Europe moves towards greater openness

In Europe, freedom of information is moving slowly yet inexorably up the political agenda. Freedom of Information legislation has been introduced in Ireland. In the UK, the new Labour Government have included the introduction of FoI legislation in their election manifesto and in their policy program outlined in the Queen's speech opening Parliament. Meanwhile in the institutions of the European Union, proponents of access to information have received a boost in the shape of European Court of Justice decisions granting access to Council and Commission documents.

The Irish FoI Act

The Irish FoI Act was passed on 10 April 1997 after a protracted lead-in period. One of the major forces behind its introduction was public reaction to political scandals which emerged in the early 1990s. Suddenly 'openness and transparency' emerged as the political issue of the day. A promise by the government to 'consider' the introduction of such legislation was first made in January 1993. The issue was followed up by the succeeding government in December 1994 when a commitment to the introduction of FoI legislation was made.[1] Legislative proposals were prepared and widely circulated in late 1995 but it took until December 1996 for the Bill to be published. The delay was due in part to the wide consultation process undertaken within government. This included the referral of the proposals to the parliamentary Select Committee on Legislation and Security as well as their circulation to government departments and agencies. Despite the misgivings of some bureaucrats and, in particular, those of the Department of Justice, the legislation as enacted, though little changed from the original proposals[2] is, if anything, stronger than those proposals. Changes include the decision to extend the Act to local government and regional health boards 18 months rather than three years after the Act comes into force as well as the extension of the Act to two important environmental bodies not originally included. However an attempt, at committee stage, to have the police force included within the scope of the Act failed and its inclusion must therefore await regulations to that effect. The proposals relating to protection of whistleblowers have not been carried through to the Act. Instead it has been decided to formulate separate legislation on this issue.

Reaction of the opposition parties to the FoI Bill was somewhat muted. Generally it involved complaints that the legislation did not go far enough but with few concrete proposals for its radical extension. The more obvious shortcomings of the Act such as the conclusive certificate mechanism, the complete exclusion from the scope of the Act of certain law enforcement information and the almost complete lack of retrospectivity were not raised. Instead, the main opposition party, with perhaps an eye to the forthcoming election and the recent upswing in popularity of the Green party, chose to focus on the issue of environmental information. Its efforts did, however, result in the extension of the Act to additional environmental bodies.

Overall, while the events giving rise to the introduction of the legislation were the subject of much controversy in Ireland, there has been little public debate surrounding the legislation itself. Instead the contents of the legislation have been determined to a large extent by the sponsoring Minister.[3] She and members of her staff undertook a research visit to Australia and New Zealand in 1995 to review the operation of FoI legislation in those jurisdictions and the influence of that legislation on the framing of the Irish Act is strongly evident. Indeed given the general lack of debate it is interesting that the Act is relatively strong by comparison with its overseas counterparts. In particular, the reliance on public interest tests in most exemption provisions and the establishment of an office of Information Commissioner who will have the power to order release of records imbue this Act with the potential to usher in an era of openness unparalleled in the history of Westminster style administrations. Whether the dominant culture of secrecy pervading the bureaucracy will succeed in stymieing the Act remains, however, to be seen.

FoI in the UK

So far the UK has no Freedom of Information Act. That is not to say that the issue of Freedom of Information has not been the subject of debate in that jurisdiction. Controversies such as the arms to Iraq affair and the Westland helicopters saga have focused attention on the issue and there have been regular calls for the introduction of Freedom of Information legislation in the UK.[4] A number of private members bills have been introduced over the years[5] with the most recent, the Right to Know Bill being sponsored by Mark Fisher MP in 1993.[6] While none of these Bills have resulted in the introduction of FoI legislation to the UK, a number of related measures have been introduced in recent years . These measures have however tackled the issue of access to government information in a rather piecemeal fashion.

On the issue of access to personal files, the *Data Protection Act 1984* provides a right of access to personal information held in computerised form. In addition, private members Bills have led to the introduction of legislation such as the *Access to Personal Files Act 1987*, the *Access to Medical Reports Act 1988* and the *Access to Health Records Act 1990* which have granted limited access to certain personal files, to individual files held by schools and by local authority social services and housing departments, and to medical records.

