expenses, Oireachtas attendance allowances, mobile phone expenses, constituency telephone allowance and constituency office grants). The Office refused to release details of these expenses in a format which would identify the precise level of expense claimed by individual Oireachtas members; this was on the basis that such details constituted the personal information of the individual members and that the public interest was best served by protecting the privacy of the members. The Commissioner took the view that the public interest in ensuring accountability in the spending

of public funds greatly outweighed any right to privacy which Oireachtas members might have in relation to these claimed expenses.

As a result of the Information Commissioner's decision, the Office (now the Houses of the Oireachtas Commission) has released such expense details whenever sought under FOI; and it is now relatively standard practice that such details are published in the media as a consequence. However, the Houses of the Oireachtas Commission has not yet taken the next logical step of publishing such details, as a matter of course, on its website. At its inaugural meeting on 2 February 2006 the Commission "unanimously agreed in principle to the publication of members' expense details on a regular basis". At its second meeting, on 23 February 2006, the Commission further decided that expense details should be published on its website for each parliamentary session (three times annually). However, at its third meeting (23 March 2006) the Commission "decided not to proceed with the prototype" developed and it appears the matter has not been progressed since.

In 2005, his first year of operation, the Scottish Information Commissioner dealt with a similar issue in relation to the travel expenses of an individual Member of the Scottish Parliament (MSP); while the MSP's travel expenses generally were released under FOI,

"Unlike in Ireland, where details of TDs' expenses are regularly revealed under the Freedom of Information Act, in Brussels the authorities refuse to detail the public money spent by MEPs. Last week, the EU ombudsman ... renewed his call on the parliament to publish MEPs' expenses, insisting it would boost democracy in the EU. But a bureau of 15 senior MEPs wrote to him last week rejecting his recommendation. They argued in a letter that revealing their expenses could infringe the privacy of MEPs' assistants, and publishing details of travel expenses could enable people to draw conclusions 'as to the political activity of the member as well as his/her sources of information'."

Jamie Smyth, *Irish Times*, 11 March 2008

details of taxi expenses were withheld. The Scottish Commissioner directed the release of the withheld taxi expenses and the particular MSP resigned subsequently because of his having claimed expenses incurred for party business as opposed to constituency business. The Parliament then adopted the practice of publishing MSP expenses on its website and this, it is reported, has had the effect of dramatically reducing the level of expenses claimed.

The release under the UK's FOI Act of the expense claims of Westminster MPs has been proving somewhat controversial. The UK Information Commissioner has made a number of decisions in this area in favour of requesters. One of these decisions, dealing with details of claims (under the heading of Additional Costs Allowances) made by a number of MPs, was appealed to the UK's

Information Tribunal by the House of Commons. The Information Tribunal ordered the release of the details sought and it appears the House of Commons proposed to appeal this decision to the High Court. At the time of writing, it appears that the appeal to the High Court will not go ahead and that, in effect, the principle (that MP expenses should be released) has been accepted. Equally controversial is the fact that, at the time of writing, the European Parliament is resisting the recommendation of the European Ombudsman that details of the expenses claimed by individual MEPs should be made public.

EU Farm Payments - Cases No. 99591, 99594, 99596, 99598, 99606

In 2001 the Information Commissioner affirmed the decision of the Department of Agriculture & Food to release the

“I do not accept that true accountability for the use of public funds can be achieved through disclosure of expense details on an anonymous basis. In my view, the release of information about significant payments by public bodies to business firms, sole traders, or individuals should be the norm unless it would involve the disclosure of personal information and the consequential intrusion on the privacy of the recipients would outweigh the benefits of openness and transparency.”

Information Commissioner Decision, Cases No. 99591, 99594, 99596, 99598, 99606, 27 November 2001

names of the recipients of the top 10 payments under various agricultural supports funded by the European Union. The cases came on appeal to the Commissioner from five of the farmers affected by the Department’s decision who argued that release of the information was an unwarranted invasion of their right to privacy. While the Commissioner did not accept that the farmers’ dealings with the Department were necessarily confidential, or that the information was necessarily personal information, he nevertheless based his decision on the public interest test, which was the approach taken by the Department. The Commissioner endorsed the Department’s view that accountability is best served where there is openness about the recipients of public funds and the amounts paid, particularly where the sums of money involved are relatively large.

Following on from this Irish decision, a similar approach to disclosing EU farm subsidies was taken by a number of other member states. And in March 2008 the European Commission announced that full details of all EU agricultural and rural development payments will be published from 30 April 2009 on nationally-managed websites. The details to be published will include “the full name, municipality and, where available, postal code of every recipient”.

“This is taxpayers’ money, so it is very important that people know where it is being spent. Transparency should also improve the management of these funds, by reinforcing public control of how the money is used. Only in this way can we guarantee an informed debate about the future of the Common Agricultural Policy. This level of transparency is something both we and the European Parliament have been pushing for ...”

Mariann Fischer Boel, EU Commissioner for Agriculture and Rural Development, Press Statement, 19 March 2008

Public Procurement/Tendering - Cases No. 98049, 98056, 98057

In 1999 the Information Commissioner gave the first in a series of decisions which set out an approach to the right of access, under FOI, to the details of public procurement competitions conducted by public bodies. The decision concerned the right of access to documentation relating to a tender competition for army vehicles conducted by the Office of Public Works (OPW). Three of the four successful tenderers appealed the OPW decision to release the Order Form relevant to each part of the tender containing the successful tenderer’s name, the tender price and the number and type of vehicle involved. The Commissioner found that while some of the information at issue might be commercially sensitive, and thus potentially exempt, the final decision came down to the application of a public interest test. Having examined the public interest, the Commissioner found that the advantages in terms of openness and

accountability of disclosing the tender prices outweighed any possible harm to the tenderers, or to the tender process, and that the public interest was better served by disclosing the information sought.

The Commissioner explained his decision in the following terms:

“I consider that the public have an interest in establishing how much the government is spending on commodities and from whom they are purchased and at what cost. ... The public interest firmly favours the release of information of this kind. The public have a right to know who supplies the government, what commodities are provided and at what price they are obtained. While it must certainly be acknowledged ... that the tendering process currently in place is the subject of audit in the expenditure of public monies both by Irish bodies and by the EU, it cannot be denied that this is the minimum required in an open democracy. The systems in place in auditing are generally provided to protect against fraud. This does not however, make the system fool-proof or obviate the need to ensure that the system is as transparent as possible.”

In the course of the appeal, one of the successful tenderers put forward the view that “[i]f the norm for the Office of Public Works is to release such information, soon nobody will tender whether invited to or not and the Office of Public Works will suffer”. In the

meantime, public tendering is now conducted on an assumption that the identity of the successful tenderer, as well as its pricing structure and all criteria relevant to the ultimate cost to be borne by the public purse, will be disclosed after the event. Indeed, most invitations to tender in the public sector now inform prospective tenderers that such details are likely to be released under Freedom of Information. The doomsday scenario anticipated by one of the successful tenderers has not come to pass!

Financial Settlement with Employee - Case No. 000528

The Commissioner took the same approach, in principle, where a public body entered into what purported to be a confidential financial settlement with an employee who had taken legal proceedings against the public body. The case concerned a medical consultant employed by the North Eastern Health Board who had been placed on administrative leave following a dispute with the Board. The consultant’s legal action was settled out of court when the Board made a financial settlement with him. The Board refused a FOI request from a journalist who sought details of the settlement terms. This was a case in which, as the Commissioner described it, “*the CEO of a public body and a senior member of staff of that body have agreed to settle a dispute on terms which are substantial from the public body’s point of view. The details of that settlement have not*

been disclosed to the governing authority of the public body, to the Government Department with which the public body has a reporting relationship, nor apparently have the details come under scrutiny in the context of external audit.” The key exemptions relied on by the Board each carried a public interest override and the Commissioner decided that, even if these exemptions were to apply, they should be set aside in any event in the public interest. In her decision, the Commissioner observed:

“While it is important that the Board is free to exercise its functions without undue interference, the Board should be aware that the financial implications of the settlement terms are borne ultimately by the taxpayer. Where settlements reached by public bodies involve significant financial outlay, there is a very strong public interest in members of the public being aware of the terms of the settlement and being able to satisfy themselves that the settlement represented a fair outcome to the dispute. In my view there is a public interest in the public knowing the full extent of the cost of the settlement terms. Ultimately, it is the tax-payer who is paying.”

