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**FOI "Regime Change": Should Information Commissioners Play a Role?**

The question posed in this afternoon's session is whether Information Commissioners should seek to influence the shape and scope of the FOI legislation under which they work. Should they, in particular, become involved where there are proposals to change FOI law in a way which will render FOI less useful in terms of openness and transparency? And if the answer to these questions is "YES", the related question is how precisely should Information Commissioners involve themselves: by way of quiet, behind the scenes contacts? By way of direct advice to Parliament? By way of active lobbying (including use of the media and public forums)? Or by way of some combination of these approaches?

Of course, each Information Commissioner is the creature of the legislation which created the office as well as being constrained by the wider legal system of his or her country. This may mean that, for some Information Commissioners, the role appears to be purely adjudicatory and the FOI legislation does not confer any function in the area of promotion of standards of good practice or in supporting and promoting the principles of openness and transparency in government. But, where this seems to be the case, I would ask this question: where the term "Information Commissioner" is used (or its equivalent in the particular country's language), does it by definition include certain implicit attributes? Is it implicit that an Information Commissioner's functions include the promotion of transparency and openness in government? That an Information Commissioner will necessarily engage in public debate, and engage with Parliament,

whenever these matters arise? Or, where there is no debate on openness and transparency in government, is it not implicit that an Information Commissioner is mandated to encourage such a debate? Issues of personal style are also relevant: some Commissioners will be natural activists and lobbyists; some will be cautious and careful, by instinct or experience, or both; and many (perhaps the majority) will fall somewhere in between. While the matter of personal style may be relevant to a Commissioner's approach to adjudication in individual appeal cases, even more so is it a factor in a Commissioner's approach to lobbying and influencing.

A Commissioner's personal style, and I include in that personal beliefs, philosophies, ideologies also comes into play in the decision making process as well, specifically at that point when a public interest override emerges for consideration in a case. In many instances the resolution will be obvious but in other cases highly subjective views as to what constitutes the public interest may emerge, the same views that come into play when the wider issue that we are discussing today is at stake.

At this early stage in my contribution, I would offer these tentative answers to the questions posed in this session:

YES - an Information Commissioner should seek to influence the shape and scope of the FOI legislation under which he or she works.

YES - an Information Commissioner should become involved where there are proposals to change FOI law in a way which will render FOI less useful in terms of openness and transparency.

YES - an Information Commissioner should be involved in public debate on all issues to do with transparency and openness in government.

I recognise that, in acting in this fashion, an Information Commissioner is inevitably drawn into politics. This should not be surprising; nor should it be an excuse for refusing to engage in public on issues of openness and transparency in government. Freedom of Information, after all, is quintessentially political. Politics should be the concern of all of us in public life and, while there is a particular role for elected political representatives, politics is not the preserve of elected politicians.

Freedom of Information is now part of the political fabric of very many countries and, not surprisingly, frequently it becomes a political football: used as a tool to embarrass government by the Opposition and disliked by government which often tries to restrict its use by amending the FOI law (even though, while in opposition themselves, government parties will have been ardent advocates of stronger FOI laws).

I recognise that for many people, that may be a challenging view. Some might question our objectivity our neutrality, in interpreting our respective FOI legislation if they sense that in our view the legislation is too restrictive. Is there a legitimate concern that we might over stretch the boundaries in our zeal to do our bit to promote what WE consider to be the appropriate levels of openness and transparency. I imagine however, that if that were the case, the checks and balances within the system - generally in the form of court appeals - would soon root out the pure ideologues from our ranks.

While it can be difficult to keep up to date with FOI developments internationally, it is clear from even a brief survey that, in many countries, FOI is struggling to maintain its position and/or struggling to achieve real relevance. The United Kingdom, as I understand it, has recently had a "near miss" in terms of FOI restrictions. The UK Act became operative in January 2005; but by early 2007 it became clear that the government intended to change the legislation to limit its use, principally by amending the charging regime in a way that would, in effect, exclude many requests. Recently, the new UK Prime Minister announced that his government would not proceed with these proposals and, instead, committed itself to strengthening the FOI Act. I'm sure Richard Thomas will be able to tell us how this turn-about was achieved and the role he played in it. We will all be taking careful notes.

Also, from what I read at least, the FOI world of Australia is not very happy with what it perceives as government hostility to Freedom of Information. A recent audit of freedom of speech, produced for the Australian Right to Know campaign, concluded that the intention of FOI law is often frustrated both by the broad nature of some of the exemption provisions and by the willingness of government to exploit these provisions. This audit was prepared by Irene Moss, a former NSW ombudsman, who is reported to have observed:

"Claims that FOI is achieving its intended purpose, including opening government activities to scrutiny and criticism, are not substantiated by the evidence".

