



An Roinn Caiteachais
Phoiblí agus Athchóirithe
Department of Public
Expenditure and Reform

Review of the Freedom of Information Act

Consultation Document



Prepared by the Department of
Public Expenditure and Reform
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Introduction

This consultation forms part of a review of the Freedom of Information Act, which will inform an approach to FOI and transparency policy more generally into the future, potentially including amendments to the legislation.

This is an opportunity to have your say and to identify strengths and weaknesses of the FOI system as you see it. This document sets out the context for FOI, including background information, emerging international trends, and the inputs into the review process. It asks you to consider structural and incremental reform issues and poses a number of questions. Its purpose is to garner your views on these themes, whether each should be a priority and if so, how appropriate reforms might be implemented.

For further details of the review process and how to respond to this consultation, please see page 9.

Brief History of FOI in Ireland

Freedom of Information legislation is designed to allow for access to records held by public bodies. Ireland's first Freedom of Information Act was enacted in 1997. It was amended in 2002, with a revised and consolidated version enacted in 2014. The basic model in the legislation has remained unchanged since its introduction. It provides for three key rights:-

- A right of access to records held by public bodies, where they are not exempt under the terms of the Act;
- A right to seek an amendment to personal information that is incorrect, incomplete or misleading;
- A right to seek a statement of reasons for an action of a public body that affected a person's interests.

The right of access is by far the most commonly used of these rights, and in practice is synonymous with the term "FOI request". The 2014 Act significantly expanded the number of bodies that are subject to FOI, to approximately 500 diverse entities.

The first Freedom of Information Act made a dramatic change to state information policy in Ireland. Previously, the Official Secrets Act was the main legislation governing state information, which demanded a culture of secrecy in all instances. Recognising FOI's landmark significance, Fennelly J considered that:-

The passing of the Freedom of Information Act constituted a legislative development of major importance. By it, the Oireachtas took a considered and deliberate step which dramatically alters the administrative assumptions and culture of centuries. It replaces the presumption of secrecy with one of openness. It is designed to open up the workings of government and administration to scrutiny. It is not designed simply to satisfy the appetite of the media for stories. It is for the benefit of every citizen. It lets light in to the offices and filing cabinets of our rulers.¹

However, there may be a tendency for "FOI" and transparency to be treated as one and the same, where in fact the request mechanism is only one way of "doing transparency".

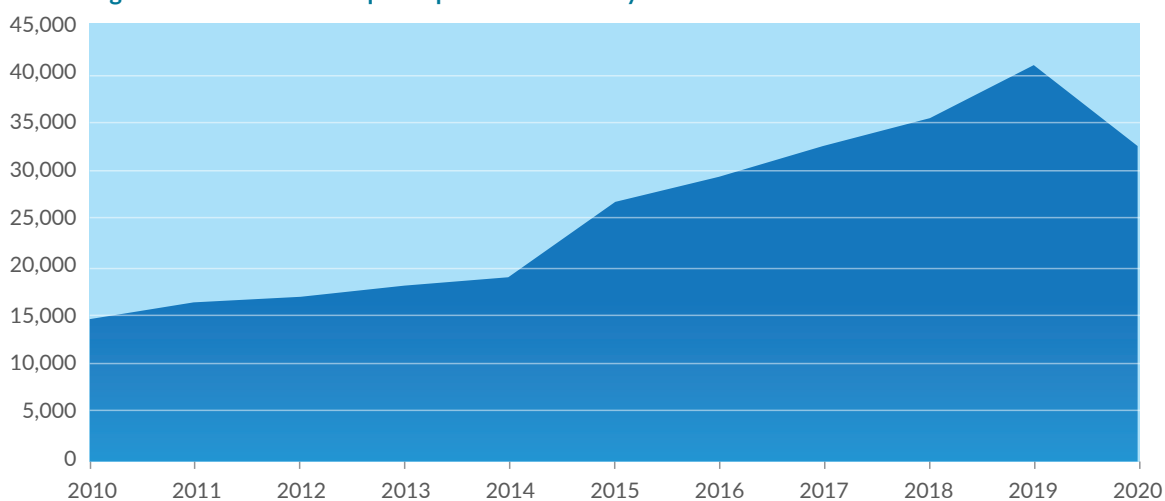
Indeed, the FOI request mechanism may not be necessarily suitable or user friendly in all circumstances, and can often be cumbersome, resource intensive and time-consuming. Moreover, there may be an overreliance on FOI by public servants, seeking reassurance that a release of information will not breach data protection or other legislation. These themes will be explored further later in this consultation document.

¹ Sheedy v. The Information Commissioner [2005] IESC 35

FOI in practice

Recent years have seen a significant expansion of FOI usage. The annual number of FOI requests handled by public bodies almost doubled between the update to the legislation in 2014 and 2019. The decade between 2009 and 2019 saw an increase of 179% in the number of FOI requests received by public bodies.

Fig 1: Number of FOI requests processed annually



In most given years, the vast majority of FOI requests decided on across the system are granted. A certain proportion of FOI requests are misdirected and must be transferred to a more appropriate body. Also, in some instances requests are dealt through an informal release of information, or can be withdrawn by the requester. The remaining requests must be decided on. In 2020, the latest year for which statistics are available, close to four out of every five of these requests were granted in full or in part.

Fig 2: Overall outcome of FOI requests in 2020

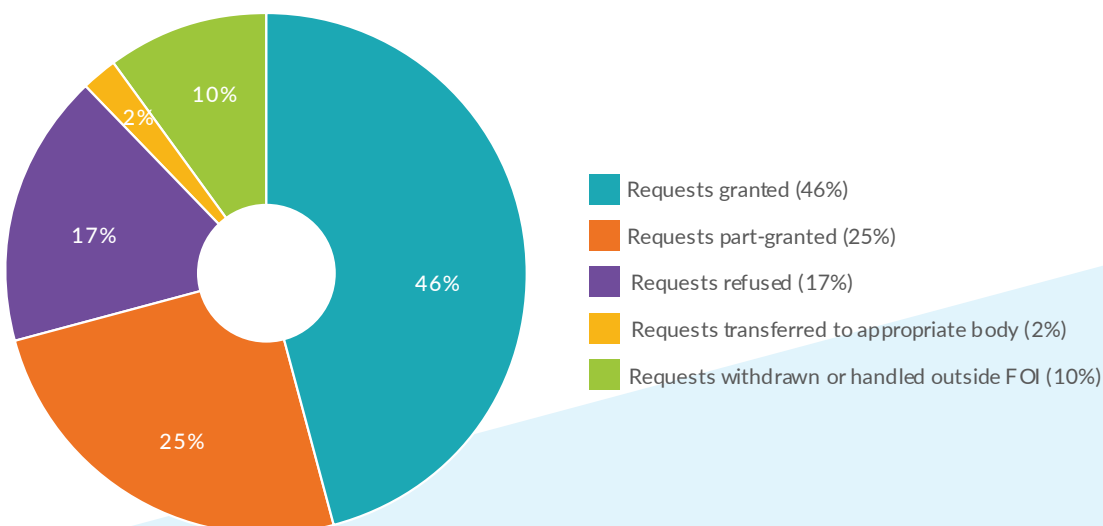
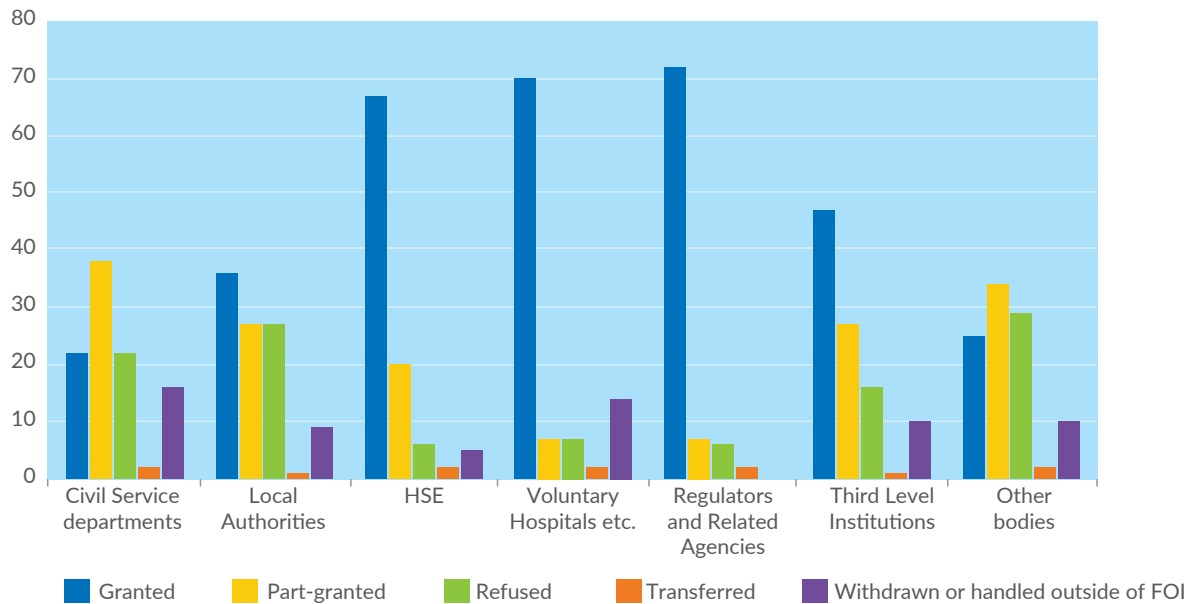