Recruitment Procedures for Public Jobs

The need for transparency in recruiting public employees has been a long-standing concern for the Irish state. The establishment of the Civil Service

Commission (1924) and the Local Appointments Commission (1926) was based on a desire to ensure that public employees would be recruited by an independent agency on the basis of ability rather than on the basis of political or other patronage. It is generally recognised that this approach, now the mandate of the Commission for Public Service Appointments and the Public Appointments Service, has provided assurance as to the overall integrity of the public recruitment process. However, the independence of the process does not necessarily ensure that it is free of bias or error. A series of decisions by the Information Commissioner has dealt with some procedural practices which, when applied at the level of the individual applicant, leaves the process open to a charge of unfairness.

Interview Notes - Case No. 98020

Traditionally, candidates for public service jobs got no more information than the fact that they did, or did not, succeed in the competition. Amongst the earliest cases to be decided by the Information Commissioner in 1998 were a number in which the question of access to records of the interview and selection process was raised.

In this case, an applicant for a civil service job had failed at interview stage and then sought access to all personal information held in relation to his applica-

“I have dealt with a number of reviews where access was denied to interview notes and other material relating to the requester’s participation in interviews or competitions for public service jobs ... A common theme running through most such cases is the inability of the candidate to understand why he/she was not successful. This often leads to a suspicion that the result was unfair; that there was an element of bias, whether conscious or not, in the selection procedure or that a mistake has been made.”

Information Commissioner Annual Report, 1998

tion. The Office of the Civil Service Commissioners (CSC) refused access on the grounds that members of interview boards understood their deliberations to be confidential and would be unlikely to serve in the future if such deliberations were subsequently to be made available to candidates. It was also argued that if the interview process was constantly open to challenge this would have a significant adverse effect on the CSC in its management of the recruitment function. However, the Information Commissioner decided that the requester was entitled to access the records associated with the proceedings of the interview board and its assessment of the applicant. He found no evidence that prospective interview board members would be deterred from serving to such an extent that this would have a significant adverse effect on the ability of the CSC to find suitable inter-

viewers. Neither was he convinced that the likelihood or scale of potential challenges was such as to significantly affect the ability to recruit effectively.

Arising from this decision, the CSC, as well as the Local Appointments Commission (LAC), changed their practices and decided to make such records available to candidates on request. Given the pre-eminent position held by the CSC and the LAC, this change of practice was one which influenced the recruitment practices of all other public service bodies. Indeed, the general position now in the case of public service recruitment is that, irrespective of the body conducting the competition, it is the practice that candidates will be told of the selection criteria (including marking scheme and any short-listing criteria) and of their own individual marks.

Employment References - Case No. 060030

Not all of the significant issues clarified by way of Information Commissioner decisions arose in the very early years of the FOI Act. One example of a matter clarified only in recent times, and in the context of filling public jobs, is that of reliance on employment references sought on a confidential basis from a third party, usually a former employer. On the one hand, the candidate may believe (or even be told) that he or she was unsuccessful because of an unfavourable reference and that, in accordance with fair procedure, he or she should be entitled to see the reference in order to have an opportunity to respond. On the other hand, the public body may have given some assurance of confidentiality to the referee and feel that any release of the reference would be a breach of confidence. Such cases, on the face of it, create a conflict between two apparent rights: the right to have a confidence respected and the right to fair procedures in matters affecting one's life chances.

This issue first arose for the Commissioner in a decision of January 2003 (Case No. 020425). The case involved the Civil Service and Local Appointments Commission (CS&LAC) which had sought a reference, in relation to a job applicant, from a private sector referee. The CS&LAC had given assurances of confidentiality to the refer-

ee. The Commissioner took the view that it was inappropriate for the CS&LAC to have given such a guarantee of confidentiality in the light of the right of access created by the FOI Act. In this case, though, the requester ultimately succeeded in getting the job she sought; and in these circumstances, the Commissioner reluctantly decided to affirm the CS&LAC decision. However, the Commissioner made clear that had the job been refused because of an adverse reference then he would have had to look seriously at releasing the reference, even though given in confidence. As a result of this case, the CS&LAC changed its practice in requesting employment references and, since then, such requests make clear that the reference is potentially releasable under the FOI Act.

The same issue arose subsequently in a number of cases involving the Health Service Executive (HSE) culminating in the Commissioner's decision of October 2007 in Case No. 060030. In this case a woman had been placed second on a panel from which a number of jobs in a HSE hospital were to be filled. In the event, she failed to be given a job even though people placed lower on the panel were successful. It was clear that this was the direct result of an unfavourable reference from a former employer; though other former employers had given positive references. The HSE refused the woman's FOI request for a copy of the negative reference on

the basis that to do so would be a breach of a duty of confidence. It was clear that the HSE had, in fact, given an explicit assurance of confidentiality in the particular case. The question arising, in FOI terms, was whether the release of the reference would constitute a breach of a duty of confidence owed by the HSE to the former employer. On the face of it, the answer to this question was that release would constitute a breach of a duty of confidence. However, the Information Commissioner took the view that public interest considerations should be taken into account in determining whether release would constitute a breach of a duty of confidence. In particular, the Commissioner had regard to the public interest in upholding the right to fair procedure and to the view that, in the circumstances of this case, fair procedure required that the requester should have access to the negative reference. Ultimately, the Commissioner found that the public interest considerations favouring disclosure were sufficiently strong to outweigh the public interest in preserving confidences. On this basis, the Commissioner decided that disclosure of the reference to the reference subject did not amount to a breach of a duty of confidence. And notwithstanding that the referee was placed in a most unfortunate position, the Commissioner directed that the negative reference should be released.

Dilemmas of the kind illustrated by

these cases arise because public bodies have not always thought through the consequences of their recruitment procedures. Fortunately, this type of case should be relatively rare in future as the HSE (like the CS&LAC) has amended its procedures to provide that prospective referees will be alerted to the fact that employment references they give are potentially releasable under the FOI Act.

Another area in which Information Commissioner decisions has made a difference is that of inspection reports on private nursing homes, child care facilities and schools. These matters are dealt with in Chapter 3.

Chapter 3: Inspecting Nursing Homes, Crèches & Schools...

“If the children’s parents subjected them to semi-starvation and lack of proper clothing and attention from which they suffer in some industrial schools, the parents would be prosecuted.”

Inspecting Nursing Homes, Crèches & Schools...

One of the tasks of the Information Commissioner is to “*foster and encourage the publication by public bodies ... of information of relevance or interest to the general public in relation to their activities and functions generally*”. Some activities of public bodies are of such general interest that information on them should be made available to the public as a matter of course, without the need for individual FOI requests.

Environmental information, such as the quality of drinking water or the composition of discharges from effluent treatment plants, is one such example; policy papers which are considered in the context of budgetary decisions by the Minister for Finance, for example, are another. While more information of this kind is being made available, year by year, there is still some way to go in meeting the demand that exists in this regard. Nevertheless, the Information Commissioner has had some success in this area, even if that success cannot be described as “overnight success”. In particular, the Commissioner has focused on the desirability of the public having automatic access to the reports of those inspectorates, or regulatory bodies, which supervise and report on key public services.

