

Information Compliance and libraries: part 2 - freedom of information

Terry O'Brien

A L

An Leabharlann
22-1
March 2013

Abstract

Freedom of Information (FOI) for librarians and information workers is considered in the context of information compliance, legal obligations and the practical workings of FOI. This article addresses a second specific aspect of information compliance – freedom of information (FOI) and gives some practical insight into what we need to be aware of and what we need to know.

Keywords: Freedom of Information, FOI, Libraries, Ireland; Information compliance, Ireland, Office of the Information Commissioner, Ombudsman

Introduction

In the last issue of *An Leabharlann*, I committed to writing about Freedom of Information. This is, in effect, a complementary piece to the previous article on Data Protection (DP), in the wider context of 'information compliance' and what information professionals and librarians need to know. It is important to be clear from the outset that this is not an opinion piece, and although I personally feel that it is important that information professionals engage in these issues and contribute to the wider public debate, an opinion piece is for another time. The high profile cases of Julian Assange and Edward Snowden amongst others have undoubtedly elevated the debate around what is "public" information. What is the public entitled to know, what is public information, what is freedom of speech, what is freedom of expression and what and how



limits, if any should be applied to these, for the common good or in the public interest? These questions or imponderables provide an important theoretical framework to the core philosophy and principles of freedom of information, but this piece will focus more from a regulatory perspective and what is critical to the actual working operation of FOI. Freedom of Information is one of the twin pillars of information compliance, and as with Data Protection, is primarily concerned with legal obligations and responsibilities as set out in legislation. In more general terms information compliance involves responsibilities in maintaining the confidentiality, integrity and availability of information. There is considerable overlap between FOI and DP and both reinforce each other, both cross-reference in legislation and in practice. Although often used somewhat interchangeably in a political context and in discourse around privacy laws and public access to information, there is a very straightforward difference (see Table 1). Data Protection is concerned about the protection of a private citizen’s personal information and applies to both public and private entities. FOI is concerned with access to public records, and citizens *rights* to access this information (subject to certain exemptions, more of which anon).

Some background

It is a particularly opportune time to examine Freedom of Information (FOI). It is some 15 years since the initial legislation was introduced in 1998. Following a commitment in the current Programme for Government, there is now a new FOI Bill before parliament awaiting enactment. Also, the Ombudsman and Information Commissioner Emily O’Reilly will cease her current role in October to become European Ombudsman.

Unsurprisingly for a country renowned for its liberalism and social democracy, the first FOI law was enacted in Sweden in 1766. Most modern democracies now have some form of FOI or ‘sunshine’² legislation and it is regarded as a prerequisite to open government, even if the reality could be said to be rather different. In Ireland FOI legislation happened as part of a process of wider government reform in the 1990s. The Ombudsman Act (1980) and the National Archives Act (1986) had given the public and historians limited forms of redress and access to public information but these were clearly insufficient, especially when measured against the Official Secrets Act (1963). In the early 1990s, the Beef Tribunal had exposed a major disconnect between the government and the public’s access to information. Subsequent legislation sought in part to address this deficiency through the Ethics in Public Office Act (1995). The Public Service Management Act (1997) and the Strategic Management Initiative (‘Delivering Better Government’) aimed to modernise how the government did business in a more open and accountable way.

In a watershed moment, the so-called Rainbow Coalition government introduced the first specific piece of FOI legislation, the Freedom of Information Act in 1997. This was subsequently amended and many would say diluted by the Fianna Fáil government in 2003, when the Freedom of Information (Amendment) Act 2003 was added to the statute books. The Information

Freedom of Information	Data Protection
Citizens right	Human right
Complimentary to data protection	Used in co-operation with FOI
Public sector only	Public and private sector
3rd party records are not exempt – but consent may be required	Information exempt from 3rd parties with some exemptions
Applies to records of both living and deceased	Applies to personal information about living only
Focus on openness	Focus on privacy
Right of access	Right of access
20 days to respond to a request	40 days to respond to a request
Requires public interest test	Requires no harm prejudice test

Table 1 – FOI and DP: related but not the same

2 In tribute to remarks made by US Supreme Court judge Louis Brandeis “sunlight is said to be the best of disinfectants.”