Fig 3: Outcome of FOI requests in 2020 by sector



However, there is significant variance between sectors in relation to outcomes. For example, refusals and part-grants are more common when a request is made to central government than where an individual seeks personal records from a hospital.

Fig 4: Types of FOI requests in 2020

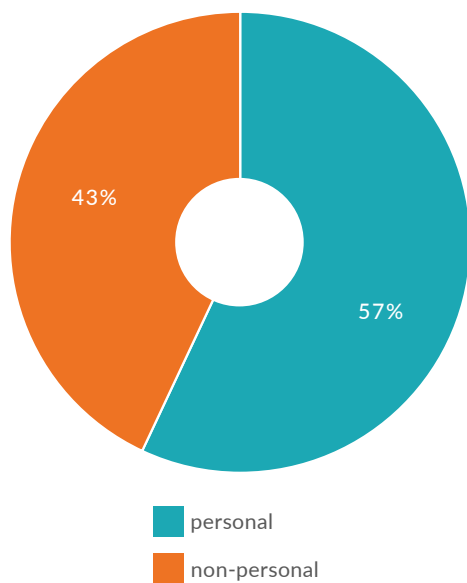
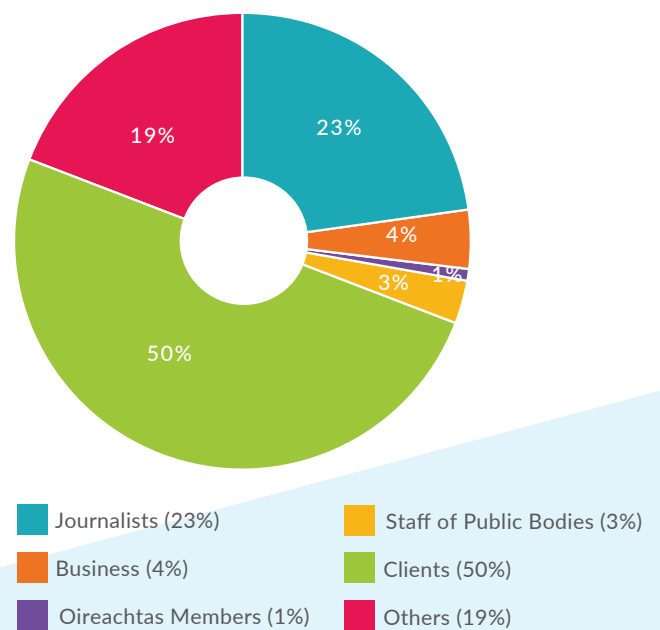
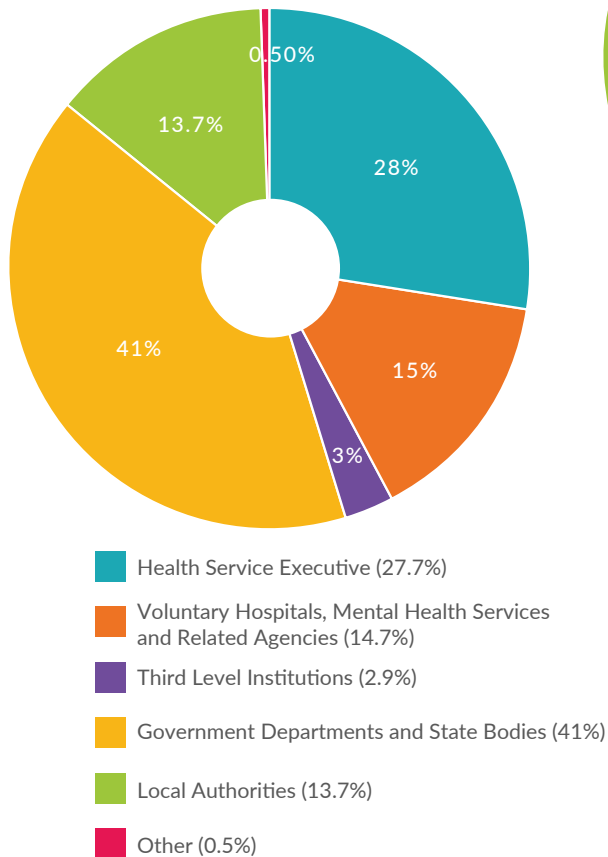


Fig 5: Categories of FOI requesters in 2020



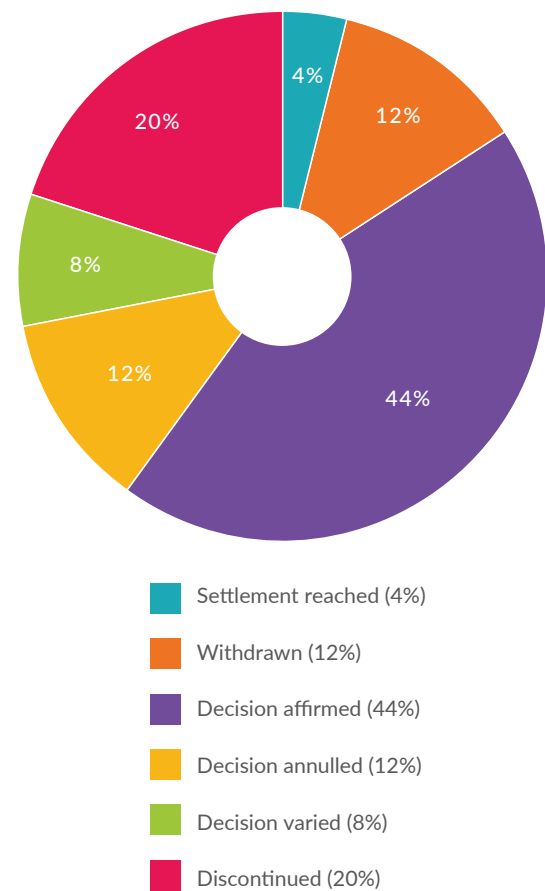
The majority of requests are by individuals for personal information relating to them, often in healthcare settings. In 2020, the last year for which figures are available, this made up almost 60% of requests. Clients of public bodies were the largest single grouping of requesters, while journalists made up a little under a quarter of the total. It should be noted that there is significant variance across bodies and sectors in relation to the types of requests received.

