DÁIL ÉIREANN

AN COMHCHOISTE UM AIRGEADAS, CAITEACHAS POIBLÍ AND ATHCHÓIRIÚ

JOINT COMMITTEE ON FINANCE, PUBLIC EXPENDITURE AND REFORM

Dé Céadaoin, 6 Feabhra 2013

Wednesday, 6 February 2013

The Joint Committee met at 9.30 a.m.

MEMBERS PRESENT:

Deputy Richard Boyd Barrett,	Senator Sean D. Barrett,
Deputy Michael Creed,	Senator Michael D'Arcy.
Deputy Timmy Dooley,	
Deputy Sean Fleming,	
Deputy Joe Higgins,	
Deputy Heather Humphreys,	
Deputy Kevin Humphreys,	
Deputy Mary Lou McDonald,	
Deputy Michael McGrath,	
Deputy Peter Mathews,	
Deputy Kieran O'Donnell,	
Deputy Brian Stanley,	
Deputy Billy Timmins,	
Deputy Liam Twomey,	

In attendance: Senator David Cullinane.

DEPUTY CIARÁN LYNCH IN THE CHAIR.

The joint committee met in private session until 10.05 a.m.

Freedom of Information (Amendment) Bill 2012: Discussion

Chairman: We will have a number of sessions over the course of today in our public consultation on the draft heads of the general scheme of the Freedom of Information (Amendment) Bill 2012. This is the first session, which is to conclude at 11.30 a.m. at the latest. I welcome from the National Union of Journalists Mr. Gerry Curran, cathaoirleach of the Irish executive council; Mr. Séamus Dooley, Irish secretary; Mr. Michael Brennan, Dublin branch; Ms Emma O'Kelly, chair of the Dublin broadcasting branch; Mr. Ken Foxe, Dublin branch and the *Mail on Sunday*; and Mr. Colm Ó Mongáin, vice chair and member of the RTE trade union group. Mr. Curran will make some opening remarks, which we will follow with a question and answer session. I remind members, witnesses and those in the public Gallery that all mobile phones must be switched off.

I advise the witnesses that by virtue of section 17(2)(*l*) of the Defamation Act 2009, they are protected by absolute privilege in respect of their evidence to the committee. However, if a witness is directed by the committee to cease giving evidence in regard to a particular matter and he or she continues to do so, that witness is entitled thereafter only to a qualified privilege in respect of his or her evidence. They are directed that only evidence connected with the subject matter of these proceedings is to be given and are asked to respect the parliamentary practice that, where possible, they should not criticise or make charges against any person, persons or entity by name or in such a way as to make him, her or it identifiable. Members are reminded of the long-standing ruling of the Chair to the effect that they should not comment on, criticise or make charges against a person outside the House or an official either by name or in such a way as to make him or her identifiable. I now invite Mr. Curran to make his opening statement.

Mr. Gerry Curran: I thank the Chairman and the committee for this opportunity to share the views of our trade union on the legislation. The delegation represents trade union views and the experience of our members in broadcasting and publishing newspapers. I will give an overview of the freedom of information legislation and Mr. Dooley will go into more detail.

It is the view of the NUJ that for freedom of information to work, every society and public body needs to make a decision to overcome a legacy and ethos of secrecy. We inherited this legacy with a very organised Civil Service from the British authorities on our independence. The "do not tell, do not reveal and obfuscate" ethos is in the DNA of official Ireland. Perhaps it goes back to the playing of hide-and-seek with the body of Richard III, but the idea of telling, openly revealing and being forthright is not one we inherited or created in our society.

A previous review of the legislation by senior officials and the Minister was a little self-serving, to put it bluntly, and it brought us back to many decades prior to the 1997 Act. An example of this is that many bodies do not publish online information they have already released under the freedom of information legislation, and if another journalist or member of the public seeks the same information they are sometimes told to submit a freedom of information request for it, even though the information has already been gathered and is already in the public domain.

We welcome the extension of the list of bodies to be included in the Bill, but we think it

regrettable that commercial semi-State bodies are excluded. We wonder about the definition of environmental issues under the access to information on the environment, AIE, regulations and whether it needs to be examined further. We are slightly concerned about the strong exclusions regarding NAMA and the National Treasury Management Agency, NTMA. They need particular scrutiny, as they literally have what is left of the family silver and the management of our considerable national mortgage in their care. We question whether giving the Minister sole power over future inclusions of public bodies is democratic.

The experience that we will share with the committee is that, despite freedom of information being the law, there is a general stonewalling of journalists' requests through unhelpful explanations of what records are held, delays in responses and appeals, creative interpretation of excuses and exclusions, and costs, particularly to new and freelance journalists.

This is the general overview of our union's position on freedom of information, FOI, and what these amendments may offer. I ask Mr. Dooley to provide a more detailed input.

Mr. Séamus Dooley: The American lawyer and biographer James Huneker once stated: "Lawyers earn their bread in the sweat of their browbeating." It strikes me that, in this environment, politicians and journalists also have this in common. Today is the committee members' turn to question the questioners, particularly the practitioners. Ms O'Kelly, Mr. Brennan, Mr. Foxe and Mr. Ó Mongáin are more regular users of the Act than I am as a full-time official, although I use FOI legislation as a union official.

Our submission deals with the proposed legislation on a head-by-head basis. Rather than going through our written submission, which the committee has read, I will deal with one section in particular and explain our thinking on the matter. We have dealt at length with the issue of fees. Our strong preference is for the abolition of fees. Access to information, personal and public, is a feature of a modern functional democracy. Eithne FitzGerald, in drafting the original legislation, was clear that freedom of information was a right, not a privilege. Over the years, this culture has been reversed.

In the past 24 hours, we have learned - not for the first time - some of the lessons of what can occur when the State and powerful institutions collude in secret under cover of darkness. It is no coincidence that the National Union of Journalists, NUJ, campaign, that led to the first Act was called "Let in the Light". Freedom of information is an ethos. It is not legislation or an administrative mechanism. In this context, the total abolition of fees would be our preferred option.

I am a trade union official, though, and we sometimes deal in compromises, but only sometimes. We realise that, in the current environment, abolition may be a difficult argument to win. If winning is not possible, I suggest that there should be a public interest element that would enable the waiving of fees where the query was demonstrably in the public interest. The reality is that many organisations, on a grace and favour basis, use a common-sense approach, but common sense is a commodity not always guaranteed. Therefore, we need to consider a public interest defence with a possible appeal where an organisation refuses. What do I mean by this? There are people around this table, Mr. Foxe being an example, whose work was clearly in the public interest, but the organisation should not have been required to pay to serve that interest.

The current fee structure, particularly the insistence on up-front payments, is a problem for freelance journalists, small independent organisations and regional newspapers. If the committee needs an example of the value of small media organisations or freelance journalists working

with the power of a media organisation, I will provide one name - Ms Mary Raftery, who did much to highlight the abuse of vulnerable women. Ms Raftery was a freelance journalist who, in making freelance queries over the years, was required to pay for information. Who would have doubted that the information she used in her daily work was in the public interest? We represent people like her throughout the country.

The editors and reporters of regional newspapers with whom I have spoken in the past week admit that the current charging structure and the up-front nature of the payment - this was one of the changes brought about by the "Cheltenham Two" when they introduced the amendment before heading off to the Cheltenham races, leaving a Cabinet colleague to present the Bill despite the work of Deputy Sean Fleming and other Members on the previous committee - act as disincentives. Our members in the regional and national media as well as online journalists are united on one issue, namely, that the current charging structure is a disincentive. Coupled with the ethos, one is buying a pig in a poke. Sometimes, one cannot even find the pig.

Due to the deadline, our submission does not deal with every section of the Bill, but I reiterate Mr. Curran's concerns about the exemptions regarding commercial bodies. For example, we do not believe that Irish Water should be exempt from public scrutiny. The Act makes provision for commercial sensitivity without the imposition of a blanket exclusion. I cannot understand why communications between Irish Water and a regulator cannot be deemed to be in the public interest.

The initial legislation was the result of widespread consultation with stakeholders. The establishment of a users' group was a valuable mechanism for giving stakeholders, including the NUJ and citizens' groups, a forum for feedback. It enabled the promotion of training in the use of FOI, and sometimes training in the need not to use FOI. It gave users a role in monitoring the Act's implementation. The users' group was never abolished. Surreally, it just disappeared. When the Act was amended, we raised the issue - in this room, I believe, under the then chairmanship of Deputy Fleming - of why the groups had not been consulted. The former Deputy Conor Lenihan blamed the group for a failure to be convened. Without access to FOI, I tried to get the minutes of the group. Surreally, even some of those cannot be found.

I ask the committee to give consideration to restoring the group. I hope the committee will raise the matter with the Minister for Public Expenditure and Reform, Deputy Howlin. The group would be a useful way to monitor on an ongoing basis the use of the Act, including its unnecessary usage, and to assist in the development of the ethos to which Mr. Curran referred.

While FOI legislation is useful for journalists, it is not designed for them. Rather, it is designed for all citizens. The mechanisms and procedures involved in the appeal systems mean that it is not the most efficient method of securing public information in a 24-hour media environment. As a trade union official and someone who deals with community groups and is involved in civic society, I am aware of the potential value of FOI as a tool of citizenship, but my comments on charges also apply to those who may be deterred from making requests concerning information about their local communities because of costs.

The proposed changes are welcome despite our stated reservations, but without an ethos of open government that permeates the system of public administration, journalists and citizens will continue to encounter barriers in accessing information that by definition, as they are citizens of a republic, is their property.

We will now take questions from members of the committee. Questions would more use-

fully be directed to the users, but Mr. Curran and I are also available.

Chairman: I thank Mr. Curran and Mr. Dooley. I will outline the context for this meeting. Under the programme of reforming how committees operate, we engage in pre-legislative scrutiny. This meeting is an opportunity to allow groups such as the delegation to make their opinions known on how they believe legislation should progress. At the end of this process, the committee will send a report to the Minister. It will include the delegates' comments and reflect members' opinions. As Chairman, I will not place a value judgment on recommendations in terms of what will be edited in or out - everything will be included when the report goes to the Minister. The submissions to the committee will not only be published on our website, but will also be included in the report to the Minister.

Rather than allowing members to express their detailed opinions on the FOI Act this morning, we have provided an opportunity to hear what the NUJ has to say and to tease out some of its thinking on same, if that is agreeable. Mr. Curran indicated that as the legislation is currently set out, the Minister would determine who would come under the Freedom of Information Act. Does he have a view as to what, other than the Minister, would be a determining authority?

Mr. Gerry Curran: The Oireachtas might be a place of appeal to the Minister's opinion.

Chairman: With regard to Irish Water, the Oireachtas committee dealing with the environment, community and the Gaeltacht carried out a very extensive examination of water provision in Ireland for a number of years, including consideration of the establishment of Irish Water. There were 141 recommendations in the report and the committee recommended that Irish Water should come under the Freedom of Information Act.

Mr. Séamus Dooley: I gave Irish Water as an example and the process would not be exclusive. There is also a union concern with regard to privatisation. With Irish Water and EirGrid, the view permeating the thinking of recent years has been maximising the amount of confidentiality. The legislation as drafted allows for commercial sensitivities. I deal with RTE, although I am not a spokesman, and it is covered by the Freedom of Information Act. The issue of commercial sensitivity has regularly arisen with requests but the legislation is there to deal with it. There is also an appeal mechanism. The exclusions that currently exist concern us.

Chairman: Other members may wish to comment on the issue. Irish Water is currently being established by the National Treasury Management Agency and Bord Gáis Éireann will be a single operating publicly owned company that will not have a competitor in the market. With the likes of the ESB, Bord Gáis, Bus Éireann and Irish Rail, does the witness envisage the same level of freedom of information being applied?

Mr. Séamus Dooley: I believe there should be but some of my colleagues may wish to comment.

Mr. Ken Foxe: To my mind there should be automatic inclusion of all public and State bodies under FOI legislation. As journalists, we are familiar with the exemptions and exceptions in place governing commercial sensitivity, security matters etc. We deal with them every day and they are more than enough to protect semi-State public bodies. Everybody should be automatically included and there should be no governing authority; when a new agency is set up, it should automatically come under freedom of information legislation, with exemptions used to deal with issues concerning commercial sensitivity and so on.

Deputy Sean Fleming: I welcome the witnesses. I will put some observations and ques-

tions to them because we are more interested in their views than they are interested in listening to us. We can express our own views at subsequent meetings and we have many people to meet.

There is a practical issue with regard to fees. It was mentioned in the submission that the Office of the Information Commissioner had fees of approximately €5,000 last year. I am sure the cost of establishing the administration system, programming computers, setting up an accounts, receipts and acknowledgement system, along with an auditing system, was a multiple of the €5,000 which was received. Public bodies at local level may get four requests in a year, with income of less than €100; nevertheless, the cost of processing the requests may have run to several thousand euro. I know some bigger organisations deal with more requests. I am inclined towards the view that the cost of processing the fees in many organisations is higher than the fee income received. Perhaps the witnesses may be correct to reconsider the view of not having fees.

There is an undercurrent in what has been said about fees. By and large, journalists never indicate that there are no fees for personal information. We have heard much about the fees but there was a reduction in requests for personal information when the legislation was introduced some time ago, notwithstanding the fact there was no fee for personal information. The barrage of publicity through the NUJ gave the clear impression that fees existed, which put people off. I ask the witnesses to consider putting the other side of the equation out there, as people have been put off making individual requests.

With the likes of NAMA, the Minister holds the view that commercial State organisations working in competition should not have an arm tied behind their back. An example of such competition would be RTE and TV3, as TV3 is not covered by freedom of information legislation. If there is a State monopoly, as there is with Irish Rail, EirGrid and Irish Water, with no competition issues, is there any question that they should be included? Mr. Foxe seems to have indicated that even organisations in competitive business should be automatically included in the freedom of information umbrella, and exemptions could arise afterwards that deal with commercial sensitivity.

One facet of the legislation has not been addressed in the debate. All Departments are subject to freedom of information legislation but there are exemptions in every Department for a variety of reasons. A request could be made to several Departments but it could be refused because of an exemption. Has the NUJ run into that issue? There are dozens of exemptions.

We can have more transparency but less information. If people believe their thoughts will be placed in the public sphere, they may commit less information to the record. I am somewhat concerned that we could have full transparency but little substantive information. What is the view of the witnesses in that regard? For example, there has been discussion of a banking inquiry taking place through the Oireachtas, and the people most resistant to the idea are public servants. Some former colleagues may not emerge in a good light and they may not want to be exposed when they leave office. Politicians would have no problem speaking in public, as they have always done. The "Sir Humphrey" process is alive and well in that regard, and politicians tend to be more open when officials do not have a hold on them.

Do the witnesses agree that most of the work done in the NAMA name is not carried out by the agency rather by receivers, administrators or individual property owners who sell by private treaty with the consent of NAMA? The beneficial interest would be the taxpayer. If the beneficial interest of the Irish taxpayer is involved, should the likes of receivers, administrators and private treaty sellers of property be included?

There is the question of legal protection for freedom of information requests, which we all know about. There is legal protection by issuing information through the freedom of information process but there may not be the same legal protection if the issue is raised by means of correspondence. Do the witnesses agree that the anomaly should be eliminated?

Chairman: We have much to get through and if there is a litany of questions to be followed by a litany of answers, it will be difficult for journalists to report and the broadcasting unit to cover it. I will accommodate questions going back and forth. Speakers should look for answers to one or two questions and I will facilitate them later if they feel all the questions have not been covered.

Mr. Séamus Dooley: We make reference in our submission to the work of TASC on the assessment of the total cost to the State of freedom of information requests. It is minuscule. There is a cost but we should remember there is a cost to democracy. I regard freedom of information and access to information owned by the citizen as an integral part of being a citizen. It is similar to voting. There are ways to reduce the cost of information, with one being the placement of the information on websites, reducing the necessity for freedom of information requests. Putting more information on websites would reduce the number of freedom of information requests.

Placing basic information - including information relating to Members of these Houses - on a website would have certain effects. The information would be more easily available and as a result, some information would cease to be news. A general presumption in favour of requests was an original assumption. Our members tell us now that the general presumption is that a request will be refused.

On transparency and the issue of people concealing information, the State must issue a directive to indicate that the legislation allows for action to be taken against deliberate obstruction. As Deputy Sean Fleming will recall from our discussions regarding the previous Act, this provision of the Act is not being taken seriously. The offence is not one of deliberate obstruction but of interference with the flow of information or concealment of information. It is an obligation on public servants working under the Freedom of Legislation Act to co-operate with the Act.

There is a suggestion, especially from politicians, that freedom of information legislation has resulted in people being afraid to put decisions down on paper. All of us know the consequences of decisions taken outside office hours in rooms where there is inadequate note-taking. That is a problem.

Some of my colleagues may wish to comment on some of the other points raised. I agree on the points regarding the National Asset Management Agency, NAMA. While there are limited grounds for confidentiality with regard to some of the work by NAMA, the issue of who is engaged by the agency and how decisions are taken on giving work to one person rather than another is a legitimate public interest which does not give rise to a confidentiality issue. If one secures a contract with NAMA, the price one should have to pay is public scrutiny.

Ms O'Kelly has particular experience in dealing with what I would describe as the "sending the fool further" mentality that is evident when someone files a request under freedom of information legislation.

Ms Emma O'Kelly: The presumption should be one of openness. I agree that if a sub-

stantial amount of material was published in the first instance, there would not be any need for freedom of information requests. I will give an example I was discussing before coming to this meeting. Several years ago, I submitted a request to the Department of Education and Skills seeking information on what was being taught in religion class in certain schools in west Dublin. One would expect that it would be simple to find the information I was seeking as it was documentation on the design of the curriculum. However, it took me almost two and a half years to obtain it as my requests were refused at every stage. Interestingly, I was initially informed by the Department that I would need to submit freedom of information requests to the vocational education committees to obtain the information I sought because they were running the schools in question. However, as I knew the VECs were not subject to freedom of information legislation, I wondered if the person who gave me this direction - it may not have been the same person to whom I spoke - also knew that I would not be able to obtain the information by contacting the vocational education committees because legislation had not been passed and the Minister was still the patron. I persisted but the information was refused and refused again on appeal. I took a case to the Ombudsman and eventually received the information solely because I made it known to the Department that I planned to do a story on the fact that I could not get it. At that point, after almost two and a half years of trying, I was given the information.

Exemption seems to be the rule. Seeking information is almost like navigating a maze. One must anticipate the exemptions that will put in place and try to figure out a way around them. We would like this culture to change. Whereas the assumption should be that one will be given the information one seeks, at the moment the opposite is the case.

