

Public Consultation on the Freedom of Information Act (FOI)

Submission by the Citizens Information Board

The Citizens Information Board (CIB) welcomes the opportunity to contribute to the review of the Freedom of Information Act. Through its delivery services and its own core activities, CIB is acutely aware of the necessity of developing and facilitating public access to government and state body-held information in a manner that is effective, clearly structured and timely. CIB places particular importance on the right of individual citizens to access personal information from government departments and agencies. CIB also sees the need to ensure that organisations, researchers and people representing the needs of disadvantaged groups and vulnerable people have access to the information that is essential if they are to contribute to policy development, monitor government actions and performance, and advocate on behalf of their client-groups in an informed and productive manner.

CIB believes that access to information is crucial to the task of enhancing government transparency, accountability and integrity. For the general public to have trust in Government and state institutions, it needs to be convinced that barriers to information – where they exist – are reasonable and essential in order to meet data protection requirements and/or to enable the Government and public services to carry out their functions effectively and efficiently.

Access to information builds opportunities for citizen participation in government processes and generates improved decision-making through increased scrutiny, discussion, informed debate, comment and review of government decisions, policies and practices.

CIB-funded services (Citizens Information Services, MABS and the National Advocacy Service for People with Disabilities) provide support to large numbers of people who are, in many cases, struggling to access information that is, in principle, already publicly and freely available. Overall, Citizens Information Services dealt with almost three quarters of a million queries from the public in 2021 on all aspects of rights and entitlements to public services. Many of the people who use CIB-funded services experience difficulty, stress and confusion in dealing with the administrative aspects of the state and in seeking answers to questions about entitlements and rights. They seek support, guidance and advice in this regard. While queries to CISs have become more complex over the years, it is also the case that few of these queries actually require FOI legislation to access the information required. In most of the instances where a need for an FOI request arose, the information required should have been routinely available without the need for FOI. For example, CISs may use FOI to obtain information related to social welfare appeals and there is no apparent reason why this information cannot be made available routinely on request once an appeal is instigated. The same point applies to people seeking their medical records – this is information that they are generally entitled to have access to under GDPR legislation.

The primary reason for a small number of people contacting a CIS is to get assistance with making an FOI request. For example, during the period 2019 to 2021, 1,280 clients sought information on or assistance with making an FOI request. While the FOI mechanism was clearly useful for these clients,

there is a *prima facie* question as to why, in most instances the information could not be made available through a simple request.

Addressing the issue of the unnecessary use of the FOI request mechanism to get information that should be routinely available should be a key factor in the Review, particularly as the system as it operates at present can be cumbersome, resource intensive and time-consuming, for both the requester and for the body dealing with the request. CIB is, therefore, strongly of the view that FOI legislation should be the option of last resort. We are also of the view that the FOI option where needed should be more easily accessible and easier to navigate.

Structural Issues

Streamlining access regimes and related functions

FOI now operates alongside a wide array of other information access mechanisms, including Gov.ie, agency websites and www.citizensinformation.ie. The precise role of FOI in the public accessing information needs to be explained more clearly in the above context and, particularly, the circumstances in which recourse to the legislation is required. Also important is the need to make very clear the distinction between GDPR and FOI legislation and that information limited under GDPR legislation cannot be alternatively provided under FOI legislation. There is a further need to make more explicit the distinction between information available under FOI legislation and Access to Environmental Information (AEI) Regulations. There will be an ongoing need to ensure that the more general rights to privacy in respect of personal information and data protection offered by GDPR are clearly and robustly described and upheld.

Greater clarity and integration would be likely to reduce the tendency to 'shop-around' and would thereby reduce the extent of multiple requests for the same information, as would a greater degree of alignment of the requesting processes. The consolidation, or at a minimum the increased alignment of processes, of the FOI and GDPR functions and the AEI function, if permissible under EU law, would appear to be a practical and useful action.