Fig 6: Distribution of FOI requests by sector in 2020



In terms of volume, a little over half of requests were made to central and local government, with 40% directed towards health sector entities.

Fig 7: Outcome of OIC Reviews in 2020



Where a person is unhappy with the outcome of their FOI request, they may seek a review. In the first instance, this review is carried out by a more senior member of staff in the organisation and is known as an “internal review”. Following this, if the requester remains dissatisfied, they may seek an independent review by the Information Commissioner.

The rate at which reviews are sought has remained consistently low over time, with internal reviews sought in approximately 3% of cases in most given years (3.3% in 2020), and reviews by the Commissioner sought in about 1% of cases annually (1.3% in 2020).

The outcomes of the Commissioner’s process include cases where the request is withdrawn, or the matter is settled by the release of some records, or discontinued by the Commissioner where he does not have jurisdiction, or on other grounds. Of the cases where the Commissioner formally ruled on the approach taken by the body in 2020, the decision was affirmed in 70%, varied in 12%, and annulled or overturned in 18%.

Emerging issues and international trends

This review of the Freedom of Information system is being undertaken on the 25th anniversary of the first FOI legislation in Ireland. In the intervening years, there has been a transformation of the ways in which individuals seek out and interact with information, both in the workplace and in our daily lives.

The FOI model was designed in an era where both record-keeping and publication were paper-based. It was expected that a request for records would lead to a clearly identifiable filing cabinet that would likely contain all relevant material. Conversely, proactive publication at that time required significant printing and distribution costs, with no guarantee that an interested party would be in a position to physically access the relevant information.

The rise of information technology and the internet has effectively turned these assumptions on their head. Now, records of public bodies are so numerous and dispersed that even locating records relevant to a request has in many cases become a significant challenge. Moreover, many of the records generated on a daily basis in public bodies, particularly emails, are mundane and of a type that when FOI was designed would likely not have been recorded in the first place.

On the other hand, the costs of online publication are now almost non-existent, and material made available in this format is readily available to the vast majority of the population.²

Internationally, there is evidence that the request-based FOI model can be seen as being at a crossroads. Recent years have seen persistent claims in various countries that FOI is “broken”³ and needs “saving”.⁴ Others, such as the former Scottish Information Commissioner, believe that the time may have come for a, “radical rethink of FOI”.⁵

² Central Statistics Office, Internet Usage by Households 2022, <https://bit.ly/3adN1si>

³ FOIA Is Broken: A Report, Staff Report, U.S. House of Representatives Committee on Oversight and Government Reform, 114th Congress, January 2016 <https://bit.ly/3x7bt7R>

⁴ Kwoka, M. B. (2021). Saving the Freedom of Information Act. Cambridge University Press. <https://bit.ly/3zcRNRk>

⁵ Scottish Information Commissioner, “Proactive Publication: Time for a Rethink” (2017) <https://bit.ly/3x3vJWu>

One particularly notable development in the intervening years has been the rise of the open government movement, and related open data initiatives. Where FOI takes a reactive approach to release, open data emphasises the routine publication of valuable information, and is purported to, “[shift] the relationship between state and citizen from a monitorial to a collaborative one, centered around using information to solve problems together”⁶

A number of scholars argue that this development supersedes FOI laws in significant ways, and some advocates speculate that it may even come to supplant request-based systems altogether.⁷ Others are more circumspect, and note that in practice open government initiatives have tended to lead to a “realism”, “that data disclosure *per se* would not lead to proper levels of transparency, accountability, anti-corruption, and the other expected effects.”⁸

Another important strand of recent research looks at what makes transparency policies effective, emphasising that information must be made available in ways that are accessible and comprehensible to individuals and groups that might make use of that information.⁹

It is often assumed that simply making available ever greater amounts of information will inevitably lead to greater public understanding of the workings of public bodies and hence higher levels of trust. However, more recent

research calls this assumption into question, and suggests that for transparency policies to be effective, information should be released in a way that can easily be contextualised, understood and acted upon by its intended audience.¹⁰

In addition, the use of blanket transparency measures has been questioned, with proposals for more targeted approaches, which rather than treating transparency as an end in itself, seek to use disclosure as a means to achieve specific policy objectives.¹¹

While there remains a broad consensus that the ability to request records from public bodies remains an important feature of state transparency, proposals for improvement have included greater obligations to undertake proactive publication of information, creating alternative means for routine access, particularly to personal information, and more closely adapting the FOI mechanism to suit particular use-cases.

6 Noveck, B. S. (2017). Rights-Based and Tech-Driven: Open Data, Freedom of Information, and the Future of Government Transparency. *Yale Human Rights and Development Law Journal*, 19, 1–46. <https://bit.ly/3t8wTie>

7 Noveck, B. S. (2016). Is Open Data the Death of FOIA? *The Yale Law Journal Forum*, 273. <https://bit.ly/3abcDpM>

8 Matheus, R.; Janssen, M. (2020). A Systematic Literature Study to Unravel Transparency Enabled by Open Government Data: The Window Theory. *Public Performance and Management Review*, 43(3), 503–534. <https://bit.ly/3x70l5m>

9 Fung, A. (2013). Infotopia: Unleashing the democratic power of transparency. *Politics and Society*, 41(2), 183–212. <https://bit.ly/3PRNOQ1>

10 Fung, A., Graham, M., & Weil, D. (2007). Full Disclosure: The Perils and Promise of Transparency. Cambridge University Press. <https://bit.ly/3wYmMOI>

11 Kwoka, M. B., & DuPey, B. (2021). Targeted Transparency as Regulation. *Florida State University Law Review*, 48, 389. <https://bit.ly/3x3aKmU>

In the context of this review, general overarching questions may include:-

- What is the purpose of FOI, and how does it fit with other accountability, governance and access to information measures? Should FOI exist separately and be demarcated from open data and other open government initiatives, or insofar as possible incorporate and act as an umbrella for related transparency measures?
- Is transparency an end in itself, or should the emphasis of FOI and other measures be more clearly targeted towards attaining particular policy outcomes? What is the impact of FOI on decision making?
- FOI deals with access to records. This approach is administratively workable where a clearly defined set of records can be identified coming within scope of the request, however in and of itself may not be adequate in meeting the goal of greater transparency and public understanding of the workings of state entities.
- FOI is designed as a “one size fits all” system. However, FOI in Ireland applies to a large and diverse set of bodies and can be used by requesters for significantly different purposes. In particular, there may be a disconnect between the FOI model, which was designed based on the assumptions of paper-based administration in government entities, and the reality of handling large volumes of requests for personal information, especially in the health sector.

- Any activity in public entities must be done in a way that is conscious of the most effective and efficient possible use of state resources. Any proposed developments or changes to the FOI system must adhere to this principle.

These high level issues may be seen as feeding in to the themes identified below.

The Review Process

The review is an open, collaborative process, intended to allow all interested parties to have their say on the future of FOI and transparency policy in Ireland. This consultation is informed by an initial scoping exercise that was undertaken in late 2021, further details are set out below.