Mr. Michael Brennan: In regard to fees, the position of the NUJ is that no fees should be applied. We accept, however, that a compromise position may be necessary. The cost of processing freedom of information requests is very high and the time required to process cheques is very long. There is no easy way to pay for a request. A simple, straightforward process should be introduced for payment, perhaps through the Department of Public Expenditure and Reform. While we hope fees will not be applied, if they are applied, payment should be made as easy as possible for journalists and others. A simpler system would also assist the public service as one would not have a freedom of information officer sending out a letter on headed notepaper requesting payment and then sending back an acknowledgement on receipt of the cheque, all of which takes time and is probably a waste of money. Surely in the modern era, we can find a better way of doing this.

In regard to Deputy Sean Fleming's point on receivers, in some ways NAMA is a commissioning body and it has people doing all kinds of work. We hope the Act will cover all the information that flows back to NAMA from the people in question. While I expect the Act will not be extended to receivers, all of the information that flows from them to NAMA should be covered. As Mr. Dooley indicated in respect of the contracts NAMA has in place, it is a vast piece of work for people. We do not have any information other than that gleaned from replies to parliamentary questions tabled by Deputies. These are the prime source of information on NAMA. An extension of the Act is crucial to help journalists and members of the public.

Chairman: I will tease out two of the points made by Mr. Brennan. The possibility of vexatious use of the Act is a genuine concern. Has the NUJ considered the possibility of introducing what could be described as a registered user fee, under which the NUJ, for example, would pay a fee on behalf of member journalists? The union rather than newspapers would then pay the costs of freedom of information requests. Has that idea been considered?

Mr. Séamus Dooley: No, but we would consider the idea of having a registered user fee. It

is a possibility and could be particularly beneficial to freelance journalists.

The issue of vexatious use is something of an urban myth. When the Bill was amended by the former Minister for Finance, Charlie McCreevy, there was only one vexatious user. When we examined the matter in user groups we found that one person was clogging up the system and appropriate action was taken, through the legislation, to deal with him. Provisions are in place to deal with vexatious users. The way to deal with excessive use of freedom of information legislation is to make information available outside the Act and provide regular training for citizens. The NUJ, in co-operation with the Department, used to provide training on the use of the Act, but this has not been provided in recent years.

While I accept Deputy Fleming's point on personal fees, we take that as a given. Therefore, if the debate appears skewed, the old idea that good news is not news does not always resonate with me.

Deputy Kieran O'Donnell: I welcome the delegation. Are there any circumstances in which the Freedom of Information Act should not apply to a public body? Will Mr. Dooley elaborate on how the users' group operated and outline its membership? Does he envisage its role changing?

RTE has experienced freedom of information from both sides of the fence, as it were. Some public bodies are good at operating the administrative as distinct from the legal side of the Freedom of Information Act, while others are bad. What is the NUJ's experience? If RTE receives a freedom of information request, how are issues such as commercial sensitivity addressed? My question is directed at those of the group who work for RTE, as they see the issue from both sides of the fence.

Mr. Séamus Dooley: The Deputy's question would be more appropriately addressed to RTE as an organisation, of which Ms O'Kelly is merely an employee. RTE has two roles, which are almost two sides of the same coin. First, its employees use the Freedom of Information Act to obtain information. However, it is also a commercial organisation and until recently, Mr. Peter Feeney was its freedom of information officer.

Deputy Kieran O'Donnell: I will redirect the question. How do the appeal mechanisms work when dealing with public bodies? I am seeking information on the practical operation of the Act.

Mr. Séamus Dooley: Some of the working journalists, perhaps Mr. Foxe or Mr. Ó Mongáin, may wish to describe their experiences in that regard.

On the issue of the users' group, I recall that two groups were established. One was a business advisory group, which would be useful in terms of dealing with issues of confidentiality. It comprised nominees of IBEC and the Department of Finance and regularly monitored the implementation of the original Act. An informal red light system was used when issues of business sensitivity arose. The group I was a member of, and might still be a member of because I have not been abolished, included representatives-----

Chairman: Perhaps an FOI request could get that information.

Deputy Kieran O'Donnell: Was that a quango?

Mr. Séamus Dooley: No, because we did not get paid. That would have included repre-

sentatives of citizens' information and community groups and through that body we discovered that members were using the Act in an inefficient manner. As a result of that the Regional Newspapers of Ireland and the NUJ jointly organised training and representatives of the Department of Finance information unit came along and provided the training, which was very useful. It is basically an informal advisory group. We only met for three or four years.

Deputy Kieran O'Donnell: When was the last time the group met?

Mr. Séamus Dooley: The year before Charlie McCreevy introduced the amendment.

Deputy Kieran O'Donnell: We are going back quite a long time.

Mr. Séamus Dooley: Absolutely. After that we were refused meetings of the group when we requested them.

Deputy Kieran O'Donnell: I just wanted to get a flavour of it.

Mr. Colm Ó Mongáin: To be honest, I have no interaction with how RTE deals with freedom of information requests. The only way programme makers or journalists intersect with that section is when they are requested by the corporate side of RTE to forward information to it which may have gone into the making of a programme which then would make up the answer to a freedom of information request. In dealing with the body corporate we would go through the same structures as other journalists by requesting spokespeople from RTE through the appropriate press spokespeople. There are two sides of the house in that regard.

In dealing with different public bodies, there can be a difference. We could submit the same freedom of information request to two related public bodies, such as a Government Department and an agency under it, and we could get back two very different bodies of documents with different approaches to the redaction of figures. That could be due to the volume of freedom of information requests into a particular Department given a particular story cycle at a given time. It could, however, be that the particular freedom of information section with a Department or agency takes a more stringent approach due to the volume of requests it receives or the ethos within the body. It definitely varies.

Mr. Ken Foxe: For me this is one of the major issues with the legislation that has not been dealt with, along with cost - the inconsistency and arbitrary nature of decisions. The legislation is being extended to other bodies such as NAMA and An Garda Síochána and that is welcome but many journalists would be fearful, having dealt with those organisations in their day to day work with routine media queries, about how well they would administer the FOI legislation.

This extension of legislation to other bodies gives a perception the current operation of FOI within existing bodies is satisfactory and this is anything but the case. Any journalist who has ever dealt with the Department of Justice and Equality or the Health Service Executive knows this is not the case because deadlines are repeatedly missed, arbitrary decisions are made or information is released up to a year after the original request. I frequently submit the same FOI request to 15 different Departments. People might consider that vexatious - I do not - but perhaps ten will answer in a satisfactory manner and two or three might send me some parliamentary questions that do not answer the specific query and one might tell me the information is voluminous while the other will flatly refuse the request. Am I to appeal every unsatisfactory decision that is made? Is it somehow a victory that this new legislation will make that slightly cheaper?

A very important aspect of the legislation that already exists but that has not been highlighted is oversight of the FOI system so decisions are looked at by another body. This is a better mechanism for appealing and State bodies and organisations that repeatedly fail to deal with FOI queries satisfactorily would be investigated.

Deputy Kieran O'Donnell: Is there any situation where FOI should not apply to a public body?

Mr. Séamus Dooley: There are circumstances within many public bodies where FOI requests are not appropriate. For instance, I would welcome the extension of the legislation to cover VECs but VECs are also employers and at VEC meetings - I am speaking as someone who spent his early career as a journalist attending VEC meetings - staff matters are dealt with along with issues that relate to personal rights and issues that are covered by data protection. Those issues are outside the scope of the Freedom of Information Act and that was used as a means to keep the VECs out for years. That does not mean there cannot be protections for dealing with those issues. There are also issues of the security of the State which are recognised but they are all capable of being dealt with.

I cannot think of an organisation that should not be covered by the freedom of information legislation. The original Act excluded the Office of the President of Ireland out of deference to the office but knowing all of the office holders in my lifetime, there is no reason why freedom of information should not be extended to the President so we would know what invitations he receives. We can understand that meetings of the Council of State would be excluded.

We seem to operate on the basis of "if in doubt, leave it out". My colleague, Daniel McConnell, from the *Sunday Independent* has said that in his experience the ethos is to deter, resist and refuse. That is a fair description. There will be circumstances in many organisations where exclusion is appropriate but it should not be the norm.

Deputy Richard Boyd Barrett: I thank everyone for attending. The witnesses are the experts here so I want to learn from them. I agree there should not be any fees or restrictions on access to information and no disincentives. We must open up the State to full scrutiny by journalists and others. The disadvantages faced by freelance and regional journalists were outlined. I am not defending the fees, which I think should be abolished completely, but the other side of the coin is that if the State is opened up to full and free access to all information, there will be a significant increase in the number of freedom of information requests, which will then place an administrative burden on the State. Is that the case? We will need more people to work on this.

Perhaps the other side of the coin of asking for full and free access is an acceptance or an acknowledgment by the media that are critical of the size of the public service and want it to be culled that if they want this information, more employees are needed to provide it.

Mr. Séamus Dooley: There are two issues there. This is about a culture change. By making information available at the earliest opportunity, particularly using the departmental websites, the making available of such information becomes routine, and therefore no FOI request is needed. I wish the newsrooms were falling down with journalists who would avail of the opportunity to use the new freedom of information legislation but media organisations have decimated many news rooms. We have lost the debate between market share and editorial resources.

I do not anticipate the flood to which the Deputy refers. However, there could be an in-

crease. I am not, as he is aware, a critic of the public service and I do not for one moment believe that the current tendency on the part of some media organisations to attack public servants on a weekly basis or at weekends is good. I do not stand over this. My members only work for the newspapers, they do not own them.

Deputy Richard Boyd Barrett: Will our guests comment on the particular areas where journalists have been prevented from obtaining information and in the context of which it is important to obtain such information in the public interest? I am particularly concerned with regard to commercial sensitivity being used as a catchall mechanism to prevent all sorts of information which I would have thought to be in the public interest - particularly that relating to public private partnerships, semi-State bodies and matters involving the State's finances and the use of public money - from being released. Will our guests provide some examples in respect of this matter and comment in greater detail on it?

I did not catch the reference to environmental matters at the very beginning of the presentation.

Mr. Gerry Curran: The reference was to the EIA and the separate environmental code which can be applied. The Information Commissioner is responsible for both. What I stated is that the definition of record in the section of the proposed Bill which deals with the environment is much looser than that contained in the Freedom of Information Act. That is a matter to which the committee could give consideration in its deliberations on the legislation proper. A particular journalist will be addressing the committee on that specific matter later.

Deputy Richard Boyd Barrett: Are our guests in a position to provide examples of where commercial sensitivity is used to prevent the disclosure of information, particularly in the context of semi-State bodies?

Mr. Ken Foxe: Journalists who deal with freedom of information a great deal tend to tailor their requests in the sense that they begin to target the State bodies they believe will co-operate with them and from which they are likely to obtain information that is worthwhile. The current appeals process involves the original FOI request, which costs €15 to submit. An internal review costs €75 and this basically involves asking the same organisation - though not the same individual - which made the decision, in the first instance, to adjudicate on whether the information should be released. After that, it costs €150 to take a case to the Information Commissioner. Aside from this overall cost of €240, it can take six or seven months - sometimes longer - to complete the process. To me, that becomes the impediment in itself. One does not, therefore, pursue leads which might perhaps be blocked. For example, one does not pursue issues involving Irish Water or certain types of decisions in respect of which one knows requests will be refused on grounds of commercial confidentiality. When I make FOI requests, I frequently have in mind in advance the issues on which they will be refused and I make the decision myself as to whether to proceed. A lot of journalists do that, particularly in light of the fees issue and the cost involved.

Deputy Richard Boyd Barrett: I take the point on fees and I completely agree that we should get rid of them. However, I am referring to exemptions and how they are used. I would like our guests to provide some examples. Ms O'Kelly has already provided one such example which is shocking. Will our guests elaborate on how exemptions are used?

Ms Emma O'Kelly: In the context of pretty much any matter in respect of which I feel I need to submit an FOI request, I will instinctively anticipate whether there is going to be a

block. Any other information I require I will obtain by picking up the phone and asking someone to provide it. If I make a matter such a priority that I feel I need to submit an FOI request, I will always anticipate that blocks will be put in my way and that the exemptions will be used. That is the first point. The only answer I can give is that in respect of pretty much anything I think I need to submit an FOI requests, I will be obliged to navigate a series of blocks that will be placed in my way. The latter will either be exemptions or they will take the form of my being told that the particular entity does not have responsibility and that it lies elsewhere. That is the furthest I can go on this matter.

The example of Irish Water is very interesting. The reason we are on alert about this is because - as with other matters - it relates to an area in respect of which journalists will want to ask difficult questions. Another example in this regard is NAMA but that is not my area. In respect of Irish Water, however, as a journalist one would immediately hear alarm bells, come to the conclusion that this is a very interesting development and seek to ask questions about it. This is because water is such a hot topic. Countries have privatised their water systems and the question arises as to whether there are plans to do something similar here. These are the type of questions which journalists would start-----

Chairman: Under the FOI legislation these entities would be seen to be publicly owned.

Ms Emma O'Kelly: These are matters about which journalists would be curious and they would want, for example, to get under the skin of a body such as Irish Water. That is why an area such as this should definitely be included.

Mr. Michael Brennan: I have three brief examples for Deputy Boyd Barrett. The deliberative process is used all the time in respect of journalists. Effectively, if the Government is about to make a decision on something, journalists will be informed that they cannot have certain information. It is very welcome that the new legislation will loosen matters up and return us to the position which obtained under the original Act. Hopefully, matters will return to the way they were in the past. What one is doing is seeking is an insight into particular decisions and why they were made and, in effect, there has been a major clampdown in this regard.

The second point relates to unpublished reports. As Mr. Foxe stated, the Department of Justice and Equality often does not publish all of its reports. One could request a report which has been lying on the shelf for a year or two and one might still be refused. There is quite a secretive attitude within the Department of Justice and Equality in respect of many matters.

If one wants to discover what is happening with the Vatican Embassy and whether there is a chance of it reopening, one's requests in this regard will be blocked for reasons of diplomatic immunity. I would be great to see some relaxation in this area but it is probably unlikely to happen. Another example relates to compensation cases. If one seeks details from a State agency as to why someone was paid €90,000 or €100,000 in compensation by the Department of Education and Skills in respect of an accident in a school, one will usually receive minimal information on the grounds that such information is personal in nature. Again, we would argue that there is a better balance to be struck. One does not want the name and address of the person involved all over the newspapers but one certainly would like an explanation of why the settlement was that high and whether there are any lessons to be learned from it.

Deputy Peter Mathews: I thank our guests for coming before us. Many of the questions which come to mind have already been asked.

Commercial sensitivity is used as a shield in respect of information which is relevant and which should be explored. For example, the banking inquiries that have taken place to date were backstopped at the date of the announcement of the guarantee at the end of September 2008. The fog which has fallen into place since then constitutes a type of FOI shield. For example, FOI requests cannot be submitted in respect of NAMA, the NTMA or certain meetings with the ECB and the EU. Pertinent questions relating to landmark points, and pivotal decisions and actions taken, along the route from September 2008 to the present cannot be asked. For example, the final tranche of senior secured debt within in the IBRC was literally redeemed on the day on which the guarantee expired, namely, 30 September. That was the same day on which those in the banks had begun to admit the losses that had been made. The figure in this regard was not the final one. When I made attempts over a period of three weeks to obtain information with regard to who was approving what and why there was no public debate in respect of the redemption of these bonds, the telephones at the Central Bank, the regulator and the IBRC went dead. That was not good enough because the payment involved amounted to €7.9 billion and it was made with exceptional liquidity assistance. Again, this was only made legal and allowable through the creation of a promissory note. The latter was something which had never previously been done in the history of the EU or the eurozone. All the information about the decisions and who was applying what pressure to do these things is still unknown. That is not good enough. Whatever needs to be done in terms of removing commercial sensitivity for the purpose of getting transparency on these heavyweight decisions must be done.

The scrutiny-as-you-approach as matters unfold and as interviews take place was mentioned. This is a new culture and a new outlook on getting information out and on examining why the questions are being asked. We can remember the reaction of Klaus Masuch at the third troika review in Government Buildings when Vincent Browne asked a question like a dart to the bullseye. Klaus Masuch knew it was a radioactive question and he ducked it. He was protected then by the person in the Department of Finance who wanted to steer the conversation on to less dangerous terrain but that is not good enough. We know that after the interview takes place the chance of getting to the truth of what discussions had taken place leading to decisions will be obfuscated.

Mr. Colm Ó Mongáin: The best argument for including Irish Water in the legislation is probably what happened in the case of Northern Ireland Water and the debacle around it. Questions were raised in the recent past there that generated a good deal of public interest and that is reason enough to include, for transparency purposes, Irish Water in the freedom of information legislation.

On the question about barriers to release of freedom of information requests, in the recent past there was an example of NAMA being outside the scope of being used as a reason to block information being released to a Government Department that had interacted with NAMA. In fairness to a civil servant within the said Department, they corrected the people involved and said that this information is not covered by NAMA and that it must be released. I think it was the subject of a parliamentary question but this all transpired under a freedom of information request as well.

Deputy Fleming touched on another point. In information released under freedom of information requests one will see references that suggest a good deal of business takes place by telephone, reference to that which has taken place by phone and, in some cases, pulling and dragging over a marked reluctance to commit things specifically to writing. We are living in the midst of the post Freedom of Information Act culture but there is little enough to do apart from

emphasise under freedom of information legislation that post-its count as documents.

Deputy Peter Mathews: I remember on 10 October 2009, following the 16 September 2009 presentation of the NAMA project with the figures, the combination of Ollie Rehn, President Barroso, Joaquín Almunia and Professor Patrick Honohan said it was their pressing wish that the Irish Government would see the imperative to get the NAMA legislation in place as fast as possible. If that is not a strong army I do not know what is, yet how that level of pressure came to bear and pass was never discussed. It is those sorts of things that I am concerned about. They are the areas to focus on rather than getting lesser things that might make a personal story into the cross-hairs.

Mr. Ken Foxe: Deputy Mathews is right and unfortunately the processes he raised regarding when NAMA was included in the legislation and all the documents in that respect will remain exempt on either confidentiality grounds, or on the basis of there being ongoing negotiations and so on politicians often mention, namely, the fact that freedom of information legislation is frequently used to target politicians' expenses, their overseas travel and so on. The reason for that is that is the type of material that is easily obtainable under such legislation. None of the letters, documents and negotiations regarding the troika, the bank guarantee and so on is available.

Deputy Peter Mathews: It still remains the unknown unknown and that is all wrong because we cannot take control of our situation unless we know what has happened and how we got there.

On the question of commercial sensitivity, in the area of the health and safety for the population there are no holds barred. The freedom of information process can dig as deep and go wherever it wishes, as can the inquiries, but the establishment seems to be able to say "Shutters down, commercial sensitivity". That is absurd.

