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**"Own Motion" Investigations into Systemic FOI Problems -  
The Irish Experience**

Thank you for your words of welcome, Madam Chairman. I greatly welcome the opportunity that this conference provides to meet with my peers, both to discuss FOI issues in general and, in this instance, to share our thoughts on the use of "Own Motion" investigations.

My talk this morning is structured in five main parts, namely:

- the powers I have as Commissioner in this area, and my view on their usefulness;
- why the FOI Act grants these powers to the Commissioner;
- how I have used the powers;
- why I have used them; and
- what benefits have accrued from such use.

I do not intend to systematically summarise each of the 6 relevant investigations undertaken by my Office in the main body of this paper - such summaries have been included in the Appendix for those of you interested in the outcome of the investigations. However, I will refer in a general way to the issues giving rise to those investigations, and the conclusions that were reached, in the context of my comments under the three headings I've just mentioned. Therefore, I think it worthwhile to initially list each

investigation by title and main issue covered. The investigations undertaken by my Office thus far are, in chronological order:-

### **List of Published Reports and Commentaries**

Study of Section 15 and 16 Manuals published by public bodies (report published September 2000). This report examined the extent to which public bodies had complied with their statutory obligations to publish two reference books prescribed and described under sections 15 and 16 of the Irish FOI Act. The intention of these sections was to encourage public bodies to describe their functions, powers, duties and decision making processes in the context of encouraging them to be open about their activities, in turn leading to greater voluntary dissemination of information. The section 15 manual contains a general description of the organisation, its functions, powers and duties and the classes of records held by the public body. The section 16 manual requires the publication of the rules, practices, guidelines and interpretations used by the body in its decision making under any enactment or scheme which affects members of the public. Section 16 manuals must include an index of any precedents kept by the body for the purposes of such decision making.

The Freedom of Information Act - Compliance by Public Bodies (published July 2001). This reported on an investigation by my Office into the general practices and procedures adopted by public bodies in complying with the provisions of the FOI Act in the 3 years following commencement of the Act.

The Application and Operation of Certain Provisions of the Freedom of Information Act, 1997 (published March 2003). This report considered the practical impact that proposed changes to the FOI Act would have on decisions on records, based on the effect such proposed changes would have had on decisions made by my Office.

Review of the Operation of the Freedom of Information (Amendment) Act 2003 (published June 2004). This reported on an investigation by my Office into the effects of the Amendment Act and the introduction of fees for access requests.

Review of the Operation of Section 10(1)(a) of the Freedom of Information Acts, 1997 and 2003 (published February 2007). It has frequently been the experience of my Office in processing reviews of FOI decisions of public bodies that records which could not be found at initial decision stage were located following intervention by my staff. I decided

that this issue was worth probing further, which led to on an investigation into the use by public bodies of Section 10(1)(a), the provision under which public bodies can refuse requests on the basis that requested records do not exist or cannot be found.

Suggested amendments to improve the operation of the Freedom of Information Acts, 1997 and 2003 (published March 2007). This reported on an analysis by my Office of the current FOI Acts and, in particular, what specific changes could be made to improve how they operate. Having described the "Own Motion" investigations undertaken by my Office, I will now summarise, and present my views on the usefulness of, the statutory powers I have in this area.

## **1 STATUTORY POWERS:**

### **1.1 Summary of statutory powers:**

These powers are set out in sections 36, 39, and 40 of the FOI Act.

Section 36 provides power for my Office to investigate at any time the practices and procedures of public bodies in compliance with the provisions of the Act, and in enabling and facilitating citizens to exercise their rights under the Act. Three of the six reports I listed at the outset were produced under this provision. Section 36(2) required the Commissioner to investigate the general compliance of public bodies with the provisions of the Act within 3 years of commencement of the Act. While not an "Own Motion" provision in that this investigation was a statutory requirement, I think it is worth including in this paper as it covers similar ground to that dealt with in my other investigation reports. The Compliance investigation completed in July 2001 was initiated under section 36(2). The power to prepare a report on the findings of an investigation initiated under this section is set out in section 36(4).

Section 39 provides power for my Office to publish commentaries on the practical application and operation of the Act. The Review of Operation of the Amendment Act and the Suggested Amendments reports were prepared under section 39.

