DÁIL ÉIREANN

AN COMHCHOISTE UM AIRGEADAS, CAITEACHAS POIBLÍ AND ATHCHÓIRIÚ

JOINT COMMITTEE ON FINANCE, PUBLIC EXPENDITURE AND REFORM

Déardaoin, 7 Feabhra 2013

Thursday, 7 February 2013

The Joint Committee met at 9.35 a.m.

MEMBERS PRESENT:

Deputy Jerry Buttimer,+	Senator John Crown.*
Deputy Catherine Byrne,*	
Deputy Regina Doherty,+	
Deputy Heather Humphreys,	
Deputy Kevin Humphreys,	
Deputy Sandra McLellan,*	
Deputy Peter Mathews,	
Deputy Mary Mitchell O'Connor,*	
Deputy Dara Murphy,	
Deputy Aodhán Ó Ríordáin,	
Deputy Aengus Ó Snodaigh,*	

* In the absence of Deputies Michael Creed, Brian Stanley, Simon Harris and Pearse Doherty, and Senator Sean D. Barrett, respectively.

+ In the absence of Deputies Peter Mathews and Heather Humphreys, respectively, for part of meeting.

DEPUTY LIAM TWOMEY IN THE CHAIR.

The joint committee met in private session until 9.50 a.m.

Freedom of Information (Amendment) Bill 2012: Discussion (Resumed) with National Newspapers of Ireland

Vice Chairman: The joint committee is meeting in public session to continue its public consultation on the draft heads of the freedom of information (amendment) Bill 2012. I welcome Mr. Carl O'Brien of *The Irish Times,* Ms Dearbhail McDonald of *Irish Independent*, Mr. Frank Cullen, director of National Newspapers of Ireland, and Mr. Mark Tighe of *The Sunday Times*. The format of the meeting will be as follows. Mr. Cullen will make some opening remarks and these will be followed by a question and answer session. I remind members, witnesses and those in the 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, witnesses are protected by absolute privilege in respect of evidence given to the committee. If they are directed by the committee to cease giving evidence on a particular matter and they continue to do so, they are entitled thereafter only to qualified privilege in respect of their 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 a person or persons or an entity by name or in such a way as to make him, her or it identifiable. Members are reminded of the longstanding 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 by name or in such a way as to make him or her identifiable.

Due to the events of last night, we have a sparse attendance this morning. The Seanad sat until 6 o'clock and the Dáil sat until 3 o'clock this morning. I hope Mr. Cullen will see members straggle in during his presentation or at least in time for the question and answer session. I thank the NNI for its submission to the committee and I call Mr. Cullen to make his presentation.

Mr. Frank Cullen: I thank the committee for giving us the opportunity to highlight what we consider to be the most important issues arising from the heads of the Bill. NNI represents 16 national and 25 local and regional newspapers and has canvassed the views and experiences of editors and journalists who have used the Freedom of Information, FOI, Acts to investigate matters that are in the public interest and about which the public have a right to know. We do so on the basis as set out in international human rights treaties. We situate our arguments in the context of international standards on FOI, drafted under the auspices of Article 19 in London and endorsed by the UN special rapporteur on freedom of opinion and expression and the Organization of American States, OAS, special rapporteur on freedom of expression.

To summaries our views, I would like to draw attention to the following provisions of some of the nine principles for FOI. Principle 1 is maximum disclosure. This principle includes the provision that public bodies include executive, legislative and judicial branches of the state, as well as public corporations and publicly-funded bodies. NNI welcomes the inclusion of additional public bodies indicated under head 1 and the Schedule but we strongly urge the committee to consider extending the range of bodies included in the Act further to commercial semi-State bodies, as indicated in our submission. My colleagues will elaborate on this. Members may have read the piece in the latest edition of *The Sunday Times* written by Mark Tighe, who

is on my right, which focused on Irish Water and the need to include it in the Act. In addition, we urge that consideration also be given to bringing quasi-judicial entities, such as the Personal Injuries Assessment Board, under the Act.

Principle 2 is obligation to publish. This principle includes the provisions that public bodies should proactively publish and disseminate information, as well as responding to requests. The volume of information published proactively should increase over time, despite resource limitations. NNI argues regarding heads 8, 9, 14 and 34 that public bodies should be encouraged to publish and disseminate information proactively, rather than waiting for FOI requests. We argue in our submission that by proactively publishing information ahead of FOI requests, both the public and public bodies themselves will benefit greatly. For the public, a great deal of information will thus be made available routinely and save the time and expense of making FOI requests in many cases, while for the public bodies concerned, it will save the time and use of resources needed to process FOI requests, especially as sometimes a considerable number of them may seek the same or related information.

