NEJVYŠŠÍ SPRAVNI SOUD

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Supreme administrative courts and evolution of the right to publicity, privacy and information.

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Answers to Questionnaire: Ireland

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1. Briefly describe the administrative institutional backing of free access to information and of the protection of personal data. Whenever those agendas are institutionally linked, provide for a brief description of such relations.

1.1 Freedom of Information: The Freedom of information Act 2014

Introduction

Under the Freedom of Information Act 2014 ("FOI") public bodies and certain other bodies as prescribed under the FOI are obliged to make certain information available to requesting persons. The FOI repeals and replaces previous legislation including the Freedom of Information Act 1997 and the Freedom of Information Act 2003.

FOI bodies also make certain information publically available routinely through publications, but the FOI request system is useful for persons requiring access to information not routinely made available.

In essence, under the FOI scheme, requesting persons are entitled to:

- access official records held by Government Departments or other public bodies as defined by the Act;
- have personal information which is held about them corrected or updated where such information is incomplete, incorrect or misleading;
- be given reasons for decisions taken by public bodies that affect them.[1]

Further, the Act requires the publication of certain information pertaining to the operation of government departments and bodies.[2]

Individuals are entitled to request any records relating to themselves, regardless of when such records were created, and/or any other records created by a specified body after the effective date, which may be set out in legislation.[3]

[1] Freedom of Information Website < http://foi.gov.ie/faqs/faq1/ > accessed 03/06/2015
[2] McDonagh, *Freedom of Information Law*, 2nd Ed., (Dublin 2006) at p.41.

Bodies amenable to procedures under the FOI

Section 6(1) of the FOI defines public bodies as:

> *(a) a Department of State;*
>
> *(b) an entity established by or under any enactment (other than the Companies Acts);*
>
> *(c) any other entity established (other than under the Companies Acts) or appointed by the Government or a Minister of the Government, including an entity established (other than under the Companies Acts) by a Minister of the Government under any scheme;*
>
> *(d) a company (within the meaning of the Companies Acts) a majority of the shares in which are held by or on behalf of a Minister of the Government;*
>
> *(e) a subsidiary (within the meaning of the Companies Acts) of a company to which paragraph (d) relates;*
>
> *(f) an entity (other than a subsidiary to which paragraph (e) relates) that is directly or indirectly controlled by an entity to which paragraph (b), (c), (d) or (e) relates;*
>
> *(g) a higher education institution in receipt of public funding;*
>
> *(h) notwithstanding the repeal of the Act of 1997 by section 5 , and subject to this Act, any entity that was a public body (including bodies or elements of bodies prescribed as such) within the meaning of the Act of 1997 on the enactment of this Act.*

Section 6 has broadened the category of bodies that is amenable to FOI by comparison to previous FOI legislation.

Other entities may become prescribed bodies under the Act when a minister or committee of ministers, acting in consultation with the commissioner, designates it as such. This may occur where it is decided that it is necessary to subject such an entity to the provisions of the FOI for the purposes of transparency and accountability in

[3] For example, S.I. 148/2015 Freedom of Information Act 2014 (Effective Date for Certain Bodies) Order 2015 sets the 21st of April 2012 as the effective date in relation to information held by the Private Residential Tenancies Board.

government and public affairs, and generally occurs in respect of non-public bodies which are wholly or partly funded by the state.[4] This is a new provision, appearing for the first time in the 2014 legislation.

Commercial state bodies are largely exempt from the application of the FOI. Certain other state bodies are partially exempt. For example, under the FOI, there are restrictions on the operation of the FOI in respect of courts and tribunals regarding their proceedings. There are exemptions for an Garda Síochána (the national police force) in respect of a number of matters such as the Security and Intelligence Section, the management and use of covert intelligence operations, the witness protection programme, emergency response and specified other matters. The Criminal Assets Bureau and the Defence Forces are similarly subject to restricted application of the FOI. Other state bodies as specified under s.42 are similarly only subject to partial application of the FOI.

What information may be sought?

The term "record" in this context includes:

> (a) *a book or other written or printed material in any form (including in any electronic device or in machine readable form),*
>
> (b) *a map, plan or drawing,*
>
> (c) *a disc, tape or other mechanical or electronic device in which data other than visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the disc, tape or other device,*
>
> (d) *a film, disc, tape or other mechanical or electronic device in which visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the film, disc, tape or other device, and*
>
> (e) *a copy or part of any thing which falls within paragraph (a), (b), (c) or (d).*[5]

[4] FOI, s.7.
[5] FOI, s.2

This is not an exhaustive definition.

Certain information is exempted from the duty to disclose under the Act, and these exemptions are set out in part 4 of the FOI. Exemptions include information pertaining to:

- Personal information relating to a person other than the requesting person
- meetings of the Government;
- deliberations of the FOI body;
- Parliamentary, court and certain other matters;
- law enforcement and public security;
- information obtained in confidence;
- commercially sensitive information.

The above constitute examples only, and are themselves subject to limitations. Some exempted materials may be disclosed in any event if it is in the public interest to do so.

Office of the Information Commissioner

The Office of the Information Commissioner was established under the Freedom of Information Act 1997. The role is independent in nature, and this is specified in the section creating the office.[6] The role of the Information Commissioner includes:

- review of decisions of public bodies in relation to FOI requests;
- review of the operation of the FOI, ensuring compliance by public bodies;
- fostering an attitude of openness within public bodies, encouraging such bodies to go beyond strict compliance with the minimum requirements of the FOI acts;

[6] Freedom of Information Act 1997 s. 33

- publication of commentaries and of an annual report in respect of the operation of the FOI Acts.[7]

Procedure and Appeals

The initial request for information is made by the individual directly to the body in question. At first instance, an appeal under the FOI is an internal review of the initial decision to a more senior person within the body requested to provide the information.

