Preface

Timeline to the introduction of FOI in Ireland

The Freedom of Information (FOI) Act was first introduced in Ireland in 1997 by the then Fine Gael-led 'Rainbow' Government. It came at a time when Ireland was modernising its civil service structures and was introducing and strengthening oversight, accountability, governance and transparency measures. It also came following a period of political scandals, revealing a layer of secret corruption among Ireland's political class (see Chapter 2). The Act, which came into force in April 1998, was a watershed moment for Irish democracy because for the first time a presumption of openness replaced the presumption of 'official secrecy' that had existed in the State since its foundation in 1922. The Act granted the right to every citizen to request access to documents held by public bodies, including the right to access personal information and have it amended, and the right to see documents detailing how public bodies (including the government) made decisions. The legislation was lauded internationally and proved extremely popular with citizens and the media (Felle and Adshead, 2009).

However, just six years later, in 2003, the Fianna Fáil–Progressive Democrat Government introduced the Freedom of Information (Amendment) Act. The then Minister for Finance, Charlie McCreevy, explained that the 2003 legislation was necessary because FOI had caused unwarranted pressure on the workings of departments of state and on government. At the time, however, ministers were known to be less than enthusiastic about the release of politically embarrassing information and it is likely that was also a causal factor in the decision to amend the Act. That amended legislation severely curtailed the kind of information that could be released under FOI and also introduced fees for FOI requests. Correspondence between government ministers was specifically excluded from release under FOI, as were all documents that were created for a government meeting. The definition of 'government' was so broad as to make any document

held by a government department potentially exempt. But more importantly, the legislation sent a strong signal that the open society agenda had firmly closed. The Civil Service took its cues from government, and the signal was clear: FOI was no longer important. Plans to extend the scope of FOI to other public bodies such as financial regulatory authorities and the Irish police (*An Garda Síochána*) were shelved. After 2003, journalists frequently complained about long delays in accessing documents, about spurious reasons for refusal and about inconsistencies in the ways that information was – or was not – released. Up-front charges included a €15 fee for making a request, a €75 fee for an internal appeal and a €150 fee for a review by the Information Commissioner. There was no recourse to a refund if an appeal was successful. The complaints from journalists were joined by those from civil society groups and international rights groups such as GRECO and Transparency International. Although the 2003 legislation had little impact on personal requesters, it effectively capped the capacity of journalists to investigate in the public interest using FOI laws: documents that might be judged controversial, or potentially embarrassing to the government of the day, could be refused.

With the economic boom in the mid-2000s, Irish journalists continued to report on current affairs, but arguably there was insufficient scrutiny of government economic policy or of the financial oversight and regulatory systems. When the economic crisis of the late 2000s hit, Ireland was among the worst effected countries in the world. There has been much commentary about the severity of the impact of the financial crisis in Ireland, and about the inability of Opposition Members of Parliament, or the media, to get access to documents that formed the basis for government decisions during the Celtic Tiger years (O'Brien, 2014). It is impossible to say whether a more open system of government and regulation would have resulted in flaws in the system being spotted earlier, or whether government policy could have been changed in a way that might have lessened the severity of the crisis. However, it is arguable that if Opposition Members of Parliament and members of the media had been able to probe using the original 1997 FOI Act, some of the weak regulation and flawed policies might have been exposed earlier.

In the 2011 general election, the Fianna Fáil–Green coalition government that had been elected in 2007 was routed, and a Fine Gael–Labour coalition entered power. FOI returned to the national agenda on foot of a promise in the coalition's Programme for Government (Government of Ireland, 2011). In 2012, the Minister of Public Expenditure and Reform, Brendan Howlin, introduced a Freedom of Information Bill. Though he initially resisted changing the fee regime and acknowledged that fees kept the number of requests down to a manageable level, in June 2014 he agreed to abolish up-front fees for requests in favour of a cost limit along the lines of what is in place in the United Kingdom (SI 2014/531; Minihan, 2014). The Freedom of Information Act 2014 was

passed by the Oireachtas on 14 October 2014 and came into effect for new bodies including the Irish police and the Central Bank in April 2015.

The 2014 legislation explained

The 2014 Act is broadly similar to the 1997 legislation, in that it restores the principles contained in the original law and places openness and transparency at the forefront of the operation of the legislation. Indeed, the Act specifically states that public bodies, in performing their functions under the Act, shall have regard to (a) the need to achieve greater openness of public bodies and to promote the principle of transparency in government and public affairs; (b) the need to strengthen accountability and improve the quality of decision-making of public bodies; and (c) the need to inform discussion, debate and comment by the public of decisions of public bodies (2014(11)(3)(a–c)).

Section 8 of the Act requires public bodies to proactively publish records and to prepare publication schemes. This was a feature of the original legislation and while all public bodies initially complied with the requirement, the publication schemes became hopelessly out of date in many instances, especially following the 2003 amendment. Under the new Act there is an onus on public bodies and other organisations covered by FOI to review their publication scheme every three years. The legislation also provides for model schemes for classes of public bodies, and the Information Commissioner has an oversight role in ensuring public bodies are in compliance with the Act. A separate code of practice produced by a panel of experts also provides for training for FOI officers, and public bodies are required under the Act to have regard to the code (Section 48).