Principle 3 is the promotion of open government. This principle includes the following provisions: public officials should be trained; incentives should be provided; annual reports documenting progress should be published; and public bodies should promote better maintenance of records. NNI makes the case for the training and retraining of staff dealing with FOI requests. Under head 15, training will be essential for new bodies being brought under the Act. For bodies currently under the Act, training in the changes proposed to be brought in will be required as well as refresher training in not only the letter of the law but also the spirit of openness and the presumption in favour of openness the law espouses.

On the issue of incentives as referred to under this principle, journalists have reported many delays and failures to meet the four-week period stipulated in the Act and have suggested that there should be incentives to meet the prescribed deadlines. It has been brought to our attention also that, in practice, a number of bodies do not make accessible on their websites up-to-date section 15 and 16 manuals. For example, the HSE provides no such reference booklet, while the Department of Finance has not updated its section 15 and 16 documents since 2004. A date should be set for the provision and updating of section 15 and 16 manuals in accordance with the new Bill, when enacted.

Regarding the manner in which records are supplied, journalists report that copies of electronic databases are often provided in PDF format which, in turn, can lead to mistakes in the analysis of the record, as the record must be restored to electronic format for proper interpretation. There is no valid reason in many cases that a database, or part thereof, could not be copied and provided to a requester in electronic format as allowed for under the legislation. This would simplify the process for the granting body and cut down on printing costs.

Principle 4 is limited scope of exceptions. This principle includes the provision that exceptions to the right to information should be clear, narrow and subject to strict "harm" and "public interest" tests. NNI welcomes the removal of measures that were added to the range of exceptions and exemptions in 2003 but believes that the exemption for parliamentary briefings-draft parliamentary question, PQ, replies under head 24 should be removed. This would not adversely impact on accountability of Ministers to the Dáil and there is a significant public interest in this material and the manner in which it has been provided to the Dáil.

Journalists also report that time and time again, while requests are being partially approved, many documents within those requests are often withheld under exemptions allowed in the Act.

For example, in one instance a schedule of documents came back, along with a pile of redacted documents, and all that remained intact was the finalised press statement. Some examples will be given later. Providing exemptions that are "clear, narrow and subject to strict 'harm' and 'public interest' tests", as per the international principles, should help to address this pressing problem.

We urge in this regard that further consideration be given to the extremely wide range of exemptions envisaged in respect of some of the new bodies coming under the Act, such as the NTMA and NAMA, as set out in the Schedule. We have instanced some of these in our submission, such as records relating to whether developers are complying with their business plans, disciplinary matters and levels of remuneration within NAMA, and the rate of return on individual developments sold by the agency – all of which are a matter of growing public interest.

Principle 5 is the process to facilitate access and it includes the provision that requests for information should be processed rapidly and fairly. We have referred in our submission to constant delays experienced by journalists – often, they say, with a "like it or lump it; appeal it if you like" attitude on the part of officials. However, in reality, appealing is a lengthy and costly process and journalists, who are working within time constraints on stories, are often forced to abandon such requests because of the red tape involved. This culture of resistance to releasing records experienced by journalists needs to be addressed through training and so forth. We have mentioned the possibility of providing incentives to officials to meet the deadlines, rather than the extended period from four to eight weeks provided as an exception in the Act becoming the norm. We have also suggested a requirement or policy to publish online or otherwise make provision for general public access, after or within a reasonable period, to FOI records previously released in response to individual requests. This would be in keeping with the spirit of the Act and make for a good management system for records.

Principle 6 is costs. This principle includes the provision that individuals should not be deterred from making requests for information by excessive costs. With regard to fees under head 47, the NNI takes the view that the up-front €15 fee should be removed and that review and appeal fees, if charged, should be refunded in instances where the request for information has eventually been released having been proven to be in the public interest.

It is of concern that journalists report the onerous fees structure actively used by State agencies and Departments is a deterrent. Given the pressures on news organisations, often an editorial call is made not to proceed in the absence of any guarantee one will obtain information. The international principles, while not ruling out fees, note that experience in a number of countries suggests access costs are not an effective means of offsetting the costs of a freedom of information regime. They go on to say however, that search and retrieval fees should be waived or significantly reduced for requests for personal information or for requests in the public interest, which should be presumed where the purpose of the request is connected with publication.

