By email: Eoin.Hartnett@oireachtas.ie

Joint Committee on Finance, Public Expenditure and Reform
Leinster House
Dublin 2

1 February 2013

Your ref: I 2012/279

Dear Mr Hartnett,

I refer to your letter dated 25 January inviting submissions and observations on the Draft Heads of the General Scheme of the Freedom of Information Bill 2012 (the **Bill**). As I understand it the committee will review the submissions received and where the committee considers there is merit it will invite the submitter to make a presentation to the committee probably on 6 or 7 February.

Introduction

Firstly I wish to thank the committee for the invitation to make a submission and for the possibility of making a presentation to the committee next week.

As the committee is no doubt aware, I am a journalist and run a website entitled TheStory.ie. This is a site dedicated to sharing documents, combing and combining data and promoting transparency in public life. It is run by me in my spare time on a voluntary basis.

Through my work as a journalist and with TheStory.ie I have become a seasoned user of various access to information systems including the Freedom of Information Act 1997/2003, the Access to Information on the Environment Regulations 2007/2011 and access to documents held by the European Union institutions (EC 1049/2001). Therefore I am in a good position to make this submission as an access to information practitioner.

General

I know that the timescales are short so I will keep my comments brief and to the point.

I welcome the government's initiative to reform the Freedom of Information Act (the **Act**) and would encourage the minister to give full effect to his government's statement excerpted below from the programme for government :

> *"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."[1]

General

I would just like to make a brief mention of where the Act comes from and why it is so important for our democracy. It is easy to lose sight of this and to focus on perceived costs, abuses and disruption of public administration that are often the focus of controversy when the Act is under scrutiny.

However the culture of presumptive secrecy in the public sector which preceded the Act is now considered to be a relic of an authoritarian era, less democratic and a means of permitting the state to encroach on the rights of citizens. In fact, far from being a disruptor of administration, openness is now considered to be an essential element of proper modern public administration.[2]

Even more than that, however, openness is now considered to be major contributor to the strengthening of democracy and respect for fundamental rights. For example the pre-amble to Regulation 1049/2001EC regarding public access to European Parliament, Council and Commission documents states:

"*Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union."*

Similarly the European Court of Human Rights has held that restrictions on access to government information must satisfy the three part test articulated in Article 10(2) of the European Convention on Human Rights and Fundamental Freedom; i.e. they need to be provided by law; serve one of the legitimate interests in Article 10(2) and be necessary in a democratic society[3] .

With the fall of the Berlin Wall we now have first-hand experience of how the state can use

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[1] http://per.gov.ie/wp-content/uploads/ProgrammeforGovernmentFinal.pdf page 16.

[2] *Ireland: Towards an Integrated Public Service. Paris: Organisation for Economic Co-operation and Development (2007) page 37.*

[3] *Társaság a Szabadságjogokért (Hungarian Civil Liberties Union) –v- Hungary ECtHR (2009) Case 37374/05*

surveillance and secrecy to violate fundamental rights.

I would urge the committee and Minister to be cognisant of the origins and objectives of access to information law when they are enacting this legislation and when considering the arguments made by powerful public bodies in support of maintaining broad mandatory exemptions to openness thereby ensuring absolute secrecy over their activities. The rights of the citizens need to be equally vindicated along with the public interest of limiting access to records of public bodies.

Nevertheless in my experience of making many requests for access there is still a cultural presumption of secrecy in many arms of the State notwithstanding the statutory obligations under the FOI Act.

<u>Specific Comments on Heads of Bill</u>

Head 6 Access to Records

I welcome the extension of the Act to all public bodies and the inclusion of records held by persons engaged in contracts for services to a public body that are relevant to that contract

Head 12 Manner of access to records

In my experience when releasing records held in machine readable formats (e.g. spreadsheets and databases) many public bodies chose to print and scan the record as non-searchable pdfs. The effect of this is to make further use and analysis much more difficult. Whether or not this is a deliberate tactic of some public bodies is in the realm of speculation but I would urge the Minister to oblige public bodies to provide records in machine readable formats suitable for reuse.

This would be consistent with the intention of the Public Sector Information Directive 2003/98/EC, and with *Supporting Public Service Reform - eGovernment 2012-2015*[4] from the Department of Public Expenditure and Reform, and with the planned updating of the 2003 Directive.[5]

Head 46 Restrictions of Act

I am concerned that new restrictions have been brought into the Bill which are not necessary in light of the existing exemptions.

I do not agree that the Bill should be disapplied to records held by the Central Bank which is

[4] http://per.gov.ie/wp-content/uploads/eGovernment-2012-2015.pdf

[5] http://europa.eu/rapid/press-release_IP-11-1524_en.htm?locale=en

subject to professional secrecy obligations under the ECSB statute or EU financial services directives. If this is to be the case then the specific relevant provisions should be enumerated in the Act and the obligations to maintain secrecy should be no more restrictive than those under the statutes in question.