If the requesting person is not satisfied with the outcome of that appeal, they may appeal that decision to the Office of the Information Commissioner.

Following review by the Commissioner, an appeal to the High Court on a point of law is available to a party to a review or any person who is affected by the Commissioner's decision. From 2003, the operative legislation was amended, and it became possible to appeal to the Supreme Court against the decision of the High Court.[8] However, as of 28 October 2014, this procedure has been changed due to the establishment of the Court of Appeal.[9] In the ordinary course, the appellate jurisdiction of the Supreme Court has been transferred to the Court of Appeal, making it the proper venue for application.[10] A decision from the Court of Appeal will be final, unless the point of law considered on appeal raises further questions relating to matters of 'public interest and/or justice' that would invoke the Supreme Court's appellate jurisdiction to review decisions of the Court of Appeal granted to it under the Constitution.[11]

In certain circumstances, it is also constitutionally permissible to sidestep the

[7] See generally the Office of the Information Commissioner website at < http://www.oic.gov.ie/en/About-Us/Role-Functions-and-Powers-of-the-Information-Commissioner/ > accessed on 9 June 2015.
[8] Office of the Information Commissioner website at < http://www.oic.gov.ie/en/Decisions/Appeals-to-the-Courts-/ > accessed on 9 June 2015.
[9] The statutory framework for the establishment of the Court of Appeal is found in the Court of Appeal Act 2014. The Courts appellate jurisdiction derives from s.8(1) of the Act 2014.
[10] Section 74(1) of the 2014 Act provides a general provision, whereby references (howsoever expressed) to the Supreme Court, in relation to an appeal, shall from the date of establishment be construed as references to the Court of Appeal, unless the context otherwise requires.
[11] See *Thirty-Third Amendment of the Constitution (Court of Appeal) Act 2013.* SCHEDULE 4, Part 2, (i)-(ii).

appellate jurisdiction of the Court of Appeal altogether, and to appeal against a decision of the High Court directly to the Supreme Court.[12] Similar to its powers to hear Court of Appeal decisions, in granting permission to hear appeals direct from the High Court, the Supreme Court must be satisfied that – (i) the High Court decision involves a matter of general public importance; and/or (ii) the interests of justice require that the appeal be heard by the Supreme Court.[13] Additionally, if one, or both, the above criteria are met – the Supreme Court must also be satisfied that there are "exceptional circumstances warranting a direct appeal to it".

1.2 **Data Protection**

Introduction

Whereas the FOI provides the right for individuals to access information held by State bodies and bodies in receipt of State funding (subject to certain restrictions), the Data Protection Acts ("DPA") apply to all legal entities within the State, including private bodies, voluntary organisations and charities, once they are considered to be Data Controllers as defined.

The DPA, among other things, set out that individuals should be in a position to control how data relating to them is used. The legislation also established the office of the Data Protection Commissioner and, in 2003, implemented the provisions of EU Directive 95/46. In essence, the Data Protection Commissioner is charged with the task of upholding the rights of individuals under the DPA and enforcing the obligations on data controllers.[14]

The Data Protection Commissioner is required to be independent in his or her functions. He or she is appointed by the Government, and is empowered to hear complaints from individuals who believe their rights are not being protected. The Commissioner is empowered to conduct privacy audits and inspections in order to identify potential breaches and to ensure compliance with the Acts.

[12] The so-called "leapfrog appeal".
[13] See *Thirty-Third Amendment of the Constitution (Court of Appeal) Act* 2013. SCHEDULE 5, Part 2, (i)-(ii).
[14] See www.dataprotection.ie at http://tinyurl.com/oe6p2l2 last accessed 03/06/2015

The Data Protection Acts 1998-2003

The DPA aim to ensure that data processing, where it is carried out, is done in a fair, limited and legitimate manner. Under the DPA, an individual has a right to find out whether an individual or body holds information about them, a description of that information, and the reason why the information is being held by that person or body. The purpose of this facility is to allow individuals to ensure that information being held about them is factually correct, only available to those who should have it, and only used for stated purposes.[15]

There are some matters which are exempt from the DPA entirely. These are:

a. "personal data that in the opinion of the Minister or the Minister for Defence are, or at any time were, kept for the purpose of safeguarding the security of the State";
b. "personal data consisting of information that the person keeping the data is required by law to make available to the public";
c. "personal data kept by an individual and concerned only with the management of his personal, family or household affairs or kept by an individual only for recreational purposes".[16]

In order to find out what information a data controller or processor has about an individual, at first instance, they must write to the person or body concerned to obtain that information, who must send the information within 21 days.

The DPA also provide a right to obtain a copy and an explanation of any information pertaining to them which is kept on a computer or in a structured manual filing system, or intended for such a system by any entity or organisation. Again, in order to obtain this information, it is necessary to write to the person or body in question and ask for the information under the DPA.

[15] See the website of the Date Protection Commissioner at <www.dataprotection.ie> and specifically at < http://tinyurl.com/nf735er > accessed on 03/06/2015
[16] DPA s.1(4). See Kelleher, *Privacy and Data Protection Law in Ireland*, (West Sussex, 2006) at p.99.

Subsequently, an individual has the right to request that any information about themselves be changed, corrected, deleted, or that its use be limited to the stated purpose, as appropriate.

There are certain limitations on the necessity for compliance with these requests, for example, in the context of criminal investigations, or if the data is protected by legal privilege. The general rule is that the relevant data controller must either comply with this request or provide reasons for not doing so within 40 days.

Personal Data and Data Controllers

The terms “personal data” and “data controller” are defined terms under the Acts.

