

**Adding Another Glass Block to the Barrier of Transparency: The Media and the  
Freedom of Information Acts**

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*“If the people don’t know what you’re doing, they don’t know what you’re doing wrong.”*

- Sir Arnold Robinson

When introduced to the Oireachtas in 1997, the purpose of the Freedom of Information Bill was:

*“to ensure that we adopt the most effective mechanism for insuring that the culture and practices of secrecy in public bodies are set aside for good.”<sup>1</sup>*

Although beneficial to all, one particular sector that welcomed the Act with open arms was that of the media, as it is the media who are traditionally the moral watchdogs of the State, daring to ask the questions and publishing the answers for the greater benefit of society. The concept of Freedom of Information<sup>2</sup> in Ireland undoubtedly excited journalists as with greater access there would be greater stories. However with the introduction of the Freedom of Information (Amendment) Act 2003, an amendment that has been described as *“deeply regressive”* by journalists<sup>3</sup>, and *“an outrageous attempt to thwart citizen’s access to public information”* by the

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<sup>1</sup> 149 Seanad Debates Cols 1249-1250 (Second stage)

<sup>2</sup> Hereafter to be called “FOI”

<sup>3</sup> P. Leahy, *“Yes minister, you’re wrong!”*, , The Sunday Business Post 03/09/2003, ([Http://www.thepost.ie](http://www.thepost.ie) Last visited 12/12/03)

Information Commissioner, Ms. Emily O'Reilly herself<sup>4</sup>, it now seems that the practices of secrecy in public bodies have not been set aside for as long as originally proposed.

My main focus in this paper will be the investigation of the interaction of the media with the Freedom of Information Act 1997, but more importantly the barriers now faced with the introduction of the Amendment Act in April 2003. I shall endeavour to investigate the problem, highlighting two issues in particular. Firstly and primarily I will investigate the changes that have been imported into the Act that effectively are creating, again according to the Information Commissioner, a “distortion” of the level playing field that was originally provided for in the '97 Act<sup>5</sup>. Secondly I wish to discuss the efforts that have been made within government circles to curb the investigative abilities of the media by undermining, albeit under “innocent” guises, the journalistic use of FOI.

### **The “Regressive” Amendment: - Freedom of Information (Amendment) Act 2003**

Proposed by the Minister for Finance, Mr Charlie McCreevy, the Freedom of Information (Amendment) Act 2003<sup>6</sup> was debated and, interestingly enough, was passed in his absence while he enjoyed the Cheltenham Racing Festival. Even from its introduction to the Seanad at the Second Stage of the Bill's passage, it was questioned as being unconstitutional and in the words of Senator Jim Higgins as being “*sinister legislation*”. Senator Higgins posed the question:

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<sup>4</sup> Speaking at meeting of the Western Branch of the National Union of Journalists in Westport, November 2003, as reported in the Western People of 03/12/2003.

<sup>5</sup> *Ibid.*

<sup>6</sup> hereafter to be called “the Amendment Act”

*“One has to ask what the government is up to. What is the reason for all the urgency and panic? What is the government afraid of that it publishes draconian legislation at such short notice and proposes to bulldoze it through in such an unseemly fashion”<sup>7</sup>*

He continued to point out that the Ombudsman and Information Commissioner, at that time, Mr. Kevin Murphy, was not even consulted. Having an intimate knowledge of the '97, when he attempted to share his expertise, not only was he given the “thumbs down”, but he was completely ignored by his former civil service colleagues. The process of amending such legislation, Senator Higgins continued, ordinarily and properly should have involved a consultation process with “*all political parties, the media and the National Union of Journalists*”. The Irish Council for National Civil Liberties were not consulted about the legislation and “*a raft of interested, legitimate organisations, which have a right to have their views heard*” were not consulted either. Condemning the government he stated that the legislation was “*sinister, anti-information and anti-people in nature*” and that they were trampling on the people’s right to information.

Although the subject to major criticism and objection, the bill was indeed passed and came into effect on the 1<sup>st</sup> of April 2003. I would now like to take some time to investigate the changes to the Original Act. As reported in the Irish Times of the 6<sup>th</sup> of March 2003<sup>8</sup>, The Tánaiste, Mary Harney insisted that there were only “very minor changes” being made to the '97 Act. This statement undoubtedly brought scoffs from all quarters, with Labour’s Pat Rabbitte insisting that the Amendment Act was

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<sup>7</sup> Seanad Debate 4<sup>th</sup> March 2003, found at <http://www.irlgov.ie/debates-03/s4mar/Sect2.htm>

<sup>8</sup> M. O’Regan, “*Changes to Information Act Minor, says Harney*”, Irish Times, March 6<sup>th</sup> 2003

effectively repealing the Parent Act, and Mary Harney's own Progressive Democrat Deputy, Liz O'Donnell, concluding in light of the amendment that there was little point for legislating a principle of openness and access to information, if everything sensitive to the authorities was to be excluded by exemption.