Chairman: Before I bring in Deputy Timmins and revert to Deputy Fleming, I want to expand on a few points that have emerged. One of the difficulties we as parliamentarians have is that when we table parliamentary questions we get very much the same responses as the witnesses would get on foot of freedom of information requests.

Mr. Gerry Curran: However, the members do not get charged.

Chairman: If effort is taxing I suppose we do. It is a source of shared frustration. In deliberating on what is the difference between a parliamentary question and a freedom of information request, I would say it is none other than that the former would be on the record of the House. One of the difficulties we as parliamentarians have is when one tables a question on a matter such as the National Transport Authority which extends beyond the immediate remit of the Minister concerned, the Minister for Transport, Tourism and Sport, one will receive a reply to the effect that this is a matter for such an agency.

It is not appropriate to make reference to the officials but, to take the approach of Sir Humphrey, I have heard the mental reservation response been used to such requests. Whenever I hear that type of response it reminds me of Peter Sellers in the sketch "Does your dog bite" where he said, "No, my dog does not bite". Eventually the man walked up to the counter and dog bit him and he said, "I thought you said your dog does not bite" to which he replied, "That is not my dog". The mental reservation response is different from deliberate obfuscation, deliberate hiding or deliberately removing files or destroying them knowing that a request for

the information will be submitted. If such practices were to be found out, there are sanctions and penalties to be applied. Would the witnesses have ideas regarding the mental reservation response which is a response we would get to information sought in parliamentary questions? I refer to where the questioner would know the intent of the question and even though it does not fall specifically within the remit, they would deliberately avoid giving a response to it. Would the witnesses have a suggestion on protocols in that regard?

Mr. Séamus Dooley: When the original Bill was going through the House in our discussions on its implementation stage, and there was very extensive consultation on it, the Minister of the day was clear that the onus was on the public servant to assist the requester and not take the approach, as a Minister said in the past, "We will give you the right answer if you ask the right question". If one submits a question, the public servant should not say that the person has sent in the wrong question or that the question should be referred somewhere else, but there is a system in place whereby if a question goes to the Department of Communications, Energy and National Resources and it should have gone to another Department, that request is forwarded. In other words, this goes back to a culture and the onus here is that the freedom of information request needs to be seen as something that one facilitates rather than obstructs. An army of public servants on a daily basis deal efficiently with freedom of information requests and they do exactly what I described. There are equally many civil servants who will advise one that they do not need to submit a freedom of information request. There is a cost attaching to the notion of sending people back and forth.

Chairman: The next point I want to raise is the cost involved. I do not know if Mr. Dooley read the transcript of what the Minister, Deputy Howlin, said when he was before the committee. It is quite long and I will read one paragraph out of it. The Minister was responding to a series of questions and to one specifically from Deputy Fleming. He said:

> My officials will take note of everything said today. On fees, the bulk of applications are for personal information in respect of which no fees accrue. Some 70% of all applications fall into that category. As such, only 30% of freedom of information requests accrue a fee. I will have my officials check the fees' value and so on. In 2011, the totality of fees divided by the number of actual FOI requests which were non-personal generated an average charge of €23. The actual cost - these are not absolute figures [the Minister has to come back with more defined figures on this if he can] - of providing that information was €640 per request. As such, the fee charged covers only 4% of the cost of providing the information.

To return to an earlier point I made regarding a registered user fee, we all accept the validity of an open society where functions in the State can be questioned in detail.

It is also a fact that the media avail of freedom of information requests because they are in a competitive economic environment. There is a business model, so the *Irish Independent* needs to get one up on the *Irish Daily Mail* and so forth. These freedom of information requests, therefore, are actually in a commercial arena and it is not just about seeking information. As Mr. Dooley said earlier, journalists do not own newspapers, but they are privately owned and must make a profit for their shareholders. Freedom of information requests are often a vehicle by which newspapers make money. Is there, at some level, a justification for charging the media for FOI requests?

Mr. Séamus Dooley: There are a few legs to that matter. First of all, I am attracted to the idea of a registered user, but one is talking about less than 30% of the overall use.

Chairman: That is correct.

Mr. Séamus Dooley: There would be an administrative burden attached, as well as the cost of administering a registered user. The current system of charging is grossly inefficient and therefore I would query the cost benefit of that system.

Chairman: Do you acknowledge the commercial nature of FOI requests?

Mr. Séamus Dooley: I acknowledge the commercial nature of them from media organisations.

Chairman: Yes.

Mr. Séamus Dooley: Freelance journalists are not attached to any one organisation.

Chairman: But they are deriving an income from that request of a newspaper.

Mr. Séamus Dooley: They are deriving a very poor income and in doing so are serving the public interest, which is why I am advocating that there would be a public interest test. Not all media have a commercial agenda, of course. RTE is not allowed to make a profit. There is no shame in making money; I just wish our members had a greater share of it. However, the reality is that there is currently a financial crisis within the media. Many organisations are put to the pin of their collar to survive. It is hard to separate the dancer from the dance. It is hard to say that one can charge them because they are making money, but the fact is that the imperative to make money comes from the accountants. The latter are the same people who will be querying the editorial bill and saying "Did you really have to make that freedom of information request? Why did we spend money on a series of requests when we got no return because you didn't get the information?". That balance has to be struck, therefore. My colleagues may wish to come in on this as well.

Mr. Colm Ó Mongáin: Politicians have increasingly started to put in freedom of information requests precisely because of that issue, which was raised both by the Chairman and Mr. Ken Foxe. When one makes an initial inquiry, the response one gets from the established press liaison person may be unsatisfactory, so one follows that up with a freedom of information request. I am sure it is similar for TDs and Senators who pursue the same course of action. In that respect, it is being done in the public interest. The dissemination of information is also in the public interest. The media is commercial but it just happens to be in the business of information. It is a logical knock-on that some benefit is derived from it. However, as regards some of the information that Deputy Mathews was talking about - including the minutiae and a forensic building of the picture that might be needed - there is no splash as a result of that. Ironically, that is the kind of public interest information that is hard to get at and which makes the least front-page noise. At the same time, however, it incrementally builds a picture of public understanding. It would be a pity if people were to be disincentivised from going down that road, and building that kind of public information picture, by fees being charged.

Chairman: This leads me to my final question, before bringing in Deputy Timmins. As you say, freedom of information requests - particularly in the print media - can lead to a substantive story being developed over a period of time, and then maybe a two-page spread from what has been compiled through a series of requests. Is there a difference in terms of the various media - be it television, radio or print - as to how freedom of information responses are made? If one is in the daily news cycle, do freedom of information requests operate differently? Is there a different sort of need in terms of the speed of the information coming out? Different media may

have different needs with regard to FOI requests.

Mr. Colm Ó Mongáin: It is hard to know because I do not work in both. I only have the experience of how quickly my own FOI requests are processed. Other people may have worked differently. Our late colleague, Mary Raftery, would have worked in different media. Somebody who works like that might be in a better position to answer that question.

Mr. Séamus Dooley: One of the problems about FOI requests is that, by definition, once one makes a decision to file an FOI request one is resigning oneself to the long haul and, therefore, frequently it is not suitable for broadcasting. The reality is that it does take a long time. Having listened to Deputy Mathews, one of the consequences of waiving charges and greater flexibility, is that the onus would be on media organisations to devote more time to editorial resources. I would say that, would I not? The fact is, however, that if one has more information one also needs journalists to analyse it. Publishing it because one has it is not quality journalism. The users we have here are people who have got information which they have analysed and presented in context. That takes a great deal of time. To be clear, freedom of information is not some sort of journalistic fetish. It is about information being put in the public domain so that citizens can better understand the decisions which influence the world in which they live.

Deputy Peter Mathews: It is about expertise.

Mr. Séamus Dooley: Exactly.

Deputy Billy Timmins: I am a strong advocate of freedom of information. I spent a long time in opposition tabling parliamentary questions, but the amount of information one gets is minimal. It is important in a country which, historically, has been a place of strokes. Having said that, I am conscious of the fact that one man's stroke can be another man's doing good for the people he represents. In the main, there seems to be a strong suspicion by journalists of the establishment - for want of a better word - in their dealings with it.

To play devil's advocate, I will take up the point mentioned by Mr. Dooley. Perhaps one of the reasons that bodies or Departments are slow to give out information is not about providing information *per se*, but because they are concerned about the manner in which that information will be presented. Would the witnesses have any view on that? It might be outside the remit of an individual journalist who puts in an FOI request but, speaking from my own experience, when I see FOI material that comes in with regard to politicians, I would like to think that I do not do any wrong. However, when I see a request coming in, one may ask how will this be presented and how will it impact upon me. Invariably, when a request comes in and is presented in the newspaper, we see a follow-up the next day.

Chairman: Can we get to the questions because this particular module is concluding at 11.30 a.m.?

Deputy Billy Timmins: I have only been speaking for about a minute.

Chairman: I can allow the Deputy to speak.

Deputy Billy Timmins: I have questions coming, Chairman.

Chairman: I will push you towards questions.

Deputy Billy Timmins: Invariably, when I see an e-mail from Mark Mulqueen, I may write to the newspaper to correct the interpretation that has been given by the presentation of the in-

formation, but it never appears. Do the witnesses have a view on that?

Mr. Colm Ó Mongáin: The opportunity is there now, more than ever, when documents can be published online so that a Deputy can point to the raw information and say that many interpretations can be derived from this. The best example I can think of does not relate to the Freedom of Information Act, but what the *Boston Globe* did when it uncovered a mass of information as to how the Boston archdiocese had dealt with child abuse claims. There simply were not enough journalistic resources in the *Boston Globe* to deal with it in its totality, so the information was put up online by the *Boston Globe*. People who had been affected by it were able to go through that and judge, through the prism of their own personal circumstances, how the archdiocese of Boston had acted. In a way, therefore, it is nearly in a Deputy's interest to get as much of the raw information, and its context, out. Therefore, when a credible explanation is presented in the public domain one can at least know about, or can confidently point to, easily accessible sources that contradict the misinterpretation, as one would see it, of that information in the public domain.

Mr. Séamus Dooley: Under the original Act - and it remains so - in dealing with a freedom of information request it is not legal to consider the use to which the information can be put. In deciding whether to release information, under the law, one has to block out what use can be made of that information.

Chairman: Or its interpretation.

Mr. Séamus Dooley: I understand the political instinct for survival and self-preservation, but the reality is that that is not an entitlement. As someone whose own salary and expenses are in the public domain by virtue of union policy, my instinct is to say that if everything was put on a website people would eventually get bored. One of the members' colleagues, who also happened to be a journalistic colleague of mine in the *Sunday Independent*, tormented me for a long time in his previous life about salary and expenses. The way to deal with that was to state they are on the website and go look at them, and he was so bored, nothing appeared. Frequently, information placed in the public domain on a systematic basis means that the novelty wears off.

Mr. Ken Foxe: Deputy Timmins struck at the heart of the purpose of freedom of information legislation. It is about persons in authority in public bodies and State bodies thinking twice before they make a decision. It is about them wondering whether this is a good use of public money, whether this is a correct decision or whether this will be considered stroke politics. What is frequently lost in the discussion of the cost of FOI is the cost benefit of FOI. What about all of the money that has been saved by Irish newspapers on behalf of taxpayers through the major reforms of the expenses system and through the disclosures of what was going on at the State training agency, FÁS? All of this creates an environment in which public bodies, public servants and politicians feel like every decision they make is subject to scrutiny and they will no longer get away with something.

Deputy Kevin Humphreys: I apologise if the following matter was dealt with earlier. I had to attend the Select Sub-Committee on the Environment, Community and Local Government for a meeting on an important Bill.

In recent months I came across a lead story in which stated that the information which followed was discovered by a news agency through freedom of information. As it happened, I was nearly sure I had read that on the website, which I did, but it gave the article gravitas as if the matter was being hidden and was discovered by freedom of information.

Turning the fees on its head, what would be the witnesses' views of imposing a large fee on FOI applications for information that is already freely available on websites? Many Departments provide a great deal of information. To be honest, I myself discovered it. I have asked parliamentary questions and found that if I had looked at the website, the information was there.

Ms Emma O'Kelly: In my experience, one is told in the FOI response one does not get anything in the public domain that comes into the FOI request. For example, if one looks for all documents related to X and if there happen to be documents in the public domain, one will get a list. Item 75 on the list might be the report concerned but if it is in the public domain, one does not get it.

Chairman: Does one get a list or a link?

Ms Emma O'Kelly: One gets a list.

Chairman: We get a link in parliamentary questions.

Ms Emma O'Kelly: Maybe one is able to get links as well.

Chairman: The link is worse.

Mr. Ken Foxe: It is grounds for refusal under the legislation. If the documents are in the public domain, the FOI request is refused.

Deputy Kevin Humphreys: There is an issue in researching a matter.

Ms Emma O'Kelly: That is the point I wanted to make. On the general issue of fees, even a small fee goes against the spirit of the legislation which should be for openness and transparency. It is not a problem for me, particularly because I work in an organisation, but for freelancers it is a real barrier to the excellent journalism that we should be about promoting.

Deputy Kevin Humphreys: I take Ms O'Kelly's point about the user group. I have strong views on where the State has a monopoly. Irish Water and the grid, for example, should be covered by freedom of information.

On why the delegation is before the committee, they refer in their own submission to the public interest. Often I have a question over the public interest. Unfortunately, the group that is here is probably not one of those to whom I should be talking. Those in public life do not necessarily put their families, their wives and children, into the media. I refer to double standards. I am merely asking for their viewpoint on this. Are wives, children and employees fair game in the context of the public interest?

Mr. Séamus Dooley: Deputy Kevin Humphreys has strayed way outside the Freedom of Information (Amendment) Act.

Deputy Kevin Humphreys: I ask the witnesses this question while they are here.

Chairman: At 11.25 a.m., I will not accept the question.

Mr. Séamus Dooley: On the wider issue of the definition of public interest, I can only paraphrase Louis Armstrong's definition of jazz, which was that if you have to ask what it is you will never understand.

Deputy Brian Stanley: I was not here earlier either due to attendance at another meeting.

I welcome the delegation. I would like to see the maximum amount of information being made available. The press should have it. The limitations that were put on the Freedom of Information Act 1997 under previous Governments were a retrograde step.

Would the panel agree that there is a responsibility on the press that when FOI information naming individuals is published, the individuals should be given the opportunity to respond? In general some of press provide such an opportunity, but some do not. I have seen bad examples where information was released by a newspaper and, regardless of who it was about, their political persuasion or allegiance, there was no opportunity to respond. In fact, I saw a case in the past week which does not affect me but where there was no opportunity given by the publication to the persons concerned to even answer. Would they agree that, regardless of who are the owners of their newspapers or stations, they, as journalists, have a responsibility to allow people such an opportunity to at least present their side of the story? They are starting from the perspective of the public interest. The public interest has been mentioned on several occasions since I came in. It is in the public interest that both sides should get equal coverage.

Mr. Colm Ó Mongáin: The freedom of information process is about access to the information. How that information is used is the practice of journalism and what Deputy Stanley touched on is, week one, day one, basic journalism. One should verify the story, give the other person the right of reply and do one's level best to either get him or her to quote on the record or to forward a statement.

Deputy Brian Stanley: I can show Mr. Ó Mongáin an example.

Mr. Colm Ó Mongáin: That is what journalism is supposed to be about, where one brings about a synthesis of the information with as many points of view as one can get one's hands on but tries to ensure that everybody has been given ample opportunity to reply, either in a statement or, in the case of broadcasting, in their presence. That is what the job is supposed to be about.

Mr. Michael Brennan: I support what Mr. Ó Mongáin's point that, effectively, it is basic journalism practice, rule 101. Also, one may do oneself a disservice because sometimes what is in the FOI document is not quite what one thinks it is and unless one goes and chases up the person, the Department or whoever, one may get into a great deal of difficulty. It is basic good practice. People have a right of reply and often it can change the story to what the journalist thought it was in the first place.

Deputy Sean Fleming: There is an aspect on which we did not touch and I would like the witnesses' opinion on it. Would they outline the practice in other countries, if they know it, or have they a view on it?

This is what I would call the broader societal impact of freedom of information. The conversation on this issue in which we have been involved so far has been dealing with public bodies. The only reason we are dealing with public bodies is the Government runs the country, but such bodies are funded by the taxpayer. If the taxpayer pays for an organisation, there should be public accountability and information. Government activities are only a fraction of public life. I refer to broader society. Many organisations have a much greater impact on the public than have some public bodies. I seek their view on how we should proceed on freedom of information on private companies, whether it be the food sector, banking, financial and, especially, the private media, whether print or electronic. For instance, there is not a house in Ireland that has not got mobile phones, a landline and television. The major private companies have a greater

impact on daily life than have some Departments and quangos. Church, sporting and cultural organisations have a major impact. Citizens' right to information on how major organisations in the country affect their lives is as important. All such organisations are excluded merely because the taxpayer does not fund them. Now that I am listening to this debate, I realise it is a very narrow one. I should be entitled to information about how, for instance, the GAA and the church run their business if I think it is relevant, or how Vodafone decides not to provide a signal somewhere, not to waste money or to put it somewhere else. Such issues are as important to citizens' daily lives as whether the Department of Agriculture, Food and the Marine issued a veterinary inspection to somebody or whatever the case may be. Has Mr. Dooley a view on that issue? I believe we are only scratching the surface in terms of information that affects peoples' daily lives.

Mr. Séamus Dooley: One can take it for granted that any organisation representing journalists is going to favour maximum access to information and therefore we would believe in as much openness as possible, while taking into account all the other consequent issues regarding respect for the Data Protection Act and for privacy rights. Inevitably, the road we are going down would also require a system of registration and regulation of organisations. Certainly with regard to private media companies, I would be delighted if they were open to full scrutiny.

Chairman: To take that issue further, applications that one downloads onto one's mobile phone can give the owners of those applications incredibly detailed information about one as a user. They can identify one's location, access one's e-mails, get into one's contact list and so forth. While that is a separate issue from the freedom of information debate, it is a matter of concern in terms of data protection.

Mr. Séamus Dooley: It is a data protection issue. The Minister for Justice and Equality has frequently flown kites about introducing privacy legislation but he has referred only to media privacy. The issue to which the Chairman and Deputy Fleming are referring is definitely an area that needs to be addressed. The debate on privacy, which is outside the remit of this committee, has had a very narrow focus to date. We would certainly agree that the issue identified is of great concern.

Chairman: We must conclude now. I thank Mr. Foxe, Mr. Ó Mongáin, Mr. Curran, Mr. Dooley, Ms O'Kelly and Mr. Brennan for coming before the committee this morning. As I said at the outset, this is part of a process that is feeding itself into the pre-scrutiny of the freedom of information legislation. I would encourage the witnesses to read the transcripts of the other proceedings in this module. The Ombudsman and Information Commissioner, Ms Emily O'Reilly will be appearing before us this afternoon and I am sure she will have things to say that would be of interest to them, for example. We would be open to receiving a submission on the submissions, once the witnesses have reviewed what has been said. If there are any other matters that the witnesses would like to raise during this process, they are welcome to submit them to the committee.