The biggest problem with fees is inconsistency. Journalists have detailed their experience on this and other aspects of fees and I will give a few examples. Journalists have stated there is absolutely no consistency and one Department will reply for free while another will charge hundreds of euro. A journalist made a simple freedom of information request for which the Department of Justice and Equality attempted to charge €5,116.83. Naturally this stops the flow of information dead in its tracks. The standard rate is €20.95 per hour for search and retrieval fees. The agency or Department in question estimates the number of hours work involved in a request and then issues a bill, of which one must pay 50% up-front without even knowing whether any documents exist. At one stage a particular journalist was able to get every com-

plaint issued against taxi drivers in Dublin over a 12 month period for €15, but now only figures on how many complaints are made with a sample of ten is provided. How is the journalist to know these are not the ten least controversial incidents? A story by an Irish journalist in Ireland was published based on a freedom of information request to the UK Department of Health. This was done at no cost and with minimum of fuss. One well-worded e-mail was sent and a month later the journalist had the information sought.

It is also of concern that if a freedom of information request is rejected the cost of any appeal falls upon the applicant regardless of the outcome. If I make a freedom of information request which is rejected and then successfully I appeal I am liable for the cost of the appeal even if the public body was wrong to force me to appeal in the first place.

While it may be argued that €15 is not an overly burdensome fee, in truth, its presence has certainly acted as a barrier to journalists submitting requests. What is more controversial is when additional search and retrieval fees are demanded for a request to be processed. In recent months bills of several hundred euro have been handed to us to finalise requests, and in some cases bills of several thousand euro have been received.

The NNI welcomes the proposed changes to the existing freedom of information regime but urges the committee to give some thought to the concerns and difficulties we have expressed. I am joined by three very senior journalists who are very familiar with the Act and work with it. They are very familiar with the issues they confront in making freedom of information requests.

Deputy Aengus Ó Snodaigh: This is this is not my area of expertise but I have an interest in it and in ensuring Irish society has an open system of government, so I agree with the points made.

Vice Chairman: A mobile telephone is on which is interfering with the sound system.

Deputy Aengus Ó Snodaigh: Does Mr. Cullen agree we have had a secretive system of government and progress has been made and that what is intended is further progress? It is often difficult for an institution to change its culture, and one of the big challenges for the Civil Service, but also for us as a society, is to change this mindset. I know from making inquiries to Departments that when we ask questions to elicit information it is seen as a distraction from the daily work of Civil Servants rather than is being seen as part of their work. When we have a shift in culture we will achieve the pro-active maximum publishing of material.

Deputies often clash with Departments when we ask parliamentary questions because a freedom of information request made at the same time elicits more information than we do. Perhaps the reverse is also true, where a Deputy gets a better answer to a parliamentary question then is received through a freedom of information request. I do not know why this is. Perhaps the freedom of information officer does not speak to the person who writes the parliamentary questions.

Mr. Cullen mentioned two organisations, the NTMA and NAMA, one of which is not covered by the freedom of information legislation. He also mentioned that according to the legislation establishing Irish Water, it will not be covered by the freedom of information regime. Perhaps an amendment can be made. I know of a few other organisations not covered at present. Does Mr. Cullen believe other organisations which are not covered at present and which are not intended to be covered should be covered to allow for the model he strives for and for which I strive for also?

I was interested in the point made that material is not given in electronic form in this day and age. This is a different problem. People still have not come to grips with the fact that one can press a button and send material and cut out the delay. This is not only with regard to freedom of information material. People requesting their files from the Department of Social Protection have the same problem. Those appealing social welfare decisions must wait until the physical file is transferred from the Department to the appeals office, but in this day and age most of the material is online. This is more a comment than a question.

The witnesses before the committee include journalists who are used to making freedom of information requests, and we have seen the articles they have managed to produce based on information which was hidden from view. I presume in most cases a freedom of information request is made after having applied to a Department for information in the first instance, and when a blockage is reached a freedom of information request is made. This comes back to the earlier point that if Departments were proactive they would answer questions honestly and up-front, particularly now they know one can pursue a freedom of information request, which adds to their burden and that of the journalists and the public.

Mr. Frank Cullen: I will make a quick comment after which Ms McDonald will respond. As I have been around for many years I will go back to the original Act. Ireland led the way with the first Freedom of Information Act. Unfortunately we took a retrograde step with the amending Act in 2003. We have slipped down the chart. We welcome the Bill as an attempt to bring us back to where we should be in the international rankings. The spirit of openness and transparency needs to be led from the Government. There is a natural resistance down the line but the leadership must come from the spirit of the Act. We want to be proud of where we rank when it comes to openness, transparency and accountability.