In addition, the Department of Public Expenditure and Reform is undertaking a number of other strands of information gathering alongside this consultation, including a further survey of FOI requesters and decision makers, a review of international best practices and a project aimed at estimating the cost of the FOI system to the exchequer.

Further details may be found in the Review Roadmap at the following link:- <https://www.gov.ie/en/policy-information/2e3d5-freedom-of-information-updates-from-the-department-of-public-expenditure-and-reform/>

Responding to this consultation

This consultation document aims to open a discussion around various themes that have been identified through the initial public consultation and review of international best practices.

The themes identified are broad, and should allow for a good deal of scope to raise any issues that may be of concern. However if you wish to raise an issue that does not obviously fall within one of these themes, you should not hesitate to do so.

If you have already responded to the scoping phase of the review, please be assured that your views will feed in to the final report. However, if you wish to provide further or more detailed submissions at this point of the process, we would encourage you to do so.

We would be grateful for your responses by **close of business on 12th August**.

In relation to each of themes, we would ask respondents to consider addressing the following key points in their response:-

- Do you agree with this direction?
- How would you see it being implemented and with what level of priority?
- What risks, drawbacks and barriers to implementation do you see?

However, you should feel free to make comment as you see fit on any aspect of the consultation document, or FOI practice more generally. You should not feel obliged to comment on every theme or issue identified, please feel free to provide a response on only those issues that are of interest or concern to you if you wish.

As will be outlined further below, some of the themes go towards the longer term direction of travel for FOI policy, while others are aimed at more immediate and granular updates to the legislation. We would be grateful to hear from you in relation to all of the issues raised.

It is proposed that submissions to this consultation will be published in full on the Department's website. If you feel that there are particular reasons why some or all of your submission should not be published, please notify us when making your return.

You may make your submission by post to:
FOI Central Policy Unit,
Department of Public Expenditure and Reform,
3rd Floor,
7-9 Merrion Row,
Dublin 2.
D02 V223

or by email to: foireview@per.gov.ie

If you have any questions or queries, please do not hesitate to contact the FOI Central Policy Unit by email at foireview@per.gov.ie

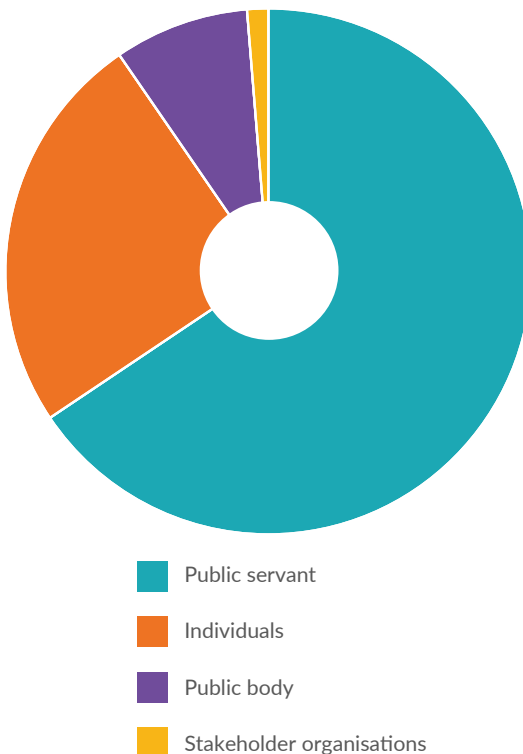
Scoping Consultation

The first phase of this review process was a public consultation on scope. This offered an opportunity for stakeholders to identify in general terms issues of concern to them. It took the form of an online survey and brief written submissions around three key questions: what should be addressed in the review, what parts of the current system are working well, and respondents' views of the purpose of the FOI system.

Breakdown of responses

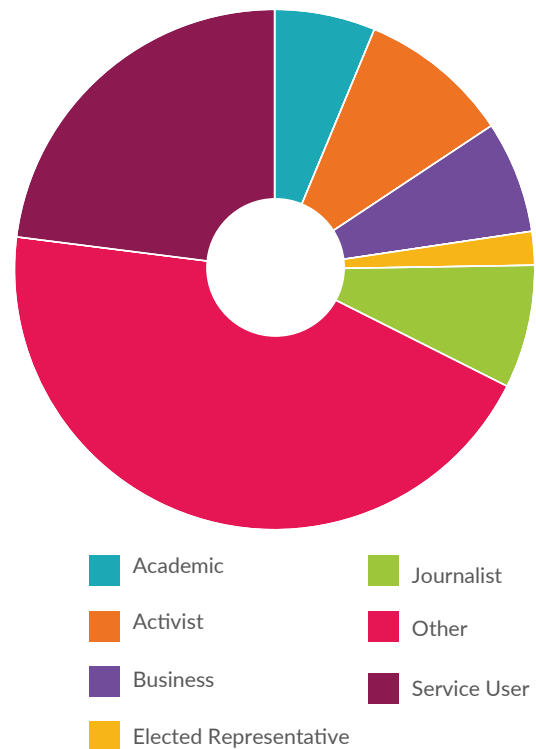
1,171 responses in total were received, consisting of 1,060 returns to the online survey, 96 written responses from public sector stakeholders, and 15 written responses from stakeholder groups outside the public sector.

Fig 8: Breakdown of Scoping Submissions



The majority of responses to the online survey came from public servants, amounting to 73% of the total. 302 online responses were received from individuals outside the public sector. While individuals were invited to choose a category that best described their position, most chose to identify as "other", which places a certain limitation on the ability to carry out a detailed analysis of these returns.

Fig 9: Individual Respondents' Self-Identification



Respondents to the online survey were invited to confirm whether or not they had personal experience of either making or processing FOI requests. A significant number indicated that they did not, just over 20% of public servants and a little over 40% of other respondents.

Overview of scoping responses

The responses to the scoping exercise have informed the themes identified below. Direct quotes from respondents are included in relation to each of the topics in order to illustrate the diverse viewpoints that were represented.

Further research is ongoing, including an additional customer satisfaction survey. The outcomes of that process, together with responses to this consultation document, will be reflected in the final review report. The following key themes and features of the scoping survey are briefly highlighted by way of overview.

- Many responses placed a strong emphasis on the purpose FOI as being an accountability mechanism. 19% of the total number of responses referred to accountability in one way or another.
- Almost 30% of individual respondents outside the public sector did not identify any elements of the current system that they felt to be working well, or stated that the fact that the system exists was its only positive feature. Among the segment of this cohort who did not have first-hand experience of making requests, this figure rises to almost 60%.
- A small number of responses may be seen as reflecting an understanding that the core purpose of FOI is “monitorial”. These submissions tended to question whether there should be any redactions or exclusions under FOI and emphasised enforcement.
- A larger group, around 12% of responses, saw FOI as a support for participatory democracy and “a key part of enabling active citizenship”.
- A number of submissions referred to the position of adopted people. In the 2011 *Rotunda* judgment,¹² the Supreme Court confirmed that FOI cannot in most instances confer a right of access for adopted people to birth information, insofar as it also consists of the personal information of birth parents. However, in order to address the particular situation and the right to identity of adopted people, specific legislation is currently before the Oireachtas that would provide a mechanism for individuals to access such information and records.¹³

¹² [2011] IESC 26

¹³ Birth Information and Tracing Bill 2022 <https://www.oireachtas.ie/en/bills/bill/2022/3/>

Structural Issues

The first set of themes seek to explore the potential for fundamentally updating and restructuring the FOI legislation and how public bodies approach transparency. By their nature, they are intended as the opening of a much longer conversation and process. In terms of implementation, it is envisaged that many of these themes will take the form of medium to long-term projects if adopted.