Mr. Séamus Dooley: I thank members of the committee for their attention. I also wish to thank the staff of the committee, whose assistance in a very narrow timeframe was very much appreciated.

Chairman: That has been recognised. Thanks again.

Mr. Ó Mongáin: I apologise for my late arrival. I would not like it if the Chairman did it to me at 1 p.m. on a Sunday, so once again, my apologies.

Chairman: I may be ducking Mr. Ó Mongáin completely.

Sitting suspended at 11.22 a.m. and resumed at 11.24 a.m.

Chairman: We are now in public session again. I welcome Mr. Gavin Sheridan of the website, *thestory.ie*. Mr. Sheridan will make some opening remarks which will be followed by a question and answer session. Once again I remind members, witnesses and those in the Public Gallery that all mobile phones must be switched off. I advise the witness that by virtue of section 17(2)(*l*) of the Defamation Act 2009, witnesses are protected by absolute privilege in respect of their evidence to this committee. However, if witnesses are directed by the committee to cease giving evidence on a particular matter and they continue to do so, they are entitled thereafter to only a qualified privilege in respect of that evidence. Witnesses are directed that only evidence connected with the subject matter of these proceedings is to be given and they are asked to respect the parliamentary practice to the effect that, where possible, they should not criticise or make charges against any person, persons or entity by name or in such a way as to make him, her or it identifiable. Members are reminded of the long-standing ruling of the Chair to the effect that they should not comment on, criticise or make charges against a person outside the House or any official, by name or in such a way as to make him or her identifiable.

I thank Mr. Sheridan for coming before the committee to assist us in our deliberations and I now invite him to make his opening remarks.

Mr. Gavin Sheridan: I thank the Chairman and members of the committee for their invitation to make a submission. My perspective would be similar to that of the previous witnesses from the National Union of Journalists. I work as a journalist and also as a transparency advocate. I will give members some background information on the website I am representing here today.

In 2009 myself and a friend, Mr. Mark Coughlan, set up the *thestory.ie* website with a view to systemising the approach to accessing information. Our idea was that we would begin submitting FOI requests at a more systematic level than was the case previously. We decided to approach it from a getting information point of view rather than a getting stories point of view. We decided to systemise the approach to FOI and to, for example, ask the same question of multiple authorities and try to obtain better information. In the first year we focused very much on obtaining data as opposed to documents. In the first instance, we were focused on getting expenses data because at the time, the scandal about former Deputy John O'Donoghue was unfolding and Mr. Ken Foxe of *thestory.ie* was involved with that. We were interested, not necessarily in salaciousness or in getting stories but rather in the idea that public authorities should actually be publishing a lot of this information proactively. We felt that if we could get data efficiently and then put that information into the public domain, perhaps more people would see what is going on within those authorities. When I say people, I mean the general public as well as those working in the public authorities.

Within the first few weeks of setting up the website, the public came to us and asked what they could do to help and obviously the fees are the biggest issue. We have submitted more than 140 FOI requests in the last three years under the Act. We have spent in the region of €4,500 on those requests and have published a very large amount of documents and data obtained under the Act. That has led to stories in newspapers but has also led to engagement with our own relatively small readership. The value of the website is that people can see the original documents as released and make their own judgments, in some cases, about the merits of a story. We have published a very large database of Government expenditure, for example, which allows people

to see spending data from individual Departments. I believe that the Departments themselves could probably publish that data. In many cases it is not difficult to obtain the data or to publish it.

On the proposed amendment, one of the issues that relates closely to what we do is expenditure. Fees play a big role in how we approach the legislation. We do not just submit FOI requests to Irish public authorities but also to authorities in the UK and the European Union. We have submitted a very substantial number of requests to the European Central Bank on the promissory notes and on what was said, or not said, by Mr. Jean Claude Trichet to former Deputy Brian Lenihan in November 2010, for example. We also take a very systematic approach to the appeals process and have taken a number of appeals under the FOI legislation to the Office of the Information Commissioner. We have also used regulations which are not directly related to the freedom of information legislation to obtain information, most notably the Access to Information on the Environment Regulations 2007, as amended in 2011. We used it in one significant way, which was to ask the National Asset Management Agency and Anglo Irish Bank for information under that legislation, which has a fairly wide-ranging definition of what a public authority is or is not. It does not have a prescriptive list in the way the current Act or the Freedom of Information Act do. The environmental regulations had a non-prescriptive list and approached the question by setting out that a public authority is A, B and C and includes one, two, three, four, five, six and seven.

We made a request to NAMA three years ago stating we sought certain environmental information under that legislation. The request was refused on the basis that NAMA stated it was not a public authority. We appealed that entire process to the Commissioner for Environmental Information, who also is Emily O'Reilly, and she agreed with us that NAMA was a public authority for the purposes of that legislation. NAMA disagreed, this case was heard before the High Court back in August and we await judgment on whether NAMA is a public authority for the purposes of that legislation. However, for the purposes of freedom of information, FOI, we spend an inordinate amount of time in writing requests. The Minister appeared before this joint committee a few weeks ago and referred to people staying up late at night submitting numbers of freedom of information requests on their computers and how that overwhelms systems. He may have been referring to me, I am not sure, but we do send a lot of requests. The interesting part of his comment was about people sending out requests on their computers. I do not know whether anyone present has ever sent a non-personal request under the legislation but we must print out the letters, get the envelopes, stamps and cheque books and send off the request in an almost Victorian manner. We cannot e-mail requests but must have ink in the printer and must get stamps. Cheque-books cost money.

Chairman: Can I draw Mr. Sheridan out on this point? This was the one part of his submission that struck me. He advocated providing records in machine-readable formats. As this probably is where Mr. Sheridan is going, can he tell members more about that?

Mr. Gavin Sheridan: Yes, there is a very particular method behind this. A new movement called Open Data has arisen in the past few years. The idea is that while proactive publication is good, when such information is proactively published by a government, it should be in machine-readable formats, that is, when data are published, they should be in open formats as opposed to proprietary formats.

Chairman: Mr. Sheridan should explain technically what that means. Does he mean using PDFs or JPEGs or in open source software?

Mr. Gavin Sheridan: Yes. For example, one might get a table of information, as we make such requests extensively. To make the distinction, if I make a request for a database, I will ask for that, in the format specified under the Act, and will indicate I want it to be in a CSV or XLS format, that is, in a spreadsheet format. In various instances, I have been given printed-out databases, which does not allow me to do things like adding together the figures or doing sums or basic arithmetic.

Chairman: You cannot manipulate the text.

Mr. Gavin Sheridan: In other cases, I have asked for items in open formats but have got tens of thousands of pages of PDFs, which are next to useless when one wants to display the sum of the figures. It is something as simple as that, whereas if it is in open accessible format, one can do calculations oneself on what the figures contain.

Chairman: Right.

Mr. Gavin Sheridan: This really is my focus in this regard. Much of this information could be published routinely, perhaps on a quarterly basis, and that certainly is the practice in other jurisdictions. In the United Kingdom, the Government mandated that Government Departments publish all line item expenditure of more than £20,000 in open accessible formats and that all local authorities in the United Kingdom are obliged to publish all spending data greater than £500 per line item in open accessible formats. Our philosophy would be there is no need to set an arbitrary limit but that governments simply should publish all their spending data as a matter of course. Then, we would not be obliged to send the FOI requests. Journalists almost always rely on getting a scoop.

Chairman: That was the word I was searching for earlier when talking about the competitive nature of the media. The object is to get a scoop. I thank Mr. Sheridan for reminding me.

Mr. Gavin Sheridan: The Minister also spoke about how there is a certain cachet attached to a journalist declaring that he or she obtained the information under the freedom of information legislation. As was referred to by the previous witnesses, if it already is in the public domain or on a website, the FOI request often fails because the relevant Department can simply state the information is on the website. It is important that this is within the minds. Oftentimes, when I ask for these formats, it is not that those concerned are releasing stuff in formats in a deliberate attempt to block. It often is they simply do not know it is important that I get the format for which I have asked, as opposed to a format I cannot use.

Chairman: Does Mr. Sheridan believe this is a cultural thing? For instance, when Deputies receive replies to parliamentary questions containing tables, they come back as tables in a word document or they might be provided as additional information in JPEG or PDF format or whatever. Is this just a business cultural thing or does Mr. Sheridan believe it is deliberate? The reason I ask is that when constituents approach members, we retain information that is covered under the data protection legislation. While there was a time when it simply would have gone into a filing cabinet, it now gets scanned into the computer and is logged with the constituent's details. However, there is a degree of effort and work involved in turning a regular document into a PDF.

Mr. Gavin Sheridan: There is and what the Act, as it currently stands, provides for is the information should be given in the format requested, if that is not more difficult to do than in another format. I certainly do not wish to attribute malice to any of this. I would say it is done

because it often is not known. In other jurisdictions, if one asks for a particular format, one will get that format. As the Chairman has pointed out, a table is not very useful if it is just a table on a PDF file. I cannot really do anything with it. I cannot carry out simple calculations like pivoting the table within the spreadsheet and cannot analyse, for example, spending data within the spreadsheet. This certainly is an issue and while it already is covered in the Act to an extent, the provisions could be strengthened.

This comes back to a larger issue, which is records management in general within Government authorities. This brings in the reason the fee structure was introduced in the first place - or the purported reason it was introduced - which was that it was a burden on the Department to answer requests. I was in Scotland last week to speak at a conference on freedom of information and I spoke to the Scottish information commissioner on the same subject. She is cognisant of the fact that there is no fee structure in the United Kingdom or in Scotland for upfront fees. They simply take an approach that if one creates better record management structures within government, it becomes more efficient for people to ask for information. Moreover, because there are no upfront fees, it almost forces the hand of the Government to try to be more organised about how requests are handled. If the Government authorities are better organised in respect of their filing systems, it is much easier for them to give out information and they can manage their own records much more efficiently. I studied the 2011 figures from Emily O'Reilly in respect of fees and under the non-personal section, the Government collected €87,000. One issue with that is that the €15 fee actually is costing more to manage itself----

Chairman: Did Mr. Sheridan submit an FOI request on that?

Mr. Gavin Sheridan: Well, I looked at other analyses and spoke to people in Scotland, where they have conducted analyses on how much, for example, an invoice costs to process when it comes into a Government authority. They came up with a figure of approximately £35 per cheque that comes in.

Chairman: Okay.

Mr. Gavin Sheridan: I am using that loosely. However, the Minister admitted that an analysis has never been done here. No analysis has ever actually been carried out to ascertain how much the fee structure costs. On balance, it is a punitive charge and seems to constitute a block to members of the public. They do not have cheque books and are not used to printing out stuff. They cannot just send an e-mail asking for information. This is a huge issue because the upfront €50 fee has no net benefit. When I send in the €15 to a Department, on its arrival the officials could simply burn it, as the cost of administering the cheque is lost in the actual processing thereof. It is important to note that were there an allowance for electronic submission and were the €15 fee to be removed to allow this to happen, the public would have greater participation in democracy. I also made the point in my submission that arguably, under Article 10 of the European Convention on Human Rights, I have a right to freedom of expression. In recent rulings of the European Court of Human Rights, a connection has been made to the right to freedom of expression under Article 10. How can one have full freedom of expression unless one has access to information? This connection has been made in a couple of court cases and my argument is that in a way, the infringement of my rights to information also is an infringement of my rights to freedom of expression.

Deputy Sean Fleming: I thank Mr. Sheridan for his attendance and wish to tease out a few points on which I seek his views. On the issue of search and retrieval, we concentrate a lot on the fees and there is an emerging consensus, although it might not yet have landed on the

desks of those officials who are drafting the legislation, that most people now accept the cost of processing the application fee is far greater than the value of the fee. Consequently, it actually is a net cost to the Irish taxpayer to have that fee in place to start with. However, I will move on to the second aspect pertaining to the search and retrieval fee. I produced draft legislation last summer, namely, the Freedom of Information (Amendment) (No. 2) Bill. The Minister accepted it in principle and it fed into the process in which we now are engaged. Last February, I tabled a series of parliamentary questions about the search and retrieval fees. The reason was that something came up in the budget announced more than a year ago and I was interested in the reason the Minister made a statement. I put in a request to the Department of Finance to give me the submissions that were received on that issue. After some time I got a letter back saying that the search and retrieval fees would be €1,300. I did not proceed. That was the end of that request. It just killed it stone dead. That prompted me to submit a parliamentary question to every Department. Mr. Sheridan may even have seen them. Many Departments charge no search and retrieval fee. The Department of Social Protection charged no fee. As a matter of policy it gives out the information. For some, such as the Department of Jobs, Enterprise and Innovation, the average fee was only €8.

The reply from the Minister for Justice Departments, and Equality was that he had received 579 fees last year, of which six attracted a fee to the total value of €756. This equates to an average search and retrieval fee of €130. The maximum fee in that Department for processing a freedom of information request was €15,664. The Minister said one request did not proceed as a consequence of non-payment of the fee. It must have been that one. Much attention is paid to the initial fee but the search and retrieval fee can be off-putting too. I propose that there be a maximum search and retrieval fee. Could Mr. Sheridan give me his view on that? I have posed three specific questions.

Mr. Gavin Sheridan: There are several issues connected with search and retrieval fees. First, once a person puts in a request an estimate comes back from the public authority. That estimate may often mean the death of the FOI request because it is so large. We have been submitting them fairly regularly for three years and I have noticed that the fee estimates have started ramping up in the past 12 months. I am not sure whether a decision was made to start doing that. It is worth noting that when the search and retrieval estimate comes in and the FOI request fails, that fee is not collected. I have received search and retrieval fee estimates of €29,000 for what I thought was relatively innocuous information that could easily have been retrieved. The ability to argue one's case around the search and retrieval fee estimate is fairly limited in the legislation. One can try to appeal it to the Information Commissioner. It is not entirely clear whether one should pay the €75 internal review fee to see whether the fee was there or whether it should or should not be there. Should we pay the €75 to get the internal review to see if the fee is there? I have received various answers, even from the Office of the Information Commissioner, as to whether the €75 charge should be there at all for that process. It is not clear whether it should be charged.

Search and retrieval fees are a huge barrier. I know from the legislation that the Oireachtas has considered adopting the UK-style cap on search and retrieval fees. In the UK, upfront fees have been considered, but the decision was not to charge them. It has been decided that there should be free time and if a request takes longer than that time and the fee is £600 or above, the request fails. I would not be averse to that. Search and retrieval fees are becoming quite high and often I do not think this is legitimate. We could have some provision to limit the process. The legislation has exemptions which work really well if they are applied correctly. For example, section 10(1)(*c*) is a volume issue; one has asked for too much. Under section 10(2) I

can say I am prepared to narrow the scope to reduce the volume.

Sometimes when we receive a fee estimate we are told it will take 40 hours to search and retrieve this information. How is that calculated? If the FOI officer is providing reasonable assistance, as he or she is obliged to do under the Act, it must depend on how the record is held. Is it held efficiently? Do I have to pay for an inefficiently held record in a search and retrieval process? That is not fair. If the records are held efficiently it should not be that hard to get them. Search and retrieval fees reinforce the notion that accessing information is a privilege rather than a right. I have to pay for access to something. While I accept that there might be fees involved, I do not think those fees should be prohibitive.

Deputy Sean Fleming: Could Mr. Sheridan tell me about the exemptions in the legislation? In most or maybe all Departments there are items of legislation in which exemptions are listed stating that certain information cannot be released. Although, for example, the Department of Jobs, Enterprise and Innovation is subject to the FOI Act, there might be items on which one wants information but an exemption prevents disclosure of specific information. That has not featured sufficiently in our debate. The Information Commissioner and the committee are obliged by law to review those every five years. I think we did it once. I was involved in it on one occasion. These exemptions have flown under the radar.

Mr. Gavin Sheridan: The exemptions generally start from section 19 in the legislation. For section 19 the proposed amendment is to lengthen Cabinet access. In the 2003 amendment Act that Fianna Fáil brought in, the five-year rule for access to communications and Cabinet records was increased to a ten-year rule. The proposed legislation proposes to bring that back from ten years to five, which is a good thing. The most commonly used exemptions in my experience are section 27, which is commercial sensitivity, and section 28, which is personal information. Unfortunately, I increasingly see the exemptions applied incorrectly. I may get a reply from an FOI officer saying that certain records have been exempted for personal information reasons, but I may have submitted the same request before to another Department which said it was not personal, or I may have successfully appealed the issue to the Information Commissioner but that did not trickle down to the FOI officer, so I have to appeal it again. I go back through the €15, €75 and €150 process but I do not get any of that money back. The €75 goes, whether I am successful or not. The €150 to the Information Commissioner comes back only if one reaches a settlement with the Government authority. If one cannot reach agreement at settlement one loses €150 through the process and the Information Commissioner will make a decision at some point. It can take six months to three years to get a decision because of the resources available to the Information Commissioner.

The exemptions are generally applied inconsistently. That goes back to the issue of whether there is adequate training for FOI officers in all Departments and agencies covered by the Act. Maybe when the Act is extended as proposed under this legislation it should make a point of stating that training should be done consistently and regularly across the public service, because I increasingly see that sections are not applied correctly. Often spurious refusals are made and one is left in the invidious position of wondering whether to spend the €75 and €150 fees just to make a point. If the upfront fees did not exist, the process would be much more efficient.

On a related point, a €37,000 bonus was handed back as a result of a journalist's FOI request and story. Does that €37,000 count against all the future FOI requests from that journalist? No, it does not. The taxpayer, however, obtained a net benefit from that process because money was returned that probably should not have been paid. These issues with regard to the approach to accessing information need to be factored in. A total of €90,000 a year is brought in as fees but

much of it is lost in administration. That is not very effective and does not take into account the broader benefits of better records management. It is the job of journalists to hold authority to account and money comes back to the State as a result of that process.