Ms Dearbhail McDonald: I thank the committee for this opportunity to make a submission on behalf of my colleagues at Independent newspapers and other colleagues throughout the country. The Freedom of Information Act was originally described as landmark legislation in terms of Ireland paving the way for open government. The barriers for us as working journalists are well rehearsed if not fully understood by members of the public and, possibly, Members of the Dáil and Seanad. I believe these could be circumvented significantly if not entirely if there was a genuine commitment to transparency and, as described by Mr. Cullen, a proactive approach to open government, including e-Government, as mentioned by Deputy Ó Snodaigh.

The type of barriers we face include upfront fees, including search and retrieval fees, fees in respect of appeals, which act as a deterrent, and a failure of decision making within the prescribed timeframes. In my experience and that of my colleagues there is a flagrant disregard of the deadlines prescribed in the Act. Also, there is inadequate training for officials dealing with freedom of information requests and inconsistencies within and across Departments in terms of interpretation of the Act, which leads to huge anomalies, not least in fees. There is under-resourcing at every level up to and including the Office of the Information Commissioner. One of my colleagues is currently awaiting a reply from that office in relation to a freedom of information request he lodged in June 2009.

In my view, taken on their own these types of barriers are a deterrent. On a cumulative basis, they have a paralysing effect. If it is the intention of Government that these barriers would act as a deterrent, I can confirm that they are succeeding. As journalists we must take realistic decisions and weigh up the use of the Freedom of Information Act on a cost benefit analysis basis in terms of the time and money spent. In my view, the Act has been filleted and contorted to such an extent that it has been in many cases rendered impotent, which is regrettable. We

therefore welcome many of the reforms.

Deputy Ó Snodaigh referred to the culture within Departments. We have not yet emerged from that culture of secrecy. It remains the case that the initial instinct on the part of official Ireland is to say nothing at all. One of my colleagues in the *Sunday Independent* describes this as the culture of deter, resist and refuse. To that I would add, "If all else fails, redact". I will provide some specific examples. One of my colleagues at the *Sunday Independent,* Daniel McDonnell, sought to obtain documents relating to the Government decision to financially assist or bail out CIE to the tune of €36 million. We in the *Sunday Independent* and elsewhere felt that the documents and memos relating to that decision were matters of huge public interest. The Department of Transport, Tourism and Sport took a different view. After extensive liaison all that was released was a significant amount of redacted documents and drafts of a press statement. CIE is a State owned company. It operates a near monopoly and has just received a major bailout to plug its deficit. This type of issue is of huge public interest.

This leads me on to the issue of public bodies. We do not yet know what additional public bodies will come under this Act. There is huge power vested in the Minister to decide that. We believe there are major weaknesses in respect of the exclusion, for example, of commercial semi-State bodies such as CIE. Although the inclusion of An Garda Síochána and the vocational education committees is welcome, it boggles the mind how CIE, from a security perspective or otherwise, is higher up on the list than the Garda Síochána or Central Bank. There is huge significant public interest in that issue.

We also believe there are major weaknesses, currently and possibly into the future, in respect of bodies such as the National Treasury Management Agency, NTMA, and the National Asset Management Agency, NAMA. I will give an example of what we cannot get access to in respect of NAMA. Records relating to developers working with NAMA are excluded. We do not know if developer A is complying with his or her business plan or if developer B is being investigated for not fully disclosing his or her assets. We have to wait for actions to come before the courts to get information. In relation to actions before the courts in America, we log on to a website and can get all the required information. There is a major deficit in this area. We do not know about disciplinary matters within NAMA, which information is pertinent in respect of court action taken against a named individual in the courts over security concerns about information emanating from NAMA. We do not know about the remuneration or salary levels of NTMA staff.

Given the events of last night, I can think of no greater issue facing current and future generations than the operations of NAMA, the Department of Finance and the NTMA. These are manifestly in the public interest. While we accept and acknowledge that there should be exceptions, there has been and is abuse of the cry of emergency and of commercial sensitivity in blocking access to information that we as citizens, taxpayers and members of the public already own. I cannot stress this enough. The right to freedom of information is, like any other right, not a right if not effective and accessible. My concern in relation to the reforms, although much desired and welcomed, is that if the spirit of the law is not matched by practical implementation on the ground then it is an ineffective right.

On culture, as working journalists we often believe the media are being punished for daring to ask questions. The relationship between the media and the body politic can often be uncomfortable, if not hostile, but we should not be punished for seeking access to information that, as Mark Tighe of *The Sunday Times* will back up, is widely available in other countries. We believe there is a unique opportunity, in terms of Ireland's Presidency of the European Council

and the eyes of the world being upon it, for Ireland to show leadership, not alone in the area of freedom of information but also of open government and e-Government.