Commissioner commented in her most recent Annual Report³ (2012) that when measuring the impact of FOI legislation over the past 15 years, there was an “ebb and flow” to the Acts and that what was initially “widely lauded when introduced, subsequently significantly truncated, and now proposed for restoration, highlights one particular truth about FOI – that Governments worldwide treat the information in their possession as a resource, to be doled out in amounts as they see fit, either copious flows or mean little trickles”.⁴ What we can say with certainty though is that there was a major change in approach, a change in mindset “a complete culture shift”⁵ from what went before, following the enactment of the 1997 FOI legislation⁶ and the establishment of the Office of the Information Commissioner (OIC).

The OIC has wide ranging powers fortified by the FOI legislation. The OIC is completely apolitical, independent and separate from the government. Its functions include reviewing decisions of public bodies in relation to FOI requests, reviewing the operation of the Freedom of Information Acts ensuring compliance, promoting openness among public bodies by encouraging the voluntary publication of information of public interest, and publishing commentaries on the practical operation of the Acts. Additionally under sections 35 and 37 of the FOI Act the OIC has considerable investigative and enforcement powers. A further specific and independent role of the OIC is as Information Commissioner for Environmental Information under the European Communities Regulations 2007-2011.

All public bodies are obliged under FOI legislation to publish information about themselves that is of value and interest to the public. These

3 Available online and to download directly from <http://www.oic.gov.ie/en/publications/annual-reports/2012-annual-report/>

4 Original quote from Information Commissioner speech given at University of Limerick Conference – “The Right to Know” 11th February 2013 and re-quoted in p.10 OIC Annual Report 2012.

5 OIC Annual Report 2012 ibid

6 Both Acts and statutory regulations are available online at www.irishstatutebook.ie

publications, known as *Section 15* (relating to information about a body’s structure and records held by them) and *Section 16* (relating to rules, procedures, guidelines and interpretations which they use for the administration of their business) should be updated regularly.

Key basis for Freedom of Information
• FOI Act 1997
• Establishment of Office of Information Commissioner (OIC) 1997
• FOI (Amendment) Act 2003
• Statutory Instruments (Regulations) 1998-2006
• Department of Finance Central Policy Guidelines

Principles of Freedom of Information

The three core principles of FOI relate to *openness, transparency and accountability*. This in effect means that public bodies that create records should do so in a way that is open and clear and that can be easily and clearly accessed by members of the public. This translates into three statutory rights:

- A right to have personal information amended (meaning that if a public agency retains personal information about you, you have a right to access and amend that information),
- A right to access records held by public bodies (meaning that as a member of the public you have a right to access records held by public bodies e.g. tenders, financial information, with certain exemptions, and generally not in the case of 3rd party information),
- A right to obtain reasons for decisions affecting the person (meaning that you have a right to access information held by public bodies where a decision has been made that directly affects you e.g. an interview, social welfare decision).

Section 6 of the Act is critical in this regard, and takes the following starting point –

Every person has the right to and shall on request be offered access to any record held by a public body.

This right has been broadly interpreted and the exceptions narrowly interpreted. Equally important is the issue of motivation – why a person looks for access to a record. This is unambiguous – the reasons or motivation for seeking access are irrelevant. Moreover, access to records is not limited to ‘interested’ parties (except in cases of personal information, save for some exemptions).