Streamlining access regimes and related functions

FOI exists alongside other access mechanisms of varying scope and purposes, including data protection subject access requests, access to information on the environment and open data

The variety of access mechanisms in practice may give rise to “regulatory arbitrage” or “forum shopping”, which can often involve processing multiple requests under different frameworks. By their nature, slightly different outcomes may arise out of requests under different legal rules. However, often what is at issue in reality is access to effectively the same material, such that handling repeated requests may create an unwarranted resource drain for public bodies.

Moreover, the inevitable tension between transparency imperatives and individual privacy rights can give rise to misunderstandings, both on the part of public servants and stakeholders. A number of returns in the scoping process pointed in particular to a lack of clarity on the interaction between data protection and FOI.

In addition, where FOI can be seen as a groundbreaking “open government” measure, since its introduction it has been joined by a number of others. It is not necessarily clear how these can be aligned or brought together in a more coherent way.

Separate out requests made for personal data and environmental information from FOI – these should be handled automatically under GDPR and AIE respectively.

More training provided for staff, and alignment between records management guidance and FOI processing

More clarity in relation to releasing personal information after considering the FOI and GDPR Acts and which Act is inferior to the other one?

Address the need to align information access rights under FOI, GDPR, and the AIE Regulations, as in the UK and certain other European jurisdictions in order to reduce the repetitive and inefficient use of resources in dealing with multiple requests for the same information and the confusion arising from different rules applying to different requests depending upon which access regime has been cited (which may not necessarily be the one most beneficial for the requester).

One key theme that arose in the scoping consultation was a prevalent view of FOI as an accountability mechanism. In practice, however, some scholars note that transparency has at best an “uncertain” relationship with accountability.¹⁴ Aside from FOI, a broad range of substantive audit, regulatory and complaint-handling processes exist to ensure accountability in public bodies.

Sometimes individuals may not be aware of the existence of complaint or Ombudsman type mechanisms, which would be more suitable to their needs, while public bodies can tend to feel that the “motive blind” nature of FOI prevents an engagement with the requester to understand their aims and handle the issue appropriately.

Issues to be addressed in relation to this topic may include:

- How does the right of access provided by FOI align with or complement other accountability mechanisms?
- Is it possible or desirable for FOI to be more closely aligned with other access mechanisms? Should the long-term aim be to consolidate requests for information from public bodies in a single mechanism insofar as possible?
- If so, how might this best be achieved, bearing in mind the fact that other relevant regimes may derive from European law?

- For example, should the definitions in the FOI legislation be more closely aligned with those found in related legal frameworks, e.g. “personal information” in FOI and “personal data” in data protection?
- How can FOI operate more effectively to support other, related functions, such as open data?
- Often FOI is used in circumstances where an individual is in some way dissatisfied in their dealings with a public body. How should FOI align with complaint, Ombudsman and related mechanisms?
- How could a more joined-up and coherent organisational approach across all the relevant obligations and legal frameworks best be developed? Is there a need for a defined information governance and access function?

¹⁴ Fox, J. (2007). The uncertain relationship between transparency and accountability. *Development in Practice*, 17(4–5), 663–671. <https://bit.ly/3wTp80U>

Transparency by design

The concept of transparency by design is related to and builds upon the archetype of “privacy by design”, as seen in data protection and privacy law and practice.¹⁵ It is based on the understanding that working methods and digital/ICT systems should embody and enable policy goals and legal requirements from the design phase.¹⁶

Embedding transparency tasks in the work processes and supporting digital/ICT infrastructure of public bodies, rather than as an “ex post” requirement, may be a means of ensuring better outcomes, facilitating straightforward routine access to information held by public entities, and also reducing the administrative burden of compliance.

Generally the focus of “transparency by design” scholarship to date has been on algorithms and AI systems. However, other jurisdictions have begun to adopt design-based approaches as a matter of policy, for example when meeting transparency obligations in the context of procuring services,¹⁷ or more generally,¹⁸ as well as setting out statutory rules for the design and procurement of digital/ICT systems so as to facilitate transparency.¹⁹

I feel FOI is dated

All information that could be released under FOI should be published automatically

Improving the technology available to all public servants in administration of FOIs to increase efficiency and reduce time spent processing-better search tools using Artificial Intelligence, redaction software available to all - design and roll-out bespoke IT FOI admin system

Since the FOI Act was first enacted, there has been significant advances in technology to enable citizens to access their own records through electronic channels. Where it is possible for requesters to access their own personal records online, it is suggested that a provision be included in Section 15 that an FOI body may refuse a record on administrative grounds where the records requested are already available to the requester through an alternative means.

15 See e.g. Hartzog, W. (2018). *Privacy's Blueprint: The Battle to Control the Design of New Technologies*. Harvard University Press. <https://bit.ly/3GFcOWn>

16 Koulou, R. (2021). *Crafting Digital Transparency: Implementing Legal Values into Algorithmic Design*. *Critical Analysis of Law*, 8(1), 81–100. <https://bit.ly/3M5UGGw>

17 UK Information Commissioner's Office (2015). *Transparency in outsourcing: a roadmap*. <https://bit.ly/3Nbn0Zf>

18 Office of the Victorian Information Commissioner. (2021). *Enhancing Victoria's FOI Culture to be Open by Design*. <https://bit.ly/3zrTfzB>

19 e.g. Massachusetts Freedom of Information Act, 950 CMR 32.07(e)

Existing legal frameworks already place obligations on public sector organisations to “design in” transparency when processing personal data,²⁰ and to structure datasets in a way that is, “open by design and default”²¹ While “privacy by design” is based around a set of established basic principles,²² some researchers have begun to propose similar principles for transparency.²³

Issues to be addressed in relation to this topic may include:

- As a medium to long-term goal, what is the potential of adopting “transparency by design” as a requirement for work processes and supporting digital/ICT systems?
- What might a “transparency by design” approach look like in the Irish civil and public sector?
- What legal or policy frameworks would be necessary to support design-based approaches to transparency?
- What might principles for “transparency by design” contain?

20 Article 29 Working Party. (2018). *Guidelines on transparency under Regulation 2016/679*. <https://bit.ly/3M5W6AQ>

21 S.I. No. 376/2021 - European Union (Open Data and Re-use of Public Sector Information) Regulations 2021, Regulation 7

22 Office of the Information and Privacy Commissioner of Ontario (2009) Privacy by Design: The 7 Foundational Principles. <https://bit.ly/3tcYsaj>

23 Matheus, R., Janssen, M., & Janowski, T. (2021). Design principles for creating digital transparency in government. *Government Information Quarterly*, 38(1). <https://bit.ly/3x7ErDs>

Proactive publication

The low costs and wide reach of online publication is not something that could even have been imagined when the FOI legislation was first introduced. There is a strong argument for increased publication of material by public bodies, in a manner that is accessible so as to promote greater understanding of the activities of the public sector, as well as providing information that will be useful and valuable to stakeholders on a day-to-day basis.

The FOIA 2014 took an important step towards driving proactive publication, through the introduction of the FOI Publication Scheme. While this has had positive impacts, including through the publication of past requests, overall the outcome cannot be seen as transformative.

The publication scheme makes it mandatory for public bodies to identify and publish information in certain categories, but this may have become something of a static “tick-box” exercise, rather than a dynamic means for expanding the amount of information published on a routine basis by public bodies. On the other hand, recent years have seen an overall expansion of routine publication in the public sector, however this has taken place largely independently of the FOI framework.