Deputy Sean Fleming: My last point is the one I raised at the very end of our meeting with the NUJ, the broader societal right to information. All of the debate on this legislation and everything that has been written and presented to us about it concerns freedom of information in Government bodies, agencies and public bodies, excluding some commercial semi-State companies and matters of commercial sensitivity and personal information. It is as if the legislation deals only with organisations funded by the taxpayer, but there are many organisations that have more impact on the daily lives of citizens than some Government bodies. Within the private sector, for example, there is the banking and financial sector. If those institutions are in private hands they can have much more impact on people's lives than any Government body. I refer to the financial institutions and companies in the food industry, for example. They have nothing to do with this because they are private companies. The print and electronic media also have a big impact on people's lives. They are private profit-making organisations. The mobile telephone companies that have the 3G and 4G mobile telephone licences have an impact on our daily lives, as do Sky television and TV3. Those who deal with such companies do not have the right to make a freedom of information request if, for example, Vodafone chooses to spend money on improving the signal in one area but does not bother to do so in another area. I appreciate that its licence was issued by a Government regulatory body. It is up to the private company to implement that licence as it sees fit on a commercial basis. Many cultural, sporting and church organisations have a big impact on people's daily lives. Perhaps people would love to know more about how church organisations are run. They might want to know more about the involvement in schools of sporting and cultural organisations. The fundamental impact that an organisation might have on people does not come into this debate - it is a question of whether it is paid for by the Irish taxpayer. What is Mr. Sheridan's view on broadening the freedom of information legislation in some respects to cover all types of organisations that have an impact on citizens' lives?

Mr. Gavin Sheridan: They are covered in the sense that the Data Protection Act, as it stands at the moment, allows individuals to access information about themselves from private companies. One can ask any company that has information that relates to one'self to release that information. The Deputy asked about broadening the scope of the freedom of information legislation. The Government is saying it will not include semi-State organisations in this legislation for reasons of commercial sensitivity. I do not think that holds any water because the original Act has a commercial sensitivity provision. If that provision were applied to these organisations, we could just go through the normal process. The NAMA authorities have argued strongly for a special exemption to be made for NAMA. I think it is incorrect that the public interest test will not apply to section 27. The law should stand or fall on its merits.

On the Deputy's suggestion that the freedom of information regime should be broadened to private companies, there is an international movement to make large international non-governmental organisations more transparent. That does not necessarily involve the use of the stick approach of legislation. The carrot approach involves trying to convince large organisations that take money from the public to some degree, including non-governmental organisations and charities, that they should be more transparent about what they spend that money on. The World Bank, for example, has made a large push in the last two years to become more proactive in its publication of large amounts of data that nobody could access until recently. The same argument applies to many charities and non-governmental organisations, including Amnesty

International. The current campaign aimed at standardising the approach to such organisations is underpinned by the idea that one should be able to ask them certain questions about what they are doing. At the moment, the contents of such organisations' annual reports mark the limit of what we know about what is going on in them.

I am not sure about the case for extending the freedom of information regime to individual private companies like mobile telephone companies. There would be a cost attached to that. We have spent a large part of this meeting talking about fees. I think there is merit in what the Deputy is saying. I am not sure how it could be implemented practically. I suggest that industry would ask what the benefit of a changed approach would be. Companies would want to know whether it would cost them money. Would the company mentioned by the Deputy increase its mobile telephone bills in order to fund the process of people asking questions? I suppose I would be neutral on the issue of providing for a much broader remit. Certainly, I do not see why non-governmental organisations that are publicly funded should not be subject to freedom of information. This approach is certainly being considered in many other jurisdictions. Serbia probably has the best freedom of information legislation in the world because requests are entirely free and 60,000 public authorities are covered by it. The Serbian authorities have taken a very broad view of what is a public authority.

I would like to mention the access to information on the environment regulations in this context. It is not envisaged that a waste management company in Dublin, which is technically a private limited for-profit company, will be covered by the new freedom of information legislation. Under the access to information on the environment system, which is related to this legislation, such a company can be deemed to be carrying out a public service - waste management - on behalf of a public authority and to have a contracted relationship with that authority. One could argue that such a company is technically a public authority because it does an act for which a public authority is responsible. I would certainly go that far. I would broaden the definition of a "public authority" to make it much more general. I would make it clear that a company which is doing things of this nature should be subject to some kind of scrutiny by the public, in terms of how information can be accessed from that company.

Chairman: That is an interesting observation because this country's waste management strategy is based on the idea that the role of the Government and the local authority system should be to develop policy in this area before contracting out the implementation of that policy.

Mr. Gavin Sheridan: It is worth noting that governments around the world are increasing their use of public private partnerships and developing their relationships with companies that are carrying out things that Governments would previously have carried out. That has happened to a large degree in the UK. The approach taken by the UK authorities, as evidenced in certain decisions, is that private limited companies which are involved in waste management or in regulation are subject to access to information rules even though they are essentially for-profit companies.

Chairman: I would like to ask Mr. Sheridan a final question before I bring this part of the meeting to a conclusion. The initial legislation, which was introduced in 1997 and adjusted in 2003, is being examined again in 2013. It is expected that the forthcoming Bill will, at a minimum, repeal many of the things that were done in 2003, return us to the 1997 position and make progress from there. Representatives of the traditional media - print, radio and television - were in attendance this morning. Would Mr. Sheridan like to make any specific comments to the committee about how we can future-proof the freedom of information legislation as the media develops?

Mr. Gavin Sheridan: I will return to what I said at the outset. Proactive publication and good record management are good for everybody, not least from a public relations perspective. If the Government published all of its spending data on a quarterly basis, journalists would not get that many scoops because all of the information would already be in the public domain. If such information was published routinely, the journalists would not have to send in as many freedom of information requests. On the question of the future of the legislation, I suggest that we have an opportunity to provide for a much more fundamental reform of the Act. It is a little unfortunate that it seems this opportunity might be about to be missed to some degree. We need to examine international best practice and consider what has been learned in other jurisdictions. If we study our closest neighbours, we can see how Scotland and the rest of the UK are adjusting, not just in terms of what the legislation does but also in terms of its implementation, which is extremely important because it leads to a better right of access for the public. The involvement of the media is tangential. As we move on, there will be a greater overlap between a person asking a body for information and that body making its own decision to publish that information. I think we should have both. The Government should have an open data policy whereby large volumes of data on things like spending are put into the public domain. At the same time, if something is contentious, I should have the ability to ask for information on it and, if it is refused, go through the appeals process at a minimum cost. In such circumstances, a neutral third party like the Information Commissioner should make a ruling on the matter.

Chairman: The perceived concern is that when information is provided under freedom of information in its original format, which may be a financial cost table, spreadsheet or database, such a record might reveal more than what the applicant is actually looking for. If someone wants to know the specific amount of money that was spent by Department under a certain heading, that is a factual and static piece of information. I can see the potential for manipulation that exists when people decide to create pie charts and tables, etc., in order to present the information in a better way. Is there a danger that information which is in a fluid state as it is drawn up can be interpreted incorrectly as a result of deliberate or accidental manipulation?

Mr. Gavin Sheridan: Some kind of risk will always be attached to that. I think the benefits outweigh the risks. Websites like *data.gov.uk* or *data.gov*, which is the US version, publish very large amounts of data. I have published large amounts of data that I have obtained from the Department of Public Expenditure and Reform. I obtained and published all of its invoices relating to every line item of expenditure since it was established. I did the same for the Department of Finance. A kind of therapeutic process is happening, which is a good thing. I think the benefits far outweigh the risks. Ultimately, the canonical or original version of the data is on the website. People can make their own judgments on it. When a Department publishes spending data, for example, it can attach a note saying "here is why we spent it" or "here is some context relating to this data". All of that can be on a Government website. I can have my own interpretation, but journalists and the public can make their own minds up and look at what the data says to them. They may take a different view on it. However, the original information should be made available.

Chairman: I thank Mr. Sheridan for coming and for presenting a very enlightening and differently informed view of the route the legislation may need to take. I thank him for his deliberations and for sharing his information with the committee. I know Mr. Sheridan was in the public gallery earlier and that he was here when the Minister, Deputy Howlin, was here and that he is very interested in this process. Therefore, if he wishes to make further submissions as the process develops, the committee would be very happy to receive them.

Mr. Gavin Sheridan: Thank you.

Sitting suspended at 12.10 p.m. and resumed at 2.30 p.m.

Chairman: We will continue now with session three of our pre-legislative examination of the Freedom of Information (Amendment) Bill 2012. This is part of a pre-scrutiny process allowing various groups and witnesses to present their ideas and views on how the legislation should progress. At the end of this process, the committee will make a series of recommendations to the Minister, Deputy Howlin, in preparation for the full publication of the Bill. The various submissions we have received from the groups that have come before us will be included in the committee's submission and will be published on the committee's website. Our report will not be an edited report but will include all comments and views of both members and witnesses. I welcome Mr. Luke Bukha, Ms Josephine Bakaabatsile, Ms Patricia Murambinda and Mr. Joe Moore from Anti-Deportation Ireland. We will hear first a presentation by Mr. Bukha, following which there will be a question and answer session.

By virtue of section 17(2)(*l*) of the Defamation Act 2009, witnesses are protected by absolute privilege in respect of their evidence to the joint committee. However, if they are directed by it to cease giving evidence on a particular matter and continue to do so, they are entitled thereafter only to qualified privilege in respect of their evidence. They are directed that only evidence connected with the subject matter of these proceedings is to be given and asked to respect the parliamentary practice to the effect that, where possible, they should not criticise or make charges against a person, persons or an entity by name or in such a way as to make him, her or it identifiable. Members are reminded of the long-standing ruling of the Chair to the effect that they should not comment on, criticise or make charges against a person outside the Houses or an official either by name or in such a way as to make him or her identifiable.

I now invite Mr. Bukha to make his opening comments.

Mr. Luke Bukha: We welcome the opportunity to make a submission to the joint committee. We acknowledge and appreciate the work of the Government and the Minister on the Freedom of Information Bill. We are happy that the Office of the Refugee Applications Commissioner and the Refugee Appeal Tribunal will no longer be exempt from the provisions of freedom of information legislation. Like other agencies dealing with refugees and asylum seekers, we are seeking clarification on the exemptions and limitations applicable to these two boards. Of main concern to our members is how the Refugee Appeal Tribunal is assigned cases. We would welcome clarification on how cases are assigned, which information is important to us.

Ms Josephine Bakaabatsile: I live in direct provision accommodation and my concern relates to the Reception Integration Agency and how it functions. I live in one of its centres with my three children, one of whom is almost grown up. We need to know how children in asylum centres are affected by the children's rights referendum passed last year. For example, does the Government bear full or part responsibility for these children, or are their parents responsible for them? Their social development is bad. There are always complaints about how unsocial they are at school, but everybody forgets where and how they are growing up and about the confined spaces in which they are living. Many such families do not have or know what a microwave oven is because the space in which they are living is so small that there is no room for one. I am concerned about food, living conditions and health and safety at the centre in which I have lived for the past seven years, as it is infested with rats and cockroaches. Some residents, including me, try to keep the centre clean, including the outside spaces, and would like to know

who is responsible for all of these issues.

On the Geneva Convention, we need transparency on whether Ireland complies with it in full or in part. Another issue of concern is the number who have died while in direct provision accommodation. We need to know how many have died, the causes of death, the centres at which they died and about the care they received while there. In 2008 I helped to care for a sick woman at my hostel until she was taken to hospital, where she later died. What is the point of people being granted refugee status when they are being buried in Ireland and what should happen to children in places such as Africa whose parents are buried here?

I would like to tell a little of my story. I am not sure if I am crossing the line because I am subject to a petition order of remand, but I do not really mind what the outcome will be. What I do mind about, however, is what happens when one tries to report a matter to the Garda Síochána. When I first came to this country, I went to the Garda Síochána to report how I had been brought here and so on. I could not tell it at the time that I was seeking asylum. I was so fearful I could not even speak to people staying at the hostel. I later managed to come out of my shell and go to the Garda Síochána to tell it I had discovered where the person concerned was staying. When I asked for help, I was asked if he had been abusive or beaten me. Did I have to be beaten to be listened to? How much do women staying at the refugee camps need to do in order to be heard and understood? They are often told when they report matters to the Garda Síochána, that they are not criminal matters. How are they to have their issues addressed? We need to know the role of the Garda Síochána in these matters.

Ms Patricia Murambinda: I am also an asylum seeker. We are asking that the Minister make an order to provide that the freedom of information legislation applies to Garda National Immigration Bureau and the Irish National and Immigration Service. An individual garda can refuse entry to a person at the point of entry, which causes that person to then exercise his or her rights under the Geneva Convention. We need transparency on that issue also.

On the issue of deportation, the manner in which people are taken from the centres is appalling. They are beaten; pepper spray is often sprayed in front of children; and as they are usually picked up at 3 a.m., everybody at the centre is awakened, leaving children fearful and not knowing what is happening. There is a need for protection at the centres.

My final question relates to the Ombudsman who was given powers in respect of certain categories of refugees but not in respect of asylum seekers in prison. We believe we are being sidelined in this regard. I do not understand where human rights fit into this. We need transparency on this issue.

Chairman: I welcome the witnesses before the committee this afternoon. I will raise three items before inviting other members of the committee to speak. As the Minister has outlined legislation, there will be aspects of the Garda Síochána's operations that will come within its scope. The presentation this afternoon referred to two issues about which we would like more information.

With regard to access to records, Anti-Deportation Ireland has requested confirmation that the freedom of information Act will apply to the records of reception and integration agency centres around the country, including the centre on the airport road in Cork, which is in my constituency. The witnesses have indicated there is currently no information available on asylum seekers who die in direct provision facilities, with certain questions to be asked. They have also indicated there is no information on how many people have died in direct provision in Ireland

and there is no information on cause of death and the hostel centres where people die. There is also no identification of the nationality of people who die. Does this arise because of existing freedom of information rules or has the group not been able to obtain the information because of other factors? What has been the difficulty to date with getting the information?

Mr. Luke Bukha: We have been trying to get the information for some years now. In 2010 we had to ask a Sinn Féin Deputy to ask a question but even the Minister was not clear about how many people had died in those circumstances. That happened after a gentleman living in Cork had just died. The number given is between 49 and 52 or 53. Last year the Minister was asked the question again but there was no exact number. We are trying to find out the age and gender of the people in question.

Chairman: Does the reception and integration agency have that information but is not releasing it or has the information not been logged? Has the information been compiled or is it that there is no access to it?

Mr. Luke Bukha: We suspect the agency has information but it cannot be given out.

Chairman: Has it provided reasons for that? Mr. Bukha indicated that a Deputy put down a parliamentary question so when the Minister responded, was any detail given? Was it a holding answer because the information was not available?

Mr. Luke Bukha: The answer was not conclusive and it did not provide an exact number. From our experience, it seems there is no proper system of recording those figures. People could die of natural causes but some are taking their own lives. If the number of people who died is 52, how many of these are a result of natural death and how many are people taking their own lives?

Chairman: I am not sure if that is a systems problem or a problem regarding access to information. Is the agency compiling the information? It would be a revelation if that was not the case. Does the agency have the information but it is outside the remit of the Freedom of Information Act?

Mr. Luke Bukha: It is not providing the information.

Chairman: The presentation indicates that certain agencies should be included in the first Schedule of the Act, including the Office of the Refugee Applications Commissioner, the Refugee Appeals Tribunal, the Garda National Immigration Bureau and the Irish Nationalisation and Immigration Service. Are those agencies currently outside the legislation?

Mr. Luke Bukha: Some of them are. We understand the Minister has indicated that the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal are exempt. We are concerned with to what extent the agencies can give out information. When asylum seekers look to make an appeal, we wish to know how cases are assigned to different members of the appeals tribunal.

Chairman: Are the witnesses concerned with the entirety of those operations or specific aspects? In his engagement with the committee, the Minister for Public Expenditure and Reform, Deputy Howlin, there was consideration of general Garda operational matters. It is not that he organisation would provide information regarding criminal investigations but rather statistical information etc.

There is a request that may help the committee. The witness referred to a parliamentary question. If Anti-Deportation Ireland has written to the Department of Justice and Equality or an Oireachtas agency, will the witnesses provide the correspondence and, more important, the type of replies from the various agencies? That would inform us about what could specifically be presented as evidence or information as we complete our submissions. The committee would appreciate that help, which might give us a better understanding of the difficulties seen by the witnesses.

Mr. Luke Bukha: Yes. We did not like the idea of bringing it with us but we would be happy to furnish it to the committee.

Chairman: We would like examples of the correspondence and replies from the Department indicating that the information has not been given to the group.

Deputy Mary Lou McDonald: I welcome the witnesses. When the remit of the Ombudsman was extended but still excluded issues of asylum, prisoners and elements of the criminal justice system, it was a big mistake. I share the concerns around the issue, which was raised with the Minister at the time. There was an explanation that there would be independent procedures built upon to investigate, report and provide that accountability function but that is not the right way to go about this. Nevertheless, I am not the Minister. He also indicated that if it transpired that those systems were inadequate or not working, he would revisit the issue. We will probably be doing so in order to bring the issues under the umbrella of the Ombudsman and freedom of information legislation.

Will the witnesses provide insights in respect of the different agencies identified and the deaths within direct provision facilities? Have they any examples of where information was required but blocked?

Mr. Luke Bukha: On 15 December 2010, a flight was facilitating the deportation of people to Africa and other locations. The flight experienced a technical problem in Greece and had to return to Dublin. That was the first time deportees were returned to the country. On their return there were some complaints, with teenagers not allowed to go to the bathroom; they were given bottles to use. The incident was reported, with our service and the Irish Refugee Council submitting complaints.

That is why we think that if the Ombudsman was covering what happened to this group of people who are deportees and if they were covered in law, these complaints would be subject to independent investigation, which would allow individuals to seek redress or get a fair hearing.

On the Refugee Appeals Tribunal, we hear reports, even from some of the activists with whom we work who write blogs. They try to understand how the members are sent cases. What they say, which is not certain which is why we want the information, is that those with a high rate of refusals get more cases to deal with, while those who accept the cases of asylum seekers get fewer. That is why we are seeking the information. If we knew how members were sent cases, that would clarify the matter and remove the myth of how this body works.

Deputy Mary Lou McDonald: Does Mr. Bukha think it is simply a myth or does he suspect there might be some truth to it?

Mr. Luke Bukha: There was a report in the *Irish Independent* by the one of the solicitors with whom we work and some others and the view came across that there was a systematic way. However, that can only be proved if the records are released.

Ms Josephine Bakaabatsile: I wish to say something on that issue and will refer to my own case. During the time my application was being processed, I was assigned what they said was a private solicitor. I did not understand how they could be a private solicitor. I later sent a letter from the same solicitor to a friend and she told me she did not have qualifications under the UNHCR to deal with asylum cases. That was for the three years of the process. Somehow the allocations are not clearer because this was probably just somebody who had just finished school and she had not done some training on that particular issue.

Deputy Mary Lou McDonald: I wish to probe a little further into the direct provision system. It is imperative that we get to the bottom of the deaths that occurred. Obviously, if there is a death which is unnatural or occurs in suspicious circumstances, there is a requirement for the coroner to be involved. It is a criminal offence not to report a death. Aside from this, will the delegates discuss some of the other issues involved? They referred to living conditions, of which I am trying to get a sense. The freedom of information legislation does what it says on the tin. It is about accessing information and I am trying to envisage to what extent queries or concerns can be addressed through this mechanism as against the necessity to overhaul the entire process. This is something the Chairman was probably trying to examine also.