“A record is defined as including any memorandum, book, plan, map, drawing, diagram, pictorial, graphic work or other documents, any photograph, film or recording (sound and/or images) in any form in which data is held, including machine readable format or that in which information is held or stored manually, mechanically or electronically”.⁷ This includes paper or electronic diaries, e-mails (not stored on a back-up system), draft records, electronic records, x-rays even post-it notes.⁸

Accessing records⁹

There are two types of FOI request. Requests for personal information (personal requests) carry no charge and requests for non-personal information (non-personal requests) carry a charge of €15.00 with reductions for medical card holders. For a request to be valid, it must be submitted in writing with the required fee, be explicitly clear that the request is being made under the FOI Acts, be clear as to which public body the request is being made and as to what records are being sought. The role of the actual FOI Officer is very important in this regard. The FOI Act imposes a duty to assist the requestor, and the role of FOI officer is very much one of facilitation and independence. FOI also encourages the release of records when appropriate without recourse

7 http://foi.gov.ie/files/2010/09/Short_Guide_to_FOI_Acts.pdf

8 <http://www.slideshare.net/TerryOBrien100/infocompliancejune25-autosaved>

9 For full details on how to make an FOI request, including fee schedules, timelines, retrieval fees etc. visit www.foi.gov.ie

to requesting. The OIC is extremely proactive in encouraging this.

Having made an official request, it should take no longer than 20 working days for the decision-maker (i.e. that person charged with responsibility for making the relevant records available) to release the requested records. If the requestor is dissatisfied either with what was released or with non-disclosure (the onus being on the decision maker to state why records were not released), they can apply under internal review. This process should take no longer than 15 working days and results in a more senior decision maker reviewing the request. A review fee of €75 applies but only for non-personal information. If the requestor remains unhappy they can appeal to the Information Commissioner who is duty-bound to review (but not necessarily accept) the request. This only happens in a small number of cases but is legally binding, although there remains recourse to the High Court and Supreme Courts on points of law.

The role of the FOI officer is central to this whole process, acting as an ‘honest broker’, facilitating, co-coordinating and advising both requestor and decision maker as to what the legislation requires, and ensuring requests are fulfilled within the statutory deadlines. Amongst the types of requests for records that public bodies have historically received include requests for tenders, health information, councillors expenses, financial information, travel claims, requests for access to personal records (interview feedback), shortlisting criteria, model answers, and scripts, medical records, reasons for decisions made etc. The OIC has in certain cases refused access where information is personal in nature such as specific salary details, work performance and evaluations but has contrarily granted access to salary scales, expenses information, and general sectional public service performance. In keeping with the OIC promotion of transparency and voluntary release of information, the approach is very much one of presumption in favour of disclosure of public records.

Main elements of an FOI request
Personal or non-personal requests
Schedule of fees and potential retrieval costs
Clear reference to records and that request is under FOI
20 days to answer, 15 days for internal review
Reasons or motivation for seeking access are irrelevant
FOI Officer to assist through process
Reasons for refusal must be given (specific reference to exemptions)
Starting point of 'why not?' instead of 'why?'

Why refuse an FOI request and key exemptions

As mentioned earlier, FOI implies the right to access to any record held by a public body. This right has been broadly interpreted and the exceptions narrowly interpreted. Therefore a public body cannot simply decide not to release records that have been requested, irrespective of the broad interests of the requestor and of their motivations. Under Section 28.5(a), a public interest (or harm) test should be applied to each request. However, public interest is a rather vague concept and does not simply mean interesting to the public. Section 18 offers protection in insisting on the right for reasons for decisions particularly if an individual is affected or has a material interest in the record released. That said, as per Section 28(5), 'on balance, the public interest test that a request should be granted normally outweighs the public interest that the right to privacy of the individual to whom the information relates should be upheld'. Similarly when in conflict with Data Protection legislation, rights of access under FOI prevail and generally take precedence. Section 1(5) of the Data Protection Act states that "a right conferred by this Act shall not prejudice the exercise of a right conferred by the FOI Act". FOI is, however, not a free-for-all and although anyone can in theory ask for anything, this does not mean you will get it. It is often the case that part records are released and other parts not disclosed. The fee schedule is undoubtedly a prohibitive factor too as is the possibility of being charged for search and retrieval. Requests

that are viewed as overly vexatious or voluminous can also be refused but this would require a strong burden of proof. It is also likely that over the years as public and civil servants have become more au fait with the workings of FOI, that the amount of contentious information actually available through public records has diminished, simply because good practices have evolved, either it is not written down or it is written with the expectation of a future FOI release request.

