

APPENDIX A

International Benchmarking and Possible Change to the *Access to Information Act* in relation to records under the control of the Canadian Broadcasting Corporation

(2011-10-25)

Exceptions to the right of access should be limited and specific, they should be discretionary and injury-based. The wording of exemptions should be clear and objective in nature.

An injury-based exemption requires that a government institution must establish a reasonable expectation of harm and support that expectation with specific evidence.

A discretionary exemption ensures that the public interest in obtaining access to the requested information will be considered by the head of a government institution even where the information would otherwise qualify for exemption.

Thus, instead of an exclusion, the OIC proposes a discretionary, injury-based exemption along the following lines:

The head of the Canadian Broadcasting Corporation may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to prejudice the journalistic, creative or programming independence of the Corporation.

Appendix A

International Background

In the United Kingdom, Australia and Ireland, public broadcasters are subject to Freedom of Information (FOI) legislation to a limited extent, and journalistic and programming aspects of their work are not subject to disclosure. The exclusion of journalistic and programming aspects of the broadcasters' work is achieved in different ways in each jurisdiction.

The following table provides a comparison of these three international jurisdictions.

Coverage of Broadcasting Corporations under Freedom of Information Legislation

Countries <i>Relevant legislation</i>	Canada <i>Access to Information Act</i>	Australia <i>Freedom of Information Act 1982</i>	Ireland <i>Freedom of Information Acts 1997 and 2003</i>	United Kingdom <i>Freedom of Information Act 2000</i>
Are broadcasting corporations covered by FOI legislation?	Yes (Canadian Broadcasting Corporation)	Yes (Australian Broadcasting Corporation)	Yes (Radio Telefis Éireann, RTE Commercial Enterprises Limited, RTE Music Limited, Seirbhísi Theilifis Na Gaeilge Teoranta and DTT Network Company)	Yes (British Broadcasting Corporation, Channel Four Television Corporation and Sianel Pedwar Cymru)
How is journalistic and programming information protected?	Exclusion For: information that relates to journalistic, creative or programming activities	Exclusion For: program material and datacasting content	Exclusion For: information gathered for journalistic or programming content purposes.	Exclusion For: journalism, art or literature

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Is there an exception to the exclusion?	Yes: exception for information related to general administration		The Regulation specifies that the Act applies to the functions of management, administration, finance, commercial, communications and making of contracts of or for service.	
What powers does the Commissioner have to require disclosure of the information to a requester?	None: Recommendations making powers only	Full: Order making powers	Full: Order making powers	Full: Order making powers
Does the Commissioner have the power to compel production of responsive records related to the journalism etc. in the course of an investigation?	Issue is currently under reserve before the Federal Court of Appeal	Yes	Yes	Yes (House of Lords decision, <i>Sugar v. BBC</i>)

[Appendix B provides the specific language of the statutory provisions in Canada, Australia, Ireland and the United Kingdom]

Appendix B
Relevant legislation

CANADA

Access to Information Act, R.S.C. 1985, c. A-1

Section 3 definitions

3. In this Act,

“government institution” means

(a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and

(b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act;

Section 36

36. (1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power

(a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;

(b) to administer oaths;

(c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;

(d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;

(e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and

(f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.

Access to records

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

Section 68.1

68.1 This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that relates to its general administration.

AUSTRALIA

Freedom of Information Act 1982, Act No. 3 of 1982 as amended

Section 7

7(2) The persons, bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of this Act in relation to the documents referred to in that Schedule in relation to them.

Schedule 2, Part II, Division I

Australian Broadcasting Corporation in relation to its program material and its datacasting content.

Section 55K

Decision on IC review—decision of Information Commissioner

(1) After undertaking an IC review, the Information Commissioner must make a decision in writing:

(a) affirming the IC reviewable decision; or

(b) varying the IC reviewable decision; or

(c) setting aside the IC reviewable decision and making a decision in substitution for that decision.

Section 55R

Division 8—Information gathering powers

55R Information gathering powers—obliging production of information and documents

Scope

(1) This section applies if the Information Commissioner has reason to believe that a person has information, or a document, relevant to an IC review.

(2) This section applies subject to sections 55T (exempt documents generally) and 55U (particular exempt documents).