The right of access to general government information is even less developed. In terms of enforceable provisions there are the *Local Government (Access to Information) Act 1985* which provides a right of access to the meetings and meeting places of local authorities and the Environmental Information Regulations 1992 which give a right of access to environmental information pursuant to the EU Directive on Freedom of Access to Information on the Environment.[7] There is also the (non-binding) Code of Practice on Access to Government Information. This was introduced following the publication, in 1993 of the White Paper on Open Government.[8] The Code of Practice came into force in April 1994. It requires government departments to respond to requests for information and includes a role for the Parliamentary Commissioner for Administration — the Ombudsman in investigating complaints that departments have not complied with the code. Complaints to the Commissioner of breaches of the code are few[9] and this has been attributed to the failure to publicise its existence.[10] The White Paper also proposed the introduction of two new statutory rights of

access to information: a right for people to see personal information relating to them held by a range of public sector authorities; and a right of access to health and safety information, except in cases where disclosure would betray 'necessary confidentiality'. At the time of writing neither of these proposals have been acted upon.

FoI and the European Union

Decisions have been handed down recently by the European Court of Justice in two cases relating to interpretation of the EU Code of Conduct concerning public access to Council and Commission documents and the Council decision on public access to Council documents.[11] These instruments provide for the granting of access to documents of the EU Council of Ministers and the EU Commission.[12] They are subject to two exceptions. The first exception, which is stated in mandatory terms is set out in Article 4(1) of the Council decision. It provides that access *shall* not be granted where disclosure could undermine: the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations); the protection of the individual and of privacy; the protection of commercial and industrial secrecy; the protection of the Community's financial interests; and the protection of third party confidentiality. The second exception which is found in Article 4(2) of the Council decision is and provides that access to documents *may* be refused in order to protect the institution's interest in the confidentiality of its proceedings. The cases, both of which are decisions of the Court of First Instance,[13] are the first two cases to be decided under the Code and the Council decision.

The first case[14] was brought by John Carvel the European Affairs Editor of the *Guardian* newspaper with the support of the Danish and Dutch Governments and the European Parliament. Carvel had sought access to preparatory reports, minutes and attendance and voting records of Council of Ministers' meetings relating to Social Affairs, Justice and Agriculture. The Social Affairs documents were sent out although later the Council claimed this had been done in error and they ought to have been refused. The requests relating to the Agriculture and Justice meetings were refused, the latter a month after the time limit for reply had expired. The applicant sought an annulment of the decisions to refuse access and he put forward a number of arguments in support of his claim. The only one to be considered by the Court was that the refusals amounted to an infringement of Article 4(2) of the Council decision which provides that 'Access to a Council document may be refused in order to protect the confidentiality of the Council's proceedings'. The applicant argued that the Council had expressed a blanket refusal to allow access to certain types of documents and that this amounted to an infringement of Article 4(2) because of its discretionary nature which is evidenced by the use of the word *'may'*. The Court held that while the Council is obliged under Article 4(1) to refuse access to documents where certain circumstances exist, in the case of Article 4(2) the Council enjoys a discretion as to whether or not to refuse a request for access to documents relating to its proceedings. It went on to state that:

> It is clear both from the terms of Article 4 of Decision 93/731 and from the objective pursued by that decision, namely to allow the public wide access to Council documents, that the Council must, when exercising its discretion under Article 4(2) genuinely balance the interest of citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations.[15]

On the evidence before it, which included statements of the Danish and Netherlands Governments relating to the conduct of the Council meeting at which the decision to refuse access was taken, the court found that the Council did not comply with the obligation of balancing the interests involved. The decision to refuse access was annulled. Carvel received his documents and wrote a series of articles in the *Guardian* immediately after the judgment was announced.

The second case[16] concerned an application by the World Wide Fund for Nature for access to Commission documents relating to a controversial EU funded visitors' centre to be located in a scenic area in the west of Ireland. The Commission had undertaken an investigation into allegations that the construction of the centre would infringe community law. Two exceptions were relied on by the Commission in denying access to the documents. One was the mandatory exception for documents the disclosure of which could undermine the protection of the public interest (public security, international relations, monetary stability, court proceedings and investigations) (hereafter 'the public interest exception').

The other exception relied on was the discretionary exception allowing the Commission to refuse access in order to protect the institution's interest in the confidentiality of its proceedings (hereafter the 'confidentiality exception').

The Court made an important statement on the issue of interpretation of the relevant provisions in holding that 'grounds for refusing a request for access to Commission documents, set out in the Code of Conduct as exceptions, should be construed in a manner which will not render it impossible to attain the objective of transparency.'[17] It found that the Commission was entitled to rely on the public interest exception in refusing access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation. This approach is at odds with jurisprudence on similar exceptions in other jurisdictions. It is generally accepted in common law jurisdictions that exceptions relating to law

enforcement investigations cannot be availed of unless there is a prospect of proceedings. Thus the US equivalent was interpreted as not being intended to 'endlessly protect material simply because it [is] an investigatory file'.[18] This approach has been confirmed in Australia.[19]

The Court went on to say that when such an exception is invoked by the Commission, it is obliged to indicate:

> at the very least by reference to categories of documents, the reasons for which it considers that the documents detailed in the request which it received are related to the possible opening of an infringement procedure. It should indicate to which subject matter the documents relate and particularly whether they involve inspections or investigations relating to a possible proceedings for infringement of community law.[20]

The Commission was found to have failed to have met this requirement.