Some jurisdictions take an approach that specifies categories of records that are deemed to be “open access information”²⁴ and are subject to mandatory publication. However, such an approach would arguably also require a review or enforcement mechanism to support it.

It was assumed when introducing the publication scheme mechanism that greater proactive publication would inevitably lead to fewer FOI requests. In practice, however, it

FOI needs to be complemented by increased and routine publication of information by government.

Encourage bodies to publish more material without FOI being needed to access the information

Matter of course publishing: FOI requests should not exist as each Public Bodies Publication Scheme should be updated to include all information recorded

The presumption of disclosure and the automatic and open publication of official/government/state information

Ways to encourage bodies to publish more material without FOI being needed to access the information

Open data by default. Publication of minutes etc as standard.

The principle should be to publish as much information as possible and by so doing reduce the need for FOIs

²⁴ e.g. New South Wales Freedom of Information Act, Part 3

is commonly observed by public bodies that publication often leads directly to the resource burden of further FOI requests for background material, thereby negating any efficiency gains and acting as a disincentive to taking a proactive approach. It could be considered whether the use of incentives might be an effective way by which to encourage greater openness through the ongoing publication of up to date material.

Issues to be addressed in relation to this topic may include:

- How can we build upon the publication scheme mechanism in the 2014 FOIA to promote the greatest possible level of proactive publication of material?
- Should the FOI legislation be more prescriptive about the types of information that must be published? Could particular categories be identified that should be prioritised because of high explanatory value in relation to the activities of public bodies, or high value and usefulness to the public?
- How would any such moves be supported by way of review or enforcement mechanisms, bearing in mind the practical reality that FOI applies to approximately 500 diverse bodies?
- What kinds of incentives might effectively promote publication on a much wider basis than seen presently?
- Section 15(1)(d) of the 2014 FOIA already provides for a refusal of an FOI request where information is in the public domain. However, in practice the interaction between “information” and “records” can be difficult to navigate. Could this provision be modified, expanded or clarified by way of statutory guidance?

Informal release

There may be reason to believe at this point of the development of FOI and transparency policy in Ireland that the cultural and administrative impact of the formal FOI request mechanism could be approaching its limits.

The FOI request model may fairly be seen as rigid, technical and legalistic. International scholars have noted that the request model is an, “inherently adversarial tactic”,²⁵ which may in and of itself drive a “culture of adversarialism”²⁶ or “culture of suspicion”.²⁷

FOI quickly became the central pillar of state transparency policy, and often is the default mechanism that individuals are directed to when seeking information from public bodies. Moreover, recourse to the formal FOI request mechanism may be viewed as a “safety blanket” by public sector staff, who may be concerned about compliance with other regimes such as data protection and the Official Secrets Act when releasing information.

In the intervening quarter century, the release of information from public bodies has become the norm, and it may be possible to make this routine activity less administratively burdensome for both requesters as well as organisations. A more collaborative approach may have significant benefits both for requester satisfaction and also the most efficient possible use of resources.

The entire act could be overhauled to simplify it, and make it more accessible to the general public, rather than being the preserve of journalists

That requests can be handled outside of FOI, which is a process that saves time for both the journalist and the FOI unit, particularly where the record in question is specific and easily identifiable. This avenue should be encouraged more in any cultural shakeup of FOI

More emphasis should be placed on providing information other than by means of FOI

A more collaborative approach by all parties should be encouraged i.e. by the requestor, decision maker and OIC would improve efficiency and possibly lead to more favourable outcome for all.

Less bureaucracy leading to faster outcomes

FOI is necessary because public bodies are so risk adverse and so reticent to give people information. It should not be necessary to use the Act.

²⁵ See note 6

²⁶ Pozen, D. E. (2017). Freedom of information beyond the Freedom of Information Act. *University of Pennsylvania Law Review*, 165(5), 1097–1158. <https://bit.ly/3NSB9ux>

²⁷ O'Neill, O. (2002). *A Question of Trust: The BBC Reith Lectures 2002*. Cambridge University Press. <https://bit.ly/38H431G>; Meijer, A. (2009). Understanding modern transparency. *International Review of Administrative Sciences*, 75(2), 255–269. <https://bit.ly/3M7vjUA>

Some commentators tend to emphasise cultural factors within organisations as a core explanation for perceived implementation issues around FOI, a view that was also reflected to an extent in the scoping returns. However, it may also be considered that the formal and legalistic structure of FOI itself may act as a barrier to greater openness, seen to be defined by “box-ticking” and “one way communication, rather than real answerability in effective dialogue”.²⁸

One possible approach seen internationally, notably in Australia and New Zealand, is supporting and encouraging “informal release”, sometimes with a statutory basis.²⁹ Such measures clearly authorise and encourage staff of public bodies to release information routinely without the formality of a full FOI request process.

Issues to be addressed in relation to this topic may include:

- How can we make the FOI process more collaborative, as well as less bureaucratic, formal and administratively onerous, while also ensuring that important rights and interests in information held by state entities are appropriately protected?
- As well as providing for formal requests, can FOI legislation or guidance provide an enabling framework to allow bodies to routinely release non-exempt information as appropriate, without the need to go through the full FOI request process? How could this be supported as a matter of both law and administrative practice?
- What supports would be required to give public servants the confidence to release information routinely without the need to have such frequent recourse to the formal FOI mechanism?
- How can public bodies be supported and incentivised to make the release of information to interested parties a core and routine part of day-to-day work, rather than an add-on or compliance requirement?

28 Hood, C. (2010). Accountability and transparency: Siamese twins, matching parts, awkward couple? *West European Politics*, 33(5), 989–1009. <https://bit.ly/3GM260A>

29 E.g. New South Wales, Government Information (Public Access) Act 2009, section 8

Managing the increased volume of “records”

Terms such as “infoglut”³⁰ and “data smog”³¹ have been used by commentators to describe the difficulties in extracting useful knowledge from the ever expanding amount of information that is created and stored in contemporary technologically-driven societies and workplaces.

In practical terms, the amount of “records” generated on a daily basis across the civil and public sector goes far beyond what could have been imagined when the request mechanism was first designed and implemented. At a certain point, blanket and indiscriminate transparency mechanisms such as the FOI request may be subject to diminishing returns, as it is questionable whether much of the material coming within scope is of any significant evidential value in terms of ensuring that the public are informed and bodies are accountable for their actions.

The academic Cass Sunstein identifies two distinct types of transparency, “input transparency”, which relates to preliminary matters feeding in to a decision or action, and “output transparency” which relates to the decision itself, as well as information such as statistics or audits concerning outcomes. He argues that there is a case for a significant expansion of routine disclosure in relation to the latter, while the case in relation to the former is less compelling.³²

Given the huge increases in the volume of records that exist due to email systems etc in the last 7 years, the timelines for processing can be extremely challenging for organisations working with limited staffing resources, where FOI requests may only be a small part of someone’s overall post, numerous legacy systems and multiple locations and sites.

Resources required to find all relevant data. This requires searching through numerous systems and potentially files of 100s of people

Volumes of data sought and situations where organisation does not have the tools to carry out in-depth searches, covering archived material hard copy and digital copies.

Record management and how it crosses over with FOI – chaff/extraneous records

Transitioning to a sustainable model which can be implemented by all relevant public bodies, given the resource challenges associated with search, compilation of records.

