DEMONCRACY AND THE RIGHT TO KNOW -
10 YEARS OF FREEDOM OF INFORMATION IN IRELAND
Democracy and the Right to Know –
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Abstract

Freedom of information (FOI) is important because it aims to make government open, transparent and accountable. The legislation is based on the premise that people have the right of access to public documents, save for certain exemptions (Doyle, 1997: 68). The philosophy behind such legislation is that citizens have a ‘right to know’ (Wraith, 1977: 2) how and why decisions are made by government in their name. In that context it is arguable that FOI legislation also has the potential to lead to more accountable government, less corruption and better democratic outcomes for states. Those noble aims were not, it can be argued, foremost in the minds of the founding fathers of the Irish State. Instead the State’s colonial heritage and violent birth contributed to a highly secretive and centralised bureaucracy and government. Successive governments since then have sought to keep the State’s secrets. Exposés of corruption, external influences and cultural change finally lead to Ireland’s first Freedom of Information Act in 1997, and for the first time it allowed citizens a ‘right to know’. In 2003 significant amendments were introduced in that legislation, which removed a number of key release provisions and introduced fees for requests leaving the principle of the legislation - albeit in a narrower form – still in place. This paper firstly sets out the background to the development of open and accountable government in Ireland, and secondly examines elite attitudes to the introduction, operation and amendment of FOI legislation in the State between 1998 and 2008. It does this by distilling the proceedings of an expert focus group convened to discuss the Act and its legacy.

Introduction

Throughout the 1980s and 1990s, there were a number of significant moves towards more ‘open government’ reflected in several pieces of legislation designed to challenge the traditional ‘cult of secrecy’ (Doyle, 1997: 64-68) in Irish administration. Together, with other more general changes in the public service, such as the wider development of IT, financial management systems (and the Strategic Management Initiative – a wide scale attempt at organisational reform), these have led to a tighter focus on accountability and the way that it is exercised in the civil service (Boyle, 1998: 6-7). Taken together these developments reflect an attempt to develop a more contemporary service ethos, one where citizens are treated as clients and customers, who have a right to a service, rather than supplicants looking for favours. It is the government equivalent of modern management and is reflected in a raft of legislative changes throughout the 1980s and 1990s.
In 1984, the Office of the Ombudsman was established, tasked with investigating complaints by members of the public regarding their treatment by public bodies. In pursuit of this function, the Ombudsman has the power to demand any information, document or file, or official, from a public body in order to gain details about the complaint (Hogan and Morgan, 1998: 337-93). Between 1998 and 2002, 2,400 valid cases were received, plus another 1,400 that fell outside the Office’s remit (Gallagher and Komito, 2005: 260). Some 47 percent of the valid complaints related to the civil service, 32 percent to local government, 18 percent to health boards, and 3 percent to An Post (ibid: 260). Since the Office of Ombudsman began work, its investigations have found both individual cases of unfairness and/or maladministration as well as systemic problems within the public service as a whole, significant anomalies in the pensions regulations being a case in point (Connolly, 2005: 345).

In 1989, the Data Protection Act was introduced in order to protect personal data held by state. The Act was designed to protect the personal information of citizens held by the State, and was the then government’s response to the 1981 Strasbourg Convention (Clarke, 1996: 1). Governments, by their nature hold significant amounts of data concerning its citizens, particularly in sensitive areas such as healthcare (OECD, 2005: 37). While FOI type legislation seeks to give the individual the right of access to such records, data protection was specifically designed to protect the individual’s right to privacy (ibid: 37). The Organisation for Economic Cooperation and Development note that Ireland was one of 28 other OECD countries to adopt the legislation in tandem with other open government type laws (ibid: 47).

In 1993, the introduction of a ‘value for money remit’ for the Comptroller and Auditor General (Amendment) Act, 1993 broadened the authority of this Office. Until this piece of legislation, despite a number of attempts by successive Comptroller and Auditor Generals (C & AGs) to broaden their role, their powers remained limited by the original provisions for their office established by the British Exchequer and Audit Act of 1866 (O’Halpin, 1985: 506). During the late 1980s, however, under the chairmanship of Fine Gael TD Jim Mitchell, the Dáil committee of Public Accounts sought to remedy this problem (Connolly, 2005: 346). The 1993 Act empowered the C & AG to carry out ‘value for money’ audits and comparative studies across the public sector, which served both to draw attention to problems where they existed, and to promote best practice across the public sector more generally (ibid: 347).

In 1995, the Ethics in Public Office Act was introduced requiring senior civil servants, as well as members of the Oireachtas and other public servants, to disclose their business interests to the Oireachtas for annual publication. Details of property and business interests of TDs and senators provided under the Act’s provisions (Ethics
in Public Office Act, 1995: Sec: 5-7) were used as the basis for the sacking of former junior minister Ned O’Keeffe, who failed to declare an interest in a pig farm on a Dail vote (The Irish Times, February 17, 2001) and formed a part of a Standards in Public Office Commission investigation into former Cabinet minister Frank Fahey’s international property interests (SIPO, 2007: 8).

