Freedom of Information

Irish Council for Civil Liberties
An Comhairle um Chearta Daonna

ICCL Submission to the Joint Oireachtas Committee on Finance and the Public Service
Report to the Government by the High Level Review Group on the FoI Act 1997
Thursday 14th March 2003

EXECUTIVE SUMMARY

- The ICCL believes that the Report of the High Level Review Group on the FOI Act undermines the fundamental principle that FOI legislation should be based on a presumption in favour of access to information and on the democratic right of individuals and the public to know how decisions that effect them are taken.
- Freedom of Information is a basic democratic right of the people to have information about decisions affecting their lives, and amendments to the FOI Act inevitably affect the rights of citizens. The main recommendations in the report will have a negative and detrimental impact on the rights of citizens, and to suggest that amendments based on the report do not change the rights of ordinary citizens is misleading.
- The Report of the High Level Review Group represents the views only of the senior civil servants tasked by the Government. As the report was not based on any consultation with the Information Commissioner, any independent experts, any citizen or public stakeholders, it does not reflect any inclusive, considered or balanced review of how the FOI Act may be improved to the benefit of all. To enact legislation based on the report without further consultation and input from the many stakeholders affected would be contrary to the principles of participatory democracy.
- The ICCL welcomes the detailed and considered commentary of the Information Commissioner on the Report and its implications on legislative change, and demands that full consideration be given to his report before any further steps are taken to amend the FOI Act.
- The ICCL notes that the HLRG contains many assertions as to the problems with the FOI Act, but provides no examples of how this has happened, or provided no empirical examples of how the current system has damaged the effectiveness of government. The ICCL opposes restrictions on the right to information in the absence of clear and justifiable evidence that there is harm being caused to the functioning of government, or to individuals by the operation of the Act.
- The ICCL strongly opposes the approach of the report to seek greater categories of exemptions to the FOI Act. The ICCL believes that a human rights compliant, and a pro freedom of information approach, is to start with the assumption that access to information should be permitted and then to identify specific harms to an individual or to the public good and interest which would result form disclosure of the content of a particular document.
- The recommendation to change the *discretion* of a Head of Department to refuse access to Cabinet records, to a *mandatory* refusal of access completely reverses the presumption in favour of access to documents. The creation of a regime where there is automatic refusal of a request

with no regard to the type of record sought, no regard as to whether the information may already be in the public sphere, no regard to the public interest in having access to the record, or any harm caused by its release flies in the face of a culture of transparency and accountability.

- The recommendation to *widen* the type of record which could be automatically refused from records *solely* for the purpose of the transaction of Government business to records *primarily* for that purpose will again remove a category of documents out of the reach of citizens, without regard to the merits of the request. The interpretation that a record was created *primarily* for the purpose Government business can be used widely to exclude access to documents which are used for purposes other than Government meetings but may at some stage have been used in a government meeting.
- The imposition of fees beyond those of the costs has direct negative implications specifically for non-commercial users of the FOI Act - that is individual citizens and non-profit organisations that may represent the interests of citizens. Where charges for expenses incurred are permitted, and indeed significant fees are often charged for requests, the imposition of an additional fee for a request requires further justification. The HLRG makes clear that the recommendation to introduce a fee is indeed in part to have a deterrent effect. The ICCL believes that using costs as a deterrent factor is inappropriate, when there is the power to refuse frivolous and vexatious requests.

INTRODUCTION

The Irish Council for Civil Liberties (An Chomhairle um Chearta Daonna) is an independent non-governmental organisation that works to promote and defend human rights and civil liberties. It was founded in 1976 by, among others, Mary Robinson, Kader Asmal and Donal Barrington.

ICCL was the first body to campaign for freedom of information (hereinafter "FOI") legislation in Ireland as far back as 1978 and was involved in consultations with Government leading up to the enactment of the Freedom of Information Act 1997. During that campaign the ICCL together with the Let in the Light Campaign set out a number of core principles which should form the heart of FOI legislation. Those principles included:

- A general presumption in favour of access to documents must lie at the heart of the legislation.
- Fees, if any, charged for access to documents must be set at a modest level, particularly in relation to requests for access to personal files, where they should be nominal.
- Exemptions from access to documents must be drafted as precisely as possible, particularly in the area of policy advice.
- Access may only be refused where there is a demonstrable, clear and present danger to acquired specified interests, the protection of which might reasonably be regarded as necessary for the maintenance of a democratic society, or necessary to the reasonable right to privacy of individual citizens. Where the disclosure of a document might threaten the public or an individual's interests, as defined above, it should still be disclosed if the information which threatens these interests can be 'blacked out' or otherwise withheld.
- Detriment to the reputation of an elected official, of a department of government or of a political party interest is not a ground for refusal.