Section 40 requires the Commissioner to produce an Annual Report and lay it before the Oireachtas (Parliament). While also clearly not an "Own Motion" provision, as I will refer to issues arising from my Annual Reports elsewhere in this paper, I think it worthwhile mentioning the enabling provision here. Power to prepare and publish in the

public interest a report of any activity carried out by the Commissioner is provided for in section 40(2).

## **1.2 Views on usefulness of such powers:**

I will now outline my views on the usefulness of the powers I've just described. My views at this point are presented in general terms as I will go into more detail on what I see as the benefits of those powers later in this paper.

I, and my predecessor, have found the investigative and commentary provisions to be most useful tools in providing my Office with a variety of opportunities to comment on FOI matters of concern. I have found my Annual Reports to be an excellent vehicle in raising issues, with the inclusion of (currently) 21 statistical tables allowing for quantifiable analysis of trends over time. Indeed, it was statistical analysis of the pattern of requests received over time by public bodies that provided me with hard evidence that the reduction of over 50% in requests (over 75% for non-personal requests) from January 2002 to March 2004 was a direct result of the introduction of access fees in the 2003 Amendment Act.

While the mandatory production of the compliance report under section 36(2) is not an "Own Motion" provision, nevertheless it provided an opportunity for my predecessor to make evidence based comments on the compliance of public bodies with FOI generally. Of course, the rest of the investigative and commentary powers set out in sections 36 and 39 provide me with more flexibility in addressing systemic FOI problems. As well as providing evidential conclusions on the activities of public bodies in various areas, each of the reports published under those provisions have made recommendations that can be used as an empirical basis for measuring subsequent performance of those bodies.

The next section of this paper considers why I have the powers just described.

## **2. WHY I HAVE THESE POWERS**

The powers I've just described in sections 36, 39, and 40 of the Act were conferred on my Office by Government in the process of enacting the legislation. At this point I think it's worth summarising what the main intention of each of those 3 provisions was.

**Section 36:**

Apart from undertaking a key role as the main independent appeals system under the Act, the Commissioner is also the guardian of the mandate of the legislation and custodian of effective implementation of its provisions by public bodies. To bring this about, section 36 established a wide-ranging and influential brief for the Commissioner, enabling me to investigate and report on the practices and procedures adopted by public bodies in complying with the Act.

**Section 39:**

This provision enables me to prepare and publish commentaries on the practical application and operation of the Act, including but not confined to commentaries based on my experience of conducting reviews. As I outline elsewhere in this paper, my Office has found this provision of particular use in clearly describing the FOI landscape both before and after the 2003 Amendment Act, thereby placing the spotlight firmly on the resulting increase in restrictions and sharp decline in use of the Act.

**Section 40:**

This is a standard provision requiring office holders to produce Annual Reports on their activities and to present them to Parliament. However, the provision in subsection 40(2) is wide ranging and much more discretionary, and does not require me to consult with Government or public bodies, or to submit any report to a Minister, prior to publication.

In the next section I will deal with the practicalities of undertaking investigations and reporting on their outcome.

**3. HOW THE STATUTORY POWERS HAVE BEEN USED****3.1 Picking the Right Issue:**

The experience of my Office thus far has been that it is important to choose a subject for investigation that firstly, is a matter of considerable public interest and, secondly, lends itself to the production of a succinct and readable report. In my view, there is little to be gained from committing the limited resources of my Office to the resource intensive task of producing a report on an investigation unless that report contains conclusions that will both reach, and be considered by, its target audience. I hope that, in addition to providing information on the workings of FOI to the general public, the particular target audiences for the investigations my Office has undertaken to date were reached and

given the opportunity, at least, to engage with the comments or conclusions in the reports. The target audiences for each report are listed in the Appendix to this paper.