In 1997, the Public Service Management Act provided for the transfer of responsibility downwards in the civil service hierarchy and clearly defined the roles of Ministers and Secretaries General of departments for the first time. By outlining the respective roles and responsibilities of Ministers vis-à-vis Secretaries Generals and special advisors, the Act implied that ‘individuals know and recognise the extent of their responsibility and the ways in which they are answerable’ (Connaughton, 2006: 264). Managerial responsibility for the department was assigned to the Secretary General, whilst Ministers retained overall responsibility for the political direction and performance of functions of the department. Ministerial responsibility was not removed under the Act, but its exercise was greatly clarified. Ministers retain overall responsibility for government departments and offices. Under the Act members of government are collectively responsible to the Dail for departments of state administered by them and Ministers have a duty to inform and explain actions to the Oireachtas (Boyle, 1998: 14). Within the revised framework, however, Ministers are increasingly likely to redirect responsibility, “either through referring queries to agency heads or heads of independent units, or through instructing civil servants allocated responsibility for specific functions under the Public Service Management Act to deal in the first place with a query” (Boyle, 1998: 15). In the same year, the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, gave Oireachtas committees increased powers of investigation into areas of public concern, including the ability to compel witnesses to respond to questions.

It was within this context that the 1997 Freedom of Information Act, giving citizens a legal right of access to official and personnel information was introduced. As with other FOI legislation in other states, the principle of the act is that all public documents should be available for public scrutiny, save for specific exceptions. These exceptions usually concern documents dealing with security and defence, international relations of the state, ongoing deliberations, commercial interest and individual privacy (McDonagh, 1998: 10). The legislation also includes public interest overrides and harm tests, so documents may be released if the information they contain is deemed to be in the public or national interest, though specific countries apply specific rules depending on individual circumstances (Bugdahn, 2007: 129-130). In all FOI legislation, however, one central theme can be identified, namely the presumption of a right to know. It is assumed that information disclosure is important to allow opposition parties, the media and the public to
judge the quality of decision making (Doyle, 1997: 65). At the level of the citizen it is intended to ensure fair treatment at the hands of bureaucracy, including, for example, the reasons for decisions concerning access to public services such as social welfare entitlements (ibid: 65). In order to test these propositions in an Irish context an expert focus group was convened on February 29, 2008, in order to elicit the opinions of members of the Oireachtas and members of the media on the contribution of the Freedom of Information Act to Irish democracy, as well as experiences of their own and their colleagues use of the Act. Questions for the discussion revolved around two main themes, namely ‘democracy and the media’ and ‘security and democracy’. Set questions were put to the panel and members were asked for their opinions (see appendix).

**Methodology**

The expert focus group comprised five members: two TDs, two journalists and one Senator. In addition to this, the Swedish Ambassador to Ireland, His Excellency Claes Ljungdahl and the former Editor of The Irish Times, Conor Brady, now Commissioner with the Garda Síochána Ombudsman Commission, were asked to make contributions from their alternative state perspectives of the evolution and use of FOI legislation. Ambassador Ljungdahl spoke about the Swedish experience of open government and freedom of information, while Commissioner Brady addressed the issue of state security and democracy, specifically opening up An Garda Síochána to scrutiny by the introduction of the Garda Síochána Ombudsman Commission.

The focus group included:

**Senator Dan Boyle** attended on behalf of the Green Party. Senator Boyle is the party’s spokesman on finance, and as such is responsible for FOI on behalf of that party. Senator Boyle attended on behalf of the Green party and not on behalf of the (Fianna Fail/Green coalition) Government.

**Joan Burton, TD**, Deputy Leader of the Irish Labour Party and spokeswoman on finance, was invited to attend as an expert legislator. She was a member of the government that introduced the Freedom of Information Act in 1997 and she also regularly appears in the national media using the results of FOI requests to gain publicity for her campaigns as an opposition spokeswoman.

**Charlie Flanagan, TD**, is justice spokesman for Fine Gael, and was chair of the Oireachtas Committee on Finance during the passage of the 1997 Freedom of Information Act. A solicitor by profession, he was also identified as a regular user of FOI through the national media reportage of his work as an opposition spokesman.
Mark Hennessy, political correspondent for The Irish Times attended as a member of the national media who uses the Act in the course of his work as a journalist.

Conor Keane attended on behalf of the Irish Examiner. Mr Keane is a regular user of the Freedom of Information Act and is the newspaper’s chief commentator on FOI issues.

No representative of Fianna Fail or of the Government attended. Brian Cowen, who at the time of the workshop was Finance Minister, responsible for the Act, was invited to attend but his office declined the invitation. Local Fianna Fail representatives also declined our invitation to attend. Defence Minister, Willie O’Dea and Junior Minister Peter Power were both unable to attend. The focus group was held at the University of Limerick and was open to the public, and a small number of guests were also invited to attend. The focus group lasted for three hours (excluding a break) and the full session was audio recorded electronically. This working paper is derived from the contributions of those that attended.¹

The evolution of FOI in an international context

The idea that citizens have the ‘right to know’ (Wraith, 1997: 2) has its roots in Swedish democracy. The Swedish Freedom of the Press Act (1766) gives express rights to citizens both to see any official document and to inquire of a civil servant or politician what he or she knows about an official decision or policy, even if the information is not in written form. Those rights are enshrined in the Swedish Constitution. Later legislation on whistle-blowing also makes it illegal to prosecute an official who tells anyone what he or she knows (Ljungdahl, Expert Focus Group, 2008). This has resulted in a very open relationship between citizens, the bureaucracy and politicians. Swedish citizens have the right, for example, to inspect Ministers’ credit card statements, to demand access to any civil service document, or to examine any incoming or outgoing mail sent and received by government ministers - up to the point where citizens can walk into the Prime Minister’s office and ask to see the morning mail and not require a reason, or be required to give their name (Smyth and Brady, 1994: 22-23). Sweden’s Ambassador to Ireland HE Claes Ljungdahl argues that Swedish citizens consider openness in government a fundamental tenet of their democracy. ‘Openness as such is considered to be one of the cornerstones of our democratic Government, it is who we are. We believe that openness is good for democracy and there are many theories for that: The first one would be that it provides a guarantee against the abuse of power, and it also

