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Freedom of access to information on the environment – the reality in Ireland

Geraldine O'Brien

Introduction

A chink of light appeared on the horizon in 1990 with the Irish Government's laudable comments on the adoption of the EC Directive 90/313 on Freedom of Access to Information on the Environment. This commendable approach was contained in the Government's Programme for Action during its EC Presidency¹ and appeared to herald new beginnings. The Directive would come into force on 1 January 1993.

1. Dept of the Environment,
1990. *An Environment Action
Programme* p.14.

Political angle

The Labour Party had been extensively lobbied by environmentalists on the implementation of the Directive. Its election literature for the November 1992 election campaign contained promises of openness and transparency and had extensive commitments on environmental issues. When the Labour Party decided to join in a new coalition government with Fianna Fáil under Albert Reynolds, most environmentalists felt confident that a definitive Labour imprint would appear in the new freedom of information regulations, reflecting their earlier promises. While Labour did not obtain the Environment portfolio or indeed the junior ministry at Environmental Protection, decisions on the contents of regulations allowed for consultations with *all* Ministers.

Pharmaceutical industry and environmental conflict in Cork

The chemical companies have been steadily arriving in Cork for the past two decades and their presence was impossible to overlook. They usually located in highly visible sites, while their environmental pollution was indeed quite noticeable. The fears and concerns of ordinary residents were increased when faced with what was perceived as a potential health threat. Proficient as individuals and community groups had become, over time, by 1 January 1993 they were still unable to obtain the basic information needed to protect their health and environment.

The companies themselves were required under various pollution acts to supply specified monitoring data to the local authorities on a regular basis. The local authorities also stated that they were required to monitor the companies and the effects of their environmental emissions. Since the public could not examine or verify the actual position as to what exactly was contained in the data, they were at a great disadvantage. The lack of information contributed more than any other factor to the growth of opposition to 'dirty' industry in Cork and to the discourse on the Irish state's industrial policy.

Open conflict between citizens and the state ensued in many cases, Raybestos Manhattan, Schering Plough, Merrel Dow and Sandoz were notable examples. The state wished to retain a monopoly on the available environmental information and was aided by what can only be described as the 'cult of secrecy' practised by the chemical/pharmaceutical multinationals. This alliance claimed its information demonstrated that there were no pollution problems, yet the community knew from personal experience that this was not the case.

Some EU citizens were permitted access by their governments to these type of facts. EU legislation, with all its lowest-common-denominator characteristics can be viewed as a great leveller. With regard to Directive 90/313, environmentalists in Ireland had looked forward to being provided with a great deal of information. However the free flow of environmental information within this State was vitally dependant on how the Directive, which establishes the principle of access to information, was transposed into Irish law. Observers knew that the Directive, if implemented in a broad, open, user-friendly manner, would go a long way towards eliminating the mistrust, controversy and conflict that had become the hallmark of many projects and infrastructural plans in Ireland. Conversely, a minimalist and begrudging approach would increase the potential for community conflict, antagonism and public cynicism towards the state. The fair implementation of the EC Freedom of Access to Information on the Environment Directive 90/313 would have been reciprocated in turn by a mature and positive response from the environmental movement in Ireland.

Irish implementation of Directive 90/313

Despite the fact that the Irish Government had had almost two and a half years to draft the implementing regulations, Statutory Instrument 133 did not appear until 20 May 1993 and was a grave disappointment. The regulations, by and large, adopt a minimalist interpretation of the Directive, replicating its weaknesses and ambiguities and availing of virtually all the possibilities for exempting classes of information. They are quite short, being of similar length to the substantive provisions of the Directive itself and in most respects adhere quite closely to the text of the Directive. Indeed the regulations are as notable for what they do not contain as for what they do. The failure to define the practical arrangements for accessing information has proved to be a major stumbling block and essentially makes information available now only to the rich, and the persistent. The expected stamp of the Labour Party was disappointingly absent.

The regulations are vague, for example, the government appeared unable and unwilling to clearly define what constitutes a Public Body – the authority from which the information was to be made available. It suggests instead that 'in cases of dispute it will be for the courts ultimately to decide'². This seems to be another instance of the legislature abrogating its legislative responsibility to the judiciary. At that very time, the often bitter Mullaghmore dispute was at its height, so it did not seem too much to expect that lessons might have been learned by the government and that the potential for such divisive controversy would be averted in all upcoming legislation.