The most controversial provisions find root in the introduction of new charges.

The '97 Act originally imposed charges for two activities

- 1) Search and retrieval of records<sup>9</sup>
- 2) Reproduction<sup>10</sup>

According to Maeve McDonagh in her paper entitled "Freedom of Information in Ireland: 5 Years On"<sup>11</sup>, in practice the government agencies originally were reluctant to charge due to the uncertainty and lack of clarity surrounding the provisions, finding them to be "complex and confusing". An example of such scope for confusion is apparent where the fee for reproduction may be waived in certain circumstances such as where the content is of "particular assistance to the understanding of an issue of national importance"<sup>12</sup>. Indeed one can appreciate the need for the clarification, and thus the need for an amendment, however the government arguably went a few steps too far.

With the 2003 Amendment Act new charges were introduced. First and foremost was the introduction of an application fee that has been set at €15 per application. Admittedly this provision is safe guarded by fee waiver where the requested information is wholly personal information relating "to the requester or, as

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<sup>9</sup> s.47 (1)(a)

<sup>10</sup> s.47 (1)(b)

<sup>11</sup> M. McDonagh, "*Freedom of Information in Ireland: 5 Years On*", Published online at <http://www.freedominfo.org>, (last visited 22<sup>nd</sup> September 2003)

<sup>12</sup> s.47 (5)

the case may be, the applicant”. It is my understanding that the Government, in an attempt to give clarity to the payment of fees, in essence completely missed the point. The confusing and complex provisions relating to waiver of fees, as seen in s.47 (5) remain, and now exacerbating this, the application fee is imposed on everything but requests “only” for personal information. Although the Parent Act provides a comprehensive definition of “Personal Information”, must a public body now go through the extra time consuming task of ensuring all documents released are of a personal nature before deciding to charge an application fee? This requirement, one must add, is in addition to the already confusing task of deciding whether documents will or will not be released. It would appear therefore that in an attempt to add clarity, the government have confused the matter even more.

The second controversial change is that of the introduction of an appeal fee. Prior to the Amendment Act, there was no fee for an internal appeal to the public body, or an external final appeal to the Information Commissioner. Now a fee has been set at €75 and €150 respectively. The Information Commissioner and many commentators have expressed concern at the likely disincentive to appeal a decision that such a charge creates<sup>13</sup>. If one was to compare other jurisdictions, the move is relatively without equal and thus defies explanation. In Ontario, Canada, the final appeal costs just €16, a fraction of the Irish appeal cost of €150; in Western Australia there is no charge, likewise in Queensland<sup>14</sup>. The Information Commissioner in a forthright statement said that the Minister for Finance, Charlie McCreevy’s decision to impose the €150 levy on appeals could work to discourage the people from using

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<sup>13</sup> *supra* fn.12

<sup>14</sup> Admittedly there is an appeal at the Federal Level in Australia which costs €334, however this appeal is by way of a full court case before a judge and includes lengthy judgments, thus in practice is still relatively cheap.

the appeals process and indeed the legislation itself.<sup>15</sup> Seamus Dooley of the National Union of Journalists (NUJ) has accused the Government of a “*scandalous betrayal of the Irish people*” by imposing “*punitive charges*”, and

*“The decision to charge €150 for an appeal to the Information Commissioner was a deliberate attempt to place access to information outside the reach of the ordinary citizens and journalists”*<sup>16</sup>

### **New Barrier to Media Freedom**

It was quite apparent from an early stage that the new amendments to the Parent Act, even in light of the limited reference to the amendments highlighted above, can and have acted as a deterrent to the media’s use of FOI. Mark Hennessy noted in his article of the 8<sup>th</sup> October 2003 that since its commencement in April, the amount of requests for information under the Act have halved. Prior to the Amendment of the Act, there were a total of 3000 applications in the period from January 1<sup>st</sup> to April 11<sup>th</sup> 2003. In the subsequent 3 months, after the commencement of the Amendment Act, the figure fell to 1700 requests, which then fell again between July and October to 1060 requests. Government departments have seen dramatic decreases in their request volumes. The Department of Finance now entertains 85% less requests; The Department of Enterprise and Trade have seen decrease of 84%; and the Department of Agriculture and food have seen the figures slump by 61%<sup>17</sup>. The Information Commissioner has vowed to begin an investigation into this dramatic decline on foot of her promise, made when the Amendment Act was commenced, to

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<sup>15</sup> Mark Hennessy, “Information Chief Criticizes FOI Appeals Fees”, Irish Times, July 2<sup>nd</sup> 2003