Deputy Kevin Humphreys: I thank all of the witnesses for attending this morning's meeting. I also thank them for the remarks made earlier about the former Minister, Eithne Fitzgerald, in the context of the introduction of ground-breaking freedom of information legislation. We often concentrate on the negativity of freedom of information requests, but this can lead to positive change in terms of record keeping and efficiencies in the public service to ensure not only that information is easily accessible when a freedom of information request is made but also that it is easily accessible for the body politic when it needs to review the record. It is hoped that the spirit of the Act will be upheld. I hope also that it will impact in the area of responses to parliamentary questions. Members are also often frustrated by the "only answer exactly what one is asked" type attitude. For this reason many Deputies, including myself, often table a number of parliamentary questions around the same issue.

I have a couple of questions for the witnesses. What is their vision in terms of incentivisation to meet deadlines in relation to freedom of information requests? I would welcome if they could put some meat on that vision. A user group system was previously operated in respect of freedom of information requests. Have the witnesses participated in it or would they consider it a positive move to put a structure around the user group through which a real method of engagement would be available?

We heard submissions yesterday on the format and PDFs, which ensures easy access to information. I acknowledge the point that the exemptions must be clarified. I welcome that the NTMA and NAMA are to come within the scope of this legislation. We will need to wait and see how this goes and to expand on it later, if necessary. The issue of appeal fees is causing huge frustration. There is a need to reduce appeal fees and not only in respect of freedom of information requests. For example, members of the public are often frustrated when they take up a matter with An Bord Pleanála, carry the fees, win the appeal and yet are at a loss financially. I believe that all non-commercial semi-State companies should be included, including Irish Water, EirGrid and other companies which have a monopoly. All State companies with a monopoly should come within the scope of the freedom of information legislation. As for commercial semi-States, I agree with the witnesses to a point but not to the extent that it would disadvantage them when operating in a commercial market. One must be very careful in this regard. While it should be so in spirit, it should not be to such an extent that one would give their competitors a competitive advantage. Perhaps it could be designed in such a way that everyone in the market would have the same level of openness to freedom of information requests as the semi-State commercial entity. However, one must be very careful to not disadvantage such entities, because they are of significant importance to the State. I will leave it at that and might come back after the witnesses have dealt with these points.

Mr. Carl O'Brien: On the issue of incentivising and perhaps achieving a faster turnaround for freedom of information requests, there are a couple of practical ways this could be done. For example, on the issue of delays, if a freedom of information request is not processed within the legislative time limit, perhaps the information then should be made available automatically to the requestor. This would provide a real incentive to the decision-makers to process it. In addition, as the National Newspapers of Ireland, NNI, submission noted, making available a lot of this information as a matter of course would preclude the need for freedom of information requests in the first place. It would be going to the spirit of more open governance that routine basic information should be provided as a matter of course. On the issue of fees and incentivis-

ing the correct decision-making in this regard, appeal fees should be refunded if it is found that the material sought was found to have been in the public interest because, at present, there is no incentive for a decision-maker to get the decision right. One can keep redacting and refusing information and ultimately appealing it but no matter how many times this is done, there is no incentive on the decision-maker to get that right. In addition, training will be absolutely crucial in changing this cultural shift and incentivising freedom of information officers to make decisions that genuinely are in the public interest.

This cultural issue and such training will be crucial because as journalists, we come up against barriers in a very practical way on a daily basis. A big issue with the 2003 amendment to the Act is that not only was it an attempt to shut down the operation of large aspects of the freedom of information legislation, but it also led to this culture of redaction and rejection of information. I will give a couple of practical examples. On the issue of delays, for example, I made a freedom of information request to the HSE regarding the treatment of separated children seeking asylum. These were particularly vulnerable children who were in unregulated hostels, were disappearing and about the welfare of whom there were major concerns. That freedom of information request took three and a half years to be processed by the HSE. The information was only released after the Government had actually changed the practice and shut down such hostels. Consequently, one gets the sense that in many cases, the information was being delayed until they had political cover for the decision they had made. Similarly on excessive fees, as Ms Dearbhail McDonald mentioned, there is a huge disparity, on a day-to-day basis, in the fees being quoted for the same types of documents. I refer, for example, to briefing material prepared for Ministers or Secretaries General. Sometimes it is the basic €15 fee while at other times, it is hundreds of euro. One gets the feeling a lot of the time that such excessive fees are being quoted to dissuade people from seeking information.