Problems

Although environmentalists knew that they were now moving into uncharted terrain, governed by what seemed to be a totally inadequate law, they were unprepared for the force of bureaucracy which greeted them in their initial attempts to access information. It was immediately clear that public servants needed more than the circulation of Guidance Notes³ and a vague set of regulations to make the necessary leap out of a traditional mind set of secrecy. In fact it appears from the outset there was no change of practice, no training, no extra staffing provisions. During that first year public bodies were largely allowed a great deal of lee-way in handling requests because of the failure of the Government to define practical arrangements to facilitate information flow.

Costs

Charges are left to the discretion of the individual public authority although they may not exceed a 'reasonable cost'⁴. It is clear that providing a legal right of access to information will not of itself lead to a regime of openness so long as it is possible for public authorities to erect financial barriers. Costs represent a fundamental problem with access in the sense that information is unavailable if one cannot afford it. At

2. Dept of the Environment, May 1993, 'Access to Information on the Environment' Guidance Notes, section 2.9 Page 4.

3. Dept of the Environment, 1993, 'Access to Information on the Environment', Guidance Notes.

4. S.I. 133 of 1993, Section 9.

present the applicant is at the discretion or mercy of the public authorities. However, the Directive, does not provide for concessions for information sought for non-commercial purposes, and in this respect compares poorly with the US Freedom of Information Act which requires that the first 100 pages of photocopying and two hours search time are free.

At the implementation stage of the regulations the Cork Environmental Alliance (CEA) met with Cork County Council, a local public authority holding substantial environmental information. It was agreed that data supplied to community groups such as ours would be photocopied free of charge. This agreement has since been revoked by the Council – initially 5p per sheet photocopied was charged. We were subsequently notified that 10p would be a more reasonable cost in view of the time taken to collate the data thus bringing our bill to £110 on that occasion. (We had applied for the monitoring returns made by the pharmaceutical companies in Cork for 1993.) The resultant round of written argument led to further delay and antagonism between two firmly entrenched sides of the information divide.

In this instance the public authority has interpreted the cost of 'supplying' information to take into account searching, retrieving, compiling and copying information. If charges for such items are to be levied at all, they should only be levied on the basis of the presumption of a well-ordered transparent filing system.

In an effort to extract the information ourselves, we visited County Hall. It was exactly the approach of Cork County Council, whose publicly available information system seemed out-of-date and disordered when we inspected it,⁵ that prompted CEA to clearly define in writing the precise and detailed information which we required. That application resulted in the £110 bill.

At that time we sought a relatively large volume of information for a particular purpose but I am aware that Kildare County Council quoted a charge of £30 for a single sheet of collated data. The Waste Action Group, deterred by the high price did not proceed with the request at that time. On re-application six months later, the fee was reduced to £5. In two other cases, Offaly County Council and Clare County Council each imposed charges of £30 for two pages and eleven pages respectively.⁶ These examples demonstrate the need for a standardized charging policy for public authorities.

Form of Access

The operations of the recently established Environmental Protection Agency (EPA), a body given to repeated statements on its commitment to transparency⁷, is becoming an area of major concern with regard to access to information. The Agency has established a new and elaborate system of pollution licensing which in practice has required 'activities likely to have a substantial environmental impact' to undergo application of an Integrated Pollution Control Licence (IPC).

The licence applications are substantial documents typically consisting of seven to eight volumes running to a couple of thousand pages. In the first round of licence applications which began on 1 September 1994, six of the major chemical companies in Cork made the required application. At the end of August 1994, CEA confidently wrote to the EPA asking for a copy of the licence applications. Heretofore, although applications were much shorter, they were available for public inspection only at the offices of the Local Authority. They were considered to be the property of the company and could not be photocopied. This situation necessitated the transposition of documents in long-hand by anyone concerned about a potentially polluting development in their community.

The EPA initially responded to CEA's request by directing us to the offices of Cork County Council where copies of the relevant 40+ volumes of highly technical information were available for inspection. The Agency also offered to assist in obtaining copies of 'selected portions' of applications but stated that because of the sheer volume of

5. This situation has now improved.

6. Wates, Jeremy (November 1994). *Practical Arrangement for Providing Access to Environmental Information*, Earthwatch Ireland.