The ICCL believes that these principles were incorporated into the FOI Act 1997. **It is the opinion of the ICCL that many of the recommendations in the Report to the Government by the High Level Review Group (hereinafter "HLRG") undermine those principles and, if implemented as in the report, will have detrimental impact on the rights of citizens to information, currently enjoyed under legislation.**

Freedom of Information as a democratic right

1. The FOI Act is an Act primarily for the benefit of individuals in society, and therefore recommendations to amend the Act, as are contained in the HLRG report, necessarily impact on the rights of ordinary citizens.
2. The FOI Act gives effect to a citizen's right to know, receive and seek information about governmental decisions. It is also affords citizens a means of exacting accountability and transparency from their elected officials, and from public bodies. Although the FOI Act allows any one to exercise the right to information in a personal or individual capacity, the fact that the exercise of that right is often mediated through elected representatives, the media or representative organisations, does not detract from the basis that the operation of the Act is to benefit those individuals living in Ireland.
3. Article 19 of the International Covenant on Civil and Political Rights states that the right to freedom of expression shall include "the freedom to seek, receive and impart information". Article 10 of the European Convention on Human Rights guarantees the right "to receive and impart information and ideas without interference by public authority" as part of the right of freedom of expression. The right to seek information and the obligation to provide information as part of the right to privacy, home and family life have all been developed in the cases such as Gaskin v UK ; López Ostra v. Spain and Guerra and Others v. Italy . These cases all reflect the importance of access to information as a corollary of the vindication of other rights such as the right to privacy, to personal dignity, to respect for home and family life. This can include documents which relate to personal information, but also information of for example an environmental, planning, or health issue.
4. To suggest therefore that the FOI Act is primarily an Act that governs how government organises its affairs and not citizens rights is a fundamental misstatement of the purpose of the Act. To suggest that recommended changes to the FOI Act do not affect citizens rights flies in the face of the purpose and spirit of the Act. Changes to the scope, operation and cost to the requestor of FOI have direct, immediate and potentially far reaching implications for the rights of citizens.

The process by which the FOI Act should be reviewed

5. The ICCL recognizes that the FOI Act 1997 sets high standards in the area of freedom of information. It was drafted in line with best international standards in freedom of information, and is a piece of legislation which is widely used as a model for FOI legislation. It is a piece of legislation of which Ireland can be proud. However, the fact that in 1997 the government chose to adopt standards of best practice cannot now be used as a justification for down grading the standards afforded to citizens. Reference in the Report to the existence of more restrictive regimes cannot be taken as justification for adopting those models. Any restrictions on the current right to information, must be carefully considered, justified in terms of public interest necessity and be proportionate in the impact it has on citizen's rights.
6. The ICCL wishes therefore to place on the record the extra-ordinary manner in which the HLRG was tasked to consider the operation of the Act and produced a report with recommendations which would in turn form the core of legislative amendments. The ICCL notes that the HLRG did not consult with the Information Commissioner, independent experts or any citizen's organisations. It is also notable that even as a reflection of the experience of civil servants in complying with the act, the HLRG report is flawed in that it did not reflect consultation with the civil servant unions, the main group applying the act. The report of the Group was then forwarded to government and legislation drafted without any debate of the report. The ICCL considers that the manner in which the report was drafted, and in particular as key recommendations in it were immediately translated

into draft legislation, is an affront to the democratic and open principles of government which inform the FOI Act.

7. In this regard, while the report is welcome as a contribution to a review of the Act from a senior civil service perspective, it can certainly not be considered as a comprehensive or balanced analysis of the operation of the Act or of how the Act could be improved for the benefit of the public.
8. To limit and detract from the rights enjoyed by citizens without any consultation or input from the Information Commissioner, any citizen's groups or any individual experts who might have protected or represented the rights of the individual, is an extraordinary sidelining of regard for democratic participation or rights. The Report should have been used to form the basis for open and inclusive consultation, if it was considered necessary to review the Act. As it stands it is not and cannot claim to be a balanced or considered assessment of the operation of the FOI Act, and certainly could not be said to represent the public interest when no element of the public was consulted on the report.
9. The test of whether the recommendations of the HLRG stand up to scrutiny would be to open them for debate with the possibility of those who would seek to endorse them in legislation defending the recommendations and arguing their merit.
10. The fact that this has not been done and that the recommendations in the report have been transposed into legislation to be forced through parliament lends weight to the argument that the recommendations in the report, represent only the interests of the parties to the report and of no other party.
11. As the FOI Act is about citizen's rights. A review of that Act should therefore adhere to simple principles, key of which is that respect for the rights of citizens must take precedence over administrative convenience. Where there is a pressing public interest aim to be met that will result in the restriction of a right, then the way in which will be least restrictive on the right and still meet the public interest should be chosen.
12. The following questions should be asked of each of the recommendations which will restrict the current scope of the Act:

- Why is the restriction being sought? Is the purpose a pressing public interest?>
- Is there evidence that the scope of the right currently enjoyed is impeding the attainment of the public interest aim?
- What way can the public interest be met that least impinges on the scope of the enjoyment of the right?
- 13. In the review of the FOI ACT the HLRG did not consider the FOI Act as a piece of rights legislation, and did not place the citizen's rights at the heart of the review. This process was not conducted by the HLRG when issuing their recommendations.

Summary of Main Recommendations of HLRG

General Comments

1. The ICCL welcomes the acknowledgement that the introduction of FOI legislation has played an important role in promoting openness, transparency and accountability in Government and that internationally, freedom of information is recognised as an important contributor to good public administrative practice. The ICCL regrets therefore that much of the report is aimed at restricting the FOI Act and thereby clawing back the gains made in openness, transparency and accountability in Government.
2. The ICCL notes that throughout the report, assertions are made as to negative impacts of the Act on government administration, yet no examples of what those negative outcomes have been included. The report in general makes many recommendations on further restrictions, but offers no empirical justification as to why the restrictions are necessary.
3. The ICCL notes that the recommendations in the report weigh heavily in favour of increasing categories of documents to which access will be denied, rather than to reply on whether or not disclosure of the contents of a particular document would give rise to an identifiable and undesirable harm. This approach subverts the intent of FOI legislation

which should be premised on a presumption of access. It also fails to place the right of the citizen to know as the starting point of consider whether to grant a request and then to balance that right against specified competing public interests.

4. The ICCL has read and reviewed the commentary of the Information Commissioner on the HLRG Report. As the independent office holder entrusted with overseeing the operation of the FOI, and the individual with the most direct experience of the operation of the FOI Act, the ICCL welcomes, supports and endorses the views of the Information Commissioner. The ICCL also recognises and welcomes the role that the Information Commissioner plays in representing the interest of the individuals who exercise their rights to seek information.
5. No review of the FOI Act should have even be contemplated by the HLRG, or by the government on the basis of its report, without full consultation with the Information Commissioner and full consideration given to his opinion and recommendations. This situation must be rectified immediately.

Records Prepared for Cabinet

6. The HLRG makes the self-evident statement that "ultimately it is in the public interest that the institution of Cabinet works well and effectively". The HLRG then makes five recommendations that would create greater exemptions from the FOI Act for documents connected with the work of the Cabinet. The HRLG therefore draws a direct correlation between Cabinet working "well and effectively" and creating greater restrictions on transparency and access to information about Cabinet decisions. This suggestion that greater secrecy results in better government is in the view of the ICCL extra-ordinary, but regretfully the predominant approach throughout the report.

Section 19 (1)

7. The HLRG recommend that "may" be replaced with "shall" in section 19 (1) of the FOI Act, rendering it **mandatory** for a Head of Department to refuse a request for a cabinet record. The ICCL believes that to change the presumption that access to cabinet records can be granted, to a regime of automatic refusal, irrespective of the merit of the request, or content of the document is unsustainable. This could be used to deny legitimate access to records of significant public interest or with individual implications, without any reference to specific cause of harm.
8. Contrary to the suggestion of the HLRG, the Information Commissioner notes that manner in which the Secretary Generals have chosen to given effect to section 19(1) is that there are situations in which decision makers appeared to feel obliged to refuse access to Government memoranda **even though their contents had already been released in their entirety by way of press release.**
9. The ICCL believes that these findings reflect a need for greater clarity on when access should be granted, with the clear emphasis on favouring access. Where the contents is already largely in the public domain, only exceptional compelling reasons should prevent its disclosure.
10. The ICCL recalls the words of the Information Commissioner:

I am concerned that an exemption which is clearly intended to be applied with discretion is regarded, in practice, as mandatory. Further, the refusal of access to records whose contents are already largely in the public domain is not an encouragement to the creation of a more open public service. It appears to place the emphasis on finding the correct "technical" basis for refusal rather than making information available "to the greatest extent possible consistent with the public interest and the right to privacy". Such a minimalist approach can easily

spill over into the use of other exemptions resulting in an overly cautious approach to the release of other information".