The crucial distinction between the purpose and function of FOI and that of GDPR needs to be clearly explained in order to ensure that there is no public misunderstanding about the respective role and functions of each.

Transparency by design

It is clear that there has been a massive change in the technologies used to record, store and process information since the introduction of the initial FOI Act. These advances offer a real potential for the development of greater and easier transparency with benefits for both requesters and responders.

While a proportion of requesters may lack the skills required to access their own information, it is increasingly likely that many citizens will over time possess the necessary familiarity with IT systems. At a minimum, it should be envisaged that citizens will be able to access information with the support, advice and guidance of suitably skilled advocates, information assistants or advisors, in particular, Citizens Information Services.

Transparency by design is an essential step in achieving this much-improved, efficient mode of accessing information. Bolstering the current system may not be enough. True transparency will only be achieved when the public can access information at the point it is required, without an undue dependency on the basic rights of citizens under FOI.

Proactive publication

The enforceable right to request information is an essential and major strength of the FOI system in Ireland and must be preserved. However, there is an increasingly clear argument for giving the duty to proactively publish information that is not limited by GDPR or other public service operational requirements an equal emphasis in regulation. At present there is a clear imbalance. The law places the emphasis on the right to ask, with the effect that authorities focus their resources on responding to individual requests, the volume and scope of which is continually increasing. The more proactive publication of information would serve the purpose of lessening the amount of information that had to be provided as an 'add-on' to the work of public officials and would be likely to result in a more seamless flow of information. Important here is the fact that FOI legislation permits the withholding of certain information but does not oblige or require an agency to do so.

The 2014 Act took steps toward proactive publication through the FOI Publication Scheme. Section 8 of the Act requires FOI bodies to prepare and publish as much information as possible in an open and accessible manner on a routine basis outside of FOI, having regard to the principles of openness, transparency and accountability. While this has the potential to provide much more general access to information from public bodies and while progress has been made, the range and scope of proactive publication by public bodies requires further consideration. There is a real need to put in place a regulatory requirement that establishes proactive publication as a primary requirement.

The right to access information provided for under FOI legislation should be viewed as a 'last resort', concerned only with unreasonable failures to provide information, or cases where complex legal and data protection issues exist.

Under any enhanced proactive information release mechanisms, the public will need to be informed of the new pathways available, be able to trust the process, and be convinced that their needs are being effectively and adequately met without having to have recourse to FOI legislation.

Social researchers, for example, should not have to depend on elaborate and formal requesting processes, but should be able to access information through largely proactively published materials and mechanisms.

Individuals should be able to access personal information directly, albeit with necessary data protection mechanisms in place.

Informal release

CIB agrees that the FOI model as it has operated to date can be regarded as somewhat rigid, technical and legalistic and that a less rigid approach without the need to invoke FOI procedures should be the norm rather than the exception. However, the term 'informal release' of information may not be the appropriate one as the term 'informal' may have connotations of a casual and somewhat *ad hoc* approach which would undermine the notion of a systematic approach to the dissemination of information across all public bodies.

There is a need for strong leadership in the public service toward changing this culture and towards supporting and incentivising staff to routinely publish information unless there is a clear an obvious barrier to doing so.

As a back-drop to the positive reinforcement of positive attitudes and practices there will, however, be a need for regulatory measures that make the regular release of information and proactive publication an obligation.

Managing the increased volume of 'records' (and requests).

It is acknowledged that the volume of information generated and held by the public service is massive and increasing. This stored information must, in many instances, be accessible to officials if they are to carry out their duties and should be easily accessible.

Personal information should be considered a priority in designing access pathways. Similarly, records relating to the performance of public bodies in meeting important policy objectives should be seen as requiring special attention. Current examples of the latter include housing, the environment, and health matters.