<sup>16</sup> *ibid.*

<sup>17</sup> Mark Hennessy, “Requests Under FOI are Halved Under New Limits”, Irish Times, 8<sup>th</sup> October 2003

closely monitor the impact of the changes. Enda Kenny, The Fine Gael leader has reacted to the figures angrily stating that:

*“The government’s policy of strangling the FOI Act has proved to be one of its few policy successes in the last 18 months. It has effectively applied a tourniquet to the flow of information.”<sup>18</sup>*

In relation to the media, the National Union of Journalists (NUJ) have been equally vocal. Seamus Dooley, the NUJ national organiser has found the effect of the Amendment “alarming”. He stated that:

*“It confirms our worst fears that the amended legislation would be used as an excuse to refuse access to information and it shows up the Taoiseach’s claim that this was a relatively minor administrative change.”<sup>19</sup>*

### **The Media as a Nuisance**

According to many commentators<sup>20</sup>, the media in its use of the Freedom of Information Act have caused a nuisance. They have been accused of using FOI as a mere tool to find the sensational and exclusive story. Many politicians themselves have expressed the belief that the media supposedly “abused” the legislation.<sup>21</sup>. According to Mark Brennock, journalists may claim that their FOI requests are motivated by the greater good; the duty of the media to inform the public of those

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<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

<sup>20</sup> FOI Civil Service Users Network Report, December 1999

<sup>21</sup> As stated in the article “Information Act is Being Abused”, Irish Times, 7<sup>th</sup> Of October, as quoted in Maeve McDonagh’s paper *supra* fn. 11. It may be interesting to note at this stage that these allegations from the politicians came in the wake in the publishing of politician’s expenses just days before.

stories that are of national importance. In reality however, he concludes that this is of course not true and in general the journalist is motivated by the exclusive story, and “scooping” the competition<sup>22</sup>. Competition, he continues, according to the Government brings greater efficiency to all aspects of life, however it seems that when the FOI Act is used as such an instrument of competition<sup>23</sup>, the Government hails the method as an abuse of process. This is of course understandable as since the inception of FOI, the most damning reports about government misdoings in the last 5 years have been uncovered. Tensions were revealed between the Minister of Finance and the Minister for Health over health sector spending; reports about the spiralling costs of the National Stadium were revealed to the public; and scandals such as the one surrounding the appointment of Hugh O Flaherty to the European Investment Bank found its way onto the front pages of the nation’s newspapers. All these stories found their source in the Freedom of Information Act, therefore it is any wonder the FOI Act has found itself in the amendment spotlight.

To ultimately answer the question “Were journalists abusing the FOI Act?” again I will turn to the opinion of Senator Jim Higgins<sup>24</sup>,

*“If one considers the statistics, journalists have not abused their rights of access to information under the 1997 Act and done the State a considerable service by establishing certain information, which has led to far ranging changes”*

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<sup>22</sup> Mark Brennock, “Journalists Exposes The Only Competition Discouraged”, Irish Times, 5<sup>th</sup> July 2003.

<sup>23</sup> in scooping the rival journalist, which Mark Brennock believes to be an aid to the flow of information, rather than as abuse of FOI

<sup>24</sup> *Supra* fn. 7

Although it is quite obvious that Senator Higgins oration is seemingly biased in the media's favour, he is undisputedly correct. The statistics have shown that the media have not overly used or abused FOI. In the years 2000 and 2001, journalists accounted for 20% of the total FOI requests<sup>25</sup>. This has decreased to 12% in subsequent years. Surely if one was to abuse a system, the statistics would show an overburdened use of the Act, not a modest figure such as this. When all facts are weighed together, a fool can see the political undertow. From the modest number of FOI requests, journalists have exposed stories of a political nature that are of public interest and at the same time encouraged a healthy competition within the media. Indeed it would be naive to assume that all journalists aspire strictly to the goal of the greater good, however one cannot condemn a person for trying to make a name for themselves. The FOI system has not been over-burdened by journalists. Thus it must be assumed that the government, although veiled in openness and transparency have with the Amendment Act, strangled FOI use for fear of more embarrassment. If I may refer once more to my opening quote,

*“When people don't know what you're doing, they don't know what you're doing wrong.”*

### **“Scooping” the “Scoop”**

Without appearing to be a staunch supporter of unchecked media freedom, with the minimum of research and the application of common sense, it is easy to conclude that the media do come up against glass walls. Although the FOI Act, a tool of transparency, should be a jewel in the journalistic crown, the government has not

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<sup>25</sup> *Supra* fn. 11

made it easy. The government may be transparent, but one is still effectively blocked. According to Maeve McDonagh investigating the Original Act, she found that consideration should have been given to redressing the main shortcoming, its “limited scope” due to its over reaching exemptions<sup>26</sup>. However ignoring this advice and that of many other commentators, the government saw fit, not to curb the exemptions but increase them to further exclude certain committees of officials<sup>27</sup>. Now coupled with, the introduction of charges in the Amendment, effectively the government has stopped the prying of the media into public records. Even if the Amendment Act was not enough to stop a journalist in his tracks however, it seems that there are more veiled attempts by officials in undermining the journalistic use of the Act anyway.