¹ We are especially grateful to PPA faculty members, Peadar Kirby, Tom Lodge and Andrew Shorten to moderating, facilitating and contributing to this workshop.
provides inclusiveness in the decision making process in the Government and its agencies. It’s a delicate balance to strike but we hope for more openness in our democracy than less’ (Expert Focus Group, 2008).

Following the early Swedish example, a range of other western states have followed with FOI legislation. Finland introduced FOI in 1951 and since then, most EU member states have introduced similar FOI legislation - France, for example in 1978, Greece in 1986, and the Netherlands and Belgium in 1991 (Banisar, 2002: 7 & 16-18).

Among western common law countries, the US was the first to pass FOI legislation with the 1966 *Freedom of Information Act* followed, in 1974, by the *Government in the Sunshine Act* (Bugdahn, 2007: 130). In the US context, the pluralist system of democracy is predicated on a ‘core belief that a well informed citizenry was essential to effective functioning of an elected government’ (Giles, 2003: 476). The movement toward open access to government did not come until the McCarthy hearings of the late 1950s, and civil society and Capital Hill pressure for accountability in spending by government departments, particularly defence (McCran, 2007: 4-7).

The Commonwealth countries of Canada, Australia and New Zealand followed each other in introducing FOI legislation, with Canada being externally influenced by the US legislation, and Australia and New Zealand following Canada’s example, (McDonagh, 1998: 6) with all three countries introducing the legislation within months of each other in 1982 and 1983. All three are similar in that they have Westminster-style common law political institutions. In these states, demands for government accountability were primarily driven by opposition parties, much less so from citizens. Although these governments did not particularly like FOI legislation, once introduced it was hard to reverse and it has been subsequently argued that it represents a ‘small but significant shift in the balance of power between the citizen and the state’ (Hazell, 1989: 202).

**The evolution of FOI in Ireland**

From its foundation the Irish Free State was centralised and secretive, and far from a model of openness and transparency. Kissane (2002: 8) suggests the fledgling Irish state did experiment briefly with radical pluralist democratic institutions such as an elected judiciary and plebiscites on important matters, but reverted back to Westminster style governing soon after the Treaty was accepted. One of the first acts on the statute book of the fledgling government was the 1923 *Censorship of Films Act*, which gave the power to an officially appointed censor to keep from the public films, which it believed to be ‘indecent, obscene or blasphemous’ (*Censorship of
Films Act, 1923, Section 7(2)). This tradition of closed government continued throughout the 1920s and was carried forward with great enthusiasm by de Valera in the 1930s, even though he had complained about it when in opposition (O'Drisceoil 1996: 2 & Kissane 2002: 7-12).

Openness and transparency in government institutions were not high priorities for the fledgling Irish Free State. Fresh from fighting the War of Independence and in the middle of the Civil War, the Free State government was more concerned with defending against subversive elements to assure its survival and characterised by a ‘spirit of intense centralism and control’ because of the circumstances of its foundation (O’Halpin, 1998: 124). Garvin (1993: 9-23) suggests that the pervading culture of centralised and secretive government was ingrained into the new Free State as a consequence of the manner of its birth - through secret societies, meeting with the aim of subverting British rule. Suggesting that the commitment to democracy in Ireland was somewhat ‘equivocal’, Garvin even goes so far as to suggest that the emergence of democracy as the favoured form of government at all was a ‘close run thing’ (ibid: 22-23), arguing that Irish democracy was born at a time of considerable violence and forcibly imposed on the rebellious republican minority and the guerilla IRA which had shown contempt for democratic ideals (ibid: 11-12).

As the Free State government established its control, its civil service developed in a highly centralised and secretive way - largely influenced by the Westminster model of government, where citizenry had no right of access to information and the relationship between the citizen and government was from the start kept at arms length (Chubb, 1992: 4). The 1924 Ministers and Secretaries Act, which laid the foundations for the structures of modern government departments, combined with the adoption of British civil service structures and staff, lead to the incorporation of old British traditions such as centralised, authoritarian and secretive public service (Garvin 1996: 179). Farrell (1993: 93) argues that the establishment of the Irish Free State represented a continuation of the British traditions of civil service secrecy, which were a ‘Westminster import’ rather than any great revolutionary birth. The prevalent and ‘entrenched commitment to executive secrecy’ (ibid: 93) was further augmented by the attitudes among ministers in the new government at the time, many of whom remained suspicious of civil service personnel who had served previously served ‘the Crown’ (O’Halpin, 2002: 283). Contact between politicians and bureaucracy in the Irish Free State context was similarly an arm’s length relationship, because many civil servants working for the Free State government had previously worked for the Crown (ibid: 283).