Inspectorates and regulatory bodies are a well established feature of contemporary government; they operate across a broad field, including the areas of nursing homes and child care facilities, mental hospitals, schools, the work place,

food safety, telecommunications, the financial services sector and the corporate business sector generally. They operate in the public interest, including consumer interests, to ensure standards of practice reach acceptable levels which are safe and appropriate.

Ten years ago, before the advent of FOI, it was generally the norm that such inspectorates or regulatory bodies operated outside of the public domain; their reports and findings in individual instances tended not to be available to the public and there were few if any mechanisms for informing the public of their activities. An exception to this rule was the annual report of the Inspector of Mental Hospitals, dealing with conditions in individual mental hospitals, but for whatever reason these reports failed to attract the attention they clearly deserved. Another exception was the Social Services Inspectorate, established in 1999, which from the outset published on the internet its reports of inspections of children’s residential centres operated by the health boards (now the HSE).

As a direct result of the operation of FOI, and based in particular on decisions of the Information Commissioner, the operation of many of these inspectorates and regulatory bodies is now open to the public generally either by way of automatic publication of reports on the internet or by way of release of information under the FOI Act. This is

so in particular in the case of inspections of nursing homes, child care facilities, primary and secondary schools and, to a lesser extent, in the case of inspections of food premises under the food hygiene legislation - though the Food Safety Authority of Ireland has given a lead by its automatic publishing of details of food premises on which closure orders or prohibition orders have been served. At the same time, it is worth noting that some of the inspectorates and regulators remain outside the remit of the FOI Act; this is the case, for example, with the Irish Financial Services Regulatory Authority.

And in the case of the Health & Safety Authority, whose activity in investigating workplace accidents is of particular interest to the public, it was removed from the scope of FOI for all practical purposes in 2005. It is difficult in principle to see how inspections of the workplace, for the purpose of ensuring the health and safety of employees and of visitors, differ in any fundamental respect from inspections undertaken to ensure the health and safety of residents of private nursing homes. The position regarding workplace inspections is all the more puzzling given that between 2001 and 2005 they were covered by the FOI Act and there was no evidence of any particular harm being caused on that account; yet in 2005 they were made exempt from release with virtually no discussion and no publicity.

“The explanatory memorandum for [the Health and Safety at Work] bill was not very explanatory on Section 74 which, it says, ‘amends the Freedom of Information Act, 1997 by inserting references to records arising from the enforcement functions of the authority in section 46(1) of that act’. That explains very little to even the experienced parliamentarian and certainly does not tell them that Section 74 exempts investigation documents currently available under FoI. In fact, the FoI change was so well buried within the 2005 legislation that Section 74 was not even discussed in the entire debate in the Dáil and Seanad.

At the committee stage, legislation is supposed to be considered line-by-line and that is where one might have expected Section 74 to come under the spotlight. For this legislation the Dáil committee stage was in November 2004 and the Seanad committee stage was in May 2005 but, in both instances, Section 74 was simply agreed and passed over. The sad reality is that what happened to this section is not unique.”

Noel Whelan, *Irish Examiner*, 19 January 2006 - commenting on the removal of HSA records from FOI release

Because we are now accustomed to the notion that the work of public inspectorates or regulators should be published as a matter of course, or at least be available by way of individual FOI requests, it is easy to lose sight of the significance of this new level of transparency. To dispel complacency, it is necessary only to recall how different life might have been for many thousands of industrial school children in the Ireland of the 1920s to the 1970s had the inspection reports on industrial schools for that period been publicly available and, as a result, acted upon. As the work of Mary Raftery and Eoin O’Sullivan has shown, over the decades of their existence, a great deal was known and recorded in Departmental files about the appalling negligence and abuse which were a feature of the indus-

trial schools. The problem was that this information remained securely protected within the relevant Departments.

It is very disappointing to note that even now, in 2008, these historical industrial school inspection reports have not been made available. In 2003 the Department of Education & Science gave a commitment to publish the historical reports which it holds; this was at a time when very many former industrial school residents were seeking records of their own periods of detention and many had an added interest in seeing the general inspection records of their particular school. Five years later, the Department appears to be concerned that publication of these reports might carry legal consequences and that they should remain unavailable at least until

the Commission to Inquire into Child Abuse has reported. It is difficult to understand why the Department should take this view.

Another area in which, regrettably, progress has not been made is that of the reports of the Prisons Visiting Committees. It remains the case that, unless sought specifically under the FOI Act, they remain outside the public domain. No more than the care of any other vulnerable group, the care of prisoners is surely something of concern to any civilised society.

Inspections of Private Nursing Homes

Standards of care in private nursing homes became a matter of particular

“...*The Irish Times* used the Freedom of Information Act to gain access to the reports of various prison visiting committees. They painted a very disturbing picture of conditions in Irish prisons. ...Concern was expressed by these visiting committees. These were the considered views not of some radical, revolutionary left wing groups but by individuals appointed by the current Fianna Fáil-PD Government or its immediate predecessor and they painted a realistic but disturbing picture of conditions in many of our prisons. Most depressing of all were the conclusions that in some instances conditions were getting worse. ...It is a shameful situation that these reports lay in the Department of Justice, Equality and Law Reform for 18 months before a freedom of information request from a national newspaper prized them loose and made them public.”

Brendan Howlin TD, Dáil Éireann, 1 February 2007 - speaking on the Prisons Bill 2006

public controversy in 2004 and 2005 when two such homes, Rostrevor House Nursing Home and Leas Cross Nursing Home (both in the Greater Dublin area), hit the limelight for the wrong reasons. As a result of this, the media and the public more generally became aware of the important role played by the health boards (now the HSE) in ensuring compliance by private nursing homes with the standards prescribed in the Nursing Homes (Care and Welfare) Regulations 1993. As the health board reports of its inspections of private nursing homes were not being published or made available to the public, both media people and interested members of the public began to use FOI as a means to gain access to these reports. The initial response of the health boards to these requests was mixed and this led to an increase in the number of such cases coming on appeal to the Office of the Information Commissioner. In dealing with these cases the Commissioner took the view that, while the release of a criti-

cal inspection report could have negative implications for the nursing home operator, any commercial disadvantage would generally be outweighed by the public interest served in having such inspection reports available to the public. The cases dealt with by the Commissioner suggested a lack of consistency in approach not just as between health boards but also, in some instances, between counties within the one health board. This lack of consistency was evident in terms of, for example, frequency of inspection, prior notice

of inspection, the extent of inspection, follow-up in the event of unsatisfactory standards prevailing and general communications with nursing homes in relation to inspections.

In a decision given in February 2004, and subsequently in her Annual Report for 2004, the Information Commissioner recommended that all nursing home inspection reports should be published as a matter of course. In June 2005, in an immediate response to the Commissioner's Annual Report rec-

“There is an overriding public interest in ensuring that the health, security and welfare of elderly and vulnerable members of society is seen to be protected by the enforcement by health boards of the relevant legislation. There is, also, a significant public interest in the public knowing how health boards respond to, and investigate, complaints made to them by members of the public in relation to specific nursing homes.”

Information Commissioner Decision, Case No. 020533 - 16 February 2004

ommendation, the HSE (which replaced the health boards in January 2005) gave a public commitment to publish future inspection reports on its website, “following review and standardisation of inspection report formats and consultation with key stakeholders” .