### **3.2 Picking the Right Method:**

As well as choosing a worthwhile issue, experience has also shown that the method of investigation, and subsequent reporting, is of importance. In this regard, as I will also mention in the section on the benefits of investigative reporting, my Office has found that involving the public bodies that are the subject of an investigation in the conduct of that investigation and production of the subsequent report to be a most useful modus operandum. In practical terms, this has worked by asking the public bodies to provide the basic information:

- (i) for the sections 15 and 16 Report, separate questionnaires were sent to public bodies, applicants to my Office, and to a number of interest and key user groups;
- (ii) for the Compliance Report, the FOI officers in the public bodies selected for investigation were interviewed and asked to comment on issues arising from the sample of public bodies investigated; and
- (iii) in the Section 10 ("search" exemption) Report, where replies to a general short questionnaire to all public bodies were used as the basis for selecting the 12 bodies chosen for investigation, in which the FOI officers were required to complete a more detailed questionnaire.

My Office has found that soliciting information from public bodies by way of targeted questionnaire to be an efficient and effective means of undertaking the research that is necessary for the conclusions of any report on an investigation to withstand proper scrutiny. It has also secured buy-in from public bodies in the investigation process itself, making it in turn more likely that any conclusions or recommendations emerging from the investigation are more likely to be implemented.

### **3.3 In-House or Outsourcing?**

Another practical issue to be considered when conducting an investigation is whether the production of the subsequent report should be undertaken within the Office or outsourced to a professional service provider. Given the detail of some issues that my Office has investigated, the two Amendment Act reports and the Suggested Amendments commentary being good examples of this, it would not be practicable to engage external expertise on report content issues. Publication is a different matter, however.

Experience has shown that the Annual Report is the publication most likely to lead to a demand for paper copies, so it is important that it is well presented visually as well as in content. My Office has taken a pragmatic approach to this point, and has now evolved a practice where the Annual Report, as the flagship publication of the Office, is internally written but professionally published, but other once-off investigative reports are both written and printed internally. As the investigative reports tend to be for more targeted audiences, the visual aspect of presentation is less important, making the issue of justifying expenditure of scarce resources on a visually pleasing but expensive product more relevant than in the case of the Annual Report. Furthermore, with increasing access to publications taking place over the web, the requirement to produce large volumes of paper copies is diminishing over time.

#### **4. WHY THE STATUTORY POWERS HAVE BEEN USED**

I have noticed that it has been the practice of some of us Information Commissioners, and I certainly include myself among this number, to periodically comment publicly on matters of FOI concern. While useful as a mechanism to raise public awareness of particular issues, the effectiveness of such public commentary can, in my view, be enhanced when supplemented by empirical, research-based evidence. In this context, I have found the production of investigative reports and commentaries to be of great value generally, but in the following three categories in particular:

##### **4.1 Awareness Raising:**

My predecessor used his report on Application and Operation of Certain Provisions of the 2003 Amendment Act as an opportunity to raise public awareness of the possible erosion of access rights provided for in the draft legislation. While duly acknowledging the primacy of the legislature in the introduction of all legislation, my predecessor adopted the approach of demonstrating the differences the proposed changes to the Act would have had on his decisions on applications for review he had decided upon. The report was prepared in the context of my Office, in a departure from normal practice, not having been consulted on or even informed of the proposed legislation. My own commentary on Suggested Amendments to Improve the Operation of the FOI Acts can, I think, be seen as a continuation of that approach where practical difficulties in aspects of operation of our legislation were highlighted, with suggestions as to how such difficulties

could be addressed in order to reinforce the core access rights so enshrined in the philosophy of FOI.

#### **4.2 Quantifying Existing Problems:**

The obvious example of this is the reduction in request rates following the introduction of access fees in the 2003 Amendment Act, as already mentioned above. Another example is the over-reliance of public bodies on exemptions relating to Government papers, the decision making process and the performance of functions of public bodies, as set out in sections 19, 20 and 21 of the Irish Act and reported upon in the 2001 Compliance by Public Bodies report. Analysis of decisions made by different public bodies using these exemptions allowed for the conclusion to be drawn that public bodies were adopting a blanket approach in using the exemptions to withhold records that could easily and harmlessly been released outside of FOI.

#### **4.3 Testing Anecdotal Hypotheses:**

Another reason for using my powers to publish investigative reports and commentaries is to establish the extent to which commonly held assumptions about FOI can be tested for validity. As this could also be described as a benefit of the use of those powers, I will go into more detail on the point in the next section of the paper. This brings me on to the third and final main theme of my paper, where I will discuss the main benefits as I see it of use of "Own Motion" reporting.