According to the DPA, "personal data" means data relating to a living individual who is or can be identified either from the data, or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller. This is a broad definition which includes data which may become personal on access to further information. It may be assessed on a case-by case basis.

A “data controller” is the individual or the legal person who controls and is responsible for the keeping and use of personal information on a computer or in structured manual files.[17]

A “data processor” is a person who processes personal data on behalf of a data controller but does not include an employee of a data controller who processes such data in the course of his employment.[18]

Appeals and Complaints

[17] See the Data Protection Commissioner’s website at < http://www.dataprotection.ie/viewdoc.asp?m=&fn=/documents/FAQ2012/1.1.htm > accessed on 3/6/2015.
[18] Data Protection Act 1988 s.1.

Where requests under the Act are not complied with, or where an individual is dissatisfied with the response of the data controller in question, it is possible to make a complaint to the Data Protection Commissioner. The Commissioner will endeavour to resolve any disputes and to come to an amicable resolution while protecting the rights of the individual. Where an amicable resolution is not possible, the Commissioner may make a formal decision as to whether a contravention has occurred.[19] The Commissioner may require a data controller to amend, delete, supplement, or specifically limit the use of the data in question. The Commissioner may also prohibit the transmission of data overseas.

An appeal is available from a decision of a Data Commissioner to the Circuit Court. Further, there is provision for a judge of the Circuit Court to refer a question on a matter of law to the Court of Appeal.[20] A further appeal to the Supreme Court is possible under the 33rd Amendment of the Constitution in the manner referred to at para. 1.1 above.

1.3 **Interaction between the FOI and the Data Protection Acts**

Where a request for information is made of a public body under the FOI, that body is obliged to consider the request under the Data Protection Acts at the same time, and to provide the maximum possible amount of information under both sets of legislation.

1.4 **Judicial Review**

De Blacam describes judicial review as the means whereby the courts examine the legality of all public actions including their own.[21] The High Court may review the decisions of administrative bodies and lower courts because under the Constitution, the High Court has full original jurisdiction to hear all matters. Pursuant to the architecture of the Irish courts system, citizens dissatisfied with the outcome of a

[19] See the website of the Data Protection Commissioner at < http://www.dataprotection.ie/viewdoc.asp?m=&fn=/documents/FAQ2012/1.1.htm > accessed on 3/6/15.
[20] Courts of Justice Act 1936, s.38, as amended.
[21] De Blacam, *Judicial Review*, 2nd Ed., (Dublin, 2001) at p.3.

Judicial Review by the High Court have two options in regards to appealing such a decision, (1) the decisions can be appealed to the aforementioned newly created Court of Appeal, or, (2) a 'leapfrog appeal' can be directly submitted to the Supreme Court Appellants should be mindful of the conditions pertaining the granting of such permission by the Supreme Court.[22]

In essence, the decisions of public and administrative bodies are generally amenable to judicial review on a number of grounds, for example, if the deciding body makes an error of law, a decision outside of their jurisdiction, or where fair procedures have not been observed.

1.5 **Criminal Offences under the Data Protection Acts**

The Data Protection Commissioner may prosecute summary offences under the Data Protection Acts in the District Court.

1.6 **Digital Rights Ireland**

In terms of the protection of personal data, it is helpful to note that there is a culture of voluntary legal work in the arena of human rights in Ireland. It is common for lawyers to do a certain amount of *pro bono* work, be it in advising citizens in free legal aid clinics or simply by taking on cases, in which human rights are at issue, on a "no foal no fee" basis. There are also groups, such as Digital Rights Ireland, which are concerned with the monitoring and vindication of rights in certain areas. Digital Rights Ireland is the group that mounted a successful challenge to the Data Retention Directive before the Court of Justice of the European Union. The group was supported in this action by the Irish Human Rights Commission. Though this is not an administrative body, these kinds of challenges form part of the legal landscape of data protection in Ireland.

[22] For greater detail on the Irish appeals process, see para 2.1, pp.11-12 below.

2. Describe in general terms the regular administrative and court procedure in a typical disputable case of free access to information. Describe also the procedural role of your supreme administrative instance.

2.1 Freedom of Information Requests

Due to the statutory requirement for certain bodies to make information available under the FOI, in some instances it will not be necessary for an individual to make an FOI request. The relevant website of the body in question may be helpful, and certain information may be published in manuals.

If this is not the case, the individual's first step is to write directly to the body in question requesting the information they seek under the FOI. The individual may request any of the information described above. A request must be acknowledged within two weeks and responded to within four weeks, though extra time may be afforded if third parties must be consulted.

Since the fee scale was revised in 2014, the initial request for a record is free of charge, though some (now reduced) fees are charged for the internal review process and for any appeal to the Information Commissioner. Reduced fees are charged to medical card holders and of third parties appealing release of information on public interest grounds. Additional fees may apply for searching and copying. If the cost is less than €100, no charges apply, but above that amount, full charges apply. Charges are capped at €500 and a body may refuse your request and require a more refined request if the cost will be higher than €700.

If dissatisfied with the outcome of the preliminary FOI request, or if it was not dealt with, an individual may request that a more senior staff member within the body in question review the matter. This review may be commenced by addressing an application to the FOI unit of the relevant body.

A review of that internal review by the Information Commissioner is available, or from the initial procedure where subsequent review was impossible (e.g. if the most senior person within the body conducted the initial procedure.) The Information

Commissioner's review may be commenced by applying, in writing or online, to the Office of the Information Commissioner. This must be done within six months, though the Commissioner may extend time where deemed appropriate. A fee applies, and the Commissioner must acknowledge the application immediately. The Commissioner is required to notify the party as to whether or not the Commissioner has accepted the application for review.