In consequence, early Free State governments sought to protect their integrity through a vow of omertá-like adherence to the notion of collective responsibility and confidentiality in Cabinet decision-making (Farrell, 1993: 93). It is unlikely that decisions in Cabinet were made without any dissent, yet even for the purposes of
recording government decisions for national archives purposes the minutes of Cabinet meetings have traditionally been sparse with only the final decision included and disagreements never recorded (ibid: 96), a practice that continues to this day. A notable feature of successive Cabinet Handbooks, which lay down the procedures for Cabinet meetings, was their obsession with keeping the inner workings of government secret (ibid: 97). In 1932, the Department of the President of the Executive Council laid down that ‘cabinet documents not likely to be required again can be burned... personally by the private secretary [to the minister]’ (National Archives, S1646/1, Cabinet Procedure 16 April 1932 cited in Farrell, 1993: 97). Successive Cabinet handbooks have laid down the procedures under which memoranda for government are to be delivered to ministers – enclosed in special envelopes and marked for the ministers’ personal attention, and sealed with wax (Farrell, 1993: 97).

This early penchant for control was demonstrated firmly with the outbreak of World War II. The 1939 Emergency Powers Act empowered the Government to censor all broadcasts and newspapers in the Free State. The late Douglas Gageby, former editor of The Irish Times, noted the impact of this on democracy, writing that the wartime censorship “probably had an affect on the press and the public for some years after” (Lee 1979: 125). In 1963, the Irish Government updated and amended the Official Secrets Act, further engraining the secretive nature of the civil service. The original British legislation, from 1911 and 1920, was considerably strengthened by the then Justice Minister, Charles Haughey, who banned all official documents from release without the express permission of the minister responsible. The Act also made it an offence to receive official information. Penalties for breaches on indictment included a jail term of up to seven years (Official Secrets Act, 1963: Section 13.3). Introducing the legislation in the Dail, Mr Haughey argued that ‘surely a minister or government is entitled to decide whether a thing is secret or confidential and mark it as such’ (Dail Debates, Volume 194/1493, April 5, 1962). If FOI was designed to let in light on government secrecy, then it can be argued that Irish Official Secrets Act was firmly designed to ensure everything stayed out of that light. Instead of any right of access to official documentation, there was an express ban on the release of all official documentation unless a government minister granted permission to do so (Section 4, Official Secrets Act, 1963). However Doyle (1997: 65) notes that no distinction was made between information that was simply embarrassing to a government of the day, and information that was prejudicial to the State’s interest. While the Act was ‘extraordinarily wide’ (ibid: 65), sanctions were rarely used with just a handful of prosecutions against journalists recorded. Nevertheless the Act served to further support the so-called ‘culture of secrecy’ in Irish government (Holohan: The Irish Times, February 13, 1999).
Secrecy continued with the outbreak of the ‘Troubles’ in Northern Ireland in the 1970s and the invocation of Section 31 of the 1960 Broadcasting Act, which allowed the Minister responsible for RTE to direct the station not to interview Sinn Fein or IRA representatives (Broadcasting Act, 1960: Section 31). That directive was used successfully to prevent senior republican figures including the Sinn Fein leader Gerry Adams from being interviewed on RTE, and it lead to the sacking of the entire RTE Authority and journalist Kevin O’Kelly for an interview broadcast with the then IRA chief of staff Sean Mac Stiofain in 1971 (Meehan: Sunday Business Post, April 10, 2003). It was not until 1994 that these measures were lifted by the Minister for Arts and Culture, Michael D Higgins of the Labour Party, as part of the 1994-7 ‘Rainbow government’, which was also responsible for terminating the ‘state of emergency’ that had been declared with the Emergency Powers Act of 1939.

**Modernisation, the EU and pressures for change**

From 1973 onwards, Ireland’s membership of the EEC had a transforming influence on opening civil service bureaucracy. The attendance of Irish civil servants at EEC meetings both prior to and following membership of the EEC in 1973 had a dramatic effect on the Irish civil service (Laffan, 2000:125-130). Going to Europe changed attitudes within lead departments such as Finance, Foreign Affairs and the Department of the Taoiseach, which up to then were primarily influenced by the institutionalised British norms inherited by the State. The Department of Foreign Affairs in particular was ‘transformed by membership’ (ibid: 129). EEC membership required the State for the first time to decentralise decision-making because of accountability rules on regional funding and spending for structural and cohesion funds (Hayward, 2006: 1-3). Subsequent EU access to environmental information directives required Ireland to make all information relevant to the environment available to the public (Bugdahn, 2007: 129).

Throughout the 1980s and 1990s, there were a number of significant moves towards more open government reflected in several pieces of legislation designed to challenge the traditional ‘cult of secrecy’ (Doyle, 1997: 64-68) in Irish administration (detailed earlier). Added to this, the economic crises of the 1970s and early 1980s also lead to the National Understanding in 1979, and the National Economic and Social Council report in 1986, which recommended social partnership (NESC, 1986: 305-306). This was significant in that the Irish Government’s move to this mode of governance moved decision-making in important areas of public policy away from central government and into the hands of the social partners. The success of social partnership lead to its adoption at sub-national, regional and local level in a range of areas (Adshead, 2006: 331, 335). Social partnership, it can be argued, decentralised decision making for the first time and it gave citizens a taste of
change. In doing so it can also be argued that it lead to increased demands for accountability and openness from the public toward government.

