

Presentation by Mr Kevin Murphy, Information Commissioner to the Joint Committee on Finance and the Public Service under section 32(5) of the Freedom of Information Act 1997

Chairman,

As you may recall, I originally reported to the Committee on 10 June on an interim basis in relation to the reports of those Departments which were to hand at that stage. In the meantime all other Departments have reported and I have taken the opportunity to consolidate the comments in my interim report into my final report. I understand that this final report, covering all Departments, has been circulated to the Committee.

As you can appreciate, the full report is rather long and technical, covering, as it does, the reports of all Departments. Indeed, in many cases I have no real difference of opinion with the Departments concerned. I do not intend, therefore, in the course of this presentation to go through the report line in any detail and I will confine myself to making some general observations on certain matters of principle or to commenting on specific provisions which have recently been the subject of media discussion.

Naturally, if the Committee has any questions on specific provisions mentioned in my report, I will be delighted to deal with them at the end of my presentation.

The interaction of FOI Act and other secrecy provisions.

One matter which I should explain at the outset is my view of how the FOI Act should interact with secrecy provisions contained in other legislation.

The Committee in doing their review are, of course, required to have regard to the provisions, purpose and spirit of the FOI Act. I also have an additional role under the Act of encouraging the publication of information by public bodies.

The FOI Act confers important access rights on citizens in a manner which is consistent with the right to privacy and the public interest and subject to necessary exemptions, which are dealt with in considerable detail in the Act. The operation of a general access regime of this kind over a range of public bodies should, over time, lead to greater certainty both among public servants and the public as to what information should properly be released and what should not. The existence of separate secrecy provisions in legislation other than the FOI Act is not helpful to this process of achieving certainty. In some cases such secrecy provisions may themselves be subject to exceptions or qualifications which can create uncertainty or confusion. In other cases the secrecy provisions may, without good reason, be wider than corresponding exemptions permitted by the FOI Act. As a general point, I do not accept that merely because a secrecy provision in another statute broadly serves the same purpose as an exemption in the FOI Act, this is a good enough reason for leaving the secrecy provision outside the Third Schedule to the FOI Act.

I should also mention that since the FOI Act was passed, there have been three new secrecy provisions introduced. It seems to me that there is a case for this Committee, Chairman, being enabled to preview proposals for new secrecy provisions as well as review enacted provisions.

Records pertaining to investigations

I note that a number of provisions contained in the reports of various Departments are designed to protect investigations where wrongdoing or breaches of the law are alleged or suspected. Examples are section 21 of the Companies Act, 1990 and section 97(2) of the Employment Equality Act, 1998 which are dealt with on pages 5 and 24 of my report, respectively.

It may well be that that public bodies are not yet fully confident that the exemptions in the FOI Act are sufficiently strong to protect investigations of this kind. Clearly, there is a significant public interest in

ensuring that investigations are not impeded in any way. In my view the fears of Departments are misplaced and the exemptions in the FOI Act are sufficient to protect these records. Indeed, I have already recognised the need to protect investigations in a recent decision which dealt with records created during the course of an investigation by the Department of Agriculture and Food, when I pointed out that

"an investigator must be allowed a fair degree of latitude, subject to the need for fair procedures, to decide when information already in his or her possession should be made available to a party which is the subject of the investigation. If a party subject to investigation by a public body has a right to be fully informed at all times of the state of knowledge of the investigating authority, then it would appear to be inevitable that this would impair the investigation of offences."

In some cases, a public body's main function may be to carry out investigations and it may not be satisfied to leave open the possibility of access to records of these investigations. In so far as the Oireachtas concludes that there is a strong case for records of such a body to be exempt, the inclusion of specified records of the body in section 46 of the FOI Act may be a more appropriate mechanism than the continued use of the exemption in section 32.

Protection against unauthorised disclosure

Another issue that recurred frequently in Departments' reports was the existence of provisions equivalent to the Official Secrets Act but applying to specific bodies only. Examples are section 34 of the Health Insurance Act, 1994 which prohibits the unauthorised disclosure of information by staff, consultants or advisers of the Health Insurance Authority and Section 8 of the Consumer Credit Act, 1995. I recognise that, in some cases, separate secrecy provisions are required to prevent unauthorised disclosure of information. In such cases, repeal of the provision would not be appropriate. However, the relevant sections of the Official Secrets Act are included in the Third Schedule and there is no reason in principle why such similar provisions should not be included in the Third Schedule to the FOI Act. This would permit access to the records subject to all the safeguards in that Act. In some cases, I have stopped short of recommending the inclusion of these provisions in the Third Schedule only because the bodies concerned have not yet been brought within the ambit of the Act.