Consideration of the number, type, and target bodies for FOI requests poses some questions that may be useful. It is noteworthy that of the 36,673 FOI requests received by public bodies in 2021, over 10,000 were made to the HSE (28.1% of all requests) and a further 5,000 plus requests were made to Voluntary Hospitals, Mental Health Services and Related Agencies (15.3%). Over half of the requests under the latter grouping were made to 4 main hospitals. Of all requests received in the overall health sector, including the HSE and voluntary hospitals, 84% were for personal information. Requests to the HSE were granted in 56% of cases and part granted in a further 26% of cases. Voluntary Hospitals and Mental Health Services showed a similar pattern with 57% granted and 16% part granted. It can be reasonably argued that these high rates of requests and high levels of granting/part-granting demonstrate a situation in which personal information could have been released for the most part without having to have recourse to FOI.

Refusal rates of under 10% (when requests that were transferred or withdrawn/handled through other means are taken into account) indicate, at a minimum, that further exploration is warranted into the reasons why members of the public felt that they had to have recourse to the FOI mechanism to get the information that they required and to which they were entitled.

The relatively small number of FOI requests made to, for example, the Department of Social Protection in 2021 (1,733/5% of all FOI requests) or the Revenue Commissioners (205/0.6%) would appear to indicate that there are specific issues connected with the release of health-related information and that these issues should be dealt with in a focused and structured manner.

Incremental reforms

Improving the request process

The experience of CIB-funded services strongly indicates that members of the public – as opposed to journalists, politicians and others – struggle with understanding and using mechanisms involved with seeking information from public bodies. There is a need therefore to take all possible steps to design and implement processes that are user-friendly and accessible.

Fees and charges

CIB believes that the existing structure for fees and charges is adequate.

Designating FOI bodies

CIB is aware of the benefits that could accrue from the FOI designation of bodies that are heavily funded by the state. In particular, there is a case for the designation of private bodies that provide health, social care and educational services for vulnerable and at-risk adults and children. Poor levels of regulation in, for example, the private home care sector bolster the case for designation of such private businesses, especially where personal information is concerned.

However, there is a need to ensure that the many small community and voluntary sector organisations - that receive sometimes modest levels of state funding – are not burdened with

undue levels of demand. The definition of part-inclusions for this sector based on size and on areas of operation (health, social care, education) would be a practical and reasonable approach.

Role of the Information Commissioner

The role of the Information Commissioner is seen as crucial and essential. The role should be expanded to include training for public officials, public education, research and debate about the need for a more proactive information dissemination culture across the whole of the public sector.

Abuse of FOI

CIB accepts that in a limited number of instances FOI requests can be vexatious and abusive of the process. While accepting that measures to discourage such abuses are necessary, it remains important that punitive measures should be seen as appropriate in only the most serious and extreme of cases.

FOI and vulnerable adults

CIB is aware of the difficulties that sometimes arise where FOI requests are made by a third party on behalf of a person with a disability or otherwise vulnerable person. The third party may be a relative or other person acting as an advocate. While the FOI regulations provide for such circumstances and place protections on access to personal information, there remains a danger that automatic assumptions may be made by officials of public bodies regarding the capacity or lack of capacity of the at-risk adult.

It is crucial that the provisions of the Assisted Decision Making (Capacity) Act 2015 be respected in all approaches to FOI.

Conclusion

CIB recognises that agency culture and attitudes play an important role in developing and operating a progressive and healthy information access environment. Leadership is required from the highest levels in all public bodies if citizen access is to become the norm.

There is a clear need for a further ‘shift in balance’ between the citizen and the State in terms of people’s ‘right to know’ both about records held about themselves and about the way Government makes policy and administers services.

It is critically important to take full cognisance of the fact that FOI legislation is only one, and a relatively small aspect of transparency in public services. The review of the FOI legislation must, therefore, be done in conjunction with a review of the Open Government initiative as it operates in Ireland and with reference to the Open Government Round Table multi-stakeholder forum¹.

CIB believes that any FOI revisions must, above all else promote, enable and require the maximum possible level of proactive and routine release of information.

¹ <https://www.gov.ie/en/publication/5a21f-open-government-round-table-multi-stakeholder-forum-activity-ongoing/#>