In fact, it was not until the late summer of 2006, and then only in the case of inspections completed after 26 June 2006, that the HSE began to publish nursing home inspection reports on its website as a matter of course. While delayed, this was a very welcome development and establishes a precedent for all future inspectorates in the wider care and health service area. As it happens, the role of nursing home inspectorate is to be taken on later this year by the Social Services Inspectorate which has now been subsumed into the Health and Information Quality Authority (HIQA). The new inspection regime, to be based on proposed new statutory care standards, will apply to all nursing homes (including HSE homes and voluntary/religious homes) and will be operated by an entity separate from the HSE itself. Furthermore, HIQA has made it clear that its inspection reports will be published on its website <www.hiqa.ie> as a matter of course.

Inspections of Crèches & Playschools

Under the Child Care Act 1991 the HSE is charged with ensuring the health, safety and welfare of children

“Almost 90% of crèches are not fully compliant with childcare regulations, an investigation by the Irish Examiner has revealed. An examination of almost 2,000 inspection reports from crèches around the country found just 203 were given a clean bill of health.

In four counties - Donegal, Kilkenny, Mayo and Westmeath - not one crèche inspected was fully compliant [...] The findings ... were supplied to the Irish Examiner on foot of a Freedom of Information request. Although a number of crèches were in serious breach of regulations, the majority were guilty of only minor breaches.”

Catherine Shanahan & Conor Ryan, *Irish Examiner*, 31 October 2007

attending pre-school services, including pre-schools, play groups, day nurseries, crèches, childminders and other similar services looking after more than three pre-school children. The HSE’s role includes the regulation and inspection of pre-school services. Just as with its role in relation to nursing homes, public and media interest has grown in recent years in accessing the HSE’s inspection reports on pre-school services.

The Information Commissioner has dealt with many FOI appeals involving the right of access to the HSE’s inspection reports on crèches. In principle, the position adopted by the Commissioner is very similar to that adopted in the case of inspections of nursing homes. While the release of reports which are unfavourable may sometimes have commercial consequences for crèche opera-

tors, the decision to be made is ultimately one based on what best serves the public interest. In her decisions on such cases to date, the Commissioner has found that the public interest is better served in people (and particularly parents) knowing what the HSE has found in the case of individual crèches, and in knowing how the HSE goes about its inspection role, than in refusing access to the inspection reports.

Media analysis of crèche inspection reports suggests that, while very few appear to be fully compliant with the relevant regulations, only a small minority are in serious breach of the regulations. Incidentally, this kind of analysis of the standards prevailing in crèches, whether done by media or others, is a first class example of that openness, transparency and accountability which

the FOI legislation is designed to promote.

For the future, and unlike the situation regarding inspections of nursing homes, the HSE itself will continue to be directly responsible for the inspection of pre-school services. However HIQA, through the Office of the Chief Inspector, has a monitoring role in how the HSE performs its inspection functions. While the HSE has not so far committed itself to publishing its inspection reports on pre-school services, it seems only logical that it would do so.

School Inspection Reports

One of the appeals (Case No. 98099) received by the Information Commissioner in the first year of operation in 1998 concerned access to the records of Whole School Evaluations (primary) conducted by the inspectorate of the Department of Education & Science. The Commissioner affirmed the Department's refusal of the records but on the narrow ground that the particular evaluations had been conducted within a pilot scheme and on an understanding that the details would not be released. The Commissioner made it clear that the particular decision should not be taken as an indication of the likely outcome in relation to school evaluations or inspections conducted outside of a pilot process. In subsequent cases involving school inspections, the

Commissioner's decisions reflected the same broad principles as informed those decisions regarding nursing home and crèche inspection reports: that the public has a right to know the findings of a public inspectorate on an area of very significant interest and importance for parents and their children.

The Commissioner's view was, and still is, that there is an increasing public demand for information which will enable people make informed choices and decisions about all aspects of their lives; this includes information in regard to choice of school or crèche for a child or choice of a nursing home for an elderly family member. While this may be to equate decisions regarding education, child care and elder care with other consumer type decisions - choice of holiday destination or of airline - it is also to recognise that people can no longer be expected to accept that they should be passive recipients of state funded or state subsidised services. In the case of schools, whether primary or secondary, the Commissioner takes the view that parents are entitled to know how a particular school is performing across a wide range of evaluation criteria. This right to know is not simply a matter of helping to make an informed choice of school, though that is in itself a valid position. In fact, the right to know about how a school is performing is perhaps more important in circumstances where a parent may have no choice as to the school which his or her child will

attend. In such a case, knowing the strengths and weaknesses of the school will facilitate the parent in assisting the child as well as in supporting the school and contributing to its development and improvement.

The question of the availability of school inspection reports became inextricably linked to the question of whether information on the academic performance of pupils in a particular school should be published (the "league table" issue). In October 1999 the Information Commissioner gave a composite decision on three separate appeals (Cases No. 98104, 98130 & 99024) by newspapers which had been refused details of Leaving Certificate results on an individual school basis. The requester newspapers had sought access to a wide range of information, including examination results, in relation to all second level schools. The Department of Education & Science refused these requests on a number of separate grounds but, by way of an overarching statement of position, identified that the essential basis of the refusal related to the long standing policy of successive Governments that the compilation of school league tables would be contrary to the public interest. In his review of these decisions, the Commissioner found that the exemptions relied upon by the Department did not apply and that, with some minor exceptions, the records should be released. However, a legislative development while the

Commissioner's review was underway then became an issue. On 5 February 1999, subsequent to the Department's decisions to refuse the newspapers' requests, and before the Commissioner's review was completed, the Education Act 1998 came into force. Section 53 of that Act allows the Minister for Education to refuse access to records whose release "*would enable the compilation of information (that is not otherwise available to the general public) in relation to the comparative performance of schools in respect of the academic achievements of students...*". In effect, section 53 allows (but does not require) the Minister for Education to ban the release of records whose content would enable the compilation of a school league table. The question for the Commissioner was whether the Education Act provision, which had not been in place when the original decisions were made, should be taken into account for the purposes of his review and, if so, whether section 53 would have the effect of displacing the right of access under the FOI Act.

In the event, the Commissioner took the view that it was correct for him to have regard to section 53 - as the review was *de novo*, based on the law, facts and circumstances prevailing at the time of the review decision - but he decided that the application of that provision would have the effect of taking away a vested right to records on a retrospective basis. The Commissioner directed

that the records (with some exceptions) should be released to the requester newspapers. However, the Department appealed this decision to the High Court.

The only matter at issue in the High Court appeal was whether the Commissioner was correct in his decision that, in the particular circumstances, section 53 of the Education Act did not displace the newspapers' existing right of access under the FOI Act. Interestingly, the Department made no case that the exemptions it had actually relied upon in its decisions were applicable. In effect, the Department conceded that, at the time it made its decisions, it had no grounds for refusing the

requests. The rather complex 2001 judgment of the High Court was that the application of section 53 was **retroactive** rather than **retrospective** and that this did not constitute the removal of a vested right to records; the Court decided that the FOI right of access did not become a vested right until a decision to grant access to the records had been given. Had the Commissioner been in a position to give a decision on the review before 5 February 1999, when the Education Act took effect, the requesters' right to the records would have become a vested right at the time of that decision.

Following this 2001 High Court judgment, the position was that the Minister

"I have carefully examined the contents of the school reports before me. I have no reason to believe that they are significantly different from other reports produced by the Department ...The reports do not contain any specific references to the academic achievements of students in each school. There are no rankings or scorings given either for the school or the students involved. I am also not aware of, and the Department has not pointed to, any criteria used for assessing the schools under each of the headings listed above. [...] The comments contained in the reports are of such a general and subjective nature that any direct comparison of academic achievement between the schools could not be drawn. [...] It is clear ...that the reports are not concerned with the curriculum but rather with an overall view of the school which is compiled under a limited number of headings."