In Canada, again as I understand it, the former federal Information Commissioner, John Reid, had been at odds with government for several years over (as he saw it) the failure to support his Office, the failure to reform the FOI legislation and, perhaps most importantly, the failure to encourage public servants to set aside the culture of secrecy. Last year, a Commission of Inquiry into a sponsorship scandal delivered a very strong report on the need for radical reform of Canada's Access to Information Act; the Inquiry, headed by a Superior Court judge, castigated an overemphasis on secrecy within government and found in favour of the principle of release of information with very strict limits on the grounds for refusing information requests. From what I have read, it appears that the position in Canada has remained unchanged. In his first Annual Report (2006-2007), the new Canadian Information Commissioner appears to paint a picture similar to that painted by John Reid. Commissioner Marleau makes this comment in his first Report:

"Despite much progress since 1983, there remain impediments to the full realisation of Parliament's intent as expressed in the Act. Too often, responses to access requests are late, incomplete, or overly-censored. Too often, access is denied to hide wrongdoing, or to protect officials or governments from embarrassment, rather than to serve a legitimate confidentiality requirement. Year after year, in the pages of these reports, Information Commissioners recount what is going wrong and offer views on how to make it right."

I was also taken with this comment from the new Canadian Commissioner in his first Annual Report, and I think its validity is something many of us can testify to:

"History has shown that the care and nurturing of the 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."

My purpose in referring to the UK, Australia and Canada - and I hope I have represented their situations reasonably accurately - is to suggest that, for many Information Commissioners, their working environment is challenging and, furthermore, these challenges are normal and to be expected. Because such challenges are inevitable, and because there is typically a political dimension to them, I think it is important that Information Commissioners should be clear as to how they will respond to these challenges.

I think I would be quite unwise to prescribe one single strategy for dealing with these challenges. Essentially, it comes down to a view as to which strategy is most likely to work. However, it is the business of Information Commissioners to promote openness and transparency in government and we should be guided by this imperative. Furthermore, most Information Commissioners are independent of government and this independence is something we should be prepared to invoke, where necessary.

## **IRELAND'S EXPERIENCE**

Having set the scene, as it were, you may be interested to hear a little of our experience in Ireland in recent years.

Ireland's FOI Act was enacted in April 1997 and came into effect one year later, in April 1998. Our FOI Act was preceded by a lengthy and quite comprehensive consultation process which involved all of the interested parties, including politicians, media, academics and civil society groups.

The Act itself was based on FOI legislation in a number of Common Law jurisdictions, with particular debts owed to Queensland, the Commonwealth of Australia, New Zealand and some Canadian provincial FOI laws. Ireland's FOI Act of 1997 was widely regarded as a very good example of what a modern FOI Act should be and, indeed, served as a model for some other countries. In the first few years of its operation, perhaps predictably enough, there were some decisions which ruffled feathers or at least caused some unease in official quarters. Everyone knew that at some stage it would be necessary to review the Act - both from a technical/procedural point of view and also from a substantive or policy point of view.

In August 2002 my predecessor, Kevin Murphy, initiated his own "in-house" review of the Act in order to be in a position to contribute to a wider FOI Act review - whenever that might be. What he did not know then was that the recently re-elected Government had already initiated its own "in-house" review of the FOI Act and that this review would lead to substantial amendments to the Act of 1997.

In June 2002 the Government appointed a High Level Review Group to look at the working of the FOI Act; the group consisted of five Secretaries General chaired by the Secretary General to the Government. This Group did not engage in consultation with any parties outside of government; as its report puts it, members of the Group "drew upon their own experiences and experiences of others of which they were aware, including that of their respective Ministers". Indeed, the Group's existence remained effectively a secret until February 2003 - six weeks after the completion of the review. Given that Ireland is a relatively small country, and not always noted for its capacity to keep a secret, this was some achievement.

On 12 February 2003, mind you in response to parliamentary questioning, the Irish Taoiseach or Prime Minister acknowledged that a Bill was being prepared to amend the FOI Act of 1997. That Bill was published on 28 February and the resultant Act came into effect precisely six weeks later, on 11 April 2003. During that six week period, the proposed amendments became a matter of major controversy in Ireland. The proposals - which I will outline shortly - were very vociferously opposed not just by the Opposition parties but by the media (both media owners and journalists), by trade unions (including, interestingly, some public service unions as well as the Irish Congress of Trade Unions) and by the leading civil liberties organisation. There were lengthy (though sometimes guillotined) debates in the two Houses of Parliament and there was a number of days consideration by a Joint Committee of the two Houses of Parliament. Matters took a rather bizarre turn when, at the height of the parliamentary debate, the Minister sponsoring the FOI Bill (the Minister for Finance), and his Junior Minister both chose to take some days off to attend the annual Cheltenham Race Meeting!