There are a number of exemptions within the legislation that allow for non-release of public records. Many of these are controversial and have been subject to numerous internal reviews. The most commonly used include –

- Section 24 – Security, defence, international relations purposes
- Section 26 – Information obtained in confidence
- Section 27 – Commercially sensitive information
- Section 28 – Personal information
- Section 29 – 3rd party consultation required
- Section 32 – Non-disclosure¹⁰
- Section 10 – Records do not exist
- Section 11 – Deferral of access to records
- Section 12 – Manner of access to records
- Section 19 – Meetings of government
- Section 20 – Deliberations of public bodies
- Section 21 – Functions and negotiations of public bodies

Good Practice: Rather than seeking to avoid the future release of information or records, or to become overly paranoid, it is more prudent to adhere to some good practices when it comes to the creation of records. In short, be objective (avoid subjective personal comment, gratuitous remarks), be accurate and clear, be comprehensive – document activities and transactions,

¹⁰ Section 32 provides for review of its operations every 5 years. See www.oic.ie for 3rd Report of the Information Commissioner to the Joint Committee on Finance, Public Expenditure and Reform for the purpose of Review of Non-Disclosure Provisions in accordance with The FOI Act, 1997 [section 32] May 2013.

document decisions (and the reasons for those decisions, including quotations, tenders, financial information), stand over anything you write and keep a paper or electronic trail including email (and remember anything posted on a public (i.e. work) network even from a private account is potentially open to FOI, so be judicious and never assume that privacy or access to records is absolute.

FOI – in summary

Since the FOI Act 1998 ‘let in the light’ to use that oft quoted phrase, it has undoubtedly changed the relationship between the public service and the general public. Its objective to be a “governmental hygiene measure”,¹¹ and to in effect keep government honest has not changed despite its chequered short history. The rationale to empower the public alongside ongoing tensions between governments and FOI in Ireland and high profile cases internationally remain. But FOI does at the very least reflect a rights-based approach – the right to know what is being done by government in the people’s name, albeit some might say with mixed success in Ireland since the introduction of a highly retrograde amended legislation in 2003.

If we take a brief look at some of the figures¹² relating to FOI, we see that since its inception in 1997, there have been over 175,000 individual FOI requests, ¾ of which resulted in full or partial disclosure of records. Reaching a spike of almost 18,500 requests in 2003 prior to the amended Act, figures have been consistent with a big increase in 2008 around the time of the downturn in the economy from some 10,700 in 2007 to 12,600 in 2008. Last year, saw approximately 13,000 requests. Of these the vast majority were to the HSE (7,469), Local Authorities (1,516), Voluntary hospitals and mental health (3,597) Third level (432). General enquiries to the OIC were up from 824 in 2011 to 1250 in

11 Phrase used by Emily O’Reilly in her 2011 speech at the Canadian Information Commissioner Conference accessed online 11th September 2013, <http://www.oic.gov.ie/en/news/speeches-articles/2011-speeches-articles/controlling-access-responding-to-political-and-administrative-resistance-to-access.html>

12 All figures from www.oic.ie and / or OIC Annual Report 2012.

A hand pointing upwards with a speech bubble containing text. The background is a blurred cityscape at night.

The rationale to empower the public alongside ongoing tensions between governments and FOI in Ireland and high profile cases internationally remain

2012; the numbers of accepted applications to the OIC for review were up 35% from 174 to 236. Two major trends emerge from the 2012 figures – the vast majority of requests to the OIC for review relate to seeking access to records following refusal of access by public bodies, and 1 in 3 of all FOI review cases involved the HSE (as well as some 7,500 individual requests to the HSE across the country). Requests to the Revenue Commissioners and the Department of Agriculture also showed significant growth. In many ways, none of these figures are particularly surprising. Despite fewer resources (both OIC and public service generally) FOI legal obligations remain. The economic downturn has increased the dependence of the public on the state and government agencies; the disconnect between citizen and State is amplified by the increasing centralisation of government services.