Still, it was to be some time before the principle of freedom of information would be accepted. The first Freedom of Information Bill, introduced by Senator Brendan Ryan in 1988, (Oireachtas Eireann, 1988) was defeated by the then minority Fianna Fail government at the time. Increased calls for accountability in government, along with the report of the Beef Tribunal lead to a commitment to FOI in the 1992 Programme for Government (Doyle, 1997, 66). It is arguable that the report of the Beef Tribunal was a pivotal moment in the debate for increased accountability and transparency in high public office. In its report, the Chairman, Mr Justice Hamilton, concluded that: ‘If the questions were asked in the Dail were answered in the way they are answered here, there would be no necessity for this inquiry and a lot of money and time would have been saved’ (Hamilton, 1992: 3). That report and Mr Justice Hamilton’s comments were catalysts for change.

Significant concerns among the public and among senior politicians following the Beef Tribunal in 1992 led, at least in part, to a breakdown in trust between the leaders of the then Fianna Fáil/Progressive Democrat coalition government (Duignan, 1995: 112) and to specific commitments on openness and transparency in government in the administration that followed. The newly elected Fianna Fáil/Labour coalition included a commitment to introduce freedom of information, public service reform and ethics legislation in its Programme for Government (Government of Ireland, 1992). That government collapsed and was replaced in 1994 by a ‘Rainbow coalition’ (comprising Fine Gael/Labour/ Democratic Left), which continued the commitment to FOI legislation as part of their government programme, (Government of Ireland, 1994). ‘Openness, transparency and accountability became a mantra’ for the Rainbow government (Fitzgerald, 1999: 19), and a specific timetable for the introduction of new legislation aimed at opening up government was laid out. In 1995 the Ethics in Public Office Act entered into law and the Freedom of Information Act and Public Service Management Act followed in 1997. Whilst the FOI Act can be seen as one part of a raft of legislative reforms introduced in the last 20 years aimed at modernising government and administration (Kearney 1999: 9), it may also be regarded as a consequence of changes in government personnel and the coming good of Labour Party pledges.

Assessing the impact of FOI in Ireland

The Freedom of Information Act was passed on April 21, 1997, and came into effect a year to the day later, on April 21, 1998. That Act was considered ‘ground breaking legislation’ because one of its primary aims was to change the culture of secrecy that had existed in Ireland, and to empower citizens (Foley, 1999: 62). The Irish Act was
shaped by a number of influences – including overseas legislation and domestic experience in transposing the European environmental information directive (Bugdahn, 2007: 135), where it was suggested that government experiences with this directive had offered a lesson in what to avoid when introducing FOI legislation (Fitzgerald, 1999: 19). According to the Minister responsible for introducing the Act, Eithne Fitzgerald, FOI was part of a package of measures designed to make government open and accountable to the people, and to reverse that culture which existed throughout the public service since the foundation of the State (ibid: 18). The presumption of openness would replace the culture of secrecy in the *Official Secrets Act* (Doyle, 1997: 78). In the words of the ‘Rainbow’ coalition: ‘We are therefore committed to the enactment of freedom of information legislation to cover both central government and the broad public sector’ (Government of Ireland, 1994).

The 1997 Act, with subsequent statutory instruments, covers all government departments, state organisations, universities, hospitals, agencies, local government institutions and so on. Essentially the Act replaced a presumption of secrecy that had existed within bureaucracy in the State since its foundation with a presumption of openness. Access to personal information has always been free and does not attract charges. For example, farmers wanting to get access to documents about their grant application, or social welfare recipients who wish to access their files, now had the right to do so.

While the Act was supposed to allow for access to all government documents, there were a few exceptions, which included: documents of a commercially sensitive nature; documents relating to potential criminal cases, or to the security and defence of the State; documents concerning international relations of the State; and Cabinet documents (narrow definition). Oireachtas documents were exempt, but documents relating to management (costs etc) of the Oireachtas were covered. Presidential executive documents were also exempt.

It is in this context that the introduction of the FOI Act was, it can be argued, a watershed moment in Irish politics. For the first time in the history of the State citizens were given a right to know. Just 34 years earlier that right to know was not only non-existent it was criminalised with the introduction of the *Official Secrets Act*. Although the *Freedom of Information Act* was not designed to weed out corruption, its enactment was a deterrent to corrupt politicians and officials against engaging in the practice because for the first time there was a chance that their actions could be uncovered by the media or the public (Hennessy, Expert Focus Group, 2008). Information Commissioner Emily O’Reilly has gone further, suggesting the Act ‘keeps government honest’ (O’Reilly, 2008).
Initial usage

According to Burton (Expert Focus Group, 2008), ‘in 1997 Irish society was opening up’. When FOI was introduced, the country was coming out a culture of secrecy, during a time when there was increased demand from the public and civil society for accountability in government (ibid). Senator Brendan Ryan, who had introduced the original and unsuccessful 1988 Bill, described the Act as being of ‘huge constitutional importance… a magnificent revolutionary piece of legislation’, reflecting a ‘political determination that administrative guile would not be allowed to undermine the spirit of openness’ (Ryan, 1999: 1). The Act, despite a number of criticisms, was broadly successful and praised internationally (Council of Europe, 2005: 25-26). By and large, a major success, and usage of the Act was very high.