### **5. BENEFITS OF "OWN MOTION" REPORTING AND COMMENTARY**

#### **5.1 To Report Inclusively on Areas of Concern:**

As I've already mentioned, a major benefit of production of investigative reports and commentaries is the production of evidence to supplement concerns expressed about operation of certain aspects of FOI. It has been the practice of my Office to give any public bodies subject to investigation or scrutiny an opportunity to provide input for the eventual final report, and to consider any comments the public bodies might have on the conclusions of the reports in advance of publication. I have found that this practice has benefited the effectiveness and enhanced the credibility of my reports by ensuring "buy-in" from the relevant public bodies at production stage, and providing a basis for follow-up on any issues of ongoing concern that may have been identified.

## **5.2 To Probe Issues Arising During Case Reviews:**

"Own Motion" investigations and commentaries provide opportunities for my Office to further delve into areas of concern that become apparent during consideration of applications for review of decisions of public bodies. To this end, in practical terms the production of statistics for my Annual Report is a most useful exercise as the statistics provide a valuable source of evidence of the emergence or continuation of measurable trends of FOI activity. For example, in my Report for this year (which I plan to publish by May of 2008), the number and source of instances where public bodies failed to adhere to the statutory timeframes in responding to requests, both an initial decision and internal review stages, will be published for the first time. Depending on what emerges from the figures, my Office may have an opportunity to focus attention, and possibly investigate, sectors on particular bodies where the scale of such failures are a cause for concern.

## **5.3 To Test Anecdotal Hypotheses:**

One of the criticisms voiced on commencement of FOI was that existence of the new access regime would lead to material not being recorded and decisions being made in corridors. A number of FOI liaison officers interviewed for the Compliance Report reported their belief that less records were being created since commencement of FOI. However, my Office's scrutiny of records undertaken in the context of that Report did not uncover any evidence that this was the case. On the contrary, there was some evidence that more care was being taken in recording the minutes of management meetings than had been the case before FOI. Another anecdotal concern expressed to my staff by applicants is that public bodies may sometimes hide behind the "search" exemption to falsely claim that requested records do not exist. In my Review of the Operation of the "search" exemption (published February last), while there was evidence of poor records management by some of the surveyed public bodies, there was no evidence of any deliberate attempt to conceal the existence of records in order to avoid having to release them under FOI.

The outcomes from these cases again show, in my view, the value of research based evidence in drawing conclusions on various aspects of the operation of FOI.

## **CONCLUSION:**

By way of conclusion, the experience of my Office has been that "Own Motion" investigations and commentaries are hugely useful tools in a number of different ways,

in particular to highlight areas of concern; to quantify the extent of issues giving rise to such concern; to provide an evidential basis for informed comment and conclusions following examination of such issues; and to provide recommendations as to how such areas of concern could be best addressed. I have used the powers provided for my function in order to further enhance the effectiveness of that function, and intend to continue to do so.

Thank you for your attention.

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## **APPENDIX.**

### **Summary of reports produced by the Office of the Information Commissioner for Ireland**

**1. Title:** Study of Section 15 and 16 Manuals published by public bodies (report published September 2000).

**1.1 Subject:** This report examined the extent to which public bodies had complied with their statutory obligations to publish two reference books prescribed and described under sections 15 and 16 of the Irish FOI Act. The section 15 manual contains a general description of the organisation, its functions, powers and duties and the classes of records held by the public body. The section 16 manual requires the publication of the rules, practices, guidelines and interpretations used by the body, including an index of any precedents kept by the body, for the purposes of decisions made under any enactment or scheme which affects members of the public.

**1.2 Target audience:** The general public, public bodies, the political system.

**1.3 Summary of conclusions/recommendations:**

At time of survey, 94% of bodies had published a section 15 manual, 88% for section 16. All publications in paper format, with some in additional formats (on web or on computer disk/CD ROM).

85% of published section 15 and 16 manuals respectively available for public inspection. Over 60% of respondents to FOI user survey, and 4 of 13 responding user bodies, were not aware of existence of the manuals.