In the event, the Bill as published was enacted with only minor changes. While she was asked by the Opposition parties and by many in the media to refer the Bill to the Supreme Court to have its constitutionality tested, the President signed the Bill into law. Looked at dispassionately, it is hard not to admire the political acumen of the then

Minister for Finance in ensuring the success of his project to amend the FOI Act. Whether his methods - which the Blair/Brown government in the UK must surely envy - are to be admired, well, that's another day's work!

So what, then, were these FOI changes which caused such a furore? They may be summarised under the following headings:

**Government Business:**

the potential right of access to records of Government was pushed back from five to 10 years;

all Government records, less than 10 years old, became mandatorily exempt (shall be refused rather than may be refused);

communications between Ministers relating to a matter before Government became mandatorily exempt;

where appropriate, a committee of officials can now be deemed to be the Government for the purposes of the Act.

**Deliberative Process:**

The Secretary General of a Department of State was given the effective power to terminate a FOI request - with no right of appeal - by certifying that records form part of the deliberative process of any Department of State; the public interest test was recast; previously, the "deliberative process" exemption applied only where release of the records sought was contrary to the public interest; following the Amendment Act, the "deliberative process" exemption does not apply where, on balance, the public interest is better served by release than by withholding the records.

**Security/Defence/International Relations:**

The Bill provided for 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 without reference to the effect of its particular contents on international relations.

**Fees:**

One of the changes with most repercussions for the average user of the FOI Act and, indeed, for public bodies processing requests, was the provision enabling the Minister for Finance to prescribe fees (a) for the making of a request for access to non-personal record, (b) for an application for internal review and (c) for review by my Office. Under the Regulations introduced in July 2003 a range of fees now apply:

15 Euro for a request

75 Euro for an internal review application, and

150 Euro for an application to my Office to review the decision of the public body.

A discount on these amounts applies to certain people on low incomes.

**INFORMATION COMMISSIONER'S RESPONSE TO BILL**

At this point I will outline how my predecessor as Information Commissioner, Kevin Murphy, responded to the publication of the Bill to amend the FOI Act. [As it happens, Kevin was due to retire within a few months - in June 2003.] He declined to become involved in the debate in the media though, I understand, there was a clamour for him to make known his views. The fact that he had not been informed of the review of the Act, and had not been invited to participate or at least to put forward his views, might have been expected to rankle. The then Commissioner took the view that the office is politically neutral and that it would be ill advised of him to intervene in a manner that might be perceived as being politically motivated. For this reason, he felt he should avoid becoming involved in a debate about the merits or demerits of the Bill's provisions. Significantly, he described these restrictions on his involvement in the debate as "self imposed", and commented that while he was not restricted in what he could say, he had chosen to restrict himself in his comments in the long-term interests of the Office.

At the same time, the then Commissioner had regard to his statutory reporting relationship with Parliament which, as he saw it, included making his FOI expertise available to members of Parliament to assist them in their consideration of the Bill.

In the event, the then Commissioner contributed to the debate on the Bill by way of a detailed, written commentary on the implications for FOI should the Bill's provisions be enacted. This commentary was completed within two weeks of the Bill's publication,

submitted to Parliament and then published generally. In effect, the then Commissioner took the key provisions of the Bill and subjected them to scrutiny in terms of what would be the effect should the provision be enacted. He did this by applying the proposed new provisions to the circumstances of previous cases, already decided under the then existing legislation, and showing what would be the outcome under the proposed provision. This was a technical commentary which, as he noted at the time, was not intended for the general reader but intended as an aid to those involved in an analysis of the Bill.

Inevitably, the Commissioner's commentary identified significant difficulties with some of the Bill's provisions. In particular, he drew attention to two provisions which, in his view, "could create serious legal and other problems in the future and which have the potential to result in costly litigation possibly involving [the Commissioner's] Office." The first of these provisions had to do with protecting the work of a "committee of officials" set up to assist the Government directly in relation to a specific matter; and the mechanism chosen to achieve this objective was a re-definition of the term "Government" to include a committee of officials even where not one of the committee members was a member of the "real" Government. The then Commissioner described this new definition of "Government" as "constitutionally unrecognisable".