In addition, another cultural approach to the decision-making is the blanket refusal or sometimes cynical use of part of the legislation to reject records, such as the use of deliberative processes or commercial sensitivity. I have to hand a document which was released on foot of a freedom of information request relating to briefing material for the Minister for Finance in respect of the 2009 budget. The budget in question involved taking between €1.5 billion and €2 billion out of public spending and, consequently, these were issues that are relevant to every man, woman and child in the State. A seven-page document was released to me that set out the spending options put before the Minister. However, as members can see, this is a seven-page document in which every single page has been blacked out and only minimal information regarding headings has been retained. Such a cynical approach to releasing information really undermines the spirit of the Act. Moreover, this example related to a budget that had been announced, to Estimates that had been published and for which the Finance Bill had been enacted. In real terms, there was no reason to reject the release of the information but yet all this information was denied on the grounds of deliberative processes. Such blanket use of deliberative processes is a real issue because matters are under permanent consideration in the eyes of decision-makers. Consequently, this often undermines the practical application of the Act and is where going back to training for staff is crucial in terms of fulfilling the spirit of the Act and ensuring we maximise the potential of this legislation.

Mr. Mark Tighe: May I address the point on how to incentivise information officers to respond in a timely fashion? We must have greater oversight from the Office of the Information Commissioner, that is, Ms Emily O'Reilly's office. There is a global right to information ranking in which Ireland is ranked just 44th out of 92 countries that were assessed by Access Info Europe and the Centre for Law and Democracy. One of the reasons for this is because the

Office of the Information Commissioner, OIC, has very few oversight powers. We recently did a story on how the OIC has stated it now has 86 staff, which is down from 102 in 2009. However, the Information Commissioner has three hats. She must deal with standards in public office and is the Ombudsman. In this context, she has a lot more responsibilities as so many more bodies have come under the remit of the Ombudsman in recent years. Consequently, that office is being asked to do more with fewer resources and freedom of information has fallen down its list of priorities. Latest statistics show that only 19.5% of appeals to the Information Commissioner were finished and completed within the four-month period set down by statute. The statue provides that the Information Commissioner must deal with appeals within four months, where practicable. While there is an "out" there for the Information Commissioner, one must concede the office does not have the resources to go knocking on doors to ask the reason the body concerned has not responded within this timeframe.

News and records like this are perishable products or pieces of information. If someone is working on policy and the Bill is published and passed but one only gets the briefing documents or the lobbying submissions two or three years later, it is academic. While it might be good for a history book, it lacks news value. One reason Ireland scored so poorly is the exemptions mentioned by Mr. Carl O'Brien on the grounds of deliberative process and commercial sensitivity. In addition, there is an exemption whereby documents prepared for the Cabinet are completely exempt. There is no public interest clause to the effect that such a document should be released in the case of there being an overriding public interest. If one goes back to the bank guarantee in September 2008, we sought access to all briefing documents and memos of the notorious meetings between the Government, the bankers, the Central Bank and so on. It was only on appeal to the Information Commissioner, approximately five or six months after we started the freedom of information process, that the Department suddenly discovered there were two brief and hurriedly written scribbled notes taken by an official that recorded what was said at these meetings. These are very important documents but, unfortunately, the Information Commissioner ruled against us after the appeal. It was decided that this was a document prepared for the Cabinet because apparently, these notes were passed on at the incorporeal meeting. However, it is a very significant document that I believe should be out of the public domain but which simply cannot be placed there under our freedom of information laws. We could have taken a High Court challenge to the ruling but in terms of cost, I do not think I could persuade my editor to take up that challenge.

In respect of one point on which Ms Dearbhail McDonald touched, it is kind of outside the scope of freedom of information legislation but access to court documents is an issue the joint committee perhaps should discuss with the Minister. As members are aware, there is a constitutional right for all legal actions to be carried out in public. However, I cover the courts a lot of the time and one often now sees lawyers standing up in court and telling the judge they will now refer to their written submissions. Unless the lawyer or the clerk will play ball, the reporters will not get to see the contents of such affidavits or written submissions. This is a practice that has evolved from court rules issued by judges. It is something the committee should examine because as Ms McDonald said, one can log on to PACE or American websites and see what NAMA has filed against Sean Dunne yet we cannot see what NAMA is saying in detail in the case of the Quinns, unless they play ball and give one a copy of the affidavit. The courts are a considerable part of the system of open government. We must open up the area as well.

Ms Dearbhail McDonald: As legal editor of the *Irish Independent*, access to court documents is a huge problem. I refer to documents that are opened, privileged and relied upon in court proceedings. I would not like to say in public what we have to do sometimes just to do

our job in covering the courts.

