Topic : The Freedom of Information Scheme

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History of Freedom of Information in Ireland

Freedom of Information (FOI) measures were first introduced in Sweden in the 1700s. Subsequent developments in public access rights have resulted in a very open relationship between Sweden's government and its citizens. In more recent times, many more states have introduced legislation of a similar nature.

FOI legislation was first introduced in Ireland 18 years ago, in 1998, at a time when more than 20 countries had similar laws. Today, more than 100 countries across the world have FOI laws, including the vast majority of the EU Member States. Such laws have become a key feature of democratic states.

The introduction of the FOI Act in Ireland represented a major change in culture and approach for public bodies regarding the information held by them. Prior to FOI, the Official Secrets Act provided for minimal access to information and created a public administration that saw nothing but danger in any attempt to release its control over information. The FOI Act provided for a right of access by members of the public to records held by public bodies, the right to have information held about them corrected or updated where necessary and the right to be given reasons for decisions taken by public bodies which affect them. The Act also introduced a requirement for public bodies to publish certain information, including information about their rules and procedures.

The radical nature of the FOI Act was acknowledged by the Irish courts at an early stage. Among other things, it was described as affecting in a most profound way access by members of the public to records held by public bodies, as a piece of legislation independent in existence, forceful in its aim and liberal in outlook and philosophy. The Supreme Court commented that the Act constituted a legislative development of major significance that dramatically altered the administrative assumptions and culture of centuries, replacing the presumption of secrecy with one of openness.

However, an observation that applies world-wide, with the possible exception of some Scandinavian countries, is that most Governments actually find it difficult to be open. For those countries which have FOI regimes, there is the ever present risk that the Government will find a way to curtail its operation. Indeed, this is precisely what happened in Ireland with the introduction of the FOI Amendment Act 2003.

The Amendment Act extensively curtailed access rights by strengthening many of the exemptions in the original Act. It seems that the primary urge to amend the legislation arose from the fact that some Government records would have become potentially available under the FOI Act during 2003. Significantly, the Amendment Act also brought the introduction of fees for making requests and for availing of appeal and review mechanisms. The introduction of fees gave rise to a significant, almost immediate, reduction in usage of the Act, particularly by journalists. Within one year, usage of the Act had fallen by 50%, with usage by the media falling by 83%. While usage rates rose again gradually year by year, it was clear that that the fees regime was a significant barrier to citizens making use of their access rights.

In 2011, the newly appointed coalition Government was facing unprecedented challenges following the severe financial crisis that began in 2008. At the time of its election, Ireland was experiencing major austerity measures, salary reductions, and high unemployment. In its Programme for Government, it was acknowledged that the failures of the political system over the previous decade were a key contributor to the financial crisis and commitments were given to radically overhauling the way Irish politics and Government work. Among other things, Government committed to restoring the FOI Act to what it was before it was amended in 2003 and to extending its remit to all public bodies.

As a result, the FOI Act 2014 was introduced. While the Act did not fully restore FOI legislation to its pre-2003 state, it reversed many of the more significant curtailments. Among other things it reduced the time period within which Government records cannot generally be considered for release from 10 years to 5 years. Significantly, it abolished the application fee for making non-personal requests for information and significantly reduced the fee for seeking a review by my Office of decisions taken by public bodies on FOI requests. The Act was also extended to all public bodies, although in some important cases, such as the Irish Police Force and certain state financial institutions, the extent of its application was quite limited.

The impact of the FOI Act 2014 has been almost immediate. FOI Usage levels have increased significantly. 2015 saw a 38% increase in the number of FOI requests made to public bodies over the previous year. Of course, such increases have brought with them significant challenges for public bodies and, indeed, for my Office. I will outline later how my Office set about meeting those challenges.

The Information Commissioner

It would be useful at this stage for me to explain my own dual role as Ombudsman and Information Commissioner. There are various models in existence around the world. In Ireland, the posts of Ombudsman and Information Commissioner were created under separate pieces of legislation. The post of Ombudsman was established under the Ombudsman Act 1980 while the post of Information Commissioner was established under the FOI Act 1997.

In some jurisdictions, such as Norway, the remit of the Ombudsman includes access to information functions. In the UK, the Information Commissioner also performs the functions of Data Protection Commissioner. In Ireland, however, my remit as Ombudsman does not extend to access to information or data protection functions. I just so happen to hold both roles of Ombudsman and Information Commissioner, while there is a separate Data Protection Commissioner.