The procedures employed by the Information Commissioner are less formal than those of a court.

As part of the decision making process, if the Commissioner decides to accede to an application for a review, the Commissioner will normally request the documents in question from the relevant body together with submissions as to the reason for their decision. The individual/appellant will also be requested to write submissions.

Next, an investigator will be assigned to the appeal, who will act as a liaison officer between the parties and will attempt to settle the matter if appropriate. Otherwise, the investigator will make a recommendation to the Commissioner on the matter. The Commissioner may affirm or vary the decision of the relevant body.

The decision of the Commissioner is binding and conclusive[23] but it may be appealed to the High Court on a point of law. The procedure for taking such an appeal is set out in the Rules of the Superior Courts.[24] The Rules provide that an appeal is to be heard and determined on affidavit unless the court otherwise directs, and the court may give such directions as to the giving of evidence "as appear appropriate in the circumstances."[25] As Ireland's legal system is adversarial in nature, it is common for individuals and the relevant body under review to be legally represented at this point, whereas that is less likely to be the case in the context of reviews by the Data Commissioner.

[23] See website of the Information Commissioner at< http://www.oic.gov.ie/en/Apply-for-Review/How-to-apply-for-review/What-the-Commissioner-May-Review/ > accessed 3/6/15.
[24] Order 130 (as inserted by S.I. No. 325 of 1998, as amended). See www.courts.ie for Rules of Court.
[25] Order 130 rule 6. See also McDonagh, *Freedom of Information Law*, 2nd Ed., (Dublin 2006) at p.522.

As already noted in the answer to question 1 (pp.5-6), it is also possible to appeal an FOI decision from the High Court to the Court of Appeal, or in limited circumstances directly to the Supreme Court. A decision emanating from an appeal directly submitted to the Court of Appeal can also potentially be appealed to the Supreme Court (again see Q.1 above).

Additionally, the Rules of the Superior Courts, which govern appeal procedures that apply to the High Court, also incorporate specific provisions detailing the procedures involved for taking appeals to the Court of Appeal and the Supreme Court.

2.2 Data Protection Requests

As noted in the answer to question 1, the DPA provide a right for an individual to find out if a body holds information about them, what information is held, and for what purpose. At first instance, an individual may write to the body concerned, who must reply with this information, including a description of the information, within three weeks.

An individual may also request a copy of any such information, and is advised to supply as much information pertaining to the information required as possible (i.e. dates, any relevant customer or employee numbers etc.) A small fee may be required, but it may not exceed €6.35. The data controller must respond with the relevant information within 40 days.

If no response is made, or any response is unsatisfactory, the individual may make a complaint to the Data Protection Commissioner. The website of the Data Protection Commissioner advises requesting individuals to write once more to the relevant body before making a complaint, particularly if no response has been received, as many instances of non-compliance can be dealt with in that way and it may be more efficient for the person concerned than embarking on formal complaint procedures.

There is no charge for making a complaint to the Data Protection Commissioner. This must be done either in writing or online and correspondence between the individual and the body concerned should be outlined and copies provided.

If the matter concerns a breach of the DPA, the Data Protection Commissioner will attempt to find middle-ground between the parties and see if there is a solution to the problem that both parties will be happy with. If this is not possible, the Commissioner will engage in an in-depth investigation of the matter to see whether the individual's rights have been upheld. The Commissioner may refuse to do so if (s)he thinks that the complaint is frivolous or vexations, in which case the individual will be informed of that decision. The Commissioner may issue an information notice for the purpose of gathering information relevant to the investigation to the body in question. Such notices are appealable to the Circuit Court. Further, the Commissioner may authorise certain officers to carry out the investigation. Under the Acts, investigating officers may be granted certain powers of entry and examination.

If there has been a breach of the Electronic Communications Regulations, the Commissioner may decide to prosecute the matter and the individual concerned may be asked to give evidence.

If the complaint is upheld, the body in question will be required to comply with the decision of the Commissioner. The Commissioner may issue an enforcement notice, non-compliance with which is an offence.

An appeal is available to the Circuit Court against a decision or requirement of the Data Commissioner. Such appeals must be initiated by motion on notice to the Information Commissioner. The Circuit Court Rules provide that such appeals "shall be heard on affidavit evidence only, save where the Court shall otherwise direct."[26]

As noted in the answer to question 1, an appeal to the High Court on a point of law is available from a decision of the Circuit Court.[27] There is also statutory jurisdiction for a judge of the High Court, on hearing an appeal from the Circuit Court, to refer a question of law to the Court of Appeal during the appeal hearing if the trial judge thinks it is appropriate to do so.[28] A decision of the Court of Appeal on such a

[26] Circuit Court Rules Order 60 Rule 5. See www.courts.ie.
[27] Data Protection Act 1988 s.26 as amended.
[28] See Order 86B of the Rules of the Superior Courts as inserted by S.I. no. 485 of 2014,.

question can be appealed to the Supreme Court subject to obtaining leave in the ordinary way. The DPA, (unlike the FOI) does not confer a right of appeal on a question of law beyond that of the High Court.

3. Describe the procedural role of your supreme administrative instance in the agenda of protection of personal data.

The answer to this question is covered in question two, but in summary, the role of the Supreme Court in relation to data protection and freedom of information is in clarifying the law through the various appeals and case stated mechanisms described above. Whereas in some other Member States, there are separate appellate courts for administrative and constitutional matters, the Irish Supreme Court may hear appeals relating to either or both. However, the Court does not generally engage in the determination of factual matters, which remain, for the most part, within the remit of the trial courts. All in all, the Supreme Court acts solely as a final arbitrator of data protection appeals within the Irish courts model. Nonetheless, if a data protection question is referred to it by the Circuit or High Courts, it can also give a definitive ruling on any legal issues of public importance arising out of appeals or referrals from lower courts.

