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Keeping the State's secrets: Ireland's road from 'official' secrets to freedom of information

The introduction of the Freedom of Information act in Ireland in 1997 was a profound change for a state, a civil service and political system far more comfortable with official secrets. It has had a transformational effect on relations between citizen and the state, and has been useful for journalists despite many challenges, writes *Michael Foley*

From 'official' secrets to FOI

It was probably the most profound and radical change in Irish political history when the Dáil (Ireland's lower house of parliament) enacted the Freedom of information Act, ending a culture of secrecy that went back to the foundation of the state. Prior to the introduction of the Act in 1997, Ireland was easily the most secretive state in Western Europe, even more so than the UK. The Official Secrets Act, which some saw as a relic of the British Empire was no such thing, it had been hardened up in 1962 by a Fianna Fail government, a political party that was, in 1997, the major party in a coalition government that was now seeking to turn on its head 70, or so, years of secrecy to 'let in the light' on the workings of government, to quote the then Taoiseach (prime minister), Albert Reynolds.

After the Official Secrets Act was amended everything that emanated from government was assumed to be secret unless deemed otherwise. The original Act was passed by the British parliament in the early years of the century in the lead up to the First World War and brought into Irish law upon independence. However, that highly restrictive piece of legislation was not enough for some Irish politicians, so in 1962 the then Minister for Justice, Charles Haughey amended the legislation. His legislation ensured it was government ministers who decided what was and was not secret and that the courts could not challenge such decisions. Under the 1962 Act disclosure became the exception rather than the rule. It gave civil servants and politicians a major role in suppressing information. Commenting on minister Haughey's legislation, the journalists Ronan Brady and Patrick Smyth said: '...he overrode important

principles of human rights and substituted ministerial discretion for the traditional role of the courts in deciding what is, and what is not to be secret' (Smyth and Brady, 1994: 3).

Under that legislation, should a minister or state authority classify any 'sketch, plan, model, article, note, document, or information' as secret then it was illegal to divulge it. It was said even the restaurant menu in Leinster House, the seat of the Irish parliament, was covered by the Officials Secrets Act. The lowliest of civil servants, including students working for the post office on the Christmas postal rush, had to sign it.

Birth of the 'Free State'

In 1922 Ireland, or at least what became the Irish Free State, gained independence, following a struggle that went back hundreds of years, but can probably be dated in its modern context to the post Famine period of the mid-19th Century. While much of that struggle was fought out in the chamber and committee rooms of the British Houses of Parliament, it was also the result of clandestine work of a revolutionary nature. As Ronan Fanning points out:

'Although the republican rebellion of 1916 registered as no more than a blip against such a cataclysmic backdrop (the Great War), its legacy – the Irish Republican Army's guerrilla war for independence – was the key determinant of British policy between 1920 and 1922' (Fanning, 2013: 1).

Ireland's independence, therefore, was won by men and women who understood, violence, secrecy and the taking of oaths. And if the new state was a democracy it was a fragile one in a world where democracies were not the norm. The new state was borne out of a violent war of independence, followed by a civil war, which probably convinced anyone who needed convincing to keep in place the secrecy that was already part of the British regime in Ireland prior to 1922.

Following the civil war and the establishment of Fianna Fail, the political party that came out of the losing republican side of the conflict, it took time to ensure there were clear divisions between constitutional politics and a guerrilla movement. The Free State, which Ireland was called until the declaration of a republic in the late 1940s, established strict censorship during the Second World War, with the Emergency Powers Act, 1939, which allowed for wholesale censorship of media and mail. It was rescinded in 1949, though strangely, the Emergency was not ended until 1976.

While the authorities appeared neutral towards the Allies, it was felt there were those, including some elected to parliament, who might have liked to see British lose the war on the basis of my enemy's enemy is my friend: especially as some believed a German victory would mean the end of partition and the country unified. Censorship was necessary, it was believed, for a neutral Ireland to tread a delicate diplomatic path, along with widespread draconian powers that affected nearly every aspect of Irish life.

There was another factor, the Roman Catholic Church. Much is often made of the links and even control the Church had over civic life in Ireland until recent times. There were tensions and the Church did not always get its own way. Censorship is possibly one of those areas, where Catholic organisations, such as the Catholic Truth Society and the Knights of Columbanus pushed for far greater censorship than was brought in. As the historian, Diarmaid Ferriter said:

'The idea of two warring factions in relation to censorship – Catholic organisations such as the Catholic Truth Society and the nights of Columbanus, versus liberal intellectuals such as Yeats, Shaw, O Faoláin and Frank O'Connor – is superficially appealing. But it is highly unlikely that either elite presented the concerns of the general population, or was intimately connected to the reality of Irish life,' (Ferriter, 2005: 341).