The 1997 Act lead to a number of exposés of government maladministration by both members of the media and by legislators. Examples include the indemnity granted to the Catholic Church by the then minister, Micheal Woods, against financial claims for sexual abuse by clerics, which left the State liable for hundreds of millions of Euro in damages (Hennessy: The Irish Times, February 12, 2003) and the Leas Cross nursing home inspection reports and health PPARS controversy was uncovered by opposition parties (O’Brien and Holland: The Irish Times, August 2, 2003; Donnellan and Reid: The Irish Times, October 5, 2005). Fine Gael TD, Fergus O’Dowd, was named Magill Magazine TD of the Year in 2006 for his uncovering of allegations of sub-standard living conditions for elderly people in nursing homes in nursing home inspection reports using the FOI Act (O’Brien: Irish Examiner, April 5, 2006). The Act was also used to find out about American planes linked to the CIA and allegedly involved in rendition landing at Shannon and Dublin airports (through use of paid security) (RTE News, 5 December 2005).

Despite this, however, the Act was never greeted with the welcome that would be typical in Scandinavian countries. Hennessy (Expert Focus Group, 2008) suggests that this was because of the previously ‘secretive and closed nature of the Irish government system, and the Irish cultural psyche’. Boyle (Expert Focus Group, 2008) argues that a change to a ‘culture of accountability’ was required in Irish society, suggesting that even today this has not happened. According to Brady, despite the existence of the Act, there was no cultural mind-shift within the public service to one of public accountability. He argues:

The Act as far as it went the sentiments were exceptionable, the sentiments were laudable, impeccable but in order to give it meaning to breathe life into it I would have thought you also needed a shift in accountability, and there never was that mind shift, no public servant was ever made amenable for any Act of Himalayan incompetence prior to the Act, and no civil servant has been made amenable since. So it’s all very fine putting it in but if you don’t actually
put in the concomitant enforcement measures, then it’s only a dead letter. I think rather than preventing skullduggery and incompetence, it has displaced skullduggery and incompetence and forced it from the written sphere to the spoken sphere (Expert Focus Group, 2008).

Flanagan explained, for example, that he was required under the Act to pay a request fee, and a search and retrieval fee, to illicit information for his constituent when inquiring into cancer misdiagnosis in his constituency:

Not only had I to use to Act but I felt some way out of joint at having to pay for such a facility, for a public representative, a member of the Dail to pay for information that should have been laid before the house in response to questions, not only would it not be laid before the house because we have a system now of closed government where government and responsibility has been devolved to so many qangos. Having to pay for information to see were statements that were made by the department’s head actually accurate and fulsome to my mind is grossly deficient (Expert Focus Group, 2008).

More generally, attitudes towards the FOI legislation have taken a while to bed in. Initially, there was a lot use of the Act, so much so the Information Commissioner’s office was swamped with appeals after refusal, which in many cases were justified because government departments and other public bodies were perhaps overly cautious in what they were prepared to release. Journalists were particularly high users, with a small number of journalists in particular accounting for a considerable minority of requests. There were a number of ‘exclusives’ at the start in relation to expenses (the costs of chocolate for the government jet, TDs expenses, mobile phone bills, the Taoiseach’s make up bills etc.), as well as a few sensationalist headlines about ministers going against advice of civil servants (Felle: Irish Independent, June 10 2005). FOI was able to show that a civil servant had written that they disagreed with a particular policy decision. Following a number of such newspaper headlines, the public and the media realised that ministers often received contradictory advice from civil servants, and that this was part of normal procedure within government departments.

**Changing behaviour and FOI?**

Some government departments – such as Finance, Enterprise Trade and Employment and Foreign Affairs - were extremely efficient and took to the ‘spirit of the Act’ in their approach. The Department of Defence, the Defence Forces and the Courts Service were also excellent and took a pro-active approach to information release – routinely releasing documents to journalists and members of the public on request, rather than going through the formal motions of FOI. The Department of Finance after a couple of years of requests, decided to publish the entire Tax
Strategy Group portfolio of documents every year after each budget – in the interests of open government (Department of Finance online, 2008). The Department of Finance had the same attitude in relation to decentralisation, opening their files for inspection by journalists (Brennock, 2000). Following this lead, and with advances in technology, a number of government departments now routinely publish documents on their websites for public inspection (Expert Focus Group, 2008).

Others, like the Departments for Justice and Health acted to the ‘letter of the law’ and were much more cautious about what they released. The Department of Justice has developed a reputation for secrecy, though this tendency against FOI is more common at lower levels of government than it is in central government (Expert Focus Group, 2008). Questions have been raised about the length of time taken to process requests and the costs imposed on journalists and opposition politicians. There are instances of some agencies outside central government charging substantial fees for information – the HSE have been known to charge as much as €2,000 fees for information, while State training agency FÁS initially invoiced newspaper columnist and Senator, Shane Ross, €1,000 for documents relating to senior executive expenses (Expert Focus Group, 2008 & Ross, 2008). In this respect some guidelines from the Information Commissioner would be helpful.

Clearly, one of the legacies of the Act has been considerable anecdotal evidence of records not being kept by civil servants in government departments and agencies subject to the Act. Hennessy suggests that the practice of verbal contact between civil servants is widespread within central government departments:

"It has an impact not just on journalists, because it’s affecting the institutional memory of government. You get changes in government and there are issues that a succeeding government needs to examine, it is now going to examine files that are far less comprehensive than they were previously. A minister is going to be far more in the trawl of civil servants who may have particular agendas one way or another in terms of objecting to policy a or b. They are not going to have a raw source of material that they can go back and check on (Expert Focus Group, 2008)."