The effect of EU Law

Another issue common to a number of Departments is the existence of secrecy provisions which are required as a result of the State's obligations under various EU treaties. Examples are European Communities (Recognition of Medical Qualifications) Regulations, 1976 (S.I. 288 of 1976) and European Communities (Authorisation, Placing on the Market, Use and Control of Plant Protection Products) Regulations, 1994 (S.I. No. 139 of 1994) which are dealt with on pages 18 and 2 of my report respectively. It seems to me that it would not be permissible to include such provisions in the Third Schedule if the effect of so doing would be to breach the State's treaty obligations. At the same time, I believe that such provisions should not be wider than the requirements of EU directives and that due regard should be had to the spirit of the FOI Act in drafting them. I accept that, in some instances, EU directives may place greater restrictions on access to information held by public bodies than the restrictions permitted by the FOI Act or, indeed, permitted by the access regimes contained in the national legislation of other States. I would express the hope that a more liberal approach to access to information will emerge at EU level over time, which will result in no curtailment of the rights afforded by the FOI Act. I would refer the members of the Committee to Council directive 93/99/EEC which is dealt with on page 18 of my report which clearly envisages that different member states may operate different rules in relation to access to information.

The relevance of certain 'secrecy' provisions to section 32 of the FOI Act.

In quite a number of cases, Departments have identified provisions which they appear to think come within the terms of section 32, but where it is not apparent to me that this is so. Examples of this are Section 13(8) of the Air Navigation (Notification and Investigation of Accidents and Incidents)

Regulations and section 44 of both the Dentists Act, 1985 and the Nurses Act, 1985 dealt with on pages 12 and 17 of my report respectively. In such cases, it seems to me that perhaps Departments should be asked to explain the precise basis on which they contend that the provisions in question prevent disclosure under the FOI Act.

Amendments to the FOI Act

I have also made reference in my report to certain amendments to the FOI Act. The first is an amendment to section 24 of the Act made by the Criminal Justice (Location of Victims' Remains) Act 1999. This amendment is referred to in the covering letter to the report of the Department of Justice, Equality and Law Reform and I deal with it on page 21. In essence, and while fully recognising the potential sensitivity of the records concerned, I am concerned at the possible effects of piecemeal and ad hoc amendments to the Act.

I also deal with section 53 of the Education Act. This provision did not amend the FOI Act but, apparently, its purpose was to ensure that any request under the Act for details of the examination results of schools could be refused. I recently completed a review dealing with this issue and I understand that my decision will be the subject of an appeal to the High Court. In the circumstances I do not feel able to go into this question in great detail. Nevertheless, I hope my comments and explanations in the report will be of assistance to the Committee.

Companies Act

Finally, I would like to refer to the comments made in my interim report in relation to section 21 of the Companies Act, 1990. I consider it rather unfortunate that these comments should have been reported in the media before the Committee had an opportunity to hear my views on the matter. The misleading impression was created that I supported the view that the names of the individuals on the so-called "Ansbacher List" should be released. I need hardly remind the Committee that my interim report never suggested anything of the kind. The report was concerned solely with the question of whether the exemptions in the FOI Act address the concerns of the Department of Enterprise, Trade and Employment regarding the possibility that release of certain types of information could compromise a criminal investigation or cause unwarranted public intrusion into the private affairs of a company. I did not accept the reasons advanced by the Department for the omission of this provision from the Third Schedule.

The question of the publication of the Ansbacher list has been and remains a matter of political controversy and I want to stress that my Office is politically neutral and its independent decisions will continue to be taken by reference solely to the provisions of the FOI Act. It is possible that I may be asked to review a decision of the relevant public body in relation to this list and, accordingly, I am precluded from making any further comment.

That concludes what I have to say for the moment. I would be glad to deal with any questions you may have.

Kevin Murphy
Information Commissioner
3 November 1999