Freedom of information has a knock-on effect on other policy areas, not least access to court documents, which are not accessed for journalists alone. We act as the eyes and ears of the public. It also affects, for example, policy areas such as the operation of the *in camera* rule, the blanket ban on coverage of family law cases and cases involving minors. The connection with freedom of information is that we seem to have a blanket culture of secrecy. It is the mindset which Deputy Ó Snodaigh referenced earlier. One could ask how we change the mindset and culture. It is not a war of attrition between the media and the Seanad or Dáil Éireann. This is a public policy issue. The public and democracy benefit when there is an open culture. Last night there was confusion on social media and elsewhere about what was happening. It erodes trust among citizens in a modern democracy when they do not know what is going on. We have huge rows over information on issues that are not controversial. Some of the biggest battles we fight relate to non-controversial information. We shy away from it because it is simply not working. The risk is that when we do not get information by ordinary measures available to journalists and taxpayers in all other countries then one must resort to surreptitious means. That is not good. I do not know what the Government and the country has to fear from a policy of openness and transparency.

Mr. Carl O'Brien: Deputy Ó Snodaigh mentioned the freedom of information users group. My understanding is that it is currently made up exclusively of civil servants, who are the decision makers. It is crucial that any users group must include representatives of the public, the media and decision makers if it is to be truly representative of the people who use the legislation.

Deputy Aengus Ó Snodaigh: Some interesting points have been made. The confusion last night was not confined to those using social media. As Whip I have access more quickly than others but I still did not know what was happening either.

There is a danger that if the culture is allowed to persist that one will end up with some of those who are taking decisions not committing anything to paper, or at the very least knowing that if they do that they will be retracted. That is not what freedom of information legislation is supposed to be about.

I am interested in the comment on semi-State companies and commercial semi-State companies. The Opposition and backbenchers feel the same frustration because Ministers are not answerable to the Dáil. Even though it is our job to hold the Government to account we do not have the same access the media are seeking. There has long been a demand for Ministers to be answerable in the Dáil and Seanad.

Ms Dearbhail McDonald: We accept and we acknowledge that there should be exemptions. The difficulty is that those who make the decisions are judges in their own cause. The source of frustration relates to the lack of oversight and the inability to challenge or successfully appeal. That is the difficulty we have. We acknowledge that there should be exceptions and exemptions but they should be clear and there should be an effective right of appeal where exemptions are raised.

Deputy Aengus Ó Snodaigh: Opposition Deputies have made some progress through the Ceann Comhairle recently on questions that were ruled out of order in the past or where it was said the Minister did not have a responsibility to the Dáil. We have an appeals mechanism now. In fairness to the Ceann Comhairle, he has been good in resubmitting questions on our behalf to

the Department or the Minister who had refused them. Given the progress on that level, there is less opportunity to not be open. Once a Deputy can gain access, then all citizens should have access. The same should be true of Cabinet decisions. There is logic to having confidentiality around Cabinet decisions initially, but one year or ten years later in the main there is not a need for it to be a secret. How the decision was made would not affect anyone.

When requests come in for information that impinges on our work as Deputies, our gut instinct can be to consider them to be frivolous. However, in the main there is nothing to hide. Any organisation or structure that is paid for by the public purse should be open to as much scrutiny as possible without interfering in its day-to-day functions. As Mr. O'Brien indicated, it is meaningless to give out a document with seven pages retracted.

I have requested freedom of information on a number of occasions and every one of them was granted. Perhaps it was to do with the questions I asked.

Deputy Kevin Humphreys: What were the questions?

Deputy Aengus Ó Snodaigh: They were probably written for me. A fee structure exists but in the event of delays perhaps penalties could be levied on the organisations. Perhaps that is what we should examine? We heard about delays of three years in one case and another where the timeframe was routinely breached. The introduction of penalties for delays might be an incentive for the FOI officers. For example, a delay of a month could result in a refund of the original fee. A rolling scale could be introduced which might incentivise the speedier provision of information. The problem is that it will be considered to be a cost on the Exchequer when the Bill comes before the House and Opposition Deputies cannot table amendments to that effect. However, it could be worth examining because there is no point in having a timeframe for the provision of information if there is no disincentive for non-compliance.

Dearbhail McDonald: The cost could be ameliorated by a proactive approach in the first instance thereby circumventing the need for so many FOI requests. Perhaps that is something that could be addressed on Committee Stage.