Information Commissioner Decision, Case No. 000238 - 5 March 2003

for Education could opt to invoke her powers under the Education Act to overrule a requester's right of access under the FOI Act where the records sought "would enable the compilation of information (that is not otherwise available to the general public) in relation to the comparative performance of schools in respect of the academic achievements of students ...". Clearly, the Minister had the discretion to prohibit the disclosure of a school's (or schools') examination results. What proved very surprising, though, was that in 2005 the Supreme Court ruled that this same provision of the Education Act could be invoked by the Minister for Education to overrule the FOI right of access to the reports of general inspections of primary schools - even though primary schools have no specific measures to test academic performance and, on the face of it, the primary school inspection reports do not disclose any information of a kind which might lead to the creation of league tables.

Case No. 000238 involved a request from *The Irish Times* for access to reports of inspections of certain primary schools carried out by the Department of Education and Science. The Department refused the request on the ground that access to the information was prohibited by section 53 of the Education Act 1998. Again, it is important to clarify that the Department's reliance on section 53 was a choice it made and not something required under the Education Act. The

"...it is common case that the information gathered does not contain examination results. However, the general words of s.53 go further than examination results and I think it obvious that the reference to 'comparative performance of schools in respect of academic achievement of students' may include a whole range of other considerations in respect of which comparisons between different schools could still nevertheless be drawn up. Academic achievements include examinations. Academic achievement can however be taken as meaning something more ...A range of other considerations must be included, some of which will show one school to differ from another and perhaps be performing better than another across a range of subjects or activities. ...Even without the criteria of examination results being brought to bear, significant performance related differences may be evident from a description of the activities carried out in any school or group of schools. These are precisely the kind of matters addressed by the school report."

Supreme Court judgment of Mr Justice Kearns in *Barney Sheedy v Information Commissioner & Ors.* [2005] IESC 35

Department also refused access on the grounds that the staff of the schools had provided information in confidence to the Inspectors during the course of their inspections; that disclosure could prejudice the effectiveness of future inspections; and also that its functions relating to its management of schools could be affected adversely. The Commissioner's decision was to direct the release of the school inspection reports subject to the deletion of any personal information they contained. In his decision, the Commissioner did not accept that access to the inspection reports could result in

the harms envisaged by the Department. He commented that, while the reports gave an overall impression of the schools, they did not contain any references to the academic achievements of students in the schools; he observed that the comments in the reports were of such a general nature that no meaningful comparison could be drawn between the schools. Nor did the Commissioner accept that the information in the reports could be described as information given in confidence as the reports reflected the Inspectors' own opinions and observations formed dur-

“In its first substantive engagement with the FOI Act, the Supreme Court ruled by a two-to-one majority that the rights created under FOI are to be set aside where the Department of Education uses its discretion under section 53 of the Education Act, 1998 to refuse inspection reports. As I understand the judgment, as Information Commissioner I have no powers to overrule the Department where it chooses to refuse inspection reports. This means that, except for judicial review, there is no independent oversight of discretionary Departmental decisions to refuse such inspection reports. This is surely a most peculiar situation; most certainly not one which permits the light to be shone in *the offices and filing cabinets of our rulers.*”

Emily O’Reilly, *Irish Times* article, 9 June 2005

ing the course of visits to the schools.

The Commissioner’s decision was appealed to the High Court not, as one might expect, by the Department but by the Principal of one of the five schools in question. In its judgment, the High Court found for the Information Commissioner on each of the appeal grounds. In particular, on the issue of section 53 of the Education Act, the High Court ruled that the appellant had “*failed to demonstrate that granting access to the school report from [the school] would enable the compilation of information in relation to the comparative performance of schools in respect of academic achievements of students.*”

The Principal, with the support of the Irish National Teachers Organisation, opted to appeal to the Supreme Court

against the decision of the High Court. In its judgment of 30 May 2005, the Supreme Court found by a two to one majority that section 53 of the Education Act could apply in relation to the particular school inspection report; and while section 53 did not constitute

“More than five years ago, the Department of Education and Science refused to release school inspection reports, claiming that great harm would be done to the education system. The refusal was upheld by the Supreme Court in 2005. Yet, just a few years after the Department’s decision, such is the public demand for, and expectation of, information to guide them in decision making in relation to their children’s education that, not alone are the reports to be released, but the Department has stated that such release will be of great benefit to all the partners in the education process.”

Information Commissioner Annual Report, 2005

a mandatory prohibition on release of the report, it was open to the Minister for Education to invoke it should she wish to do so. On this basis, the Supreme Court overturned the judgment of the High Court and upheld the Department’s initial refusal of the request by *The Irish Times*. However, the Supreme Court agreed with the High Court and with the Commissioner that the other grounds of refusal, relied upon by the Department, did not stand up. What is perhaps interesting in the majority Supreme Court judgment is the approach it takes to the term “academic achievements” in section 53; it states that in the absence of examination results there are other considerations which, when taken into account, will enable comparisons to be drawn between primary schools. The position following the Supreme Court judgment was (and remains) that school inspection reports, or information on school exam-

ination results, can only be released under FOI (or otherwise) where the Minister for Education & Science approves; the Minister retains an effective veto on the release of such information in as much as she can invoke the discretionary provisions of section 53 of the Education Act.

Very surprisingly, on the very day that the Supreme Court judgment was delivered, the Minister for Education & Science announced her intention to publish school inspection reports notwithstanding that her Department had refused such reports when sought under the FOI Act. The Minister clarified that the reports to be published, covering both first and second level, would not contain information on individual teachers or on examination results. Subsequently, following a consultation process with the “education partners”, the first of these reports was published on the Department’s website in June 2006.

While the published inspection reports are sometimes characterised as being bland and too general, they do give some insight into the individual schools.

“Some tensions and difficulties were evident in the school at the time of the evaluation. These have arisen due to poor relationships between senior management and a small number of staff, and among some staff members and have a negative impact on many areas of school life. Management indicated their belief that these tensions were due in part to their having prioritised certain values in accordance with the [Order’s] tradition. Clearly, these difficulties are not consistent with the [Order’s] ethos and vision for the school as articulated by members of the [Order’s] community during the evaluation. The mission statement prioritises students. It is recommended that a more all-encompassing school mission statement, which affords priority to the students and embraces all stakeholders in the school, be developed.”

Whole School Evaluation Report on a Dublin secondary school - published February 2008 on Department of Education website (<http://www.education.ie/insreports/>)

Indeed, a recently published report on a Dublin secondary school drew attention to poor working relationships between teachers themselves and between some teachers and management and commented on the need for the school to address these tensions “as a matter of urgency”. One seasoned commentator observed that this report suggests that the Department’s inspectors are now prepared to be more “robust” in their assessments. One way or the other, the

principle of the public’s right of access to the reports of the school inspectorate has now been established; the present position in this regard is now largely in line with the position advocated by the Information Commissioner in his decision in Case No. 000238 in March 2003.

Chapter 4:

Freedom of Information - What Next?

“If FOI is about replacing a culture of secrecy with a culture of openness in the Irish public service, I have to say that this objective is being frustrated by the continued exclusion from FOI of several key public institutions. ... even after this extension [of 136 public bodies], a significant number of public bodies will continue to remain outside of the Act. I am not aware of any pressing reason for the continued omission from FOI of bodies such as the Vocational Education Committees, the Central Applications Office (CAO), the State Examinations Commission, the Adoption Board, An Garda Síochána, those bodies dealing with asylum applicants, the Central Bank and Financial Services Authority and the State Claims Agency.”

Freedom of Information - What Next?