4. Provide for a general overview of historical development of access to information rights in your jurisdiction while focusing on most important legislative and judicial milestones. Also, please try to generally describe the main driving forces behind the development of these rights.

Transparency of public office is a relatively recent development in the history of governance in Ireland. The Freedom of Information legislation, introduced in 1998, has been described as a "milestone in terms of defining the relationship between the administration and the citizen in Ireland."[29] Prior to the introduction of that legislation, the Official Secrets Act 1963 operated to shield information relating to State governance from public view. It is now considerably restricted in its application.

[29] See the Freedom of Information website at http://foi.gov.ie/faqs/faq2/ accessed 3/6/15.

Incremental legislative inroads were made in terms of allowing access to information in the 1980s. The Ombudsman Act 1980 provided for the investigation of government departments and local authorities on behalf of aggrieved citizens. While this did not amount to access to information *per se* it did provide a certain level of scrutiny of state bodies.[30] The National Archives Act 1986 provides that departmental records which are more than 30 years old must be transferred to the National Archives for public inspection, subject to exceptions for records that are required for the work of the department. This resource has been of immense value to historians and journalists, providing materials for illuminating political analysis. Clearly, however, such provisions are inadequate to secure transparency of the workings of contemporary government.

It was not until 1997 that the FOI legislation was passed. This legislation came into being in the aftermath of the Beef Tribunal, which made findings in relation to favourable treatment having been extended to certain operators within the beef industry by ministers and governmental departments.[31] Previous attempts at legislating for freedom of information had been made, though none had succeeded. There was also a campaign for access to government information in the early nineties by a group of journalists, academics and lawyers called the "Let in the Light" campaign, which was concerned about censorship and secrecy in Ireland.[32]

The Act was described as one which would "turn the culture of the Official Secrets Act on its head",[33] with the public interest being the standard against which decisions on the release of information would be made. The term "public interest" was not defined in the Act, and exceptions on the basis of national security and foreign relations were built into the legislation. Further, the legislation provided that cabinet papers would be made available to the public after a period of five years.

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[30] John Dorney, 'A Short History of Freedom of Information in Independent Ireland', < http://www.theirishstory.com/2010/07/25/a-short-history-of-freedom-of-information-in-independent-ireland/#.VYKhlflViko accessed 4/6/15 > accessed 4/6/15.
See also the Irish Statute Book online at
< http://www.irishstatutebook.ie/1980/en/act/pub/0026/print.html > accessed 4/6/15.

[31] See Office of the Information Commissioner, *Freedom of Information The First Decade,* (Dublin, 2008) at p. 9.
[32] Maeve McDonagh, *Freedom of Information Law*,2nd Ed. (Dublin, 2006) at p.38.
[33] *Ibid* at p.10 per Eithne Fitzgerald TD.

In 2003, an amending Act rowed back on the open access provided under the 1997 Act to some extent through the introduction of fees for access to non-personal information. These fees deterred many from availing of FOI as they were described as "prohibitive". Under the same legislation, the time period for which the public was required to wait for access to cabinet papers was doubled. In its report entitled *Freedom of Information the First Decade,* the Office of the Information Commissioner noted that "the amendment of the FOI Act in 2003 represented a step back from the commitment to openness, transparency and accountability which was the key factor in the enactment of the 1997 Act"[34] and that in 2003, the first of the Cabinet documents would, had the FOI not been amended, have become available.

However, as already noted, both the 1997 Act and the 2003 Acts have been repealed and replaced in the FOI (2014), which revised the fee scale again by abolishing the nominal fee, placing a cap on the amount that can be charged, and providing a surplus, below which fees may not be charged. The FOI has broadened the scope of the scheme by extending it to all public bodies (whereas under the 1997 legislation, bodies had to be specifically scheduled in the Act) and to bodies in receipt of significant public funding. Of course, certain limitations still apply, as discussed in the answer to question 1.

5. Give basic subjective observation as to the role and importance of free access to information in the political system of your country. In particular, focus on how the importance of freedom of information is perceived by general public and by non-governmental sector.

Note

In consideration of Ireland's constitutional model, which provides for a tripartite separation of powers, between the Legislature, the Executive and the Judiciary, under which the Legislature carries out the primary law making function, it would be inappropriate for the members of the Judiciary (as the organ of the state responsible

[34] Office of the Information Commissioner, *Freedom of Information The First Decade*, (Dublin, 2008) at p. 13.

for the enforcement, and review of the laws enacted by the Legislature) to give a subjective opinion on the policy issues raised by FOI legislation, which is solely thought to be in the domain of the Legislature (via parliamentary debates and questions etc).

As an alternative, to answer the proposed question we will endeavour, where possible, to give reference to secondary sources, such as published materials provided by FOI interest groups, and the opinions of academics with a specific interest in the area FOI. Please note that this approach will equally apply in answering questions 6 and 8.

Published Sources

Felle and Adshead in their paper '*Democracy and the Right to Know*: *10 Years of Freedom of Information in Ireland',*[35] make a number of observations on the growth and importance of the Irish FOI regime that are worth repeating here.

The authors note that:

"The introduction of the Freedom of Information Act in 1997 was a watershed moment in the development of modern Ireland. It demonstrated the country's commitment to openness and transparency because it introduced for the first time a 'right to know' for citizens, the polar opposite of the centralised and secretive position that had existed previously under the provisions of the *Officials Secrets Act*. The contemporary Irish State is almost unrecognisable in terms of its approach to government from the fledgling Free State of the 1920s…".[36]

"… [i]t is arguable that decision making in bureaucracy has been considerably improved as a result of the introduction"[37] of the FOI Act 1997, and it has also "directly contributed to a more professional civil service".[38]

[35] T. Felle and M. Adshead, '*Democracy and the right to know: 10 years of Freedom of Information in Ireland'*, (2009) Limerick Papers in Politics and Public Administration, No.4, at:
< http://www.ul.ie/ppa/content/files/Felle_democracy.pdf > accessed 11/6/15.
[36] *Ibid* at p.17.
[37] *Ibid* at p.18.
[38] *Ibid* at pp. 17-18.