7. Environmental Protection Agency Annual Report 1993, P III: 'To improve public understanding of the environment and environmental issues and to promote greater public involvement in the protection of the environment by providing greater public access to environmental information and relevant databases'.

documentation contained in a licence application, 'it is not possible to accede to your request to have copies forwarded to you⁸'. However this suggestion was rejected by CEA as impractical on the grounds that even if only five minutes were devoted to each page it could take two weeks at the local authority office to read just one application. The local authority declined to photocopy the data. The EPA's solution was to make each application available at a cost of £250, or a total of £1500 for the six. In the round of applications scheduled for January 1995, up to ten further Cork chemical companies may be involved. CEA does not have available to it those kinds of financial resources and we suspect that the financial status of other community groups and individuals is similar.

Jeremy Wates of Earthwatch noted in his paper delivered to a European Environmental Bureau workshop

that this is an interesting case because it shows that costs are still a barrier to effective access to information even where they are reasonable in relation to the costs of making the information available. Unless that figure of £250 proves to be excessive when assessed in terms of costs per page, the EPA would appear to be in compliance with the Directive and the regulations. It suggests that changes to legislation and practice may be required to avoid problems of this kind.

This situation demonstrates the need to explore practical ways of ensuring effective public access to large volumes of information without entailing excessive costs. Mr Wates discusses a number of options:

1. It could be made a legislative requirement that IPC licence application and similar documents be provided on computer discs as well as in hard copy form. As a natural extension to this option the information could also be made available via modem on a database.
2. Legislation could provide for a right to lease a copy of the application or other large document similar to the library system. A person could be required to indemnify the public authority against possible damage and that this deposit should be in accordance with that person's means.
3. The conditions in which documents are available for inspection could be greatly improved. The current situation where lengthy technical documents must sometimes be inspected in corridors or standing at a counter is unacceptable. Proper seating arrangements in quiet rooms with photocopying facilities on hand is essential and could in some circumstances reduce the need to obtain copies of information. Special facilities open for extended hours would overcome the problem presented by the fact that documents may only be inspected during normal office hours when most people are, by definition, at work.⁹

8. Letter, 6 September 1994. Licensing and Control Division of EPA to CEA.

9. Ibid (5).

Voluminous information

It is worth pausing at this stage to consider what constitutes 'voluminous information'. Much has been made of this term by government and public bodies to the extent that this undefined phrase appears to have taken on a life of its own. Once uttered, this phrase offers good cause for the refusal of information to applicants who are immediately made to appear as putting forward an unreasonable request which in itself is grounds for refusal (Section 6.2 S.I.133). As stated earlier, in Cork Harbour, there are sixteen chemical companies licensed to add daily pollutants to our environment. These companies report to the local authority, that is Cork County Council, on a monthly basis, providing sheets of data in varying quantities to be examined by the Council staff for compliance or otherwise with pollution licences. As members of the community, we are frequently reassured that the Council is well equipped to satisfactorily police the industry. Indeed high rates and monitoring fees are paid to the Council to ensure just such a situation. Thus they can make the

presumption that the Local Authority is staffed in proportion to the volume of work pertaining to its statutory duty. Because of this, it is surely not unreasonable on the part of the community to seek data on the activity occurring in that community.

In reality, in the practical application of these regulations, Cork County Council has been allotted no more nor no less staff than, for example, given to Leitrim County Council, which has no chemical industry. Therefore Cork County Council is liable to be subjected to a greater volume of requests than other local authorities yet has not been granted the additional necessary staff which would perhaps allow it deal adequately with information applications. Cork County Council has been unavoidably targeted by CEA and other environmentalists as a result of the large volume of environmental information it holds. As a result of this close scrutiny of one local authority, further weaknesses of the legislation have been highlighted. The response from the Council staff charged with supplying the detailed information on the monitoring data of the chemical industries has led to the 'coining' of the term 'voluminous information'. This data, on the occasion that a request was made, in reality amounted to between 600 and 800 pages of information specifically required by CEA to complete its report on a pollution overview of the pharmaceutical industry in Cork Harbour entitled *We're Tired of Being Guinea Pigs* which was published in April 1994.

Further to the publication of the report which demonstrated frequent and substantial breaches of the licences, there was a predictable controversy in the media as the Council moved to defend its position. It was interesting to note that the press statements by the Council had multiplied the amount of monitoring results to between one million and two million pieces of data. This may have sowed a seed of doubt amongst the attentive public as to the impossibility and impracticability of first of all expecting complete compliance to the licences and secondly of supplying the public with what had generally become known as 'voluminous information'.