Brady takes a similar view. ‘An awful lot of what would otherwise have been committed to paper simply doesn’t get committed to paper now any longer…. As an old reporter my instinct is that an awful lot of the stuff that might have been traced paper wise probably no longer gets committed to paper and probably goes through verbal arrangements’ (Expert Focus Group, 2008).

Ten years after the introduction of FOI, the Gardai, the Director of Public Prosecutions and the Attorney General are still not covered at all. In the case of the
Attorney General – his advice to government is still exempt – though there is an argument to say that such advice could be made public in certain circumstances. Similarly for TDs, the blanket refusal of the Government to reveal the Attorney General’s advice is an issue. Of course there are times when it should not be released, but this is not always the case (Expert Focus Group, 2008).

**FOI, justice and policing in Ireland**

An Garda Síochána was not included under the original Act, and to date it has not been included. In addition to this, new agencies created by the Government including the Garda Síochána Ombudsman Commission have not been included under the scope of the Freedom of Information Act. This fact has been criticised by the Ombudsman, Emily O’Reilly (*The Irish Times*, May 11, 2006).

The issue of police being amenable to freedom of information raises important issues of balancing rights between the right to a good name for those suspected but never charged with a crime, and the rights, for example of victims and relatives of victims of crimes. Hennessy suggests that FOI legislation does not trump privacy rights. Brady similarly argues that while some aspects of Garda activities such as finance and management should be amenable to freedom of information legislation, it would be extremely difficult to introduce freedom of information measures in prosecutorial or criminal investigation realms. ‘People are entitled to their good name, people are entitled to their personal safety, people are entitled to give information to an investigative agency and expect their confidentiality would be maintained…. I would think that anything within the operational sphere anything that is likely to be part of a criminal prosecution or part of a serious crime investigation I would say ‘no you cant do it’ it’s a contradiction in terms’ (Expert Focus Group, 2008).

Flanagan, likewise, argues that financial and management decision-making procedures of An Garda Síochána should be open to the Act (Expert Focus Group, 2008), while Burton argues for similar lifting of the blanket exclusion from FOI of other agencies including the Refugee Appeals Tribunal. ‘I think that they are areas that are very important from a public policy general understanding of democracy. I think it’s wrong that there are so little access to those kinds of areas of the broad family of justice decision making and administration’ (Expert Focus Group, 2008).

Whist there may have been sound legal reasons for not rushing to include the Gardaí initially, after 10 years experience with FOI, this omission is glaring. In the Expert Focus Group there was a general acknowledgement that – without suggesting a glass screen in relation to the DPP or the Gardaí actions - there are areas in which both could and should be subject to public scrutiny, especially from
a management and corporate point of view. Garda management of contracts for goods and services, for example, could certainly be subject to scrutiny, as well as policy decisions on, for example, allowing non nationals to join, or the Turban ban. On a range of non security/crime issues such as Garda budgets, tenders on cars, uniforms, tyres, there is no reason why these cannot be available under FOI.

The DPP refusing to give reasons behind decisions not to prosecute is a current issue. FOI might shed light on DPP decisions not to prosecute, or take a certain direction in certain criminal cases are examples of where a more open approach is needed (Expert Focus Group, 2008). Recent comments by the DPP that he is considering a change in this long standing policy would be welcomed.

**2003 Amendment to FOI legislation**

Following six years of operation, in 2003, the Fianna Fáil/Progressive Democrat government introduced an amendment act, which it could be argued severely curtailed the scope of the 1997 legislation. The 2003 *Freedom of Information (Amendment) Act* introduced new provisions to protect many government documents and correspondence between ministers from release, and introduced fees for requests, and larger fees of up to €150 for appeals of decisions (*Freedom of Information Amendment Act, 2003, Section 14; Statutory Instrument 264, 2003, Section 3*).

Since the introduction of fees and the tightening of release provisions, there has been a noticeable drop in the number of requests being made under the legislation. Statistics from the Information Commissioner’s office show that since 2003 requests under the Act have dropped by 50 percent, non-personal requests have dropped by 75 percent and requests by members of the media have dropped by 83 percent (Information Commissioner Annual report, 2007: 11). Requests to the lead government department – Finance – fell from a high of 349 in 1999 to 66 in 2007 (Dail Eireann Parliamentary Question 172, Vol: 647/4, February 20, 2008). Flanagan argues there has been a “huge curtailment” in the process of freedom of information since the introduction of the 2003 Act, which ‘rowed back’ significant advancements in open government, adding Irish political culture ‘regressed back to little short of a climate of secrecy’ (Expert Focus Group, 2008). Similarly, Hennessy distinguishes between the period 1997 to 2003, and from 2003 onward once the *Amendment Act* was introduced, saying ‘we do not have a *Freedom of Information Act* now’ (Expert Focus Group, 2008). Burton also criticises the 2003 *Amendment Act*, arguing that the original Act was ‘gutted’ by the amendment. She argues:

I remember in the 2003 Amendment Act all of the ‘Sir Humphries’ came in, the Secretary Generals of various government departments lead by the Secretary General to the Government came in and very pleasantly and very
plausibly said freedom of information had to be restricted because basically they couldn’t operate, you got the impression people were afraid to make a note in case some pernickety person picked it up and was wondering what a little scrawl or tick on a file by a minister or by a senior civil servant meant (Expert Focus Group, 2008).