The limitation of application of the Bill to only records relating to the administrative functions of An Garda Síochána is unnecessary. The UK police force is subject to the full application of the Freedom of Information Act in the UK and relies on the standard exemptions including those for confidential information and information which must remain secret for reasons of security and prosecution of crime.

An Garda is not a special case and their concerns in relation to the proposal to bring them under the Act are unfounded particularly in light of the UK example and the existing exemptions.

I wish to make this point also in relation to CAB, the Defence Forces, HSA and other bodies listed in this head as being broadly excluded.

Head 47 Fees

Fees are a major issue in relation to the application of the Act and are widely considered to be a major barrier to the public's use of the Act, especially in terms of making appeals.

Felle and Adshead in their 2009 review of the Act state[6]

> *"The Council of Europe's anti-corruption arm, the Group of States against Corruption (GRECO), criticised the Irish government for introducing fees for FOI requests (Council of Europe, 2005: 25-26), arguing that the fee rules 'could prevent the public from requesting information and/or appealing a decision not to give out information. Above all, the fee system ... sends a negative signal to the public, which is to some extent in contradiction with the general principles of the right to access to official information' and recommends the Government should 'reconsider the system of fees' for FOI requests (ibid: 25-26). The Organisation for Economic Cooperation and Development (OECD) in a report on the Irish public service, also recommended dropping up-front fees for requests. It said: 'The Government should reduce barriers to public information by making all requests under the Freedom of Information Act 1997 free… While user charges may limit frivolous requests (and thereby reduce burdens on the Public Service), they also serve as a disincentive to greater openness' (OECD, 2007: 7). In Ireland, Reports by the Oireachtas Committee on Finance (2005) and by the Information Commissioner (2007) both recommended a rowing back of the 2003 Act in certain areas. To date there are no plans to reverse the amendment."*

[6] Tom Felle and Maura Adshead *Democracy and the Right to Know-10 Yeards of Freedom of Information in Ireland* (2009) University of Limerick page 17

The original Act only had retrieval and reproduction fees as is reflected in this head whereas the application fee and charges for appeals were introduced by Ministerial order.

While we welcome the commitment to cap search and retrieval fees; if the Minister truly wants to restore the Act to its original form then we invite him to also revoke the order setting application and appeal fees since it is these, rather than search and retrieval fees, which are the real barrier to optimising transparency under the Act.

The issue of fees is often confounded with supposed abuses of the Act. The word "*abuse*" in my view is loaded and disrespects the motivation of the vast majority of the public who use the Act. While there may be isolated cases of such abuses, fees should not be used as a way of controlling them. This is because voluminous, frivolous, vexatious and manifestly unreasonable requests may already be rejected under the Act (Section 10) and we note that the Minister proposes to strengthen this exception in the Bill.

In my view using fees to control manifestly unreasonable behaviour is itself unreasonable and is disproportionate since it also acts as a major barrier to genuine requestors and is not consistent with the fundamental principle that a barrier to openness should be necessary in the interest of a specific interest.

International perspective

It is worth noting that Ireland is the exception rather than the rule when it comes to fees. It stands with Canada and Israel as just three countries in the world that charge upfront for access to information, out of 93 countries with access to information laws; with Ireland being the only country in the European Union which does so.

United Kingdom

The United Kingdom recently examined the introduction of upfront fees, and rejected it. A parliamentary committee which carried out post-legislative scrutiny concluded[7]:

> *The introduction of application fees would mean that those who explicitly relied on their statutory rights would pay, whereas those who sought information without invoking, or in ignorance of, their rights would not. This would create a two-tier system."*

Witnesses to the committee also noted that "the administrative burden of administering the charge outweighs the issues in terms of putting it in place".

The Minister admitted at a recent meeting of the Committee that his Department has never

[7] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9602.htm

carried out an analysis of how much the fee regime costs, so it seems difficult for the Minister to argue in favour of fees at all if, in all likelihood, the €15 and subsequent fees are themselves consumed by their own administration.

The UK Information Commissioner meanwhile noted:

> *"It is a bit rich to have public authorities saying, "We are assailed by unreasonable freedom of information requests", when they do not have an adequate publication scheme, they have not got their act together in terms of records management and have a rotten website and so on. There are things that you can do before you ever get to charging."*

The UK government, in their response to the Committee agreed on fees, noting[8]:

> *"...charging for FOI requests would have an adverse impact on transparency and would undermine the objectives of the Act.... a charge would be expensive to administer and may result in increasing, rather than reducing, burdens on public authorities. This is particularly the case where a nominal charge, rather than a much higher full-cost recovery charge, is being considered."*

International jurisprudence has also evolved since the 2003 introduction of fees. In recent high profile international cases, a connection has been made between the right to freedom of expression and the right to access information.

Americas

In Reyes et al vs Chile (2006 Inter-American Court of Human Rights) the court stated[9]:

> "...*the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State."*

Europe

At the European level, recent judgments have gone further, the most significant of which is the judgment of the European Court of Human Rights in Társaság a Szabadságjogokért (Hungarian Civil Liberties Union) -v- Hungary ECtHR (2009) Case 37374/05[10].