Time frame for response

Both the Directive and the regulations state that the public authority should 'respond' within two months (S. 8(1) S.I. 133), however neither piece of legislation defines how the word 'respond' should be interpreted. Is it simply to be an acknowledgement of the application or a comment on the request? It is not stipulated that the information should be actually supplied within the two month period. It has been the experience of many applicants that public authorities appear to wait until the two months have almost expired before denying the information or referring the applicant to a different authority. First and foremost it must be stated that that time period is too long. In Denmark and the US there is a ten day time frame for responses and in the case of a refusal, the appeal must be dealt with within twenty-one days in the US. It should be noted that CEA has written for and received information from the US EPA within the stated ten day response period. The US offices are on average 4,500 miles away. County Hall, the offices of Cork County Council, one of the main public authorities with whom the CEA have dealt is two miles away.

Planning Acts

Information delayed is also information denied as the reason for the request can be negated by the passage of time. That the Irish Planning Act of 1992 does not dovetail with the time frames in the environmental Freedom of Information regulations is a further example of the lack of enthusiasm shown by Irish legislators for the operation of access to information. The Irish planning system which was governed by the 1963 Planning Acts, was relatively open and allowed greater public participation than many of our European counterparts, until the Merrel Dow and Sandoz planning controversies. Then, informed, cohesive and well prepared community and environmental organizations became locked in planning battles with multinationals, the planning authorities, the IDA and the political establishment. The effect of this was the

disillusionment of the Merrel Dow management as to the company's welcome in Cork which in part influenced its 'restructuring' decision that led to the abrupt abandonment of its plans.

The protracted planning and licensing battle with Sandoz to ensure that strict environmental controls were put in place also seemed to worry the authorities. The tenacity and persistence of the community groups, which had grasped the intricacies of the planning system, convinced their 'opponents' that changes were required to prevent a repeat performance and led directly to the introduction of the 1992 Planning Act. This Act effectively limited and curtailed participation in the planning process. It marked the reversal of the democratic process with regard to public access and accountability. Planning appeals must now be determined within a four month period by An Bord Pleanála, access to the courts has been restricted and the entire grounds for a planning appeal must be submitted to the Board within one month. In the case of complex developments, this results in undue pressure on a citizen or community group attempting to prepare a case. Even in this, the information regulations are unsynchronized with the planning acts in that public authorities have been allowed two months to respond to a request for information thus ensuring that it is impossible to meet the one month deadline for the submission of a planning appeal¹⁰. Instead of being in tandem and workable, the laws, which followed each other by only one year are totally disjointed and prevent the practical use of Freedom of Information by citizens to assist in the preparation of a planning appeal.

CEA has a large file of our attempts of our requests for information from Cork County Council. In the event of the time limit expiring and not receiving the information, we have repeated requests by registered post. A particular report on dioxin contamination in our community took fourteen months to acquire and required extraordinary dogged determination on our part.

10. CEA failed in such a manner in relation to Hickson Pharmachem, Ringaskiddy, Co Cork, planning application to Cork County Council, March 1994.

Public Authorities

Because the regulations have failed to define what constitutes a public body, many authorities asked to supply information have engaged applicants in correspondence in a bid to refuse requests.

Probably the single largest public body to hold important environmental information is An Bord Pleanála. The Directive allowed Member States discretion to exclude information held by a judicial body. Inexplicably, the Irish Government elevated the Board to the level of judiciary, calling its hitherto regarded administrative function 'quasi-judicial', and effectively closed off its deliberations and reports. By seeking judicial review, a copy of an An Bord Pleanála's Inspectors' reports can usually be attained (at an approximate cost of £3000). For many who have been left with little option but to take this course of action, the information has often proved invaluable.

The most recent case involved the Waste Action Group, which was opposing plans for proposed a landfill dump at Kill Co Kildare. The group discovered, on perusal of the Inspectors' report further to judicial review, that the Inspectors, who had presided at the Oral Hearing on the planning appeal, advised the Board, on the basis of the evidence presented to them, that the planned landfill should not go ahead. The Inspectors recommendation was overruled by the Board. Notwithstanding the existence of freedom of information laws, Waste Action Group still had to resort to costly court action in order to unearth this highly significant piece of information.