Ms Patricia Murambinda: Where I am staying in the asylum centre, a lady was sick and it was discovered that she had cancer of the womb. On 18 December last year she was operated on and two of the cancer areas were removed. However, they left two because they said it would be too much for her. There was nobody who came to see her. It is those of us who live in the asylum centre who visit her, watch out for her and bring her food to eat. She needs attention because she is not feeling okay. She went to the Coombe Women's Hospital the day before yesterday-----

Chairman: Ms Murambinda needs to be mindful of discussing individual cases and people's medical needs. Somebody's medical history is not something that comes under the Freedom of Information Acts. What can be available is an agency's record of how many ill people there are. I must separate one process from the other.

Mr. Luke Bukha: Regarding the question asked by Deputy Mary Lou McDonald, the RIA is responsible for most of the provision. It is a government body. The way the direct provision system is being run is more commercialised. The information we are looking for is on how the tenders to run a centre are carried out. We know that very few companies won the contracts. If we know that information, the names of the food suppliers and so forth, we will be able to trace the hygienic, health and other issues in that regard. It is to know how the RIA can assign companies or give contracts to companies to run direct provision centres.

Mr. Joe Moore: I can give an overall view in response to Deputy Mary Lou McDonald's question. Fortunately or unfortunately, I am not a resident. The management of these centres determines whether residents can have visitors. Security firms are employed and they log when the residents go in and out. There are instant room inspections which sometimes can happen when the residents are not even in the room. Management and some of the staff will go and check the rooms. There is some media evidence with regard to the food provided. The residents in Eyre Powell hostel in Newbridge, County Kildare, last year contacted the local media about conditions in the hostel, including the food provided. The food is prepared and meals are at laid down times. The menu and quantity of food are decided by management, even so far as rationing the number of slices of bread that can be taken. It is generally oppressive.

Josephine spoke about children not being aware of what a microwave oven was. Families

are living in one room. Anecdotally, in a primary school a child was asked to name the furniture one would have in a bedroom and a microwave oven was one of the pieces of furniture named. Children are growing up and they have not seen their parents prepare meals and so forth. There was a recent report by the Irish Refugee Council on the effect the direct provision system has specifically on children.

Chairman: We need to be careful. We must separate that discussion or we will get into two separate issues. The day-to-day management of the centres is a matter more pertinent to the justice committee. There is then the information on how tendering is conducted and the results. Is it policy, for example, that food is distributed in this manner or is that decision in the hands of the tenderer? There is a separation between what are freedom of information matters and what are operational matters. I ask delegates to focus on this because we have a time limit as other delegates are due to appear before the committee in the afternoon. As other members wish to ask questions, I ask Deputy Mary Lou McDonald to focus on the matters that relate to the freedom of information aspect.

Deputy Mary Lou McDonald: The concerns the delegates raise in respect of the entire asylum process are well founded. Clearly, there are bigger human rights issues and concerns with which the committee does not deal. However, these human rights concerns must inform how robust and thorough the freedom of information legislation is. I thank the delegates for their presentations.

Chairman: I concur with that, Deputy McDonald.

Deputy Peter Mathews: I welcome the witnesses and thank them for the submission and their explanations of it. I think Deputy McDonald has highlighted the need for transparency, completeness and accuracy of information on the bureaucracy side in regard to the files, the information and the statistics. However, there is also the visibility of the human picture side, which actually affects the lives of the people in these centres. I tried to visit a centre once. The security firms subcontracted to mind the centres were mentioned. It is a little bit like a 21st century equivalent of the Magdalen laundry experience. It is a tightly chaperoned type of experience when the children go to school and where they do two thirds of their living. Approximately eight hours of the day might be spent at school or otherwise while two thirds, or 16 hours, are spent within the confines of the centre.

It is timely and relevant that we get visibility of these centres. Maybe it is my own lack of curiosity, and I should be more responsible in finding out, but I do not know the number of people who are in the centres, the mix of men and women or boys and girls, or their ages. Even following this short presentation, I have become aware that deaths and sicknesses occur. Again, the visibility of the care is very restricted. This visit is an opportunity to prompt us all to be more inquiring and more alert.

When refugees come to this country, they probably arrive at airports and seaports. Do all, some or none have documentation? I am sure that in a refugee situation one does not look for one's passport or birth certificate. One could be in a life-or-death situation exiting from a country and travelling literally in the clothes one is wearing. Will the witnesses tell me a little about that?

Ms Josephine Bakaabatsile: I would like to use my own experience. Many women, including those being dealt with by Ruhama, do not come to this country with documentation. They are brought in by men or other sources. Obviously, many of them did not come with

documents and the names being used are not their proper names. These women want freedom and to open up but no one believes them. They end up deciding to stay where they are because they do not have hope, no one is listening to what they are saying and no one believes them. They are just treated like other criminals. We are not all the same. People run away from persecution while others are brought into this country. Most of the people who settled here, refugees or whoever, are probably not genuine refugees and those who are refugees are taken back to their countries. I was brought here by someone in this country. I do not really want to go into the details but I am someone who came into this country without my real documents because of the person who brought me here.

Deputy Richard Boyd Barrett: I welcome Anti-Deportation Ireland. I thank the committee for agreeing to see the witnesses and I thank them for making the request to come here. I know their concerns are much broader than the issue of freedom of information. Hopefully, one thing that will come out of this first engagement with the Oireachtas is that they might go on and try to be heard by other committees dealing with some of the other aspects of the situation they are in. Our particular job is to identify how we can mend the draft legislation in such a way as to assist and shine a light on the refugee and asylum process, which the witnesses have described as a process that really needs to be looked at and be much more transparent. However, what we need to know is what we have to do to this legislation to achieve that end for them. It is absolutely clear to me - and, I suspect to most of the committee members - that this needs to be done.

My view is that there is a total veil of secrecy over this process because it essentially keeps those concerned away from the rest of the community and facilitates deportations in the dead of night. I believe, although I could be wrong, that it is a systematic policy and that is why it is difficult to get the information. I suspect that is what the witnesses know to be the case. What we need is the information and to get the truth - the objective facts - out there about the processes so that society as a whole, the Oireachtas and everybody else can see it. What the Chairman was trying to get at and what we need to get at are what specific provisions or amendments we need to put into this Bill in order to ensure those concerned, the media and anybody who wants it can get free access to information about this.

Is it the case that the witnesses believe there needs to be a specific statement in the Bill to clarify the full application of freedom of information to all of these processes? Do they believe it is not stated clearly enough and that because it is not clearly stated or because there are exemptions or limitations on the information currently, it is allowing this veil of secrecy to continue? Listening to what was said, what seems to be necessary is a clear statement at the outset of the Bill or somewhere else explicitly setting out that full information on all the processes relating to these particular agencies must be fully subject to freedom of information provisions.

Mr. Luke Bukha: The Minister has come out to say that ORAC and the Refugee Act are no longer exempted from the freedom of information provisions, but what was not clear was the type of information. There is information which, for security or other reasons, cannot be given out. If we knew the sort of information in the appeal or in the application that is not given out, it would be clear to most of us, to people going through that process, and to campaigners, whether they are journalists, solicitors or even neighbours. We would know because for these two boards now, there are supposed to be no more secrets but how much information can we get in response to requests? I say this because in November a researcher who was working to produce a detailed anti-deportation document applied for information about applications and the tribunal and some of the questions were not answered because the agency said that information was not given out.

Deputy Richard Boyd Barrett: Information was refused on the grounds it was sensitive to security or was exempted from the normal application of freedom of information in some way. Does Anti-Deportation Ireland want information to be fully available on the way in which contracts are given out to direct provision centres, and the rules for running them? That information is currently not available to the organisation but would be important to it.

Mr. Luke Bukha: Yes.

Deputy Richard Boyd Barrett: Similarly, the criteria surrounding the judging of refugee applications and appeals, and the manner in which people are selected to adjudicate on appeals, is not being made available and Anti-Deportation Ireland is being blocked from getting information on that process.

Mr. Luke Bukha: That is right.

Deputy Richard Boyd Barrett: Also, information on deportations and the rules and regulations surrounding them, and complaints that might be made by deportees about the process, is not being made available.

Mr. Luke Bukha: Yes, particularly on that. When we try to research these questions, no specific information is given. Among the people who live in the centres, it creates myths about what is happening. If information is made available to groups like ours or the Irish Refugee Council, everyone would know what is happening. At the moment, however, no one has it.

Senator Sean D. Barrett: It would help if the group could give us correspondence on what information it requested and what was refused, and what the group would like to have and what sections of the new legislation the group fears might be used to prevent it getting that information. As my colleagues have said, that is what we are here to do, to go through the legislation line by line and see if we can help by inserting sections. I know this all goes back to individuals but this is the key.

To take up the point made with Deputy McDonald on the deaths, perhaps they went to another country. We have compulsory registration of deaths. Can we hear more about the people who have disappeared? Does the group think they are dead or does it know they are dead?

Mr. Luke Bukha: We have known about their deaths since October 2012. These are people we know, and we know they are dead. The only difference is we know more about them than we know about other people. We are giving this number for the last ten years because no one gives the true figure. It is not about disappearance, which is different, these are people we know. We know that last year two men died of stroke, both of whom were living in Cork.

Previously we were not documenting these events but we have started to take images. Even at one of the horrible deportations, when a woman was taken naked by the gardaí, we told people to take images on mobile phones. We did not post those images online out of respect. These are people we know. If this was about disappearances, we might be talking about hundreds of people but from the numbers of deaths from what the Minister said in 2010 are around 49 and 52. We had more deaths last year and the number increased to 55. That is the information we got after discussions in Parliament when we asked some sympathetic TDs to ask questions. We hope to get answers.

Senator Sean D. Barrett: Has the group seen the death certificates for those people?

Mr. Luke Bukha: No.

Senator Sean D. Barrett: Is that what is needed? We can help with information in cases where it is thought people died and it was not recorded, or where the group wants to know what a person died from. This has come up in the case of the Magdalen laundries, as Deputy McDonald pointed out. The State cannot lose people. People are entitled to know where their friends have gone, why they died and the causes of death.

Ms Josephine Bakaabatsile: Most of these people do not have relatives here. We care because to us, they are our brothers and sisters. We look out for each other and care for each other. We helped to bring the children of the woman who passed away in 2008 here to see where their mother was buried and will be forever.

We now understand that documents are necessary to see the efforts we have made to establish the facts. Unfortunately we did not bring them with us.

Senator Sean D. Barrett: The Chairman will be in touch and if the group can give those documents, that will help the committee a great deal.

Deputy Peter Mathews: If refugees come here and are living in direct provision centres, and they apply for residency, usually the Garda National Immigration Bureau and the Department of Justice and Equality will ask questions in the country of origin to know if there are any criminal or other records. There is always a danger in such documentation from the country of origin that people in that country resent the fact a person has come to Ireland and will fill in a mischievous form that is not true and that takes from the character of the person in Ireland to cause him or her difficulties here. Does that happen often?

Mr. Luke Bukha: It is not as straightforward as that. People come for all sorts of reasons. Refugees are manageable because the United Nations deals with them from country to country. The people we normally talk about are asylum seekers, those who come by themselves without any official outside agency helping them. In many cases, that is why the situation is so difficult if there is no clear policy or procedure to deal with this.

When Ireland accepts refugees under agreement with the United Nations or other bodies, the process can take two or three years, but asylum seekers come by themselves. Not all of them are coming from the African continent. Some come from countries such as America or even from Australia. It is not always running away from the government, some are running away from other groups of people. We realised after people died that there was no record of the number of deaths. We realise the importance of having a record of the number of deaths.

As the member suggested, we will try to document what we know. That is something we never considered. We are all just volunteers and have just done this on our own volition. We are not funded by local government but we are taking note of the numbers who die.

Deputy Richard Boyd Barrett: Mr. Bukha has made a very clear point on the deaths of refugees and that there is no comprehensive catalogue of the circumstances of their death. Is it Mr. Bukha's belief that if there was full transparency surrounding the circumstances of the people who died, and the number who have died in the centres, it would reveal a high level of suicide or premature deaths?

Mr. Luke Bukha: From the meetings I attended, there is an understanding that the majority of those who died are Congolese men. If the deaths were recorded officially, the rumours would

cease because the community could get the information. It is a cause of concern to asylum seekers that some people are more vulnerable than others. It would be helpful that our group or other groups could access the records, as it would remove the asymmetric or bogus information as people will know the facts.

Deputy Richard Boyd Barrett: Will Mr. Bukha elaborate on the point he made about the way the Geneva Convention is invoked and whether people are stopped as they try to enter this country? What is the exact point he wants clarified?

Mr. Joe Moore: May I respond? I do not have the figures but a statement was issued either by the Department or the Minister for Justice and Equality on the number of people who were deported last year. The overwhelming majority of people were stopped at the airports or ferry ports.

Chairman: I think I tabled a parliamentary question on that issue to the Minister for Justice and Equality before Christmas.

Mr. Joe Moore: The number of people who were taken in the dead of night would indicate they have been put on Frontex flights, and have not been allowed into the country to seek asylum. I think the number is in the thousands.

Chairman: The figure was quite startling and the breakdown in nationality was very distinct on who has been refused entry.

Mr. Joe Moore: People are being refused at the border and that is the reason we feel people are being denied the right to claim asylum. It is the reason that the Garda National Immigration Bureau, GNIB, should be subject to freedom of information inquiries.

Chairman: Should the witness have further questions, we will take them.

I am not trying to be uncompassionate to the day-to-day circumstances of the witnesses and the difficulties that they as individuals experience in different centres around the country. I have had first-hand experience of this in my previous job when I was very involved in setting up English and basic computer classes in centres in Cork city. I was always fascinated at how one could survive on €4 a week, which is one fiftieth of the social welfare payment for a non-dependent adult. When I worked in the prisons in Cork and Spike Island, the most popular class among prisoners was the cookery class because this was the one bit of independence they had in that they could cook their own dinner. What really struck me was the significance for prisoners in the Military Hill and Airport Road centres in Cork that cooking the food that they would eat gave them autonomy. Mr. Bukha painted a very vivid image of children never seeing their parents cooking food.

My colleagues who are still involved in that area ask me to table parliamentary questions to the Department of Justice and Equality and it seems to be an anomaly that if one asks questions on prisons and service activities, one will get a very detailed response on what is happening in the prisons. I am concerned that when similar questions are being asked about the people in asylum centres, and the people in these centres are not convicted of a crime, the information is not available.

In order to make progress on this issue, we may look at two different areas, the official avenues in which information can be provided under the freedom of information inquiries and the brokered tendered areas in which freedom of information inquiries can be made. I know that

under the FOI legislation, the NGOs and organisations that are funded by the Exchequer should come within the scope of the FOI, for example, that might mean the NGOs from Concern and Trócaire. We might need to reconsider whether that could mean tendered private organisations acting on behalf of the State in the area could come under FOI. The purpose of so doing is to ensure there is a uniform standard, even if the standard is very low, that there is uniformity and consistency around the centres. Senator Barrett and Deputies McDonald, Boyd Barrett and Mathews called for substantiated information such as the questions they have put to the Department of Justice and Equality to which it has not responded in full as this would greatly assist us in pursuing inquiries under FOI.

Will Mr. Bukha provide the committee with the correspondence to the Department on the number of deaths and the evidence of the absence of a response from the Department? In regard to the four or five departmental heads, such as the Office of the Refugee Applications Commissioner, I am sure it is not every aspect of the section on which they are looking for information under the FOI but particular functions of the Department that should come under the remit of the FOI. If he can provide that to the committee, we will certainly include it in our deliberations.

The Anti-Deportation Ireland, ADI, group has come before this committee but our engagement with your group does not conclude when you go out the door. There will be opportunities for ADI to feed in further information to the committee. Will the group provide the committee with the information within a two-week period, as this will assist us in our deliberations? On the specific issues regarding death notices, I am not too sure if it is an issue for the Joint Committee on Justice, Defence and Equality or whether we should refer it directly to the Minister for Justice and Equality as an issue that came to our attention. Is that agreed? Agreed. I will now take the concluding comments.

Mr. Luke Bukha: I thank the Chairman and members for their time. Our group never thought they would have an opportunity to come before the Members of the Oireachtas and share our concerns. As the Chairman said, this is the beginning of the process and we will try to ensure we document all communications and provide the information to the committee. We are a voluntary group and we are grateful for the opportunity to appear before the committee.

Chairman: I commend Deputy Richard Boyd Barrett in the light of what Mr. Bukha said. I was not too sure what we were going to be doing this afternoon. When our discussion started, my memories of working in this area started to come back to me quickly. In fairness to the Deputy, he is to be commended for having the foresight and vision to see that Anti-Deportation Ireland's concerns were of relevance to the forthcoming legislation.

Mr. Luke Bukha: I thank the committee for having us.

Sitting suspended at 3.40 p.m. and resumed at 4.40 p.m.

Chairman: We will commence session five in our advance scrutiny of the Freedom of Information (Amendment) Bill 2012. We are joined by the Information Commissioners, Ms Emily O'Reilly and Mr. Stephen Rafferty. They are both welcome. Ms O'Reilly's opening remarks will be followed by a question and answer session.

By virtue of section 17(2)(*l*) of the Defamation Act 2009, witnesses are protected by absolute privilege in respect of their evidence to the joint committee. If they are directed by it to cease giving evidence on a particular matter and continue to do so, they are entitled thereafter

only to qualified privilege in respect of their evidence. They are directed that only evidence connected with the subject matter of these proceedings is to be given and asked to respect the parliamentary practice to the effect that, where possible, they should not criticise or make charges against a person, persons or an entity by name or in such a way as to make him, her or it identifiable. Members are reminded of the long-standing ruling of the Chair to the effect that they should not comment on, criticise or make charges against a person outside the Houses or an official either by name or in such a way as to make him or her identifiable.

Before I call Ms O'Reilly, I advise her on the format we are using as the delegates come before the committee to make their opening statements. The committee is compiling as much information as it can in its advance scrutiny of the forthcoming freedom of information legislation. At the conclusion of this process, it will propose some recommendations to the Minister for Public Expenditure and Reform, Deputy Brendan Howlin. The presentations we are receiving from the various groups, delegates and organisations will be included in our submission to the Minister. We may also attend to some specific issues raised during our deliberations. The report will not edit or make value judgments on any of the recommendations made to us. Instead, these recommendations in respect of legislation will be assembled and given to the Minister. The purpose of this meeting is to extract from the Information Commissioner her ideas on the proposed legislation. Members can express their ideas on another occasion. We appreciate the Information Commissioner's time is valuable and we would like to learn from her.