Mr. Carl O'Brien: Another issue raised by Deputy Ó Snodaigh related to the lack of note taking. It is a serious issue. A culture has set in whereby officials try to avoid taking notes where possible. Post-it notes are made but they are not officially on a document and they can be removed when the official documents are released which means we do not necessarily see the advice that is being to a Minister by a civil servant. Increasingly, there is evidence of the use of private e-mail accounts being used, which are not subject to FOI rather than official e-mail accounts. One suggestion is that there would be a legislative obligation on public officials to use official e-mail accounts or to commit everything to paper. That is a potential way of tackling the culture that has arisen, in particular since 2003.

Mr. Mark Tighe: In the United Kingdom the Information Commissioner has ruled that if a public official is using a private Hotmail or other e-mail account for official purposes that it is still subject to FOI. That is something we should examine if officials are trying to circumvent the legislation by using Hotmail or Gmail for an official purpose. The Information Commissioner could decide that the documents should be subject to FOI.

Vice Chairman: I will play the devil's advocate. I was a member of the committee in 2003 when the then Minister, Charlie McCreevy, reversed the legislation. It was considered to be a retrograde step. If I could get senior civil servants in here in private session and turned off all

the cameras, I would hear words like "frivolous", "vexatious", "fishing exercise" and "unethical". It all boils down to the control of information. As a Government backbencher, I can see the instinct to control information while we talk about open and transparent government. I can see all the arguments being thrown up. Mr. Cullen spoke about complaints about taxi drivers, where he will get the ten mildest complaints. If I speak to someone on the other side, he will say that journalists would select the worst complaint from 1,000 complaints and use it as a banner headline. Those arguments were used privately as a reason for shutting down freedom of information - there were huge costs to Exchequer for fishing exercises to embarrass the Government. We were in opposition at the time and disagreed with it then. Our instinct, and this is where the legislation comes from, is that it is better to move towards more open government.

The Information Commissioner, Emily O'Reilly, appeared before us yesterday and marked 2003 as the watershed moment. After that the interest in FOI dropped down the priority scale, even for those managing it within the public sector.

Mr. Frank Cullen: There was a change of spirit and practice. Today, even more than then, we live in an instant society when it comes to information. We want not just openness but accuracy in the information that is available. When dealing with the courts, which is done in the public interest, it is vital that accurate information is put into the public domain so anything that can facilitate accuracy of information is welcome. There must be a change of attitude about documents and access to documents. There must also be an understanding of the role of the press in delivering that information in the public interest.

Ms Dearbhail McDonald: The original Act, and the filleted version that replaced it in 2003, addressed the issue of nuisance or vexatious claims. It is a red herring to suggest the reason why there are such exorbitant fees is to deter those claims. The right to freedom of information cannot be killed by using the cloak of its occasional abuse; the Government should deal with that. The original Act and the 2003 amended Act address that and there are ways to do it without raising the red herring of fees. There will always be nuisance and vexatious claims - this happens in all strata of society, in the courts and elsewhere. This is about proportionality, however, and the right to information cannot be killed off by raising the flag of nuisance fees. It is something that must be dealt with and the Act and its amended version did so. It can be addressed and should not be used as a proportionate justification for the fee structures.

Deputy Kevin Humphreys: I feel strongly about the public private partnerships. They have been abused in the past. I am in favour of moving back to the spirit of the legislation introduced by Eithne Fitzgerald. With greater freedom, however, comes greater responsibility. The media must live up to that responsibility in manner information is reported when it is made available. Sometimes the banner headlines do not reflect the content of the story underneath, they place a different slant on the story. As citizens we have responsibilities and the media also have those responsibilities. With the greater freedoms that are being brought through the legislation, there is an onus on all sorts of media resources to be responsible.

Mr. Frank Cullen: The point is well made and we acknowledge that. We have the Press Council and our own codes and standards. Perhaps there should be training on our side once the legislation is in place. We would be happy to work with the committee on that.

I thank the committee for listening to us today. The spirit of Eithne Fitzgerald's original Act is there but we live in a fast moving world now of instant information. Openness and accuracy are fundamental.

Ms Dearbhail McDonald: This is about honouring the spirit of the Act to maximise its potential. We made these submissions not just in our own cause for our individual newspapers and the industry, but for the broader good it will bring to society and democracy. I thank the committee for its time.

Vice Chairman: In the same spirit, we want to see more open government. There will always be toing and froing and everyone feels they are hard done by in the media in this game. I am sure we are not and that it is merely our sensitivity.

I thank the witnesses for their attendance. All submissions and discussions will go into our final report which will be forwarded to the Department to form part of its deliberations. This was a very useful exercise.

Sitting suspended at 10.45 a.m. and resumed at 11 a.m.

The joint committee went into private session at 11 a.m. and adjourned at 11.40 a.m. until 2 p.m. on Wednesday, 20 February 2013.