Access to records is provided for under Sections 11 and 12 of the legislation. The section is largely similar to sections in the original Act, in that it provides a right of access to any person to request access to records held by a public body, and requires the public body to provide reasonable assistance in getting access to those records. Stronger language on the need for public bodies to be open and transparent is included. As with most similar legislation in Western countries, the request must be in writing (though email requests are accepted) and public bodies have four weeks to respond. Sections 13 to 16 detail grounds for release, part release and refusal, or delays and deferral of access to records. There is little change in these sections from the original Act, or from similar legislation internationally. The legislation also grants access to personal records, with strong entitlements to access records, including the right to have incorrect information amended. These sections are little changed from the original legislation. Further sections of the Act dealing with the functioning and administration of the legislation, with charges for search and retrieval, and with internal appeals, reviews by the Information

Commission and appeals to the High Court, are also broadly similar to the original legislation.

There are a number of small but significant changes in Part Four – Exempt Records that tip the balance of the legislation back in favour of the public interest and away from the blanket of secrecy that was introduced following the 2003 amendments. Section 28, concerning meetings of government, reverses the absolute exemption in place for government documents that was introduced in 2003. Documents that record cabinet decisions are still fully exempted (28(2)(a)) but documents created for submission to government by a minister of the Attorney General ‘may’ be released (28(1)) and the five-year rule for the release of such documents was reintroduced (28(3)). This had been extended to ten years in the 2003 Amendment Act. There are no specific grounds listed in the 2014 Act upon which a decision-maker would base a decision to release documents under Section 28(1), though subsection 6 includes an important definition of ‘government’ for the first time. It defines government as a committee of members of the government (the cabinet or a cabinet subcommittee), or a committee with a member of the government and a minister of state and/or the attorney general. While the definition is broader than the constitutional definition (which limits government to just the cabinet) (1937: Article 28) it is significant in that the 2003 Act’s blanket ban on the release of documents included no definition of government in its wide-ranging exclusions.

Section 34 of the new Act grants the power to a minister to issue a certificate to exclude any document on a number of grounds. This is largely similar to provisions in other jurisdictions, and was included in the original 1997 legislation. The provision has been used frequently by the Department of Justice, and on fewer occasions by other government departments. The UK Act requires a cabinet decision for the issuing of a certificate, and therefore the provision has been used on only a handful of occasions in the United Kingdom, most notably regarding records on the decision to invade Iraq in 2003.

Sections 33, 35 and 36 allow for the refusal of records that are sensitive, including those relating to national security, defence, Northern Ireland and international relations (33(1)); information obtained in confidence (35(1)); and commercial sensitivity (36(1)). A public interest override is in place for Section 33, and there is an onus on a decision-maker to first decide that release would adversely affect national security, defence, Northern Ireland or international relations before refusing to release documents. Still, no such public interest test is in place for commercially sensitive documents (see Chapter 3), and there is considerable anecdotal evidence from media reports of whole-scale use of this section to refuse access to documents, even when there may be a legitimate public interest in the information being made public (see Chapter 7).

Section 40, dealing with financial and economic interests of the state, now also contains a public interest test. While information that could cause the state financial loss if released is still subject to refusal, Section 40(3) specifically states that decision-makers should consider whether the public interest would be better served by release of the information. This is a significant inclusion and offers an element of oversight of financial and economic affairs, and is likely a result of the legacy of light-touch regulation that dogged the Irish financial system during the Celtic Tiger years. The inclusion of the Central Bank and other economic and financial oversight bodies under FOI is also likely because of this.

The powers of the Information Commissioner to carry out investigations are strengthened. The old legislation gave the Commissioner the power to investigate any public body (2007: Section 36), in relation to its performance on matters pertaining to FOI, and to report on its findings. That power is continued under Section 44 of the 2014 Act. However, such reports in practice were rarely undertaken because the Information Commissioner's office did not have the resources to carry out such work. In the 2014 Act the Commissioner is granted new powers to enter any premises and demand documents (Section 45), and any person who fails to comply, or obstructs or hinders the investigation of the Commission, is guilty of a criminal offence (45(7)). Significantly, however, the power to enter a garda station and demand records is excluded (45(10)) (see Chapter 4). The 2014 Act makes the destruction or material alteration of a document a criminal offence for the first time (Section 52). While the penalty for summary conviction is a small fine, the section sends out a signal to public bodies of their statutory duty to comply with FOI legislation.

The extension of the legislation to bodies in receipt of funding from the state is also an important step. However, the legislation does not extend to companies who perform public functions that have been privatised, such as waste collection, major semi-state bodies (except Irish Water), areas where the state has a monopoly such as rail, or public transport that is part monopolised, such as Dublin Bus and Bus Éireann.

References

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