Boyle similarly argues that the 2003 Amendment Act was a backward step in terms of openness and accountability in government, saying ‘we’ve probably put our foot in the water and we’ve been forced by the 2003 Amendment Act to take it back to ankle level. It’s nowhere near the type of information we need to have in force’. Brady states that the current Freedom of Information Act on the statute books is ‘not effective’ (Expert Focus Group, 2008).

The Council of Europe’s anti-corruption arm, the Group of States against Corruption (GRECO), criticised the Irish government for introducing fees for FOI requests (Council of Europe, 2005: 25-26), arguing that the fee rules ‘could prevent the public from requesting information and/or appealing a decision not to give out information. Above all, the fee system ... sends a negative signal to the public, which is to some extent in contradiction with the general principles of the right to access to official information’ and recommends the Government should ‘reconsider the system of fees’ for FOI requests (ibid: 25-26). The Organisation for Economic Co-operation and Development (OECD) in a report on the Irish public service, also recommended dropping up-front fees for requests. It said: ‘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’ (OECD, 2007: 7). In Ireland, Reports by the Oireachtas Committee on Finance (2005) and by the Information Commissioner (2007) both recommended a rowing back of the 2003 Act in certain areas. To date there are no plans to reverse the amendment.

Conclusions

The introduction of the Freedom of Information Act in 1997 was a watershed moment in the development of modern Ireland. It demonstrated the country’s commitment to openness and transparency because it introduced for the first time a ‘right to know’ for citizens, the polar opposite of the position that had existed previously under the provisions of the Officials Secrets Act. The contemporary Irish State is almost unrecognisable in terms of its approach to government from the fledgling Free State of the 1920s. A combination of the modernisation of the Irish civil service, a Europeanisation effect, and civil society demands following public corruption scandals has made the State more open, transparent and accountable. The 1997 FOI
Act has directly contributed to this in that it has lead to a more professional civil service and it is arguable that decision making in bureaucracy has been considerably improved as a result of its introduction.

The 2003 FOI Amendment Act introduced restrictions on information that could be released, and fees for requests. Its introduction, argued the then Minister for Finance, Charlie McCreevy, was necessary in the context of protecting the decision-making process of the civil service (Dail Debates, Vol: 563/856, March 23, 2003). It is important that the decision-making process be protected, however the balance between protecting the decision making processes of government and the public’s ‘right to know’ has been tilted too much in favour of secrecy. Furthermore, as others have argued (Hennessy, 2003), the 2003 amendment legislation, which defines ‘government’ records much more widely, appears to be at odds with the definition given in the Constitution which defines government as ‘not less than seven and not more than 15’ members of the Cabinet (Bunreacht na hÉireann 1937, Article 28.1). It would appear that there is an arguable constitutional case against the definition of ‘government’ in the 2003 Amendment, although this has not been challenged in the courts. In the context of more open and transparent government the 2003 legislation should be revisited and issues such as the blanket bans on the release of certain government documents need to be re-examined.

The issue of fees charged for requests under the FOI Act remains hotly contested. While the standard €15 processing fee for requests is, on balance, reasonable, subsequent fees for appeals - €75 for an internal appeal and €150 to appeal to the Information Commissioner, are out of line with most other modern states and act as a disincentive to citizens to request information. The Council of Europe’s anti-corruption arm, GRECO, criticised the Irish Government for introducing fees for FOI requests (Council of Europe, 2005: 25-26), arguing that the fee rules ‘could prevent the public from requesting information and/or appealing a decision not to give out information.’ It argued that the fee system ‘sends a negative signal to the public, which is to some extent in contradiction with the general principles of the right to access to official information’ and recommended the Government should ‘reconsider the system of fees’ for FOI requests (ibid: 25-26). The OECD in a report on the Irish public service, also recommended dropping up-front fees for requests. It said: ‘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’ (OECD, 2007: 7).

Concerns have also been raised about the imposition of extremely high search and retrieval fees by public bodies for access to documents under the Act (Expert Focus Group, 2008) with suggestions that this was done to discourage requesters from
proceeding with their requests. There is no prima facie evidence that this is the case, however newspaper articles, such as one written by Senator Shane Ross claiming that the State training agency FÁS requested €1,000 for access to documents detailing the expenses claimed by senior officials in that body (Ross, 2008) highlight the need for a much more transparent system of charges for information requests under the Act. In Ireland, Reports by the Oireachtas Committee on Finance (2005) and by the Information Commissioner (2007) both recommended a rowing back of the 2003 Act in certain areas including fees. The Ombudsman and Information Commissioner has already suggested she be entitled to refund fees for appeals in cases where she upheld the appeal. This would also, on balance, appear to be a reasonable suggestion and should be considered by the Minister.

The Freedom of Information Act has had a major impact in allowing much closer scrutiny of government by parliamentarians, since much more detailed information is available through parliamentary use of the Act than was previously the case under parliamentary questioning (PQs) or through what individual Ministers were prepared to release. In that sense, the Act has made government much more accountable to its citizens through the parliament. However it is quite bizarre that a member of the Irish parliament, carrying out a constitutional role as a representative of the people, should be charged considerable amounts for access to information required to carry out such an important role.

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