There is no doubt some within the Catholic Church were seeking a far stricter censorship regime, including the banning of British newspapers, but while that was seen as a step too far, the idea of censorship was something both Church and state favoured.

Ferriter notes that the Catholic Church tended to agree with Republicans that moral corruption was to do with English influence and with independence an internal cause had to be found and dealt with. In 1927, just five years after independence, a pastoral letter from the Catholic hierarchy said:

'The evil one is ever setting his snares for unwary feet. At the moment his traps for the innocent are chiefly the dance halls, the bad books, the motion picture, the indecent fashion in female dress – all of which tend to destroy the virtues characteristic of our race,' (quoted in Ferriter, 2005: 336).

The Church would work with the state on the books and the cinema and would, itself, look after the other moral dangers. Despite the immense popularity of cinema going in Ireland the Censorship of Film Act passed quietly only a year after independence, in 1923. The Censorship of Publications Act took a little longer. In 1929, following a report from the wonderfully named Committee on Evil Literature, upon which sat three laymen, and representatives from the Catholic and Protestant churches, the Act was passed and the Censorship of Publications Board was born.

Such seeming obscurantism was not unique to Ireland, though without doubt the struggles for independence, the land reforms and the aftermath of a famine that had reduced the population by half as well as the decline in the speaking of Irish made Ireland a special case. However, the Official Secrets Act remained on the statute books in the United Kingdom, as well as in Ireland, and the Lord Chancellor was still banning plays in England, while in the US, the Motion Picture Code, known as the Hays Code, look remarkably like Irish film censorship. It was a period of particular militancy in the Catholic Church, one commentator described the motion picture code in the US as: 'a Jewish owned business selling Roman Catholic theology to Protestant America'. The comments in the Bishop's pastoral, which was matched by comments from

senior Catholic clergymen in other countries, showed the deep fear the Church had with the new popular culture and with democracy itself.

Strengthening 'official' secrets

Ireland entered its post-colonial phase as the inheritor of official secrecy, as a fragile democracy, following a civil war and with a dominant church forced to find the source of moral corruption inside the Irish state, rather than in England, as had been the case until heretofore. That was the context, a highly centralised state, that felt it safer to rule with caution and secrecy fearing enemies within and without. As the political scientist Tom Garvin noted,

'...a certain tendency towards authoritarian law-enforcement and censorship in the name of keeping public order and also as a way of furthering state policy has persisted in Irish public life and detracts somewhat from the republican character of Irish political institutions,' (Garvin, 1992: 226).

And so, as already alluded to, at the height of the Cold War in 1963, the then justice minister, Charles Haughey, decided to strengthen the Official Secrets Act. There were a number of reasons cited, international espionage, fear of a possible resurgent IRA, and weirdly, the leaking of the schools Leaving Certificate examination by an apprentice printer the previous year. At the time of intense anti communism in the world of Irish official secrecy, a stolen schools' examination paper was on par with leaking to the KGB.

As far as journalists were concerned the main threats to an open media were the libel laws, possibly the most draconian in Europe and not reformed until the Defamation Act of 2009: the official Secrets Act: and Section 31 of the Broadcasting Act. What all three did was engender a culture of secrecy. There was some investigative journalism, Joe MacAnthony's investigation of the Irish Hospital Sweepstake or Susan O'Keefe's programme on scandals in the beef industry and investigations in child abuse of children in care, especially that of Mary Raftery.

Despite Haughey's enthusiasm, the Act was actually rarely used; *The Irish Independent* was once fined for publishing a police identikit photograph in an investigation into the disappearance of the racehorse, Shergar. A crime correspondent, Liz Allen, was found guilty of an offence under the Act in the District Court, the equivalent of the Magistrates Court, for publishing the contents of a police bulletin. But it was never the number of prosecutions that was the issue, but the chilling effect the legislation had on journalists and journalism. The elite were defended by defamation law, once Northern Ireland blew up after 1968 the broadcasting ban kept 'subversive' voices, including Sinn Fein, off the airwaves; and the Officials Secrets Act allowed ministers to decide what was secret secure in the knowledge that no civil service would leak or blow the whistle.