30 Andrejevic, M. (2013). *Infoglut: How Too Much Information Is Changing the Way We Think and Know*. Routledge. <https://bit.ly/3NSDENr>

31 Shenk, D. (1997) *Data Smog: Surviving the Information Glut*. Harper Collins. <https://bit.ly/395xavD>

32 Sunstein, C. R. (2018). Output Transparency vs. Input Transparency. in *Troubling Transparency* (pp. 187–205). Columbia University Press. <https://bit.ly/3NQEQ3x>

Other research has focussed on what makes transparency policies effective, taking the view that “targeted” approaches are desirable in order to drive accountability to bring about positive policy outcomes,³³ and that policies should be, “design[ed] for comprehension” so that disclosures can readily be understood and contextualised by the public.³⁴ These approaches have in common an understanding of transparency that goes beyond an abstract goal, and instead proposes measures as instrumental and directed towards achieving particular policy outcomes.

As noted above, scoping work revealed a significant emphasis on FOI as an accountability measure. In order to ensure that the legislation can continue to operate in an efficient and workable manner, there may be a case for a greater focus on the accountability in terms of substantive decisions and other actions of public bodies that affect the rights and interests of individuals.

Many countries in their FOI laws specify classes of “public records” or “official documents”,³⁵ which have a particular standing or importance, and to which differing transparency requirements may apply, for example may be subject to mandatory publication, as outlined above.

- Given the challenges posed by the vast expansion in the amount of information generated by public bodies, should the FOI mechanisms aim to provide better quality of disclosure and transparency by focusing efforts on the most valuable information?
- Currently, in principle FOI applies equally to all records held by a public body. Should it instead seek to identify categories of particularly high value material that warrant particular treatment, such as mandatory proactive publication?
- In addition, how could the FOI mechanism, be more effectively targeted in order to ensure the most efficient deployment of resources?
- Does this require a reconsideration of the purpose of FOI, to move beyond treating access to records as an end in itself, but instead as a means of bringing about policy goals such as ensuring accountability, enabling citizen engagement and supporting participatory democracy?

³³ See notes 9-11

³⁴ Fung et al, Full Disclosure, note 10

³⁵ e.g. France, Finland, Sweden, Denmark

Incremental Reforms

The majority of the issues identified in the scoping process and initial stakeholder engagement may be seen as incremental in nature, insofar as they do not aim to significantly alter the structure of the FOI legislation as it exists, but rather to update certain features and to address issues that are seen to have arisen in practice. These represent potential updates to FOI legislation and practice that could be implemented in the short to medium term.

While in general the issues raised tend to coalesce around a small number of key themes, many of the issues identified are particularly technical and granular. A selection are presented below for comment.

Improving the request process

The FOI system as it stands is based on requesting records. In order to operate effectively it requires what has been termed, “prerequisite knowledge”; that the requester should know what they are looking for.³⁶ It follows from the request-based nature of the FOI system that where a request is vague, unclear, unfocused or is not addressed specifically to the task of seeking records, sub-optimal outcomes are delivered.

While the timeframes for FOI processing are tight, in general feedback from all sectors in the scoping consultation saw this as a net positive. However, questions in relation to where and how extensions of time can be applied to a request arose frequently from both requesters and public bodies.

Better communication with the requester - once the FOI goes in they tend to hear nothing till they get files or a refusal

The culture of contact between the requesters and those processing the requests - I think this can help people find out what they want

Questions too open – queries looking for all and sundry

Less picky about wording - it should be easier for people to seek information more generally, and not to have nitpicking over wording as a core part of the process

Take the request in the spirit not the letter

If you know the specific record you’re looking for most, though not all, bodies will locate it without fuss

We’re not trying to waste people’s time, we need direction if a request is genuinely too broad.

If people aren’t available to check things or there is going to be a delay and it means that I will get the documents, I’d prefer to wait and for bodies to take extra time.

³⁶ Kreimer, S. F. (2008). The Freedom of Information Act and the Ecology of Transparency. University of Pennsylvania Journal of Constitutional Law, 1012–1079. <https://bit.ly/3tbuzXX>

These reforms would focus in particular on the early stages of the process in order to ensure that only clear and focused requests for records are accepted in to the system. They would also aim to clear up ambiguities or situations not explicitly addressed in the current legislation that have been observed in practice as giving rise to issues.

Steps for consideration may include:

- How to clarify the standard for a valid request?
 - How can further engagement between requesters and public bodies be encouraged in order to assist them in meeting their objectives with the most efficient possible use of public resources? While the legislation provides an important safeguard in ensuring that a requester's motive cannot be a ground for refusing a request, this may be interpreted in an overly broad way by public bodies and act as an impediment to effective collaboration with requesters.
 - Given the tight timeframes involved in processing FOI requests, slow or non-responses to queries by requesters can be problematic. In Canada, some FOI laws provide that where a requester does not respond to correspondence in a certain time the request is automatically deemed abandoned – however where this happens there would be nothing to stop the requester submitting the request again.³⁷
 - Should we improve and clarify the standards and procedures for administrative refusal of FOI requests where requests are too large or will significantly disrupt a public body?
- The current arrangements for extensions of time were identified in scoping on various grounds as requiring further examination.
 - Is there scope for a shorter period to apply to requests where both requester and body agree that this is appropriate and the number of records involved is small and precisely identified?
 - Conversely, is there scope for a longer period to apply where both requester and body agree that this is appropriate and the request would otherwise fall to be refused under section 15(1)(c) of the Act? For example, this may be helpful if a person wants a full file relating to them and it would not be possible to process the entire set of information within four weeks.

³⁷ e.g. New Brunswick Right to Information and Protection of Privacy Act, section 12

Fees and charges

The issues of fees and charges attracted significant interest in the scoping stage of the review. Views were on a continuum from calls for the reintroduction of application fees to the abolition of all fees.

Since the outset of FOI, normally no fee whatsoever has applied to requests for personal information. This represents approximately 60% of annual requests in recent years. From 2014, the application fee for non-personal requests was abolished. This means that the only remaining fees are for search and retrieval of large amounts of records and for seeking reviews of decisions.

It is apparent that the model for applying of search and retrieval fees in particular is highly technical, difficult to interpret and implement, including very tight time limits. This was seen in scoping as a cause of frustration both to requesters and FOI Bodies.

While many of the issues raised in the scoping consultation by way of justification for application fees go to substantive issues that tend to cause poor outcomes both for requesters and FOI bodies, e.g. unclear or unfocused requests, it is not obvious that charging a fee is the appropriate means of addressing this.

Issues to be addressed in relation to this topic may include:

- What is the purpose and rationale for applying fees? Are fees a suitable and proportionate means of achieving these goals?
- Is it appropriate for search and retrieval fees to be refunded where records are ultimately refused, even though the chargeable search and retrieval work has been carried out in full?

The intention of fees should be clarified and the charges should be applied on that basis

The current system is somewhat cumbersome and administration-heavy for FOI bodies

Section 27 is as structured a cause of an “administrative burden” of questionable value in any cost - benefit scenario and ought to be overhauled.

I would like to suggest that a small fee be returned to the system - something small, like €5. Just enough to make a journalist actually think about the request before sending it, but not enough to be a real impediment.

The ten day requirement in which to issue a fees estimate can be very limited if there are a high volume of potential records which need to be initially examined for potential relevance to the request.

Cost wise it is affordable

Cost should be nil

- Should application fees be refunded where a reviewer subsequently disagrees with the original decision? What would be the purpose of such a move?
- Where the OIC has issued decisions modifying the original decisions of public bodies, approximately 60% do not “overturn” the decision *per se*, but vary it by substituting different reasons or directing release of some but not all further records. At what point would a refund be appropriate?
- Is the strict two week timeframe in which to issue a fee estimate counterproductive? For example, does it cause estimates and deposit requests to be issued hastily in order to meet the deadline? If so, how can any changes be balanced with the need to ensure prompt responses?