The Act has also allowed opposition parties, the media and the public to judge the quality of decision making.

In the course of their discussion, Felle and Adshead comment that "clearly, one of the legacies of the Act has been considerable anecdotal evidence of records not being kept by civil servants in government departments and agencies subject to the Act".[39] In building this argument, the authors quote Conor Brady, former editor of the Irish Times, speaking as a panel member of an Expert Focus Group convened by the Oireachtas in 2008 to assess the impact of the FOI 1997 on Irish democracy. Mr. Brady opined: "An awful lot of what would otherwise have been committed to paper simply doesn't get committed to paper now any longer.... As an old reporter my instinct is that an awful lot of the stuff that might have been traced paper wise probably no longer gets committed to paper and probably goes through verbal arrangements".[40]

The authors conclude that, "the *Freedom of Information Act* has had a major impact in allowing much closer scrutiny of government by parliamentarians, since much more detailed information is available through parliamentary use of the Act than was previously the case under parliamentary questioning (PQs) or through what individual Ministers were prepared to release. In that sense, the Act has made government much more accountable to its citizens through the parliament".[41]

Naturally, the FOI has been widely used in the media. Political and public interest blog The Story.ie has used the FOI on several occasions to obtain and make available documents of public interest. They have expressed the view that "the data and documents we obtained made headlines in almost every Irish newspaper, often in many newspapers at the same time…when you see documents like Ireland's application for a bailout, it was this blog that got it".[42] (Bailout refers to Ireland's EU/IMF financial funding of 2008-2013)

It is very common to see FOI requests referred to as sources in journalistic articles.

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[39] *Ibid* at p. 14.
[40] *Ibid.*
[41] *Ibid* at p.19.
[42] See generally < http://thestory.ie/2013/11/08/killing-freedom-of-information-in-ireland/ > accessed 11/6/2015.

Further, the extension of the application of the FOI to prescribed bodies as described above (bodies in receipt of public funding) by Ministerial Order was not provided for until 2014. It remains to be seen what the impact of the extension of the FOI will be.

It bears repeating that this section is a mere synopsis of external opinions.

6. Give subjective general observation as to whether and eventually how free access to information rights are in practice abused or misused by the petitioners.

Please refer to paragraphs 1 and 2 of answer 5 above, before reading this answer.

Under the relevant legislation,[43] both the FOI Commissioner and Data Protection Commissioner are entitled to refuse to investigate a complaint that is determined to be "frivolous or vexatious". Misuses, or abuses of free access rights come under this category**.**

A possible practical example of free access rights being abused by petitioners in Ireland is a case where a petitioner appealed a decision of the Information Commissioner to discontinue reviews in relation to seven separate applications made by the petitioner/appellant under the provisions of the Freedom of Information Acts, 1997 to 2003. The appeals came to a head in a recent High Court hearing.[44]

In summary, the appellant applied to a national university for a placement on a Masters degree course but was ultimately unsuccessful. He appealed the decision of the university. The High Court eventually struck out this appeal. While this litigation was ongoing, the applicant made several FOI petitions to the university's FOI unit, seeking disclosure of personal information relating to successful applicants for the course. The university denied the request, as did the Commissioner, on the grounds

[43] See s.34(9)(a)(i) of the Freedom of Information Acts, 1997 to 2003, and s.10(1)(b)(ii) of the Data Protection Acts 1988 and 2003.
[44] *Kelly v The Information Commissioner* [2014] IEHC 479.

that the requests were vexatious. The petitioner appealed the Commissioner's findings to the High Court.

The High Court upheld the Commissioner's findings, citing an excerpt from the Commissioner's written decision as follows:

> *"I conclude, based on the evidence before me, that you are using FOI tactically in pursuit of your long-standing grievance with UCD. I am satisfied, therefore, that these reviews form part of a pattern of conduct that amounts to an abuse of the FOI process and I find, therefore, that your applications or the applications to which the reviews relate are vexatious. Accordingly, in the exercise of my discretion under section 34(9)(b), I discontinue these reviews pursuant to the provisions of section 34(9)(a)(i) of the FOI Act.*"[45]

In the High Court, O'Malley J. held:

> *"100. In this case, I consider that the respondent did not err either in her assessment of the legal test to be applied or in its application to the facts. In the first instance, she was entitled to take into account the context in which the applications were made - the long-running and unsuccessful pursuit of the appellant's grievances dating from 2002. She then set out, carefully and with specificity, why she had come to the conclusion that the appellant was using the FOI process to further prosecute his grievances and that this constituted an abuse of the FOI process.*
>
> *101. Looking at the actual applications made by the appellant, it is in my view manifest that none of them were properly the subject of FOI requests. The first of the seven is, despite a slight alteration, clearly an effort to get information which the court process (including that of the Court of Justice) had already determined he was not entitled to.*
>
> *102. The remainder of the requests relate to the conduct of litigation.*
>
> *103. If a litigant has a legitimate grievance arising from the manner in which court papers are served, the proper method of dealing with it is, in the first instance, by raising it with the court having seisin of the proceedings. The appellant made no such complaint but rather, made a request under the Act for information as to how the papers were served."*

This judgment demonstrates judicial recognition of the legal role of motivation in the context of FOI applications.