As Ombudsman, I make recommendations on complaints that are made to me about alleged maladministration. As Information Commissioner, I review decisions made by FOI bodies under the FOI Act 2014. I also keep the operation of the Act under review and I may, at any time, carry out an investigation into the practices and procedures of FOI bodies. I am independent in the performance of my functions. The staff of both Offices work independently of each other but do share corporate, IT and other services.

The Irish model is a slightly unusual one but the decision to make the Ombudsman the Information Commissioner was taken for a number of reasons. The Office of the Ombudsman had been in existence since 1984 and had established itself in the eyes of the public and of the public administration as effective, independent and impartial. The Government therefore felt that the dual role of Ombudsman/Information Commissioner would give legitimacy to the new FOI legislation and to the Commissioner role. In addition, the sharing of services and the housing of both Offices under the same roof, would also be financially prudent.

The Minister who championed the FOI legislation also felt that the Act needed an enforcement agent who could make binding decisions rather than recommendations and this was why she stayed away from the model of Ombudsman who simply makes recommendations in relation to the release of documents. While virtually every Ombudsman recommendation had been accepted since its establishment, the Minister felt that the culture of secrecy was so embedded within the Irish public administration that the option of rejecting an FOI recommendation might prove too tempting for some civil servants and politicians. As far as I know, and for the same reasons I have just outlined, the option of not having an Information Commissioner was never considered. The culture of secrecy would make it inevitable that records would be withheld because officials might take a very justified gamble that the requester would find it either too expensive or too complicated to go to the courts to seek release.

Whatever the reasons for providing for a dual role of Ombudsman/Information Commissioner, it is clear to me that the work of the Office of the Information Commissioner complements that of the Office of the Ombudsman. Both Offices play an important role in raising standards of public administration. The Office of the Information Commissioner does so by helping to make public bodies accountable and more transparent. Indeed, both of my Offices operate under a shared strategic plan whose vision is for a public service that is fair, open, accountable and effective, with a key objective of driving improvements in the wider public service.

OIC Casework v Ombudsman Casework

I have made reference to one of the key differences between the role of Ombudsman and that of Information Commissioner, namely the binding nature of my decisions as Information Commissioner. There are a number of other obvious differences. The process of reviewing decisions taken by public bodies on FOI requests requires a rather legalistic, technical approach. The FOI Act requires the FOI body to satisfy me that its decision was justified. I review such decisions based on my understanding and interpretation of the law. The Act specifically precludes me from having regard to the motives of requesters, except in so far as those motives may reflect a public interest in the release of records. On the other hand, as Ombudsman, my examinations are not limited solely to compliance with the law and extend to wider considerations as to whether or not the public body has acted fairly and proportionately in its dealings with complainants.

There are, nevertheless, similarities in the procedures each Office adopts in carrying out casework. As Information Commissioner, the FOI Act provides that I may pursue possible settlement between the parties to a review. This allows a greater degree of flexibility in considering the requirements of the parties than is available where a binding decision is required. Furthermore, the Office of the Information Commissioner has established a rigorous screening procedure to ensure that only valid applications for review are accepted, which is similar to the screening exercise carried out by staff of the Office of the Ombudsman to identify premature complaints or complaints concerning matters or bodies that do not come within jurisdiction. As such, it seems to me that where one of my Offices identifies possible procedural improvements, there is merit in considering whether those improvements can be adopted in the other Office.

Meeting Current Challenges

The Office of the Information Commissioner has had cause to seek to implement procedural improvements in recent years. As I have outlined earlier, the increase in usage that has arisen as a result of the introduction of the FOI Act 2014 has brought significant challenges for my Office. For example, my Office has recorded a 50% increase in the number of applications it accepted for review in the first half of 2016, compared with the same period in 2015. It has also had to deal with a large number of additional bodies that are new to the FOI regime and do not have the same level of expertise in processing FOI requests.

In anticipation of those challenges, my Office engaged in a comprehensive review of its casework procedures and processes in 2013. The review was underpinned by fact-finding visits to the Offices of the Scottish and UK Information Commissioners. Following the review, a wide range of changes were introduced.

One of the most fundamental of the changes was the establishment of a quick closure unit that is responsible for identifying straightforward cases and bringing them to an early conclusion. Other changes included the implementation of a policy whereby the public body is given one final chance, by written submission, to satisfy me that its decision to refuse a request was justified, and significantly reduced timeframes for complying with requests made by my Office for information relating to reviews. My Office also commenced the drafting and publication of comprehensive guidance notes on the interpretation and application of the various provisions of the Act for use by my staff and by public bodies alike. Significant progress had been made in this area.