11. The evidence is therefore that the discretion is being used in an improperly narrow way and it should in fact allow greater access than is the present practice. The recommendation directly contradicts the Information Commissioner experience and the evidence.
12. The ICCL strongly opposes the recommendation and urges that the discretionary be maintained. Amendments to access should be encouraged to the greatest extent possible consistent with the public interest and the right to privacy.

Recommendation to replace the word solely with primarily in 19 (1) (c)

13. The argument that the use of the word 'solely' creates unnecessary doubts as to the eligibility for exemption of certain Cabinet records is unconvincing. The recommendation in the HLRG is that this term be removed and replaced with provision that records that were also used for other purposes also be exempted is in line with the approach of the HLRG to err on the side of exemption. This approach may be more convenient in the administration of government documents, but it does not advance the interests of the citizen. The Information Commissioner provides one clear example in the case of a policy paper prepared for the Interdepartmental Strategy Group on Employment and Unemployment which could under this recommendation have been refused, although under the current legislation access was granted. This recommendation opens the possibility for a document to be granted an exemption, simply because it was considered by the cabinet, although then used in other decision making processes which would have an impact on individuals.
14. The ICCL believes that power to refuse a document prepared solely for Cabinet is appropriate in light of the other grounds for exemptions where specific harm might be caused, is the appropriate balance to be struck and is not open to abuse.

Recommendation to exempt records of a "committee of officials"

15. The proposed amendment to section 19 is designed to exempt records of a "committee of officials" set up to assist the Government directly in relation to a particular matter.
16. In the view of the Information Commissioner, the proposed extension of the definition of government records would admit of the interpretation of the expression "Government" as used anywhere in section 19 as meaning a committee of officials, not one of whom is a member of the Government and, indeed, some or none of whom may be civil servants of the Government or the State. Moreover the recommendation grants immense power to a Secretary General to certify the records of a working group of experts as exempt, even where the records of the working group would impact on issues outside of the competence of the Secretary General.
17. The ICCL endorses the view of the Information Commissioner on this point and considers that the very wide powers of certification which are proposed for the Secretary Generals are inappropriate. Like the Information Commissioner, the ICCL would also expect there to be some justification as to why the current exemptions for cabinet records are not sufficient to protect the records of working groups, which are prepared solely for Cabinet consideration, or are submitted to Government by a Minister or the Attorney General. The ICCL favours the approach which evaluates whether the disclosure of the content of a document would lead to a specific harm, as oppose to granting exemptions to category of documents. The ICCL notes that the approach in New Zealand on access to cabinet records is to consider the harm that might flow from public disclosure of a particular document.

Communication between Ministers

18. The HLRG emphasises an important distinction between Ministers exercising their duties as administrative heads of Government Departments and as part of a collective decision making body, again recommending that correspondence relating to the latter function be exempt from the Act. Although the strength of this point is certainly open to question, even if one were to accept this reasoning, no thought appears to have been given as to how this distinction could be legislated for. In recommending that one category of Ministerial correspondence be exempted, the HLRG does not consider that any amendment to the existing Act might also result in other correspondence being exempted.

Period of protection of Cabinet Records

19. The analysis offered by the HLG on this central issue is interesting in that it asserts that the undesirability of a five-year time limit is self-evident.
"As experience is gained in the operation of the freedom of Information Act, it is evident that a five year moratorium on the release of papers is too short"
20. However, many interested parties have publicly stated that they do not accept that this is the case. Given the failure of the group to consult with opposition parties, many of whom have recent experience of serving in cabinet, the wider civil servant representative bodies, who have expressed satisfaction with the working of the act or even, most remarkably, the Information Commissioner, it is clear that the above statement can only be regarded as an asserted opinion rather than a conclusion based on any balanced consideration of the matter. There is also no analysis provided of why the exemptions with respect to the content of certain documents is not adequate protection for the government.

Factual Information

21. The HLRG's recommendations in these related areas have, perhaps some of the greatest potential impact on the current workings of the FOI Act. Limiting what is considered 'factual', and therefore accessible material, to purely empirical or statistical data could greatly increase the categories of information that will be exempt from the Act. This change goes to the heart of the current statute and could well result in large areas of policy making being deemed outside the operation of the Act.
22. The fact that the HLRG look to the UK Act which is weaker in its standards of right to information, rather than examine whether this is a problem in other jurisdictions reflects the tendency to look to where the FOI Act could be levelled down.