A possible practical example of free access rights being misused in Ireland is the case

[45] *ibid*, at para 69.

where a complainant appealed a decision of the DP Commissioner on the basis of the Commissioner striking out the complaint for being frivolous. The complaint was appealed as far as the High Court.[46] The complaint surrounded a personal data access request made by the complainant to professional accountancy body, Chartered Accountancy Ireland ("CAI"). The complainant had sat an exam with CAI and failed. His subsequent request "specified that in particular he was seeking a copy of his examination script, all personal data relating to his appeal to the Appeals Panel with regard to his failure in that examination to include any personal data in existence concerning that appeal, and any data compiled by the External Examiner".

CAI denied the request on the basis that the information being sought failed to amount to personal data under the DP legislation. The DPC agreed, and formally wrote to the complainant to inform him that his claim would not be investigated further on the grounds that it was frivolous. In the High Court, it was held that there could be no appeal, as the court did not have jurisdiction pursuant to s.26 of the Data Protection Acts to hear an appeal as the Data Commissioner, pursuant to s. 10(1)(b) of the DPA, had declined to investigate the appellant's complaint having formed the view that the complaint was "frivolous or vexatious".

Although the court lacked jurisdiction to hear the appeal, Birmingham J. did provide a useful statement as to how he may have decided the case. In agreeing with the conclusion arrived at by the Data Protection Commissioner, the judge held that *"the CAI had an examination system in place and one might have expected that Mr. Nowak would have availed of that system. If he was unhappy with aspects of the system then there was scope available to him to challenge that system. However, what would have surprised most people was that instead of utilising the examination system to the full, Mr. Nowak sought to invoke the data protection code in order to create a parallel examination code"*,[47] i.e. a misuse of the his free access rights.

It might also be noted that, in very limited circumstances, the courts may make a so-called Isaac Wunder order to prevent multiple petitions or appeals to the courts by a

[46] *Nowak v Data Protection Commissioner* [2012] IEHC 449.
[47] *ibid*, para 18.

particular litigant without the permission of the High Court. This jurisdiction is exercised sparingly.

7. Give a list and brief explanation of security, law enforcement and/or defence institutions that can benefit in your country from the exceptions laid down in Art. 7(e), Art, 8(4) and 8(5) of the Directive 95/46/EC.

Sections 2A and 2B of the Data Protection Act 1988 as amended give effect to Arts. and 8 of the Directive. Section 2A(c) of the 1998 Act as amended provides for "public interest processing", thus giving effect to Art.7(e). Section 2A(c) provides that personal data shall not be processed by the Data Controller unless the safeguards as set out in s.2 of the Act are met in addition to one of the criteria set out under s.2A. Section 2A(c) provides for processing which is necessary:

(i) for the administration of justice,
(ii) for the performance of a function conferred on a person by or under an enactment,
(iii) for the performance of a function of the Government or a Minister of the Government, or
(iv) for the performance of any other function of a public nature performed in the public interest by a person.

In terms of the first listed instance, the administration of justice, this would seem to cover courts and courts officers.[48]

The second listed instance provides for statutory bodies to process data in performance of their statutory functions. Processing of personal data under this section may be considered legitimate where the data is necessary for a state body to make a decision over, for example, social welfare eligibility.[49]

[48] See < www.westlaw.ie > annotated statutes.
[49] See *Ayanoro v HSE* [2009] IEHC 66.

In respect of the exception for the performance of a function of the Government of a Minister of Government under the third listed instance, this will provide a legitimate basis for processing what is within the ministerial powers that are conferred other than by statute, i.e. implied powers.[50] It has been observed that this exemption will be closely monitored by the Commissioner.[51] The Circuit Court recently upheld a decision of the Commissioner in finding that a former Minister for Justice who had disclosed information had no legitimate basis for making his disclosure.[52] This incident occurred on the Prime Time television programme in 2013, when the then Minister for Justice alleged that one of his political opponents had benefited form Garda discretion.

The fourth listed instance, the performance of any other function of a public nature performed in the public interest by a person, has been described as "a very sweeping provision".[53] Examples of the successful invocation of this exception include the release, by the Minister for Education, of a school inspection report, which contained personal information relating to a complainant. This was deemed to be legitimately done in the public interest because it was for the purpose of providing transparency and accountability of the education system.[54]

In case study 1/2005, a biometric time and attendance system installed in a public institution was proportionate to the aim of protection of state assets. The commissioner examined the specific system, the safeguards in place and the reasons for its implementation and found that it did not constitute an unjustified interference with the privacy of the individuals concerned.

This provision has also been invoked to trump confidentiality agreements between a bank and its customers. In *National Irish Bank v RTE,*[55] the Supreme Court dismissed

[50] For example, in *Edobar v Refugee Appeals Tribunal* [2005] IESC 15, where the Supreme Court implied a power to assess the age of an asylum seeker into the Refugee Act 1996.
See Kelleher, *Privacy and Data Protection Law in Ireland* (2nd edn, Bloomsbury 2015) para 9.08.
[51] www.westlaw.ie (n 41).
[52] *Shatter v Data Protection Commissioner.* See also Irishtimes.com (May 2015) at: < http://www.irishtimes.com/news/politics/alan-shatter-to-appeal-data-protection-case-to-high-court-1.2091418>
[53] < www.westlaw.ie >(n 41).
[54] Case study 4/2005. See < www.westlaw.ie > annotated statutes
[55] [1998] 2 IR 465.

the plaintiff's request for an injunction to restrain the defendant's publication of confidential details of alleged tax evasion by its customers. The Court held that a duty and a right of confidentiality between banker and customer did exist, which was injunctable against third parties into whose hands the confidential information may come, and there was a public interest in the maintenance of such confidentiality. Nonetheless, there was also a public interest in "defeating wrongdoing". Therefore, where the publication of the confidential information may be of assistance in defeating wrongdoing, the public interest in publication may outweigh the public interest in maintaining confidentially.