Ms Emily O'Reilly: I am grateful for the invitation to meet with the joint committee to discuss the draft heads of the general scheme of the Freedom of Information (Amendment) Bill. I reiterate that I very much welcomed the commitment contained in the programme for Government to restore the Freedom of Information Act to what it was before the 2003 amendments and extend its remit to other public bodies. The proposals outlined in the draft heads will go a long way towards restoring the confidence of members of the public in the Government's commitment to optimising openness, transparency and accountability. Some very positive additional measures are proposed, such as the automatic application of freedom of information legislation to all newly formed public bodies.

I was also very pleased that my officials were afforded the opportunity of consulting extensively with the Department of Public Expenditure and Reform on the draft heads. As the joint committee will note, I published a commentary in 2007 which contained detailed recommendations aimed at improving the operation of the Act. As the majority of these recommendations have been incorporated into the draft heads and given that the explanatory notes to the draft heads reflect, in the main, my office's position on the amendments, I will keep my opening address brief.

Members will note that I focused on three specific areas in my written response, namely, the review of non-disclosure provisions in other legislation, the exemption relating to security, defence and international relations and the partial application of the Act to the Garda Síochána and other bodies. Section 32 of the Freedom of Information Act provides for the mandatory refusal of access to certain records whose disclosure is prohibited, or whose non-disclosure is authorised, by other enactments. Section 32 is a very important provision because it subordinates the access provisions of the Act to all non-disclosure provisions in statutes except for those which are cited in the third Schedule to the Freedom of Information Act. The Act provides for the review by this committee every five years of the operation of any enactments that authorise or require the non-disclosure of records to determine whether they should be amended or repealed or be added to the third Schedule.

While I can fully appreciate that the committee has a very heavy work schedule, it remains the case that the most recent such review was conducted in 2005 and a further review is now several years overdue. The reports of individual Ministers which have been made available to my office show that, since the Freedom of Information Act became law in April 1997, many new non-disclosure provisions have been introduced in individual enactments. The non-applicability of the Freedom of Information Act is appearing as a standard component of many new Acts and the number of non-disclosure provisions being introduced in individual enactments is increasing. Departments are reporting approximately 230 enactments containing non-disclosure provisions, of which 50% became law since 1 January 1998. This means that as many non-disclosure provisions have been introduced since 1997 as were introduced in the preceding 75 years. The current proposals to amend the freedom of information legislation present an opportune time for the committee to conduct a review of the operation of section 32 and incorporate in the Bill any changes proposed arising from that review.

On the matter of the exemption relating to security, defence and international relations, the 2003 amendment Act introduced a mandatory class exemption for records containing such matters. The amendment made the protection afforded by the exemption absolute, regardless of the sensitivity of the records or nature of the harm that might be occasioned by their release. While the draft heads provide for a number of the changes introduced in 2003 to be reversed, the amendments proposed fail to fully restore the exemption to its pre-2003 state, in that a number of records remain protected as a class. For example, records containing information which was communicated in confidence between Ireland and an EU body will remain protected as a class of exempt records, even though the information contained in the records may have since lost its quality of confidence. In the 1997 Act, such records were protected only where the public body considered that access could reasonably be expected to give rise to one of the harms identified in the exemption. The protection of records as a class is generally not warranted and it would be preferable if some form of harm test were to be re-introduced. I am also conscious that section 25 of the Act provides an absolute safeguard against release of any record to which section 24 applies through the power of a Minister to certify such a record as exempt from release. While I am very conscious of the need to protect sensitive information in the areas of security and intelligence, I have expressed my concerns in my written response to the committee as to the overly restrictive nature of the protections afforded to the records of the Garda Síochána. The definition of what constitutes "a record concerning general administration" goes so far as to exclude records which, in any other circumstance, would clearly be accepted as concerning general administration. For example, records relating to accommodation matters do not appear to be captured by the definition proposed. I also note with some concern that it is proposed that my powers under section 37 to enter the premises of a public body and require the production of relevant records are to be restricted in relation to the Garda Síochána, particularly given that the Act will apply to records concerning general administration only.

I have previously expressed my views that the exemptions contained in Part III of the Act are sufficiently robust to ensure the protection of records where release would be likely to give rise to any of the harms which the exemptions seek to protect. As such, I question the need to restrict the application of the Act to the extent suggested for the Garda Síochána. In my opinion, if it is accepted that the exemptions contained in Part III are sufficiently robust to ensure the protection of records where release would be likely to give rise to any of the harms which the exemptions seek to protect, a strong case can be made for full application of the Act to all relevant bodies, including those where partial access only is now proposed.

Chairman: The Information Commissioner's most recent engagement with the Department

on the freedom of information legislation was in 2005. Is that correct?

Ms Emily O'Reilly: My most recent engagement with the committee was in 2005.

Chairman: Does the Information Commissioner intend to make a submission to the Minister for Public Expenditure and Reform or engage with his office in the coming weeks as part of this pre-scrutiny process?

Ms Emily O'Reilly: Yes, we are ready to do so as regards the section 32 requirements. We are waiting for an invitation.

Chairman: Something is in process.

Ms Emily O'Reilly: Yes.

Chairman: If I may digress for a moment, the joint committee had a discussion with representatives of Anti-Deportation Ireland earlier this afternoon. At first glance, one could ask what the relevance of the Freedom of Information Act is to issues pertaining to refugees, asylum seekers and so forth. However, our discussion was very engaging and enlightening as it seems it is not possible to obtain records on deaths in accommodation centres for asylum seekers. For example, one cannot obtain figures on the number of deaths or nationality of the deceased. We have asked Anti-Deportation Ireland to revert to us with information on whether this is a result of a systems difficulty or procedural problem. It would not be acceptable if there were difficulties in either area.

The Information Commissioner referred to the Garda Síochána. Anti-Deportation Ireland made a strong recommendation regarding freedom of information provisions as they relate to offices such as the Refugee Applications Commission, Refugee Appeals Tribunal, Garda National Immigration Bureau and Irish Naturalisation and Immigration Service. The Information Commissioner expressed a view on what could be described as regular Garda activity. Does she have a view on the agencies and bodies to which I referred?

Ms Emily O'Reilly: I understand it is proposed to include the bodies to which the Chairman referred in the freedom of information legislation.

Mr. Stephen Rafferty: Yes, they are proposed for inclusion in the Act.

Ms Emily O'Reilly: I also understand their inclusion will extend beyond administration.

Chairman: We also heard that some official agencies are covered to a greater extent than others. For example, services to accommodation centres for asylum seekers are subcontracted, which means that a centre may be managed by a third party which has won a contract from the State following a tender process. It is proposed that non-governmental organisations such as development agencies working in Africa and so forth will come within the ambit of the Act. Does the Information Commissioner have a view on agencies that are contracted by the State to provide services in settings such as accommodation centres? For example, should freedom of information apply with regard to policy implementation or whether there is some degree of standardisation or uniformity in basic areas such as the distribution of food in direct provision centres as opposed to their day-to-day operations? It is an issue I come across a lot, particularly wearing my Ombudsman's hat, because asylum and immigration issues are excluded from my mandate. There is a range of very vulnerable people who are looked after by the State, but who are denied the right to an independent complaints mechanism.

In this regard, if the bodies mentioned in the first question are to come in and they are the ones contracting or bringing in the services, as I understand it, under the proposed amended legislation the records relating to the services they are providing would be subject to FOI requests.

Chairman: Therefore, a private company that is not any way a State operation but is receiving State payments would be subject to requests.

Ms Emily O'Reilly: Yes. The contract for services issue has been slightly altered in the amended Act, but my understanding is that if a public body comes under the Act and if a private firm or company supplies services to it, the records relating to that - allowing for the usual exemptions such as commercial sensitivity and all of that, subject to a public interest test - would, potentially, be releasable under FOI regulation.

Chairman: Thank you.

Deputy Sean Fleming: There was a lot of information in the document Ms O'Reilly read. Could she arrange for us to get a copy of it?

Ms Emily O'Reilly: I will give the Deputy a copy now.

Deputy Sean Fleming: It should be passed on to the secretariat because other people will want it also. There is significant information in it. Being upfront, I did not get it all because I did not have the chance to see it.

On the issue of the section 32 review, can Ms O'Reilly give us a pen picture? In the letter she sent to us, she said that section 2 of the Act provides for the mandatory refusal of access to certain records whose disclosure is prohibited or whose non-disclosure is authorised by other enactments. How many items are included in that? Is it dozens or hundreds?

Ms Emily O'Reilly: Hundreds, approximately 230. Departments report that approximately 230 enactments contain non-disclosure provisions. Some 50% of these became law since 1997. We discussed this back in 2005. What happened is that new bodies were created, changed or morphed into other bodies and these provisions were a means of excluding these bodies from being subject to FOI requests. In other words, when a new body was created a particular function that was subject to FOI provisions was transferred. This was used as a means of keeping the Act very restrictive. What I propose is that all of these be looked at again or abolished and that they all be subject to the normal Freedom of Information provisions.

Deputy Sean Fleming: Ms O'Reilly said the review was done in 2005 and a review is required every five years. Whose job is it to do this review? Is it the fault of the Oireachtas it was not carried out? Is it our fault?

Ms Emily O'Reilly: Yes, it is the job of the committee.

Deputy Sean Fleming: It is not all the fault of the Chairman, but we have been negligent in our duty by not doing this.

Ms Emily O'Reilly: I suppose there has been a lot going on.

Deputy Sean Fleming: A review of section 32 is on our agenda, but it has been on it a long time.

Ms Emily O'Reilly: We are ready to -----

Deputy Sean Fleming: You are ready to come in to assist the committee. Is that correct? Are you available whenever necessary?

Ms Emily O'Reilly: Yes, we have done our work and all the Departments have submitted their reports. Therefore, we are ready to do that.

Deputy Sean Fleming: Ms O'Reilly said in her letter this is a timely time to conduct a review, so that any amendments identified can be reflected in the new Bill. Therefore, Chairman, it is essential we should complete the review of these exemptions before the Bill is published. At our request, the commissioner has conducted a review of all of these exemptions. We have missed the deadline for our review, but we are where are. It would be illogical not to take the review process into account before the legislation is processed. We should try to pencil in some time to deal with this before the legislation is published.

Chairman: I will take that on board. Some activity has been taking place in that regard and there has been correspondence and engagement between -----

Deputy Sean Fleming: I remember it took days to do this the last time it came up. Is it possible for it to be done swiftly? It is a big operation.

Ms Emily O'Reilly: What happened last time was I gave evidence and so did the Secretary General of the Department of Finance, who was Eddie Sullivan at the time. However, I cannot recall whether other Secretaries General gave evidence.

Deputy Sean Fleming: We called some of them here.

Ms Emily O'Reilly: It is important to do this, because even if we add a lot of new bodies to the Act, as the Minister intends to do, if there are non-disclosure provisions within their legislation, this will negate, perhaps, the intent of the overall Act to make everything a little more open and transparent.

Deputy Sean Fleming: Therefore, it would be helpful to the process if this job was done before the legislation is published. However, that is not part of today's business. That is fine and we will study the detail of the issue separately.

It is fine for the Oireachtas to pass legislation but we need to ensure the resources are there to provide for the operation of the legislation. An article in *The Sunday Times* on 20 January stated the Ombudsman's office is under pressure and that some of the appeals were there quite a while. I know some could be bogged down in legislation, but the impression given by the article is that the Ombudsman's resources are stretched with regard to meeting her deadlines.

Ms Emily O'Reilly: The Act provides for an optimum deadline of four months, as far as practicable. Therefore, the article shows correctly - we supplied the information - that we are only reaching that in approximately 25% of cases.

Deputy Sean Fleming: The Ombudsman cannot be happy with that.

Ms Emily O'Reilly: No, it is not acceptable. In the early days, many of the reviews we got to deal with were fairly straightforward and we made a significant number of seminal decisions. Much of the type of stuff that would have come to us previously is now dealt with by the public body when the application is first made. Therefore, almost by definition, the appeals we get now relate to quite complex matters. For example, one of the issues we are dealing with now - under access to environmental information - is whether NAMA is a public authority or not

under the terms of access to environmental legislation. That might seem like a simple matter, but it is not. The issue is now in the High Court, where NAMA is challenging my ruling that it is a public authority.

However, I am not here to make excuses for us. Over the past year or so we have been trying to refine our processes. We have had huge success in the Ombudsman's office and we are now getting through 30% more complaints than we did. We achieved this through major restructuring, but we realise that no amount of restructuring we can do within the Office of the Information Commissioner will help significantly to speed things up. Therefore, last week we wrote to the Department of Public Expenditure and Reform requesting additional staff to cope with FOI requests, particularly in view of the fact that new bodies are coming in.

Deputy Sean Fleming: The obvious comment to make on that is that if the office is having difficulty meeting its legal requirements because of the lack of staffing and financial resources currently, extending FOI to a lot of other bodies is a pointless exercise unless the resources are supplied to enable the existing legislation, not to mind the new legislation, work. There is no point in us passing legislation unless there is something in the Estimates to back up its good intentions.

Ms Emily O'Reilly: At the same time, approximately 1% of the requests made come to appeal. Therefore, most of the material goes out.

Deputy Sean Fleming: We understand that like An Bord Pleanála, Ms O'Reilly's office only gets the appeals.

Ms Emily O'Reilly: Yes.

Deputy Sean Fleming: To return to the public bodies that make decisions, there must be hundreds of people making decisions. Let us take for example the Department of Agriculture, Food and the Marine. I am sure there are umpteen officers in its different buildings, offices and sections dealing with FOI requests. Has Ms O'Reilly's office any mechanism for establishing the level of consistency there is within the various public bodies with regard to dealing with these requests?

Ms Emily O'Reilly: That is a very good question. I have been reading the exchanges that have been taking place, particularly those with the Minister when he came in here and I noticed there has been significant concern with regard to commercial sensitivity and how that is handled. We find this too. This is not so much a systemic issue for us, but we know there is great disparity between public bodies and how they deal with requests for records in which commercial sensitivity is an issue. Officials do not have great confidence in dealing with the issue and they often tend to take the word of the body that something is commercially sensitive and do not explore it further. Therefore, when it is appealed to us, we explore it. In issues of discretion, the discretion tends to be used in favour of the public body. That is a somewhat sweeping statement. The training of officials was excellent at the beginning of the FOI process. The central policy unit had very good regimes in place and senior high-level staff were placed in those particular positions. When FOI ceased to be the flavour of the month, shall we say, there was a little less enthusiasm for it and standards slipped to some degree. However, it is the case that there are excellent FOI officers in all public bodies. The new bodies being included under the FOI Act means there will be an onus on the Department of Public Expenditure and Reform to ensure that staff are properly trained. I refer in particular to training in those areas where there is discretion, such as with regard to the harm tests. It is necessary that they do not

blindly and without doing an examination take the word of a public body that a particular harm will emerge.

Deputy Sean Fleming: Ms O'Reilly referred to the inevitable legal challenges. How much of the Information Commissioner's budget is expended on legal costs? I know the office is stretched and may be put in a difficult position if it needs to challenge a legal case put by a public body and which may at a minimum be heard in the High Court. Those financial resources could be used instead for clearing the backlog of cases. It must be a difficult call to make.

Ms Emily O'Reilly: Yes, it is. We allocate an amount of our annual budget to deal with legal issues and this will be a large chunk out of the budget. However, in our view, certain issues must be appealed in the public interest. I refer to the NAMA case, for example.

Deputy Sean Fleming: I refer to Ms O'Reilly's letter in which she stated she was pleased with the restoration of the FOI Act to its state before the 2003 amendments. What was the fees structure at that time? I think no fees were payable.

Ms Emily O'Reilly: It was free, *gratis* and for nothing.

Deputy Sean Fleming: The Minister's proposal includes a fee structure. He is not proposing to restore it to the pre-2003 situation. The most basic element of it is the issue of fees. He may be thinking about reducing the fees. What was the fees structure initially?

Ms Emily O'Reilly: There were no fees at all. One might have had to pay a fee for retrieval-----

Deputy Sean Fleming: For search and retrieval.

Ms Emily O'Reilly: -----but nothing else. In 2003 when fees were introduced, personal information was free-----

Deputy Sean Fleming: It is still nil.

Ms Emily O'Reilly: -----but public information or public records cost €15 for an initial application, €75 for an internal review and €150 subsequently. By the time a request got to my office, there would have been an expenditure of €250. Even in Celtic tiger days that was quite a lot of money and it certainly had a chilling effect on the Act.

Deputy Sean Fleming: Prior to the 2003 Act there was no fee for any of that.

Ms Emily O'Reilly: None at all.

Deputy Sean Fleming: This legislation is not proposing to go back to the no-fees system.

Ms Emily O'Reilly: It is still proposing-----

Deputy Sean Fleming: -----but Ms O'Reilly seems happy that there is a commitment to a restoration to the pre-2003 situation. This legislation is not proposing to abolish all the fees.

Ms Emily O'Reilly: No, although I welcome the part of the legislation that does so.

Deputy Sean Fleming: Is that a full endorsement from Ms O'Reilly?

Ms Emily O'Reilly: I particularly welcome the proposal that the fee for an inquiry to my office will be €50, but the €15 fee will remain. The committee has had discussions with the

Minister, Deputy Howlin. My position remains the same. The fee is an impediment to the public seeking records. The fee does not go anywhere near to covering the cost. The total amount of money, between research, search and retrieval and fees, amounts to €85,000 in a year. The reason the fee was introduced was precisely to dampen people's ardour for seeking public records and it certainly worked. We carried out a report after the amended Act had been a year in operation which showed a drop of 75% in applications. The media certainly lost interest because of the barrier of the fee. However, in spite of the fee, once the recession kicked in there was a significant re-engagement with FOI because people wanted to know what had happened and why it had happened.

I know the Minister is of the view that the fee acts as a break on people who might be using the Act in a frivolous way and thereby engaging public bodies with vexatious requests. A section in the Bill deals with such requests. In our view, officials can be a little fearful of using that element to stop a person making a frivolous request. They are reluctant to decide they will not process such a request because it is trivial or vexatious - this is the language used in the Act. They will need to become bolder in this regard. I am also aware that the Minister is conducting a review into the operation of the Act and this review is being carried out by the senior official involved in drafting the Act in the first instance. In my view this would be a suitable issue for the investigating or for the review body to wrestle with. Public bodies are liable to receive vexatious requests but I do not think the solution is the imposition of a fee. There need to be other solutions.