The State now collects, processes, maintains, collates and creates more records about individuals across multiple platforms. The ongoing economic crisis has also had the indirect by-product of citizens more than ever wanting to know about how public bodies and the government generally spend the public purse, a sense of attempting to hold institutions to account or to seek more transparency, but also perhaps reflecting an increasing lack of faith in the institutions of the State. It is also the case that organisations undergoing significant change tend to have more FOI requests, and this most definitely applies to the wider public service over the past 5 years.

It is probably easier to list the public bodies that do not currently come under the remit of FOI than list those that do. Following the 2003 Act in which the 'genie was put back in the bottle' and FOI took a substantial backward step, many bodies remain outside FOI. These include State bodies such as An Garda Síochána, CAO, NAMA, NTMA, Pensions Reserve Commission, and State Examinations Commission.

A host of semi-state bodies including An Post, Coillte, DAA, ESB, Bord Gáis, Irish Water and the VHI all remain outside the scope of FOI and will continue so under the forthcoming legislation. The charging schedule, up-front fees and the release of cabinet records only after a period of 10 years, all seen as

negative steps in 2003 are at least being addressed to some degree in the new legislation. Appeals and review fees will go down and cabinet records will be released after 5 years. The Central Bank, NAMA, SUSI and parts of An Garda will come within the sphere of FOI. It will also become an offence punishable by up to €4,000 to destroy or alter a record which is the subject of an FOI request. The Ombudsman has commented favourably on these proposed changes save for the continued omission in the areas of prisons, refugees and asylum seekers whilst maintaining caution, "positive for transparency but ... (sic) its effectiveness will only become clear once people start using the laws to make requests".¹³

Further Reading

- Martin Rosenbaum, BBC News Specialist and Freedom of information specialist writes a very good blog about FOI see <http://www.bbc.co.uk/news/correspondents/martinrosenbaum/>
- Sejersted, Francis (2005). "Freedom of information in a modern society." *IFLA journal* 31(4): 301-306.
- O'Brien, Terry (2013). "Information Compliance and libraries; part 1 data protection", *An Leabharlann*, 22 (1):

Terry O'Brien, MA, DLIS, (PhD candidate at University College London) is Deputy Librarian at Waterford Institute of Technology

Currently on secondment as EU Projects Manager at the South-East Regional Authority. Previously worked as Information Compliance Officer at Waterford Institute of Technology.

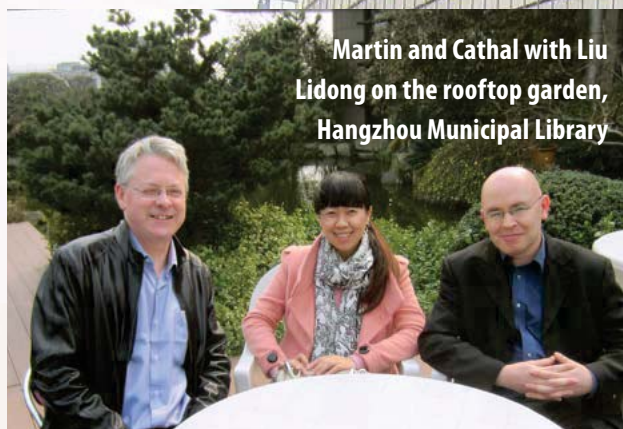
¹³ Taken from quote in the Irish Times, accessed online 25th July 2013, <http://www.irishtimes.com/news/politics/act-of-destroying-a-record-to-be-an-offence-under-new-foi-bill-1.1474673>

Cultural Revolution: reflections on an exchange

Martin O'Connor and Cathal Kerrigan

A L

An Leabharlann
22-2
October 2013



Martin and Cathal with Liu
Lidong on the rooftop garden,
Hangzhou Municipal Library

Abstract

This paper considers an on-going exchange programme between the Boole Library, University College Cork (UCC) and Hangzhou Municipal Library, South East China. The authors describe the exchange and their impressions of working in a different library setting.

Keywords: Libraries, Exchange Programme, Ireland, China, Boole Library, Hangzhou Library