Toward freedom of information

So why did the Irish government agree to introduce freedom of information? There had been some opening up before the Freedom of Information Act; the National Archives Act, which came into effect in 1991, gave historians, journalists and others access to public records over 30-years-old – other than when information relating to state security is withheld. An Ombudsman had been appointed in 1984 and much of the censorship of publications and films had been relaxed throughout the 1970s, 1980s and 1990s. There had been some individuals who were proposing freedom of information. A former senator, Brendan Ryan, wrote *Keeping Us In The Dark*, a study of censorship and freedom of information. There had been a private members bill and a campaign was run named 'Let in the Light', which united mainly journalists, academics and others. It organised a highly successful conference, with a list of speakers that included Salman Rushdie, then in hiding following a fatwa, the journalist Carl Bernstein, Anthony Lewis of *The New York Times* and others. The number of people who turned up at the two-day conference, and the subsequent sales of the book of the conference, was testament to a groundswell favouring legislative changes, openness and transparency.

However, the biggest single contributory factor in the drive for FOI was probably the Beef Tribunal, a hugely expensive judge-led inquiry into practices within the highly valuable beef industry, and the relationship between it and the political establishment. It made a number of disturbing findings about certain ministers and their departments in relation to the beef industry, including giving favourable treatment to some operators at the expense of others and of the taxpayers. Inexplicably, the journalist, Susan O'Keefe, who exposed the corruption, was the only person ever to appear in court, when she was charged with contempt having refused to reveal her sources. She was acquitted.

During the early part of the tribunal in January 1992 its chairman, Mr Justice Liam Hamilton, said: 'I think that if the questions that were asked in the Dáil (Irish parliament) were answered in the way they are answered here, there would be no necessity for this inquiry and a lot of money and time would have been saved,' (quoted in Foley, *The Irish Times*, 2 January, 1997). The tribunal continued hearing evidence until June 1993 and reported in August 1994. Costing some £30m, it was the longest, most expensive, and most controversial inquiry in the history of the state until then – there have been longer and more expensive inquiries since. It caused a general election; gave rise to three Supreme Court cases; led to an investigation by a parliamentary committee and a disciplinary hearing of the Bar Council; and led to the introduction of freedom of information legislation. Its impact on Irish politics was immense. (For more on the Beef Tribunal see O'Toole, 1995).

Following the 1992 general election, which returned a Fianna Fail/Labour coalition, both parties committed to introducing FOI laws and ethics in public office legislation in its programme for government. The tribunal had opened the door on the workings of the state just a fraction, but enough to make it difficult

to close it fully again. It was the tribunal that made it possible for freedom of information to be added to the Programme for Government in 1993. That Fianna Fail / Labour coalition collapsed, partly due to tension arising from the Beef Tribunal report, and was succeeded by the so-called 'Rainbow' coalition of three parties. That government also committed itself to enacting freedom of information legislation. The same junior minister, Eithne Fitzgerald, remained responsible for preparing the legislation. The proposed legislation was modelled very closely on FOI laws already in place in Australia and New Zealand.

Ms Fitzgerald did not have an easy task. As memory of the Beef Tribunal dimmed so did the commitment to openness and transparency. The legislation was nearly lost inside the Department of Justice, where the strategy seemed to be to delay as long as possible and it would fall with the government when a general election was called. Compromises were made. The right of public servants to blow the whistle on what they believed was a wrong doing was not included in the Act, though it had been included in earlier drafts. Also the police, An Garda Síochána, were to be included as a public body under the Act, but that was dropped, though provision to be added later was in the final legislation. The law also included a certification system, whereby ministers could issue a certificate deeming some information 'secret' under three categories - security of the state; law enforcement and international relations. These certificates were subject to regular review at the most senior governmental level. This system is similar to one operating under the FOI legislation in New Zealand and Australia. It was, according to one civil service source, more a 'security blanket.'

There were some criticisms of the Act from journalists. The 30-day response limit was seen by many as too long; that the Act did not specifically mention journalism and its role in society; and that as the bill made its slow journey through Parliament and its committees' it had become much more about the individual right to information rather than one based on the public interest (for more on journalists' criticism of FOI see Foley, 1997).

FOI and its legacy

More or less the Act has had a positive impact on Irish society. Since April 1998 people in Ireland have had the right to seek access to any information held; the right to correct information held that might be wrong; and the right to see how decisions relating to one self were taken. For members of the public they can see where they are on the housing list; see why the Arts Council turned down their application for a performance art project; and access their medical files.