Deputy Sean Fleming: I have a question on the topic of search and retrieval fees, which I have raised on previous occasions. Last July I published a freedom of information (amendment) Bill which proposed a cap on search and retrieval fees. I submitted parliamentary questions last year requesting the average and the maximum level of search and retrieval fees in each Department. I give the Department of Social Protection full praise. It is one of the busiest Departments but it does not charge any fee for anything. Fair dues to it. Other Departments charged average fees of €48. Last year following a budget I submitted a request for background information on the persons who had submitted FOI requests. I was informed the fee was €1,300. That killed the requests there and then. An unfair search and retrieval fee of €1,500 will kill off most requests. I ask the Information Commissioner to clarify the situation. Is an internal review required to query the search and retrieval fee? We are a little confused as to whether one must pay a fee of €75 for a review.

Mr. Stephen Rafferty: The appeal against the decision to charge is free. One does not need to pay a fee to appeal the decision to impose a search and retrieval fee.

Deputy Sean Fleming: I thank Mr. Rafferty for that clarification. The earlier speakers were not too sure.

Ms Emily O'Reilly: On that question, we find that the imposition of search and retrieval fees is done in an *ad hoc* and random manner, as Deputy Fleming discovered. I read the Deputy's commentary. It was proposed that he be charged €1,100 for search and retrieval. That could have been appealed to our office. The Act states that the search and retrieval must be carried out in an efficient way. Therefore, if it takes two days because the records are in a mess, that is not fair.

Chairman: One of the duties of the Information Commissioner is to identify where Departments have not complied fully with or created difficulties with regard to FOI requests. The Office of the Information Commissioner identifies inconsistencies in how applications are dealt

with by Departments. Is there a need for some form of standardised training, particularly on foot of this legislation?

Ms Emily O'Reilly: Absolutely. Training is needed. There are differing ways of working in different public bodies. There are differences in how exemptions are applied. Commercial sensitivity is one such reason. There are also differences in how search and retrieval fees are applied. Apart from an excellent training system, what is also needed is that relatively senior people are made responsible for FOI. Very often, those who have responsibility for FOI make decisions which may have a serious impact on a public body or Department. If the person involved is at a junior level, he or she could be slightly - I am not stating that this is actually the case - timid or could be capable of being intimidated. It is better if someone at a more senior level deals with FOI. Training is a critical issue. Mr. Rafferty has been doing much of the tick-tacking with the Department on this. I am not sure whether it is proposed that new training should come on stream.

Mr. Stephen Rafferty: The Department is aware that it is an issue but it does not have any specific plans as yet.

Chairman: When a ruling Ms O'Reilly has made on an appeal is implemented in a particular instance, is it then implemented across other Departments? Are those other Departments informed of particular rulings that are made or do they relate just to the individual Department involved?

Ms Emily O'Reilly: Yes. If one is making a ruling to the effect that certain records - I accept that some of these may be very specific to particular bodies - relating to procurement or a generic issue must be released, then obviously they would apply elsewhere. We put a great deal of information on our website and we circulate information on important decisions to individuals and public bodies. I think the Department may also do that.

Mr. Stephen Rafferty: All decisions go to the central policy unit in the Department of Public Expenditure and Reform. If the latter is in a position to issue guidance in respect of a decision to the wider public services, it will do so.

Chairman: The concern in this regard is how this matter is monitored and how other Departments are picking up on it. While the information may be available, I wonder how aware other Departments are of its existence.

Ms Emily O'Reilly: Yes. We are also dependent on public bodies to spread the good word. There are some individuals - I do not know if any of them have come before the committee - who are extremely active in the areas of FOI and open data. They also tend to spread the word. It is important that public bodies should also do so. We do not want to receive appeals on issues in respect of which we have already decided upon because it is a waste of time.

Deputy Kieran O'Donnell: I welcome Ms O'Reilly and Mr. Rafferty. In the context of what the Chairman stated, will Ms O'Reilly indicate the number of appeals her office receives in respect of the application of the freedom of information legislation by various public bodies?

Ms Emily O'Reilly: Is the Deputy inquiring as to the number of appeals we receive?

Deputy Kieran O'Donnell: Yes.

Ms Emily O'Reilly: Approximately 300 per annum.

Deputy Kieran O'Donnell: In how many of those cases would the original decision be overturned?

Ms Emily O'Reilly: We would either amend or overturn the original decision in approximately one quarter of those cases. Sometimes we just amend the decision and release certain records. We agree with the decisions in respect of certain records and overturn those relating to others. On occasion, the decision that was made would be completely overturned. Much of the time we enter into settlements with the bodies involved. This means that without having to go to the formal decision stage, a requester might agree to narrow the scope application regarding the records required or a public body might agree to release those records outside of FOI.

Mr. Stephen Rafferty: In approximately 50% to 60 of cases we would settle or withdraw. In many of those cases additional information would have been released through the course of the review.

Deputy Kieran O'Donnell: So in 50% to 60% of cases, there would be some alteration of the decision or it would be overturned.

Mr. Stephen Rafferty: Not necessarily. Some 50% to 60% of the applications we review are closed by way of a settlement or a withdrawal. Occasionally, this may be where the requester accepts that the public body got the decision right in the first instance. There are many occasions where a requester will withdraw having received additional information-----

Deputy Kieran O'Donnell: So the Information Commissioner would uphold the original decision in approximately 40% of cases.

Ms Emily O'Reilly: It is approximately one quarter.

Mr. Stephen Rafferty: In approximately one quarter of the cases which go to formal decision, we vary the decision of the public body. This means that we require the release of additional information in one quarter of those-----

Deputy Kieran O'Donnell: In the context of the total number of appeals received, in how many instances is the original decision of the public body with regard to the non-disclosure of information upheld?

Mr. Stephen Rafferty: It would be up in up to 60% to 70% of cases that we would uphold the decision. However, that is only where the matter goes for formal decision. If, for example, we dealt with 200 applications last year, perhaps 80 to 90 of these would have gone for formal decision. In a large proportion of the other 110 or 120 cases, additional information would be released in the course of the review and this would result in a withdrawal or a settlement.

Deputy Kieran O'Donnell: So in 40% of cases some agreement would be reached. In how many cases relating to freedom of information requests does the Information Commissioner find that the public body was correct in its decision?

Mr. Stephen Rafferty: We do not have precise figures. At a guess, I would suggest that at least 50% of applicants who avail of our services receive some sort of additional assistance by way of extra information.

Deputy Kieran O'Donnell: Is there much disparity or inconsistency across the public bodies in the context of how they deal with the public in the context of freedom of information? How does the legislation operate in this regard? Ms O'Reilly stated that the majority of

the recommendations contained in the review carried out in 2007 have been incorporated in the draft heads of the Bill. Are there recommendations that were not included which she is of the opinion should have been included? A great deal of what we have been discussing is quite legalistic in nature. How does Ms O'Reilly view the operation of the Act from an administrative point of view and in the context of the skill sets available within various public bodies with regard to dealing with freedom of information requests? What is the attitude of public bodies to the legislation? Is Ms O'Reilly in a position to provide a breakdown in respect of the public bodies to which the appeals received relate? Do a disproportionate number of appeals relate to, for example, a particular body?

Ms Emily O'Reilly: The 2003 amendments drove a coach and four through the original Act. Many people who were seeking public records lost their appetite to do so because many of the more important or relevant public records were taken off the table. That had a huge impact on matters. In general, public bodies behave well in respect of it. As Mr. Rafferty explained and as I stated earlier, issues have arisen in respect of training and capacity. For example, some decisions can be very poorly drafted. There are instances where the public body involved may have forgotten the need to consult a third party or that there was a public interest potential override with which it was obliged to deal. That is why I stated that it can become sloppy on occasion.

When we consider the statistics at the end of the year - I refer to all freedom applications in this regard as opposed to those which come to us for review - we find that the further away one goes from the centre of power, the more records are released. The lowest percentages would be in respect of central government and the higher percentages would relate to local authorities and other public bodies. The further away one gets from where the game is at, the more records are released. When the original Act was amended, one heard anecdotal complaints to the effect that it was taking longer for records to be released. People were wondering whether this was being done deliberately. There were also many complaints about the search-and-retrieval fees and people wondered if these were being used in a particular way. Whenever we examined this matter, we did not find systemic issues as such. However, with respect to the many excellent officials who deal with this matter, it would be fair to say that there was a general lowering of standards across the board.

Deputy Kieran O'Donnell: Ms O'Reilly referred to section 37. Will she explain how the changes in the draft heads of the Bill will impact on her work? I take this opportunity to compliment her office-----

Ms Emily O'Reilly: This relates to the Garda Síochána.

Deputy Kieran O'Donnell: Yes. I just want to know what the position is on a practical level.

Ms Emily O'Reilly: It never actually has happened but if I, as Information Commissioner, was obliged to seek records in order to conduct a review, I have the right to see those records. Ultimately, I may not release them but I do have the right to see them.

Deputy Kieran O'Donnell: To which records is Ms O'Reilly referring? Will she provide an example?

Ms Emily O'Reilly: Let us say that a person goes to a public body or local authority and states that he or she wants all records relating to negotiations around a development plan, or anything at all for that matter. It would be very unlikely to happen but the entity in question

might state that it does not believe that the records should be released or it might delay the process. Then I could demand that it hands them over and to take matters to the extreme I could enter the premises and search-----

Deputy Kieran O'Donnell: With one of Ms O'Reilly's officers?

Ms Emily O'Reilly: Or the Garda can be involved. It has never happened. It was threatened to happen several years ago but nobody has gone that far. The right to enter a premises and seize records using the gardaí-----

Deputy Kieran O'Donnell: There has not been any occasion on which the Ms O'Reilly has enforced that right.

Ms Emily O'Reilly: No. Under the draft heads of the Bill it is only proposed that a very limited amount - to my mind - of administrative records relating to the Garda be releasable under freedom of information legislation. Even though the records compared to some of the records it would have in regard to its operational work would be pretty anodyne, it is proposed that the power to enter a premises and remove records in regard to the Garda be removed from me. If the Garda say it will not give us records because it does not believe they are administrative records, I have no way, if this goes ahead, of finding out whether they are or not. In other words, I cannot go in and have a look at them and say they are right, they relate to a criminal prosecution or an ongoing investigation and they are administrative records. If I do not see the records in the first place I cannot make that judgment and I think that is wrong.

Deputy Kieran O'Donnell: In terms of what is being proposed, what impact would it have on Ms O'Reilly's operations? Her office does great work. I am going slightly off the theme of our consideration but one issue is the slowness of the process at times. We speak to officers who work in Ms O'Reilly's office who are excellent but there is a backlog of cases.

Ms Emily O'Reilly: I am acutely aware of that and I have said on occasions, both publicly and privately, that information delayed is information denied. I have at times ordered the release of records perhaps to a media person and I know we are not there just to give good stories to journalists but they have an important public interest function as well and I am a former member of that tribe. I am sending out material and I know that this is useless. There is no story in it and we might have expended a great deal of time and energy in doing it. We have been doing our best to improve our own processes. When we undertook the Ombudsman (Amendment) Bill which proposed bringing an additional 180 bodies under our remit, we judged that we would be able to cope with that because of the huge change process system we put in place during the past two years. We believe we will able to deal with that but we are putting our hands up and saying we cannot cope at the moment with the staff numbers we have and we certainly will not able to cope with the new bodies.

Chairman: I have a question on foot of what Deputy O'Donnell said, to which the answer is most likely yes. Is there an FOI archive? Is there a website on which I could find every freedom on information request that has been released?

Ms Emily O'Reilly: Is there one? No.

Mr. Stephen Rafferty: No. We would have a record of our decisions but the Chairman would not be able to see every FOI request that has been processed by the public bodies. Is that the Deputy's question?

Deputy Kieran O'Donnell: I am asking about requests received by the public bodies. It is an obvious question. The freedom of information process is about submitting a request for information. It is a public-----

Mr. Stephen Rafferty: Very few public bodies publish details of FOI requests.

Chairman: Should they publish them?

Ms Emily O'Reilly: I am wondering about that as the Chairman asked that question. In the past some public bodies have put up on their websites requests they have received.

Chairman: That is the way the Dáil operates in that every parliamentary question becomes a matter of public record as soon as it is published and it is there for eternity. We might not be here ourselves but-----

Ms Emily O'Reilly: It would make a good deal of sense, would it not?

Chairman: Perhaps that should be a recommendation of the committee and it would be resourced-based one.

Ms Emily O'Reilly: That would be purely in regard to public records; it would not be personal records.

Chairman: When I was speaking to representatives of the NUJ this morning they said that a question asked in a submission could have been asked by somebody else. It would sense if there was some sort of search engine-----

Ms Emily O'Reilly: I am not sure what they do that in other jurisdictions but I imagine there must be some in which details of every non-personal FOI request are made available.

Chairman: There would have to be cost savings from doing that in the long run although there would be initial start-up costs.

Ms Emily O'Reilly: Yes.

Chairman: In terms of a review process as legislation is passed, does Ms O'Reilly have a view on how the legislation could be reviewed in the future. This is something that needs constant attention a not a type of a big bang approach by a Minister every five or ten years.

Ms Emily O'Reilly: Yes, absolutely. The section 32 process would be useful. That it only supposed to be done every five years but it serves a wider purpose than just looking at the section 32 issue. When I looking at some of the proposals in regard to NAMA and the NAMA family of bodies dealing with finances and so on, I think it was a proposal that there would be an ongoing review about how that happens. I think that is specifically to make sure no harm has been done by records. Huge change took place after 2003, some of which we were not always made aware.

Chairman: Were they statutory instrument changes?

Ms Emily O'Reilly: No.

Chairman: Can there be statutory instrument changes to the Act or does it have come through in legislation?

Deputy Sean Fleming: New legislation can make amendments to FOI without Ms O'Reilly's office being notified.

Chairman: That is right.

Ms Emily O'Reilly: It can disapply-----

Deputy Sean Fleming: It could relate to something we want to do in social welfare legislation-----

Chairman: As in the Private Residential Tenancies Board.

Deputy Sean Fleming: -----and Ms O'Reilly could read in the newspapers six months later that there was an FOI restriction imposed in social welfare legislation.

Chairman: As in references to bring the Private Residential Tenancies Board under the remit of the FOI legislation.

Ms Emily O'Reilly: For example, the investigation element of the Health and Safety Authority was-----

Deputy Sean Fleming: Excluded.

Ms Emily O'Reilly: was included in terms of FOI and then that element was transferred to a new body or there was a new Act-----

Deputy Sean Fleming: A new authority.

Ms Emily O'Reilly: and FOI was disapplied. The process needs to be much more upfront. When clients telephone us and tell us that this has happened-----

Chairman: It is embarrassing.

Ms Emily O'Reilly: -----it is a little embarrassing.

Deputy Kieran O'Donnell: In terms of the publishing of all FOI requests, if a person sought information of a personal nature and a third party sought the same information, does the office distinguish between the two? If I was seeking information on myself or if Deputy Twomey was seeking information on me, does the office regard that in different ways?

Ms Emily O'Reilly: Yes, very much so. The Deputy's personal information is his personal information.

Deputy Kieran O'Donnell: If the office was to come up with register of all freedom of information requests and I was submitting a request on information that was very private to me-----

Deputy Sean Fleming: It should be non-personal.

Ms Emily O'Reilly: Yes.

Chairman: I want to deal with two specific heads of the Bill to bring matters to a conclusion. Heads 34 and 37, which are related, deal with matters covering the investigation powers of the commissioner. What types of instances prompt or motivate an investigation under the powers of the commissioner?

Ms Emily O'Reilly: That relates whether we could look at particular issue in terms of FOI and Mr. Stephen Rafferty can correct me on this. We did an investigation under section 10 some years ago where a body said it could give us those records because they do not exist. We did not know whether it was not looking for them, and it was not that it was not telling the truth, or whether there was an issue there.

Mr. Stephen Rafferty: We would have a general investigation of particular issues - systemic issues - that we may have identified.

Chairman: Is the recent issue regarding possible information pertaining to how the penalty points system was administrated in recent years one Ms O'Reilly would observe and consider to be a matter for her office? Or would a request have to be received by her office inquiring how many penalty points were issued by the Garda Síochána in 2010 and how many of those were quashed?

Ms Emily O'Reilly: I imagine it would come to us by way of an appeal if somebody has sought them under an FOI request. This would come under the jurisdiction of the Garda and it would a question of whether they come under the remit of an administrative or an operational matter. There will be issues around where administrational and operational matters meet - it is not always clear-cut.

Chairman: In terms of head 26, in 2007 Ms O'Reilly identified that there was an anomaly whereby confidential information sent in a letter to a public body from a third party can qualify for exemption if it meets the criteria in head 26 while the same information received via telephone call or noted by a member of staff of a public body cannot attract such protection, because of the difficulties in terms of this head, unless it meets the duty of confidence test.

The document also states:

> The Information Commissioner recommends that such information should attract the same protection and a distinction should be drawn between information received from a third party in such circumstances and information created or generated by a member of staff of a public body. It is worth considering for implementation subject to the legal advice of the Attorney General on the matter particularly in the light of the Supreme Court decision on the Rotunda case. Clarification with the Office of the Information Commissioner will be required also as regards the effectiveness of the suggested head above.

What is the current state of play in that regard?

Mr. Stephen Rafferty: This is a technical amendment. Some information was not being captured within the exemption on a technical issue. The Attorney General's office has been consulted and asked to come up with an appropriate form of wording to capture it. The initial efforts failed and we have yet to agree a precise form of wording. The issue is in the Office of the Parliamentary Counsel at present to identify appropriate wording.

Chairman: Let us say for instance that I was to e-mail the clerk this evening or vice-versa, to say that a certain committee member would make my life very hard at this afternoon's meeting. It does not happen too often.

Deputy Liam Twomey: It usually goes from the member concerned to the clerk

Chairman: I suppose it would be releasable information under the Freedom of Information Act.

Deputy Kieran O'Donnell: The Chairman should not give people ideas.

Chairman: If I were to ring the clerk to say a certain committee member would break my heart this afternoon and he took a note of that, it appears that one type of information is releasable under freedom of information but the other is not.

Mr. Stephen Rafferty: Not necessarily. We are dealing with finer points such as common law, duty of equity and duty of confidence. Two separate tests are contained in section 26. The more general test concerning information given to a public body is aimed at protecting information it receives from members of the public. A technical issue arose whereby the information captured by an official of the public body was not afforded the same level of protection. We are trying to come up with an amendment to address the issue.

Chairman: I will bring the meeting to a conclusion. Does Ms O'Reilly wish to add anything further?

Ms Emily O'Reilly: No. I thank the Chairman.

Chairman: I thank Ms O'Reilly for coming before the committee this afternoon. Is it agreed that the committee will publish on its website all submissions received relating to the general scheme of the Freedom of Information (Amendment) Bill? Agreed.

The joint committee adjourned at 5.35 p.m. until 9.30 a.m. on Thursday, 7 February 2013.