In the Rainbow Coalition's programme for the government 1994, it is stated that laws excluding An Bord Pleanála's Inspectors' Reports from the net of the environmental information regulations will be amended. This happened earlier this year – a testimony to those who have lobbied for this change and lends hope to concerned Irish citizens that this law is not carved in stone and can still be improved.

This would be in line with the US experience. The US 'Right To Know Act' had been equally restrictive in its early days of application. However, the Americans eroded this tightness by successive court cases, notably a Court action in 1974 which coincided with Watergate – a time of crisis in America with huge concern over secrecy.

The Health and Safety Authority (HSA) also considers its function, which pertains to the adequacy or otherwise of the health and safety of a workplace, to be outside the remit of the regulations. In fact a large section of the HSA Act 1989 (Section 45) is given over to ensuring that the operations of the Authority are protected by confidentiality. This begs the philosophical examination as to where the workplace ends and the environment begins. Are people not part of the environment? Surely the reason for protection of the environment extends beyond the preservation of species of insects, birds and fish? Is it not ultimately to protect the air, water and soil on which humans rely for sustenance?

CEA wrote to the HSA requesting its reports on two accidents that occurred in local chemical factories over recent years. The Authority has ruled so far, that the accidents, one an explosion in a chemical tank at Gaeleo Ltd in June 1990 that necessitated hospitalization of the workers involved, the other an explosion and fire in December 1988 at Irish Fertilizer Industries (IFI), had 'no environmental import'. This approach is unacceptable and has been successfully challenged by Cork Environmental Alliance.

Appeals

Because of the CEA's initial enthusiastic use of the long-awaited information directive, it is doubly disconcerting to discover the uselessness of the appeals system. The Directive is not specific, allowing in Article 4 that a complainant may seek 'judicial or administrative review of the Decision in accordance with the relevant national system'. In contrast to the equivalent provision in the US legislation, it places no time limit on the appeals process. In Ireland, appeals can be made through the administrative system i.e. the Ombudsman or by judicial review. Judicial review is prohibitive to most ordinary citizens because of the costs involved and it has been CEA's experience that going through the Ombudsman's office is a very slow process. CEA made a complaint to the Ombudsman in April 1994 regarding information we had sought and urgently required in December 1993 but had failed to receive within the two month time limit. Other than an acknowledgement there was no communication with the Ombudsman until September 1994 to which it replied the following month. A reply came in June 1995. The Ombudsman's office was not designed for this purpose and was given no additional resources to meet the number of complaints it has received in this area. Furthermore, the Environmental Protection Agency, which can now perhaps be regarded as the prime public body holding information on the environment, does not come under the brief of the Ombudsman.

Complaints to the EU Commission have also been recently restricted unless they deal with a precedent setting area of non-compliance with the legislation. Nor will the Commission deal with complaints that have not already been through the national appeals system. In short, no proper appeals system accompanies this legislation. Once again, the Programme for Government of the coalition government, in December 1994, has promised to rectify this situation.

Conclusions

For those with only a cursory interest in environmental affairs and for those who are casting an eye forward to the planned Freedom of Information Act, the Freedom of Access to Information on the Environment regulations in Ireland must stand as a timely warning and as a salutary lesson. It has been the experience of the environmentalists and community groups that have attempted to use these new laws that the organs of this state are not overly keen on public access to information, the structures do not

cater for it and can be quite obstructive at every turn beginning at the legislation drafting stage.

My observations of the preparations for the Freedom of Information Act is that the Government and the legislative drafters have admirably studied the Acts of other countries, in particular those of Australia and New Zealand and appear to be intent in taking the best from them. However, despite the good intentions, they appear not to realize that it is even more important to pay attention to the fine print of the transposition of another country's system to the turgidity of the Irish system. It is my fear that once again an impression of openness will be created. Lip service to good intent has been and will be paid but without the detail, the hard work that accompanies the nitty-gritty and the acceptance of the uniqueness of every individual situation, freedom of information in Ireland will remain an illusion rather than a reality.

Freedom of information is indeed a citizen's right. The forthcoming legislation should be clear and unambiguous and should swing the pendulum towards the ordinary person in facilitating their requirements. An informed citizen is the prerequisite for a civilized and democratic society. However many politicians, public servants and vested interest groups remain as intent on preserving the culture and practice of secrecy as ever. The Freedom of Access to Information on the Environment laws bear witness to their ongoing intent.