Freedom of Information is important in ways that, perhaps, most people do not register on an everyday basis. For people stuck in traffic on the M50, commuting long distances to work, it is not uppermost on their minds. Or for people waiting for a hospital out-patient appointment, or for speech therapy for a child, FOI is not the most pressing issue. Yet, if we did not have FOI we would certainly miss it. At least 15 years of lobbying by concerned groups and individuals preceded the commencement of the FOI Act on 21 April 1998. Having achieved an FOI Act, and having it in operation now for 10 years, it is important that we continue to appreciate why it is necessary and to understand that it needs to be cultivated rather than neglected. While Ireland may well be a more open society than it was 10 or 15 years ago, there is no room for complacency on this front.

More Open Than....?

We need to ask ourselves whether, in fact, we are as open a society as some other countries of the West with which we have close relationships.

Security, Defence & International Relations

In the UK recently there has been much interest in the fact that the Information Tribunal (which deals with appeals against decisions of the UK Information Commissioner) directed the release

“But why is FoI so important? Well, for example in the last 12 months alone, FoI has provided such big stories as the revelation that health board inspectors recommended against the registration of Leas Cross nursing home; the annual breakdown of TDs’ expenses; many of the stories about MRSA; annual schools league tables, to name but a few. FoI also allows people access to reports or documents pertaining to themselves, which they did not have before.”

Sunday Independent, 21 January 2007

under the FOI Act of a draft of a dossier entitled “*Iraq’s Weapons of Mass Destruction: The Assessment of the British Government*”. The draft dossier was regarded as politically and diplomatically very sensitive and had been refused by the Foreign and Commonwealth Office (FCO) when sought in a 2005 FOI request. This refusal was appealed to the Information Commissioner who decided, applying a public interest test, that the draft dossier should be released in full, notwithstanding its sensitivity. This decision, in turn, was appealed by the FCO to the Information Tribunal which ruled in January 2008 that the draft dossier should be released in the public interest - though it did agree to the deletion of one single word in a handwritten marginal comment. Ironically, this single word deletion proved ineffective as *The Guardian* subsequently “acquired” a witness statement to the Tribunal which identified the deleted word as “Israel”. While the entire process took three years to conclude, it

did demonstrate that FOI in the UK can provide for a remarkable degree of openness even in relation to issues which have political, diplomatic and, indeed, security implications.

What is interesting about this UK case from an Irish perspective is that, were a broadly similar FOI request to be made here, it would almost inevitably be refused. And were the case then to go on appeal to the Information Commissioner, she would have no option but to affirm that refusal. This arises from one of the amendments made to our FOI Act in 2003. Section 24 of our FOI Act provides protection for records relating to security, defence and international relations (including matters relating to Northern Ireland). In the original version of section 24, prior to amendment, records in this category were not absolutely exempt from release; to be found exempt, the decision maker had to be satisfied that release “could reasonably be expected to

affect adversely” one or more of the functions identified in the section. In effect, the exemption contained a built-in harm test - though it was not subject to a public interest override. On appeal, the Information Commissioner would require to be satisfied that release “could reasonably be expected to affect adversely” one of the identified interests (e.g. the security of the state). However, the 2003 Amendment Act created a mandatory class exemption for records which concern security, defence or international relations of the State or matters relating to Northern Ireland; this eliminates the need for a public body to identify a specific harm caused by release of the particular record. For example, a record containing a communication between a Minister and a diplomatic or consular post will now be refused under section 24 irrespective of the content and without reference to the effect of its release on international relations.

Notwithstanding the fact that there is a mandatory class exemption under our FOI Act for records which concern security, defence or international relations of the State, some such information has been released under Freedom of Information. One such release disclosed Garda intelligence material. In October 2006 RTÉ News carried an item which gave details of suspected “foreign terrorist groups” having a presence in Ireland. The details released related to three to four years back and suggested that up to six Islamist terror-

“The Commissioner recognises the importance of a space for officials in which to draft documents, but does not accept that disclosure of these drafts would necessarily have a wide-ranging ‘chilling effect’ on the drafting process. However, officials will still be required to produce such drafts as part of their roles, and the timing of any disclosure is always likely to be an important consideration when weighing up the public interest ...it is relevant in relation to the dossier that the drafting process itself has been and remains a subject of considerable public debate.”

Decision of UK Information Commissioner in “Iraq dossier” case - 3 May 2007

ist groups had been active in Ireland at that time. What’s most interesting, though, is that this information was released, not under our own FOI Act, but under the FOI Act of the United States. The enterprising journalist in question (Richard Dowling) made his request to the US State Department and, as the documents in question had been de-classified, they were released. It appears the information in question was passed from the US Embassy in Dublin to the State Department in Washington and was based on Garda intelligence on the issue. Had RTÉ tried to get this information from An Garda Síochána, it would not have been entitled even to make the request as An Garda Síochána has not yet been made subject to the FOI Act. Had it attempted to acquire the information from the Department of Justice or from the Department of Foreign Affairs, the information would almost certainly have been refused on the basis of the mandatory class exemp-

tion now in place in the case of records which concern security, defence or international relations.

In January 2008 RTÉ News again broadcast an item based on the release of records under the FOI Act of the United States; and again, had this type of material been sought under the Irish FOI Act it would not have been released. The RTÉ report, again by Richard Dowling, disclosed information concerning the use of Dublin Airport and Casement Aerodrome by the US Military. Documents from the US State Department released to RTÉ disclosed that the US Military had been using these two airports but that in 2003 difficulties arose regarding this use. Amongst the documents released to RTÉ was an email of December 2003 from the US military attaché, addressed to his superiors and to colleagues in NATO, effectively warning about problems in using these airports. The attaché

cited certain security and “systemic communications” difficulties which made use of the airports problematic. However it appears these difficulties were resolved subsequently. What is interesting is that the US authorities, engaged as they are in the so-called “war on terror” and on permanent high alert for terrorist activities, saw no difficulty in releasing this information. In Ireland, where the terrorist threat is so much lower, it is most likely that this information - or its equivalent - would have been refused under the Irish FOI Act.

Policing

Irrespective of how “open” our FOI Act may or may not be, it is of no value in the case of public bodies to which it does not apply. A key test of openness, therefore, is whether a country’s FOI laws apply to all of the key public bodies. It is true that our FOI Act now applies to about 520 public bodies compared to the original 67 bodies to which it applied 10 years ago. Unfortunately, many key public bodies remain outside of the scrutiny of the FOI Act. Of these, perhaps the most significant is An Garda Síochána and the case for its inclusion is particularly pressing.

Ireland is virtually unique in Europe in excluding its police force from the scope of FOI law. Research by a number of NGOs - produced in 2006 in the context of the proposed Council of Europe Convention on access to official docu-

“The law is clear: anyone who makes a request to PSNI for information must be told whether the Service holds such information and must be supplied with that information unless the cost to provide the information would exceed the cost limit set by the Secretary of State. Information can only be withheld under the FOI Act if certain exemptions are applicable, for example, requests for information about criminal investigations, past or present and about matters of national security. Individuals already have the right of access to information about themselves under the Data Protection Act 1998. As far as PSNI is concerned, the Freedom of Information Act will extend this right to allow public access to all types of information held.”

Police Service of Northern Ireland website -
http://www.psni.police.uk/index/pg_freedom_of_information.htm

ments - makes very interesting reading. Of 26 Council of Europe member states examined, only Ireland excludes its police force from FOI cover. Former Eastern bloc countries such as Albania, Bosnia/Herzegovina, Croatia, the Czech Republic, Georgia and Moldova have their police forces subject to FOI; so too do such “older” democracies as the UK, Denmark, Sweden, Germany and Norway. In many cases, not only is the police force subject to FOI but so also is the Secret Service! It is clear also that the Council of Europe’s Convention, though still at draft stage, anticipates that the right of access to public records will include those of police authorities; the Explanatory Report accompanying the current draft Convention notes: “*For the purposes of*

this Convention, the term ‘public authorities’ covers administrative authorities at national, regional and local level (for example, central government, town councils and other municipal bodies, the police, public health and education authorities, public records offices, etc.). ...”