Designating FOI Bodies

The 2014 FOI Act introduced a new approach for determining whether FOI applies to a body. Where previously the legislation had contained a definitive list of all the bodies that were subject to FOI, this has now been replaced by a set of criteria.³⁸

If an issue arises where a body takes the view that FOI does not apply to it, but a requester disagrees, the matter can be referred to the OIC and ultimately to the Minister for Public Expenditure and Reform for a determination.

In practice, however, significant difficulties have arisen with the operation of this approach. By way of example, it is now impossible to compile a comprehensive list of bodies to which FOI applies. Instances may have arisen where bodies have acted on an assumption that the legislation applied to them, where in fact they did not meet the criteria. Any purported FOI decisions issued in such circumstances are highly problematic.

In resolving disputes relating to whether FOI applies, both the OIC and the Department have noted particular difficulties in assessing whether section 6(1)(f) applies in the context of comparatively informal FOI processes, which involves a finding on whether an entity is “directly or indirectly controlled” by an FOI body. Arguably, if an entity is controlled by a public body in a meaningful sense, then its records should in any event be accessible by making a request to the public body concerned.³⁹

³⁸ FOIA 2014, section 6(1)

³⁹ FOIA 2014, section 2(5) provides that “... a reference to records held by an FOI body includes a reference to records under the control of that body”; see also CPU Notice 9 in relation to Board Papers held by FOI Bodies <https://bit.ly/3NMm6lN>

Widening scope to cover any body in receipt of public funds insofar as being accountable for how that money was spent.

FOI [should be] extended to non-public bodies significantly funded by the State

Funding for Community/Voluntary through public funds are for very specific purposes ... and cannot be used for any other purpose, like funding a FOI Officer.

Additional safeguards for regulatory bodies around investigative or disciplinary processes required in the public interest

Schedule 1, Part 1 exemption applying to records originating with partially included body but retained by/or forwarded to other bodies

The structure of Schedule 1 Part 1 is difficult. Also, particular issues arise such as, for example ... the status of staff members of the entity concerned; whether they are staff of an FOI body for purposes of personal information and for the purposes section 35(2)

Some agencies are excluded from FOI or part-included in relation to some functions. However, there may be a lack of consistency to the approach, with some outliers around certain types of functions, such as investigatory and Ombudsman type bodies.

A number of submissions to the scoping process argued that as a matter of principle FOI should be extended to all entities receiving “public funding”. However, often what is thought of as “public funding” in reality consists of a public body procuring a service from a private entity. Where this is the case, the current FOI model provides that records relating to the service can in principle already be accessed by making a request to the public body concerned.⁴⁰

Issues to be addressed around this topic may include:

- Is there a case for a return to a definitive list of FOI Bodies? If so, how might the transition be managed?
- If the present model is to be retained, are updates to the criteria required?
- Are the rules that extend FOI to capture records held by contractors or service providers sufficient and fit for purpose? Could these be strengthened or clarified by way of legislation or guidance?
- Given that the FOI request model is onerous and technical, particularly for small organisations, is there scope for a more tailored approach for bodies that are not subject to FOI in their own right, but do receive money from bodies that are subject to FOI? What might this look like? Is it more appropriate for the transparency obligation to fall on the entity receiving funds?
- Or is it preferable to place the obligation on the body providing the funding to put suitable transparency measures in place and where appropriate to handle requests for records?

⁴⁰ Freedom of Information Act 2014, section 11(9)

Role of the Information Commissioner

A number of submissions to the scoping survey emphasised enforcement by the Information Commissioner. Some respondents called for the imposition of “sanctions” or “penalties” in relation to the FOI process.

As matters stand, there is little evidence of widespread non-compliance with FOI obligations, nor of a failure to engage with the OIC’s processes or to adhere to its directions. The Commissioner has extensive powers at section 45 to demand access to documents or information, and if required may seek a court order mandating compliance with its decisions, although to date bodies have complied with the Commissioner’s directions without the need in any case to seek such an order.

A number of respondents to the scoping consultation referred to what was seen as a lack of consistency in decisions or perceived failure to follow previous OIC findings. This issue is not necessarily straightforward, as while OIC decisions may set out principles for applying particular exemptions, decision makers must treat each request on a case by case basis according to the contents of the specific records concerned and the particular circumstances. It follows that usually past decisions cannot in themselves be taken as determinative of a request for different records, to which different considerations may apply.

A particular issue in emphasising enforcement by the OIC is one of resources. Approximately 500 bodies are subject to FOI. Therefore, an enforcement-centred approach would certainly require significantly greater expenditure and staffing.

Issues to be addressed around this topic may include:

- Does the statutory framework for the Commissioner’s reviews need to be updated?
- Should the Commissioner’s role evolve to support other changes to the approach to FOI and transparency?

Strengthen enforcement powers of OIC

The review should also address the operation and powers of the Information Commissioner and the effectiveness of their current operation. For example, the Commissioner should be in a position to properly enforce decisions and set wide precedent for organisations which are subject to FOI.

The current Act is not being properly enforced and there are no repercussions for bodies who routinely fail to comply with it.

Although OIC cases are relatively rare, they are an enormous time drain when they arise and regularly impact other work.

The OIC should consider a public information campaign to actively promote the use of access to information legislation and inform people about how to exercise their rights (as happens in Scotland).

The review should examine the remit and functions of both DPER and the Information Commissioner as drivers of best practice and consistency.

Abuse of FOI

A common concern raised by public sector stakeholders in scoping was around abuse of the FOI process. In practice, this might involve individuals using FOI as a means of harassing staff of a public body, or as a way of indefinitely keeping open a dispute or personal issue with a public body that would otherwise have been finalised.

While it should be acknowledged that requests of this nature represent only a very small fraction of the requests received annually by public bodies, they are by their nature disproportionately burdensome. This often has a knock-on effect on other requesters.

Moreover, where the protections against such issues are seen within FOI Bodies to be ineffective, this poses a significant reputational risk to the integrity of the FOI system as a whole.

Issues to be addressed under this topic may include:

- Should the language and scope of section 15(1)(g) of the legislation be clarified? For example, other FOI laws refer to “abuse of process” to describe the kinds of issues that may arise.⁴¹
- In other jurisdictions, the Information Commissioner equivalent can give a public body permission to refuse to process requests from a particular person or persons where this is justified in the circumstances.⁴² A declaration of this nature may be limited to particular bodies, or subject matter, and can also be time limited.
- Were a mechanism of this nature to be introduced, what protections would be required to ensure that it is only applied where required? How would the process be structured procedurally?

A better system needs to be in place for frivolous and vexatious, and for requests which are trying to abuse the FOI system to deal with complaints or disputes that requesters have with public bodies... there are frequent requesters who use FOI as a means to disrupt an office/organisation. A better system for dealing with abusive or aggressive requesters needs to be in place.

Currently there is a lack of clarity on terminology such as vexatious and frivolous. This makes it difficult for institutions to determine if a request falls within the category.

Vexatious & frivolous requests needs more definition/stricter classification

[There should be a] clear and transparent reason for using “frivolous and vexatious” as a blanket reason for refusal

These concepts are interpreted via general principles of statutory interpretation and how they’ve been analysed at common law. Would greater clarity in the legislation in plain English be helpful on these issues?

41 Canadian Federal Access to Information Act, s. 6.1 (1); Australian Federal Freedom of Information Act, s.89L

42 e.g. Connecticut Freedom of Information Act, Sec. 1-206(5); Australian Federal Freedom of Information Act, s. 89K



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