For journalists it has meant having access to politicians' expenses, after an appeal to the courts; information on the use of the government jet and other expenditure; and also information held by the Department of Education on schools, which has led to a plethora of controversy over school league tables. It has also allowed access to reports on nursing homes; hospitals; schools; prisons and other public bodies, including the public service broadcaster, RTÉ; and state funded universities. Former inmates of so-called industrial schools, many of

whom suffered appalling abuse, were able to access their records using FOI when making claims under a redress scheme. Journalists have been able to inspect how regulatory bodies are working; get details of hospital waiting lists; or the details of public procurement. Discussions between the Department of Education and the Catholic Church on issues relating to the governance of new model primary schools were also accessed. However, what has also happened is that increasingly records are released as a matter of course, without journalists always having to use FOI to force disclosure.

Time and time again stories are obtained using FOI and the refrain, 'according to information released under the Freedom of Information Act' is increasingly heard on the broadcast news. After the initial teething problems of journalists not knowing how to use the Act, using it for trivial stories or going on massive trawling exercises, to many journalists today using FOI has become a routine. However, state and public bodies are still fighting access to information. The Information Commissioner received many objections to forcing the publication of judges' expenses, for instance, which has happened. Getting information relating to the government's handling of the economic collapse and the bank bailout and bank guarantees has been a long battle.

The former minister Eithne Fitzgerald fought for FOI every step of the way. After it was passed she commented that it would change, forever, the way public business was done and would herald a quiet revolution in the public service. Unfortunately, she lost her seat in the next election and parliament lost its most articulate FOI champion. For journalists, it was hoped FOI would mean an end to the days of the reputed 'no comment' and 'don't quote me' responses to queries. That probably did happen, and there is evidence that suggests more official information is now routinely placed in the public domain than was the case.

The Act amended

The 1997 Act was predicated on the notion of what best serves the public interest. It was welcomed by civil service unions, by the courts, journalists and the public in general. Its radical nature is possibly best understood when in 2003 it was amended by the then government in what the then Information Commissioner, Emily O'Reilly, described, in an understated way in a publication to mark the first 10 years of the legislation, as 'a step back from the commitment to openness, transparency and accountability which was the key factor in the enactment of the 1997 Act' (Office of the Information Commissioner: 2008: 13).

The 2003 amendment was a severe setback to openness in Ireland. The then government, led, ironically, by Fianna Fail – the party that in opposition had argued the act had not gone far enough. That government, which included the Progressive Democrat party, was a centre right government and it is believed the impetus to amend FOI came from the Fianna Fail's Minister for Finance, Charlie McCreevy, later a European Commissioner.

The amendment brought in charges for making requests; extended the time when access to the records of government was available to 10-years rather than five; gave full protection to communications between ministers concerning matters before government; and so on. One reason for this was that Fianna Fail had been in government since 1997 and still in government in 2003 with a term due to run until 2007, when files relating to 1997, when it came into office, would be available for public scrutiny. The new Act followed a review, which was held in secret (yes, really) and did not seek any contribution from the Information Commission. It was then pushed through parliament by the government.

The fees, which were extraordinarily high, especially for journalists involved in major investigations, were clearly responsible for a dramatic fall off in FOI usage since 2003 and that fall-off was particularly evident in the use of FOI by journalists. When the cost of accessing a record and the hourly cost of searching and retrieving were combined, the average cost of an FOI request was about €200 (£160). Only a year after the amendments were enacted the use of the Act by journalists fell by 50 per cent (*The Irish Times*, 17 May, 2004).

A new government elected in 2011 included the Labour Party, which had brought in the original Act, committed itself to restoring the Freedom of Information Act to its pre 2003 state. The Fine Gael and Labour Party Programme for Government, 2011-2016 stated:

We will legislate to restore the Freedom of Information Act to what it was before it was undermined by the outgoing Government, and we will extend its remit to other public bodies including the administrative side of the Garda Síochána, subject to security exceptions. We will extend Freedom of Information, and the Ombudsman Act, to ensure that all statutory bodies, and all bodies significantly funded from the public purse, are covered. We will introduce Whistleblowers legislation. We will put in place a Whistleblowers Act to protect public servants that expose maladministration by Ministers or others, and restore Freedom of Information, (Programme for Government 2011).

In October, 2014, the Government did as promised and the Freedom of Information Act, 2014 was passed. The new legislation extends the Act to all public bodies, including the police, (An Garda Síochána), the Central Bank and public financial bodies, including the National Assets Management Agency, which has been involved in a long legal case with a journalist attempting to ensure it is not defined as a public body. All new public bodies will automatically come under the Act, unless an exemption is made or if some of its work is exempted. It also abolishes the €15 application fee, caps the search and retrieval and gives the first five hours searching free. The abolition of the fee was, at the end of the day, undertaken with some reluctance, with a number of ministers voicing support for its retention, even though some of them had opposed it in 2003. The period during which government records are exempt was also restored to five years.

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