Looking beyond Europe, in countries such as the USA, Mexico, Canada, Australia, New Zealand and India, police forces are routinely subject to FOI legislation. And it’s interesting to note that in David Banisar’s Global Survey of Access to Government Information Laws [*Freedom of Information Around the World 2006*], looking at almost 70 countries, he names only one country as excluding

“The Metropolitan Police has disclosed, after a successful Freedom of Information Act request by The Times, that the cost of supervising weekly gatherings outside Finsbury Park Mosque, North London, was £874,387. The figure is far in excess of previous estimates for the 22-month police operation. Before the introduction of the new legislation on January 1 [2005], Scotland Yard had refused to discuss the cost of policing Hamza’s Friday prayer meetings. The Freedom of Information Act, which gives access to a range of information held by public bodies, forced disclosure of the figures.

[...] A request by The Times for information about the policing operation at Finsbury Park was submitted on January 6. The Metropolitan Police responded within the four-week deadline for answering Freedom of Information requests.”

The Times, 24 January 2005

the police force from FOI: and that country is Ireland.

It may be argued that An Garda Síochána is currently undergoing major transformation and that this is not the right time to make it amenable to the Act. In fact, one can well argue the opposite, that being subject to FOI should be seen as contributing to this overall transformation process just as the Garda Inspectorate and the Garda Ombudsman Commission are part of the transformation process. The Northern Ireland police force has been going through a transformation process of, perhaps, greater intensity than is the case with An Garda Síochána; yet the

generally, that FOI has not created any insurmountable difficulties but it has made information on policing much more readily available to the public generally.

When the FOI Bill 1996 was being debated in Dáil Éireann, a clear view was expressed from all sides of the House that it was desirable to make An Garda Síochána subject to the legislation from a relatively early date. Minister of State Eithne Fitzgerald, who took the Bill through the Houses for the Government, explained that, while the Bill anticipated the inclusion of An Garda Síochána the actual date of its inclusion was being left open pending the completion of the work of the Garda Review Body. However, she commented: “*I hope we will have an early report from the Garda review body and that the Garda can be included in the [FOI] legislation from an early date.*” [Dáil Éireann, 10 April 1997].

inclusion of the PSNI under the FOI Act appears not to be an issue. It is clear from the experience of our near neighbours in Scotland, as well as the UK

“...I am concerned about the omission of the Garda Síochána from the legislation. The Minister of State is positively anticipating the result of [a] Garda review in that she tells us we can rely on the review body to propose what we are including in the Bill. ...is it not possible to include the Garda Síochána at this stage? By excluding that body the Minister of State is sending out a signal that the Garda Síochána is in charge of more sensitive information than the offices of the Taoiseach or the Tánaiste.”

Dr. Jim McDaid TD, Dáil Éireann, 10 April 1997 - speaking on the Freedom of Information Bill, 1996 (which was subsequently enacted).

Refugees, Asylum & Immigration

A related concern is the fact that the areas of refugees, asylum and immigration are currently outside of the scope of the FOI Act. Despite the fact that adjudication structures in this area are proposed to be re-structured under the Immigration, Residence and Protection Bill 2008, the Government proposes to continue the exclusion of the area from the scope of the FOI Act. Section 130 of the Bill excludes from the scope of the FOI Act “records relating to a determination under Part 7 of a protection application” - in effect, any record relating to a determination of a protection application (any application for refugee status or asylum or any such application). There is serious public unease surrounding the operation of the current Refugee Appeals Tribunal; much of this stems from the lack of transparency in how the Tribunal has conducted its business. For example, the Tribunal does not publish its decisions; nor does it publish details of its procedures and criteria; nor does it publish statistics on claims and adjudication outcomes. One might reasonably expect that the proposed new structures would be intended to have greater public acceptance and would be open and transparent in their operation - as is the case in most liberal democracies. The explicit exclusion of FOI from this area, as well as its exclusion from the remit of the Ombudsman, has to be worrying.

“The Fianna Fáil proposals can be seen as the precursors to legislation removing the now ridiculously outdated Official Secrets Act, 1963. The Minister of State regards that Act as an anachronism which should be consigned to the shredder or the archive, with which I agree. It is ludicrous legislation which was brought in on the assumption that everything was secret.”

Dr. Jim McDaid TD, Dáil Éireann, 11 March 1997 - speaking on the Freedom of Information Bill, 1996 (which was subsequently enacted).

As matters stand, it may be premature to conclude that Ireland can be satisfied with its progress towards becoming a more open and transparent society or that we have achieved the level of openness and transparency of other countries with which we have close ties.

Unfinished Business?

Tied to the introduction of FOI, back in 1996-1997 when the legislation was being enacted, was an intention appar-

ently shared across the Oireachtas that the Official Secrets Act 1963 would be repealed and that “whistleblower” legislation would be introduced. This was part of the overall drive to promote transparency and to improve our image internationally in that regard.

In the case of the Official Secrets Act 1963, a recommendation was made in 1997 by the Select Committee on Security and Legislation, and in the context of the imminent enactment of FOI legislation, that the 1963 Act be repealed. Minister of State, Eithne

“(1) A person shall not communicate any official information to any other person unless he is duly authorised to do so or does so in the course of and in accordance with his duties as the holder of a public office or when it is his duty in the interest of the State to communicate it.

(2) A person to whom subsection (1) applies shall take reasonable care to avoid any unlawful communication of such information.”

Official Secrets Act 1963, section 4

“Table C includes a list of enactments that are not currently [subservient to FOI]. In these cases, the Information Commissioner disagrees with the Ministers’ recommendation. The Joint Committee supports the Ministers’ recommendation.”

Oireachtas Joint Committee, Seventh Report - Review under Section 32(2) of certain provisions under the Freedom of Information Act 1997 (as amended in the Freedom of Information (Amendment) Act 2003) - September 2006

Fitzgerald, replied to that Committee in March 1997 suggesting that the “most speedy and efficient” way to proceed was for the Department of Justice to draft legislation for the repeal of the 1963 Act along with whatever other measures would be necessary to provide the residual level of protection necessary for state secrets; in the meantime, the FOI legislation could be enacted. In the event, the FOI legislation was enacted but it appears no progress has been made on replacing the 1963 Act which remains in place.

It may be argued that the Official Secrets Act 1963 has fallen into disuse and that in any event it is, in many respects, unworkable. Section 4 of the Official Secrets Act 1963 has been amended by the FOI Act 1997 so that any *bona fide* release of official information under the FOI Act “shall be deemed” to be authorised for the purposes of the Official Secrets Act. Apart from this relaxation, all other disclosures of official information require to be authorised or to be done “in the course

of and in accordance with” the duties of the office holder concerned. These provisions lack clarity as to when a disclosure is authorised; and while civil servants may now act in a commonsense fashion in their approach to disclosing official information, it is unreasonable that they should have to, in effect, turn a blind eye to the strict letter of the law. In any event, for as long as it remains on the statute book, the Official Secrets Act will continue to form part of the culture in which the civil service operates.

Related to the Official Secrets Act 1963 is the provision, at section 32 of the FOI Act, which provides for a review, by an Oireachtas Committee, of secrecy provisions in other legislation which can be invoked to “trump” FOI rights. The Oireachtas Committee review procedure includes a role for the Information Commissioner. In December 2005 the Commissioner presented the Joint Oireachtas Committee on Finance and the Public Service with a detailed and comprehensive review of such secrecy

provisions with a recommendation, in each instance, as to whether the secrecy provision should be repealed, or retained but made subservient to FOI, or be retained and continue to “trump” FOI rights. The Commissioner also made a lengthy oral presentation to the Committee in support of her report. Individual Government Departments also made submissions to the Committee and in many instances there was disagreement between the Departments’ views and those of the Commissioner on the need to retain secrecy provisions. However, when the Committee came to make its recommendations to the Houses of the Oireachtas, in every single instance of disagreement between the position of the Commissioner and that of a Department, the Committee chose to take the position of the Department. What was particularly unusual about this was that the Committee gave no reasons of any kind as to why it chose one view over the other. The Information Commissioner subsequently expressed her deep disappointment, not that the Committee had rejected her views, but that it had failed to outline any rationale for its conclusions and that it appeared to have decided the matter along party political lines.