The result of having implemented the various process and procedural changes has been significant. In 2015 the number of reviews completed by my Office represented a 60% increase on 2012 (the first full year before the changes were introduced). By the end of 2016, I expect that my Office will have almost doubled the number of cases closed over 2012.

Furthermore, the FOI Act requires my Office to complete reviews, in so far as practicable, within four months. In 2012, this target was met in only 19% of cases. Currently, my Office is closing approximately 60% of all cases within four months. It is clear, therefore, that the revised work processes have had a significant effect. It is worth noting that many of the revised processes are just as relevant to the work of the Office of the Ombudsman.

Impact of FOI

It is also important to take time to consider what impact FOI legislation has had on public administration in Ireland.

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, and
- Promoting citizen participation.

FOI has let the light shine in on many areas of public life in Ireland over the past 18 years. In the case of personal information, FOI has been used extensively by individuals to acquire health records, child care records, personnel and job selection records, to name but a few. In terms of knowing what public bodies are doing on behalf of the citizens of Ireland, FOI has been used by members of the public and the media to see how public bodies are carrying out their administrative functions and how they are performing. In relation to developing public policy, FOI has helped shed light on every aspect of public policy making, from taxation policy to regulation of the legal professions, from pension planning to fisheries policy.

My Office has also played a significant part in enhancing transparency and accountability in public administration. Decisions of my Office 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 transparency and accountability in how those funds are spent.

In one of the earliest decisions by my Office, the then Commissioner found that the advantages in terms of openness and accountability of disclosing the successful tender prices outweighed any possible harm to the tenderers or the tender process. As a matter of course, public tendering is now conducted on an assumption that the identity of the successful tenderer, as well as the value of the contract awarded, will be disclosed after the event.

In a more recent case, I directed the release of expenses paid to court judges. I found that the public interest in ensuring accountability in the expenditure of public funds outweighed any right to privacy which the judges might enjoy in relation to details of their expenses claims.

My Office has also achieved successes in many other area of public service provision. Decisions taken by my Office have resulted in significant transparency in the operation of many inspectorates and regulatory bodies which supervise and report on key public bodies. Before FOI, it was generally the norm that such bodies operated outside of the public domain.

Standards of care in private nursing homes became a matter of particular public controversy in Ireland in the mid 1990s. As the Health Board's reports of its inspections were not made public at the time, use was made of FOI in an effort to obtain access to those reports. In considering the issues, my predecessor took the view that while the release of a critical inspection report could have negative implications for the nursing home operator, any commercial disadvantage would generally be outweighed by the public interest in having such reports available to the public.

In her annual report for 2004, she recommended that all nursing home inspection reports should be published as a matter of course. In an immediate response to the Commissioner's recommendation, the body with responsibility for such inspections gave a public commitment to publish future reports on its website. My Office has had similar success in respect of inspection reports in other areas of public service provision such as childcare facilities and schools.

Staff recruitment is another area where procedures and practices have changed as a direct result of decisions taken by my Office. It is now common practice for job candidates to be informed of the selection criteria, including marking schemes and short listing criteria, and of their own individual marks. Another related area is that of employment references. As a result of decisions of the Information Commissioner, it is now the case that public recruitment bodies, when making requests for references, make it clear that the reference is potentially releasable under the FOI Act.

Conclusion

In conclusion, I believe that FOI has transformed public life and delivered on many of its promises. Because of the concentration on the shortcomings, people often underplay the impact of FOI, but overall, access to information has been transformed and this has had a major impact on public debate. There has been a huge change in thinking by public bodies and this has contributed significantly to greater openness and transparency. The press and media generally have made extensive use of this access to challenge and inform.

However, I am acutely aware that we must not be complacent. It remains the case that public finances are stretched and I am concerned that many public bodies are failing to ensure that the administration of FOI, as a statutory function, is afforded as much weight as any other statutory function. There also remains a job of work to do in encouraging Government to proceed with previous commitments given to extend FOI to all bodies in receipt of significant public funding.

It is important that we in Ireland remind ourselves that if we did not have an FOI Act we would certainly miss it. It is just as important that we continue to appreciate why it is necessary and to understand that it should be cultivated rather than neglected. As such, I would commend an FOI regime to all states that have not yet embraced it.