The second provision singled out by the then Commissioner concerned the proposal whereby a Secretary General of a Department could issue a certificate that a record contains matter relating to the deliberative processes of a Department of State and this certificate would cause the FOI process to be halted. Where such a certificate is issued, there is no right of appeal either to the Information Commissioner or to the High Court. Given the wording of the provision - which is now part of our FOI Act - it could give rise to bizarre outcomes, including a requirement that a Minister would be required to comply with a certificate issued by a Secretary General - and not necessarily the Minister's own Secretary General. For example, as Kevin Murphy noted, the Minister for Finance could be required "to refuse to grant a request for access to a record which was certified by the Secretary General of the Department of Justice [...] to relate to the deliberative processes of the Department of Agriculture & Food."

Perhaps equally inevitably, the Commissioner's intervention drew down the wrath of some in the government parties who interpreted his commentary as an unwarranted

intrusion into politics. For example, the then Minister for Justice accused Kevin Murphy of having "strayed across his self-imposed line" and asserted that section 39 of the FOI Act (under which the Commissioner produced his Commentary) "does not entitle him to comment on Bills". When the then Commissioner appeared before a Joint Committee of Parliament, he encountered a certain level of hostility from some of the Committee's members. One senator, in effect, accused the Commissioner of having timed the release of his Commentary to embarrass the Government and to provide ammunition for the Opposition. The same senator suggested, very helpfully, that the Commissioner should not have commented at all until the Bill had been passed; after that it would be quite all right for the Commissioner to say whatever he liked about the new law.

As regards the suggested amendments arising from the Commissioner's own "in-house" review, very few of them were acted upon. This was because, according to the Department of Finance, there was enough time to process them into legislative language once the Bill had already been published.

## **IMPACT OF FOI AMENDMENT ACT**

There is no doubt but that the 2003 amendments have had some negative consequences for the operation of FOI in Ireland. The most obvious consequence has been a marked decline in the use of FOI as a direct reaction to the imposition of fees. There has also been a marked decline in the level of appeals being made to my Office and again this is a function of the high fee which must be paid to make such an appeal. A related factor is that, arising from the controversial amendments of 2003, a general perception developed that FOI was no longer open for business.

For example, in 2006 (last year for which figures available) the number of FOI requests made across the public sector was 32% lower than the figure for 2002. And if one looks solely at requests involving "official" or "policy" information - as opposed to personal information where, generally, fees do not apply - between 2002 and 2006 such requests dropped by 55% (from 7,936 in 2002 to 3,499 in 2006). And this despite the fact that a substantial number of additional bodies were subject to FOI in 2006 as against 2002.

However, all is not doom and gloom and FOI continues to be an essential element in the conduct of public life in Ireland. The worst case scenario, predicted by many following

the 2003 amendments, has not come about. Up to the end of 2006, there has not been any instance in which a committee of officials has been certified as being "the Government" for FOI purposes. And in relation to the provision enabling the Secretary General of a Department to certify that a record is part of a deliberative process (thus putting the record beyond the reach of FOI), there has been only one such certificate issued in the period 2003 - 2006. Whether the reluctance to use these provisions has anything to do with the controversy they generated in 2003, is something to think about. I would be reasonably certain that, in the light of the intense controversy generated by these provisions when they were before Parliament at Bill stage, there is a marked reluctance on the part of Secretaries General to invoke these provisions. However, it would be wide of the mark were I to suggest that Ministers and their Secretaries General are now positive enthusiasts where FOI is concerned.

For my own part, in my Reports to Parliament, in my appearances before Committees of Parliament, and in many of my speaking engagements, I continue to draw attention to the need for a full re-assessment of the FOI Act and of the amendments made in 2003. The issue of FOI remains politically contentious with the Opposition parties continuing to argue that the 2003 Act should be repealed.

## **MAIN QUESTION**

To return, now, to the issues raised at the outset. It seems to me that there are two broad conclusions to be drawn from what I've been saying. The first conclusion is that an Information Commissioner must be an advocate for openness and transparency in government and that 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.

The second conclusion is that there can be no single prescription as to how an Information Commissioner will fulfil his or her advocacy role in support of openness and transparency. What is most likely to work in the particular circumstances is what counts.

However, what is of importance is that Information Commissioners should act with a sense of purpose and with that independence which (in most cases) is central to their office.

To return to a point I made at the start, party politics is not our business, but we are all political actors in the wider sense and should not shy from that. A recent, highly controversial Book, published in the UK by the British political journalist Peter Osborne, highlights the extent to which, in his view, the so-called Political Class has cannibalised areas of civic, judicial and public life that it has no business interfering in. He points out that the politicians are but one set of actors on the stage, not the entire company and calls for the reclaiming of that territory they have stuck their flag poles in. Freedom of Information is not the private water supply of a government, to be adjusted only in reference to their needs. It is a public supply, for the benefit of all, and while it may be uncomfortable for some to have to remind them that that is the case, it is no less than our public duty to do so.

Thank you.

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