As regards “whistleblower” legislation, between June 1999 and April 2006 the Whistleblowers Protection Bill 1999 remained on the legislative programme of the Oireachtas. This Bill began its life

“The purpose of my [Whistleblowers Protection] Bill was to challenge and help transform the traditional culture of secrecy surrounding the conduct of business and public affairs. From the Blood Transfusion Service to the beef industry, whether it is Army deafness or Dublin planning or, more recently and most devastatingly, Our Lady of Lourdes Hospital’s maternity wing, the questions are the same. Did nobody know or suspect? Is it credible that nobody in the system ever stumbled across wrongdoing? Why was nothing reported earlier?”

As regards illegality and malpractice in our financial institutions, did nobody in these institutions know what was going on? In answer to these questions most right-thinking people will believe people knew or had their suspicions. However, the consequences for whistleblowers, in their careers and livelihoods, are such that it is often easier to turn a blind eye.”

Pat Rabbitte TD, Dáil Éireann, 4 April 2006

as a Labour Party private member’s bill but one which was accepted by the Government, in principle, and was ultimately included (in 2002) in the Government’s legislative programme. There appeared to be a political consensus that some type of generalised statutory protection was warranted for workers, both private and public sectors, reporting corruption, wrong-doing or dangerous practices on the part of an employer. The 1999 Bill was withdrawn from the Oireachtas in April 2006 on a Government motion but with the stated intention that the protection of “whistleblowers” would be dealt with

legislatively on a sectoral basis. It is very unfortunate that legislation in this area, whether on a general or a sectoral basis, has not been progressed to any great extent since 1996-1997 - though one recent example of the sectoral approach is contained in the Health Act 2007 which provides for “protected disclosures of information” for employees in the health sector.

One possible conclusion from these few examples of unfinished business is that the Oireachtas no longer considers them as priority matters. In determining priorities, it is instructive to look at the

consequences of the choices made. In the present context, one measure to be taken into account is the perception of Ireland abroad in terms of transparency and corruption. Transparency International compiles an annual Corruption Perceptions Index (CPI) which attempts to measure how individual countries are perceived externally in terms of measures put in place to prevent corruption and to encourage transparency - both in government and in business. In 1995 Ireland scored 8.57 on the CPI (where a score of 10 denotes a country entirely unaffected by corruption) and was ranked 11th ‘least corrupt country’ in the world. In 2007 Ireland’s CPI score had fallen to 7.5 and we are now ranked 17th out of 180 countries listed in the Index. In its comments on this loss of position, Transparency International (Ireland) drew attention to a number of causes including issues to do with our ethics legislation, the financing of political parties and particularly weak controls in place within local authorities. In terms of what might be done to reverse this situation, it mentioned in particular the need to reduce substantially the level of fees now charged for FOI requests, given that these fees have resulted in a substantial decline in FOI requests. Transparency International (Ireland) takes the view that greater use of FOI can only be beneficial, commenting: “*Freedom of Information is recognised as a powerful tool against corruption and abuse of power.*”

“Shovelling enormous numbers of documents onto web sites is seldom a good way of communicating with wider audiences. Transparency leaves many audiences unable to see the wood for the trees, unable to understand what is disclosed, unable to assess what they understand or to judge its accuracy, and ill-equipped to take an active and constructive part in democratic debate.”

Onora O’Neill, *Rethinking freedom of the press*, Acadamh Ríoga na hÉireann, 2004

What Next?

It is easy to be critical of the detached approach of government to FOI in Ireland over the past five years or so. At the same time it is important that advocates of FOI acknowledge, and face up to, the fact that FOI is not the most important issue on the public agenda and that there are many “unknowns” - both of the “known” and “unknown” varieties - as to the costs and consequences of freedom of information. Equally, it is important that FOI advocates do not overstate the effectiveness of FOI laws and of the resultant “transparency”. In many respects, we can only guess at the implications of this line of thinking. One thing we have not had in Ireland over the past five years is any kind of reasoned debate on these issues.

One very interesting contribution on these issues, though in the somewhat wider context of press freedom, was made by Professor Onora O’Neill in an

address she delivered at the Royal Irish Academy in December 2003. She asked the question: “*How good is the case for extensive transparency requirements? Are they always desirable, or do they create problems for democratic, corporate and professional governance and accountability?*” In answering these questions, she suggested that “unmitigated transparency”, under which office holders are required to disclose all working documents, “can certainly lead to problems”. Overall, she concluded: “*Excessive transparency requirements can compromise good policy process, sound management, and even democratic process.*” This, in principle, may be correct. But there is no real evidence to suggest that the Irish FOI Act, as enacted in 1997, created “excessive transparency requirements”; it is arguable that the protections built into the FOI Act 1997 did provide a reasonably fair balance between the requirements of openness and the need to protect the functioning of government. Nevertheless, it is an

important point and one which requires to be considered.

A further point made by Professor O’Neill is that “*transparency is not enough for democracy because like self-expression it is indifferent to standards of communication*”. She argues that simply making documents available does not, in very many cases, constitute good and effective communication; and that the beneficiaries of indiscriminate release of documentation may be a small, specialised audience rather than a wide audience or even the public at large. Clearly, there is considerable merit in this observation. While this does not detract from the usefulness of release of records under FOI, or from the usefulness of public bodies making certain categories of information available as a matter of course (as with school inspection and nursing home inspection reports), it does suggest that public bodies should not be reliant solely on FOI as a strategy for communicating with the public. However, Professor O’Neill’s point here is hardly an argument against making records available but, rather, an argument that the provision of records needs to be contextualised and the needs of different audiences must be addressed. There is the danger always that public bodies will withhold information on the comforting basis that the public may not understand it, or may be confused by it or, worse again, that release will lead to enquiries being made by members of the public.

There is a strong case now for a thorough review of our FOI legislation in which searching questions are asked, and answered, regarding the purposes of FOI, the modalities of FOI and the costs and benefits of Freedom of Information. Such a review should be carried out by a small group with an independent chairman and within a relatively short time span, e.g. within six months. The review group should, as part of its task, identify specific legislative measures for the implementation of its findings. In the meantime, and in order to restore public confidence in the current FOI arrangements, the application fees for internal review and for review by the Information Commissioner should be reduced substantially. And, as recommended by the OECD in its recent comprehensive review of the public service in Ireland - *Ireland: Towards an Integrated Public*

“In consultation with the Department of Health and Children, it was decided not to go into detail in relation to the numbers of patients involved ...Doing so would only serve to cause widespread alarm in the public and unnecessary confusion in the media.”

Irish Examiner, 1 March 2008 - quoting an email message (of November 2007) from the HSE to the Government Press Secretary regarding a decision not to disclose details of the number of patients being reviewed due to concerns as to the work of a particular pathologist in Cork University Hospital.

Service - the “up-front” fees for the initial request should be dropped. The OECD report commented:

“The government should reduce barriers to public information by making all requests under the Freedom of Information Act 1997 free ...While user charges may limit frivolous requests (and thereby reduce burdens on the

Public Service), they also serve as a disincentive to greater openness.”

Indeed, the OECD’s overall approach to FOI is one to which great weight should be attached in undertaking the thorough review proposed in this present publication.



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