In it, the Court made a connection the freedom of expression rights articulated in Article 10 of the

[8] http://www.justice.gov.uk/downloads/publications/policy/moj/gov-resp-justice-comm-foi-act.pdf
[9] http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf
[10] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171

European Convention on Human Rights[11] and the right of access to information.

They noted:

> *"...the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern... even measures which merely make access to information more cumbersome"*

And continued:

> *"In view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom."*

In other words, citizens cannot have the right to freedom of expression under Article 10, without proper access to information. I would argue that upfront fees for requests and appeals are punitive and *prima facie* amount to arbitrary restrictions which create an obstacle to the gathering of information, and without doubt make access to information more cumbersome.

Access to information is not a privilege within the gift of governments to distinguish between those seeking information on an artificial premise of "personal" versus "non-personal": access to information is rather a human right under Article 10 of the European Convention, and fees are a contravention of that right.

This Head proposes to continue to allow the Minister to keep his power to increase or decrease fees at will, via Statutory Instrument. The power to impose fees should not be at the discretion of the Minister, and such a power should be removed as per the 1997 Act. All upfront fees should be reduced to zero.

In addition, if the fees are not removed it could potentially leave the State open to litigation as it could be argued that they are an infringement of the rights of Irish citizens under Article 10 of the European Convention.

At the very least, the Minister should be compelled by the Committee to remove the initial €15 request fee as this serves as a significant barrier to access for members of the public.

[11] http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf

It is also ridiculous in the extreme that Irish citizens can freely and without cost access information from, for example, Her Majesty's Treasury in the UK, while in their own country, of which they are citizens and where their taxes are paid, they must pay for that same right.

First Schedule Part 1

I welcome the broadly inclusive definition of public bodies in the Bill but have some concerns for broad exemptions and moderation of exceptions for several named public bodies.

First Schedule Part 2

I am concerned that no specific legislative proposal has been put forward by the Minister for many of the specific exceptions in this part of the Bill. The exemptions are expressed in very broad and in some instances poorly defined terms. There also appears to be opportunities for some of the entities to revisit the exemptions particular to them based on their own analyses so that they may have them strengthened if they deem it necessary. It is hardly good legislative practice to provide parties to whom legislation is directed a privileged role in the drafting and shaping of that legislation.

The broad exceptions for NTMA Group entities are a concern since the interests these exceptions seek to protect are already protected by the exceptions relating to security, confidential information and commercially sensitive information etc. Furthermore in most cases the exceptions proposed go beyond the general exceptions and make what are normally discretionary exceptions mandatory exemptions by removing the public interest balancing test.

This approach to exceptions offends against the principle that exceptions should be construed narrowly and should be evaluated on a case by case basis taking into account the contents of the record and the context at the time of the request. In my view the approach to exceptions in the part of the Bill is major step backward for Freedom of Information in Ireland and significantly dilutes the positive intentions of including a wide range of new public bodies in the Bill.

I am also concerned that no specific legislative proposal has been put forward by the Minister and the exemptions are expressed in very broad and in some instances poorly defined terms. There also appears to be wiggle room for some of the entities to revisit the legislation in order to strengthen exemptions relevant to their interests. It would be a concern for me if particular public bodies were offered the opportunity for another "bite at the cherry" in order to dilute the applicability of the Act to records held by them or on their behalf.

There is no justification for the NTMA, NDFA, NAMA nor NPRF to exclude records relating to commercial counterparties. An exemption already exist to protect commercial interests. This exemption, should it be enacted, would allow NTMA Group entities to maintain absolute secrecy over all commercial transactions without regard to the public interest of disclosing records concerning them.

The exclusion of section 202 of the NAMA Act from Schedule 3 means that where confidential information is requested from NAMA there is no balancing of the public interest which could enable release. Therefore NAMA would enjoy absolute secrecy over its confidential information. In effect this would exclude virtually all of the records held by NAMA and certainly those records which could be used to hold NAMA accountable for its activities.

It is simply incredible that a public body such as NAMA can operate in almost complete secrecy under the Bill if enacted.

The absolute exception in relation to NTMA remuneration is bizarre and offends against common sense. It just doesn't seem credible that there is a commercial interest that is not protected by existing exceptions that needs this provision. In the real world the senior management remuneration in most publicly quoted companies and regulated funds is a matter of public record. Accordingly it is very difficult to see how NTMA needs to maintain secrecy of its pay levels.

The exception relating to investor anonymity is justified by the current market disruptions. However the circumstances are transitory and are not expected to continue to be relevant once investor confidence is restored. While I don't think this exemption should be there at all but given the specific circumstances cited to justify it the exception has no place in the Act since a full statutory amendment would be needed to revoke it. A temporary exception for a limited time and a sunset clause made by Ministerial order would be more appropriate.

I welcome the opportunity to discuss this submission with the Joint Committee in session.

Yours sincerely

Gavin Sheridan