The goal of the journalist, as Mark Brennock states, is to find the exclusive story and capitalise on being the first to write on it and expose it to the public.<sup>28</sup> If another journalist was to publish a story first, the effect would be lessened for that particular journalist. *“In reality [the story] is usually motivated by the “scoop””* With the advent of FOI, it was the journalist that could come up with the most prying FOI request that could discover the best stories.

In 2003, the Department of Communications, Marine and Natural Resources, under the guise of transparency, all FOI requests made to them were immediately posted on the website<sup>29</sup>, even before the requester himself was officially notified.

Included in this information was

- Requester’s name

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<sup>26</sup> Maeve McDonagh,, Freedom of Information – A Promise Fulfilled, [Http://www.ucc.ie/ucc/depts/law/foi/conference/mcdon99.html](http://www.ucc.ie/ucc/depts/law/foi/conference/mcdon99.html) last visited 12/12/03

<sup>27</sup> s.4 (e)(b) of 2003 Act

<sup>28</sup> *supra* fn. 22

<sup>29</sup> <http://www.dcmnr.ie>

- Address
- Request in full
- Decision
- All documents released

The Department's Official Press Release<sup>30</sup> states the initiative's purpose was

*"To indicate clearly just how the internet and the information society can benefit citizens and provide open government"* .

Karen Lillington , however uncovered evidence of the blatantly apparent truth stating *"...politically connected individuals including veteran politicians have told me privately that the move clearly aims to thwart journalist's requests for information."*<sup>31</sup>

The journalist now finds his or her story idea is effectively pasted onto the public domain. As all evidence uncovered by the request will also be displayed for public perusal, the very essence of the scoop is undermined. This publication of journalistic investigation also notifies competing journalists and this increases the chance of the original requester being "scooped"! Essentially the Department scooped the scoop!

Although the Department in furthering the policy of openness have stated that all documents released under the acts would too be posted online, it further betrays the "real" motive when one realises that in fact a miniscule of released documents have been posted to date. The Department maintains that they are attempting to post more documents online, however as Mark Brennock notes, this just furthers the

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<sup>30</sup> found on the website <http://www.dcmnr.ie> .

<sup>31</sup> K. Lillington, *"Openness and Transparency of the State Only Go in One Direction"*, Irish Times, 22<sup>nd</sup> August 2003.

argument that the Department is “*simply disclosing to everyone the stories journalists are working on*”.<sup>32</sup>

Of course this move did not go unnoticed, and the Data Protection Commissioner, Joe Meade, expressed his concerns at the revealing of personal information online. Although not officially reported yet, in conversations with individuals working in the Data Protection Commissioner’s Office, the commissioner has issued his first enforcement notice to the departments involved in this action. The effect of such notice appears to be a compromise, where any request about personal information will not be posted and information comprising of public information will still be posted in full. This indeed does not remove the chance of a journalist being scooped, and thus remains a thorn in the media’s side.

## **Conclusion**

To conclude John Keane, a leading scholar of political theory states:

*“we are entering into a new era of political censorship”*<sup>33</sup>

When one considers the facts, the Government has, in the past year alone, attacked FOI on 3 fronts.

- 1) High charges for the FOI requests act as a disincentive to apply and to appeal, effectively creating “*a pay-per-view service rather than a right*”<sup>34</sup>
- 2) Amendments to the legislation have the effect to conceal more facts than before.

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<sup>32</sup> *supra* fn. 22

<sup>33</sup> J. Keane, *The Media and Democracy*; Cambridge, 1991

<sup>34</sup> *supra* fn. 22

- 3) The use of websites to post requests has permanently damaged the scoop value of FOI and thus reduced the journalistic use of the Act.

The Freedom of Information Acts should be an instrument of government openness and transparency; however it is incredible to conclude that it appears our Government have done the impossible and created a barrier out of transparency, a glass wall where we can look in, but can't really do a lot. The example of the media gives us a reference point to see the Act in 'inaction'. The government have tried justify their restriction, however all justification has been either disingenuous or mendacious. The Táinaiste claimed that citizen's rights are unaffected by the Amendment; this is clearly untrue. The Taoiseach said the changes would be minor administrative changes; this was also untrue. One cannot say with certainty what the true motives of our government were. It is however hard to deny the logical explanation:

*"If the people don't know what you're doing, they don't know what you're doing wrong."*

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