With respect to the confidentiality exception, the approach adopted in *Carvel* was followed and it was held that the Commission must exercise its discretion by striking a genuine balance between, on the one hand, the interest of the citizen in obtaining access to those documents and, on the other, its own interest in protecting the confidentiality of its deliberations. The Court found there was no evidence that the Commission had fulfilled its obligations in this regard.

The decision to refuse access was annulled. The practical effect of the decision is that the Commission can choose either to appeal the case to the Court of Justice, or to release the documents or it can adopt a more satisfactory justification for the refusal.

The extent to which these decisions have helped to explain the meaning of the exceptions to the Code and Council decision is debatable. They have tended to focus more on the manner in which the exceptions are to be applied than on the substantive claim for exemption, and in so doing have set important standards for the exercise of the exception provisions. However, the value of the decisions from the standpoint of assessing the circumstances in which exceptions to the right of access will be permitted, is not so apparent. In the *Carvel* case the substantive issue was not addressed at all since the court disposed of the matter on a procedural point. In the *WWF* case the only substantive matter dealt with, namely the refusal of access to documents on the basis that they related to investigations which may lead to an infringement procedure, was addressed in a restrictive manner. There is still plenty of scope for the development of a jurisprudence concerning the interpretation of the exceptions in the Code and Council decision.

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R f renc s

1. 'A Government of Renewal: A Policy Agreement between Fine Gael, the Labour Party and Democratic Left', December 1994, p.7.
2. See McDonagh, M., 'Freedom of Information Proposals in the Republic of Ireland', (1996) 62 *Fol Review* 14.
3. Minister of State Eithne Fitzgerald.
4. The most active proponents of the introduction of Freedom of Information legislation in the UK is the Campaign for Freedom of Information, Director: Maurice Frankel, which was founded in 1984.
5. Private members Bills have been introduced by MPs Clement Freud (1978), Frank Hooley (1981), David Steel (1984), and Archie Kirkwood (1992).
6. For a detailed discussion of the Bill see Birkinshaw, P., *Freedom of Information: the Law, the Practice and the Ideal,* Butterworths, 1996, pp.336-348.
7. Council Directive 90/313/EEC on Freedom of Access to Information on the Environment.
8. 1993, HMSO Cm 2290.
9. From April 1994, when the Code came into force, and December 1996, 119 complaints about access to information were received. Of these, 66 were not suitable for investigation mostly for lack of evidence. In the 26 investigations complete up to 30 January 1997, the complaint was upheld or partly upheld in 17 cases and found not to be justified in nine cases.
10. Frankel, M., 'State's Open Secrets: How Effective has the New Code Been in Making Government More Transparent', *Guardian*, 24 January 1995.
11. In a third case a challenge by the Netherlands Government to the legal basis of the Code of Conduct and Council decision on access was rejected by the Court of Justice: *The Netherlands v EC Council* [1996] 2 CMLR 996.
12. See further McDonagh, M., 'Freedom of Information Developments in Europe', (1995) 58 *Fol Review* 59.
13. This Court has first instance jurisdiction in certain forms of action and appeals lie from its decision to the Court of Justice on points of law.
14. *Carvel & Guardian Newspapers v EU Council* [1995] 3 CMLR 359.
15. At 372.
16. *WWF UK (World Wide Fund for Nature) v Commission of the European Communities,* Case T-105/95, Judgment of the Court of First Instance, 5 March 1997, not yet reported.
17. At 15, transcript.
18. *NLRB v Robbins Tire & Rubber Co.*, 437 US at 232.
19. *Edelsten v Australian Federal Police* (1985) 9 ALN 65, D140.
20. At 17, transcript.

Secrecy: Report of the United States Commission on Protecting and Reducing Government Secrecy

On the 3 March 1997 the Moynihan Commission, more formally known as the Commission on Protecting and Reducing Government Secrecy, delivered its report to the President and Congress of the United States. While its report dealt with 'an investigation into all matters in any way related to any legislation, executive order, regulation, practice, or procedure relating to classified information or granting security clearances', its findings and analysis have some lessons for the future direction of freedom of information in Australia.

Trends in Australian access law, including the increasing resort to the shibboleth of 'commercial in confidence' and wider developments like contracting out and privatisation necessitate changes in our conceptions of accessing information. When Jim Spigalman penned his book, *Secrecy: Political Censorship in Australia* in 1972, free-