Section 20

23. The recommendations to amend section 20 of the FOI Act open the way for a far broader definition of what constitutes a 'deliberative process'. These recommendations could greatly increase the categories of information that will be exempt from the Act. While on one level the HLRG state that there should be some temporal limit on official consideration and advice on issues, their recommendation is that the public interest test be re-weighted. The ICCL considers that this rebalancing is inappropriate and against the ethos of the FOI Act. The presumption must be in the interest of the public having a right to information, and the burden on the person refusing a request to show that on balance the public interest is best served by not disclosing a document's contents.
24. The amendments in practice provide that the a head of a department shall refuse a request where a Secretary General has issued a certificate stating that the record contains matter relating to the deliberate processes of a Department. **There would be no appeal to the Information Commissioner or to the High Court against such a decision by a Secretary General**. As the Information Commissioner pointed out, this

would mean
(1) A Minister could not release a record under the FOI Act if the Secretary General of his/her Department or indeed the Secretary General of another Department issued a certificate in writing stating that the record contained matter relating to the deliberative processes of a Department.
(2) The same position would apply in the case of the Attorney General, the Comptroller and Auditor General, the Ombudsman, the Information Commissioner, the Civil Service and Local Appointments Commissioners, the Ceann Comhairle and the chief executives of the numerous public bodies covered by the FOI Act including County Managers.

25. The ICCL notes the many examples cited by the Information Commissioner where information granted now would be refused if these recommendations were to be accepted, or where he would previously have been able to review a refusal and would not know be able to do so. This has implications under the European Convention on Human Rights case law on the right to an effective remedy, and also the right of access to a body that will be able to adjudicate on refusal to grant information in certain circumstances.

Other measures

26. The ICCL objects to the further inclusion of recommendations from other bodies such as the CSNU and the Department of Finance in legislative amendment, without open consultation with the relevant bodies including the Information Officer. To the extent which this has already happened in the Freedom of Information (Amendment) Bill the ICCL calls for no further action to be taken without the appropriate consultation mechanisms being put in place.
27. The ICCL objects to the recommendation that upfront fees be imposed. The imposition of fees beyond those of the costs has direct negative implications specifically for non-commercial users of the FOI Act - that is individual citizens and non-profit organisations that may represent the interests of citizens. Where charges for expenses incurred are permitted, and indeed significant fees are often charged for requests, the imposition of an additional fee for a request requires further justification. The HLRG makes clear that the recommendation to introduce a fee is indeed in part to have a deterrent effect. The ICCL believes that using costs as a deterrent factor is inappropriate, when there is the power to refuse frivolous and vexatious requests. Where there is a disproportionate cost burden on a department as a result of the operation of the FOI Act, the evidence of that should be available as part of the discussions on review of the Act as a whole.
28. The ICCL notes that the difficulties to which the HLRG assert have arisen in the field of international relations are not specified. The Information Commissioner has provided his evidence of experience to date and does not conclude that there has been damage to Ireland's ability to function effectively under the current operation of the Act. The ICCL again notes that the assertion of the HLRG is again to encourage wider categories of exemption, rather then focus on the nature and likelihood of the harm which could flow from the release of certain documents. The ICCL believes that further consideration of this issue, including in particular the experience of the Information Commissioner, is necessary.
29. The ICCL finally notes that the report makes a number of other recommendations, including to initiate a system for more formal consultation between Departments on material to be released, early progress in significant programme of extensions of operation of the Act, the Continued development of FOI networks and Completion of review of operation of National Archives Act vis-à-vis the Freedom of Information Act. The ICCL has no comment to make in respect of these particular recommendations at this time.

Conclusion

1. The ICCL believes that the recommendations in the report of the HLRG will restrict the rights enjoyed by citizens.
2. The ICCL considers that the report, while of course fully valid as a contribution from one stakeholder, should in no way be considered a balanced or comprehensive review of the operation of the FOI Act. It should not form the basis of any legislative changes with out further consultation with other stakeholders.
3. The ICCL urges the Committee to reject the approach of the HLRG to seek further categories of exemptions for documents and to increase the restrictions on right of access to information. The ICCL urges the Committee to adopt an approach which presumes that there is a right to information as a starting point and then limits that right by reference to clear, justified instances which harm to the public interest or good could follow from disclosure.
4. The ICCL calls on the Committee to urge a wide ranging review of the Act and to look at ways in which the FOI Act may also be improved for citizens and individuals and not restricted to suit the administrative priorities.