In case study 9/2005, the Commissioner investigated a complaint by a patient that their data had been disclosed to the National Treatment Purchase Fund. The board had been specifically granted the function of collecting and collating such information under the statutory instrument establishing it, and the Commissioner held that this transfer of data was not incompatible with the purpose for which the information had been collected by the hospital.

Under s.2B of the DPA 1988 as amended, additional legitimising criteria are required in the context of processing sensitive personal data, and an extra provision exists under s.2B in the context of processing sensitive personal data for the administration of justice. Sensitive personal data is defined under the Data Protection Act 1988 (as amended) as personal data as to—

(a) the racial or ethnic origin, the political opinions or the religious or philosophical beliefs of the data subject,
(b) whether the data subject is a member of a trade union,
(c) the physical or mental health or condition or sexual life of the data subject,
(d) the commission or alleged commission of any offence by the data subject, or
(e) any proceedings for an offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings.

This definition of sensitive personal data seems to correlate to the information listed under Art. 8(1) of the directive, to which the exemptions under Art. 8(4) and Art. 8(5) relate.

Article 8(4) of the Directive provides that Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority.

Section 2B(1) of the Data Protection Act 1988 (as amended) provides as follows:

> (1) Sensitive personal data shall not be processed by a data controller unless:
>
> (a) sections 2 and 2A (as amended and inserted, respectively, by the *Act of 2003*) are complied with, and
>
> (b) in addition, at least one of the following conditions is met:
>
> …
>
> (xi) the processing is authorised by regulations that are made by the Minister and are made for reasons of substantial public interest…

No such regulations have yet been made.

Similarly, in terms of Article 8(5) of the Directive, s.2B(3) of the Data Protection Act 1988 (as amended) provides that the minister may, by regulation, make provision for the processing of data relating to criminal offences.

At present, no such regulations have been made. Therefore it seems that bodies must avail of other exemptions under the DPA 1988 in order to process such data such as, for example, s.8(b) of the DPA 1988, which provides that the Act's restrictions on the processing of data will not apply where that processing is "…required for the purpose of preventing, detecting or investigating offences, apprehending or prosecuting offenders…"[56] However, that section specifies personal data only, not "sensitive personal data".

[56] Denis Kelleher, *Privacy and Data Protection Law in Ireland*, (West Sussex, 2006) at para. 12.62.

8. Subjectively identify most emerging actual problems that arise from processing of personal data by aforementioned security, law enforcement and/or defence institutions. Whenever appropriate, demonstrate them on particular examples.

Please refer to paragraphs 1 and 2 of answer 5 above, before reading this answer.

In a recent newspaper article, Dr. TJ McIntyre, Chairman of privacy lobby group, Digital Rights Ireland, complained about the Irish system of surveillance, calling for more "robust judicial oversight" to be standard across all areas of surveillance and data disclosure here. In essence, Dr. McIntyre was alluding to the fact that, "courts and governments in the US and the UK were exploring whether their laws could reach into Ireland and force companies (Google, Microsoft and Twitter) to disclose personal data".

Dr. McIntyre states Irish structures are not on par with the UK, suggesting that in addition to the UK Independent Reviewer of Terrorism Legislation and Investigatory Powers, the United Kingdom also boasts the Office of Surveillance Commissioners and the Interception of Communications Commissioner's Office, affording UK privacy authorities better equipped "staff and technical experts, or legal experts" with the knowledge of when it is appropriate to grant surveillance powers. Whereas the Irish system of surveillance oversight is conducted by designated judges, something that Dr. McIntyre contends may be "unsatisfactory". Dr. McIntyre stated: "The reports on the parameters under which interception [or phone taps], and data retention are very short and almost worthless."

Under Irish law the power to intercept phone calls —under the Postal and Telecommunications Acts — is authorised by the Minister for Justice. Under the Criminal Justice (Surveillance) Act 2009, surveillance, including the monitoring, or recording of people, places or things is authorised by a District Court judge. While under the Communications (Data Retention) Act 2011, access to telecoms data is authorised internally within the police.

Neither the reports on phone interception nor surveillance provide details on the scale of usage which is provided by British watchdogs. He further states that Government reports to the EU suggest that between 8,000 and 12,000 requests are made by gárdai every year to internet and phone companies, although Dr. McIntyre said it could be higher. Dr. McIntyre said there was concern at the Garda system for authorising these requests, which is supposed to be done beforehand by a chief superintendent, and stated "[t]he Data Protection Commissioner found that they were rubber stamping, after the request [to the companies] had been made, instead of beforehand". Ultimately, due to the possibility of US and UK governments and courts making requests to Irish companies, he said it is "crucial" for the State here to regulate the area. [57]

In terms of Arts. 8(4) and (5), lack of regulation emerges as the current and most obvious difficulty when it comes to data processing in respect of the above mentioned provisions. Where the minister has not yet drafted regulations in respect of certain exemptions is it impossible to say with any certainty how they will operate.

In respect of Article 7(e), the most obvious issue which arises is the lack of any national legislation in relation to spent convictions. According to the Law Reform Commission, this may be in breach of the requirement under the Data Protection Acts that personal data should be retained for no longer than is necessary for the purpose for which it has been retained.

[57] See generally Irishexaminer.com,'*More robust oversight of surveillance laws is 'crucial', expert warns'*, article of 15 June, 2015, at: <http://www.irishexaminer.com/ireland/more-robust-oversight-of-surveillance-laws-is-crucial-experts-warn-336910.html>