Of those FOI user respondents aware of the manuals, 54% had consulted them for guidance on request submission. Of this grouping, 79% found the manuals useful. 7 of the responding user bodies had consulted the manuals and found them useful.

**2. Title:** The Freedom of Information Act - Compliance by Public Bodies (published July 2001).

**2.1 Subject:** This reported on an investigation by my Office into the general practices and procedures adopted by public bodies for the purposes of compliance with the provisions of the FOI Act in the 3 years following commencement of the Act.

**2.2 Target audience:** The general public, public bodies, the political system.

**2.3 Summary of conclusions/recommendations:**

Procedures for processing requests largely satisfactory with most decisions made within statutory timeframes.

Widespread failure to properly explain refusals of requests.

Records management practices often not to standard required to meet requirements of the FOI Act.

Public bodies resorting unnecessarily to exemptions on Government meetings (section 19), the deliberative process (section 20), and information received in confidence (section 26).

More information could be released administratively by public bodies without requiring requesters to seek access through FOI.

There have been major gains in openness and transparency but still a high rate of refusal of requests.

**3. Title:** The Application and Operation of Certain Provisions of the Freedom of Information Act, 1997 (published March 2003).

**3.1 Subject:** This report considered the practical impact that proposed changes to the FOI Act would have on decisions on records, based on the effect such proposed changes would have had on decisions made by my Office.

**3.2 Target audience:** Government, Oireachtas, the general public, public bodies.

**3.3 Summary of conclusions/recommendations:**

Commentary of specific proposed changes to the 1997 Act, how these changes would impact on decisions of the Information Commissioner, and a list of suggested changes to improve operation of the Act.

**4. Title:** Review of the Operation of the Freedom of Information (Amendment) Act 2003 (published June 2004).

**4.1 Subject:** This reported on an investigation by my Office into the effects of the Amendment Act and the introduction of fees for access requests.

**4.2 Target audience:** Government, the Oireachtas, the general public, public bodies.

**4.3 Summary of conclusions/recommendations:**

Use of Act fell by over 50% (75% for non-personal requests)

Use of Act by media fell by over 83%, decrease of 28% in business use.

No evidence that introduction of application fees changed general fair and balanced approach of public bodies.

Use of application fees should be reconsidered at the next available opportunity.

Central administration bodies should provide guidance on operation of fee provisions and be consistent in their approach to charging application and search fees.

Fees should be refunded where public body decisions have been reversed.  
Parliamentarians should be exempt from fees.

UK/Scottish approach to fees, charging fees to the media and parliamentarians,  
lowering of threshold required for waiver of fees on matters of national importance,  
should all be reconsidered at the next available opportunity.

**5. Title:** Review of the Operation of Section 10(1)(a) of the Freedom of Information Acts, 1997 and 2003 (published February 2007).

**5.1 Subject:** This reported on an investigation by my Office into the use by public bodies of Section 10(1)(a), the provision under which public bodies can refuse requests on the basis that requested records do not exist or cannot be found.

**5.2 Target audience:** The general public, public bodies.

**5.3 Summary of conclusions/recommendations:**

Public bodies should draw up and implement a comprehensive records management policy as a priority.

There should be consistency in searches for records undertaken by public bodies, with a checklist to be used for this purpose.

Decision letters should always set out the requester's right of appeal and include details of searches undertaken.

**6. Title:** Suggested amendments to improve the operation of the Freedom of Information Acts, 1997 and 2003 (published March 2007).

**6.1 Subject:** This reported on an analysis by my Office of the current FOI Acts and, in particular, what specific changes could be made to improve how they operate.

**6.2 Target audience:** Government, the Oireachtas, the general public, public bodies.

**6.3 Summary of conclusions/recommendations:**

Fees for internal review should be removed or substantially reduced.

Fees should be refunded where public body decisions have been reversed.

Some amendments to the 2003 Act should be removed, particularly those relating to Government records.

The Act should be re-examined to ensure there is not an unqualified right of access by spouse, partner or next-of-kin of a deceased person That the removal of records relating to the enforcement function of the Health & Safety Authority from the scope of the FOI Act be reversed.