Notice to produce

(3) The Information Commissioner may, by written notice, require a person to, for the purposes of an IC review:

(a) give the Information Commissioner information of a kind specified by the notice; or

(b) produce to the Information Commissioner a document specified by the notice.

(4) The notice must:

(a) be in writing; and

(b) specify the place at which the person must comply with the notice; and

(c) state that the person must comply with the notice:

(i) within a specified period that is not less than 14 days after the day on which the person is given the notice; or

(ii) at a specified time that is not less than 14 days after the time at which the person is given the notice.

Offence for failure to comply

(5) A person commits an offence if:

(a) the person is subject to a requirement specified in a notice under subsection (3); and

(b) the person engages in conduct; and

(c) the person's conduct breaches the requirement.

IRELAND

Regulations Prescribing Public Bodies, Freedom of Information Act, 1997 (Prescribed Bodies)(No.2) Regulations, 2000

S.I. 115/2000

1. These Regulations may be cited as the Freedom of Information Act, 1997 (Prescribed Bodies)(No.2) Regulations, 2000.

2. (1) Subject to paragraphs (2) and (3) of this Regulation, the bodies, organizations and groups specified in Schedule 1 to these regulations shall stand prescribed for the purposes of paragraph 1(5) of the First Schedule to the Freedom of Information Act, 1997 (No.13 of 1997)

(2) Subject to paragraph (3) of this Regulation, the Freedom of Information Act, 1997, shall apply to a body, organisation or group prescribed by paragraph (1) of this Regulation

only as respects the functions of the body, organisation or group which are specified in Schedule (2).

(3) For the purposes of these Regulations the functions specified in Schedule 2 to these regulations shall be deemed not to include any of the matters specified in Schedule 3 to these regulations.

SCHEDULE 1

1. Radio Telefis Éireann
2. RTE Commercial Enterprises Limited
3. RTE Music Limited
4. Seirbhísí Theilifis Na Gaeilge Teoranta
5. DTT Network Company

SCHEDULE 2

1. Management
2. Administration
3. Finance
4. Commercial
5. Communications
6. Making of contracts of or for service with any person, company or other body.

SCHEDULE 3

1. The gathering and recording, in any form of news, information, data, opinions, on or off the record quotes or views from any person or body or source, for journalistic or programme content purposes, whether or not a programme -

(a) is produced on the basis of such information, or

(b) is broadcast.

2. The identification of any potential or actual source of information or material for the purpose of programme origination, whether or not such programme is produced or broadcast and without prejudice to the generality of the foregoing, shall include the consideration of programme proposal submissions from internal and external sources.

3. The editing and storing of any material recorded by any means, whether written, aural, visual or otherwise, for the purpose of programme origination, whether or not such programme is produced or broadcast.

4. The process of making editorial decisions concerning programme or programme schedule content which, without prejudice to the generality of the foregoing, shall include preliminary programme proposal reviews, programme planning and final pre-transmission editorial decisions.

5. The process of post transmission internal review and analysis of any programme or schedule of programmes broadcast.

Freedom of Information Acts 1997 and 2003 , No. 13/1997

Section 34

(2) Subject to the provisions of this Act, the Commissioner may, on application to him or her in that behalf, in writing or in such other form as may be determined, by a relevant person—

(a) review a decision to which this section applies, and

(b) following the review, may, as he or she considers appropriate—

(i) affirm or vary the decision, or

(ii) annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper, in accordance with this Act.

Section 37

37.—(1) The Commissioner may, for the purposes of a review under section 34 or an investigation under section 36—

(a) require any person who, in the opinion of the Commissioner, is in possession of information, or has a record in his or her power or control, that, in the opinion of the Commissioner, is relevant to the purposes aforesaid to furnish to the Commissioner any such information or record that is in his or her possession or, as the case may be, power or control and, where appropriate, require the person to attend before him or her for that purpose, and

(b) examine and take copies in any form of, or of extracts from any record that, in the opinion of the Commissioner, is relevant to the review or investigation and for those purposes take possession of any such record, remove it from the premises and retain it in his or her possession for a reasonable period.

(2) The Commissioner may for the purposes of such a review or investigation as aforesaid enter any premises occupied by a public body and there—

(a) require any person found on the premises to furnish him or her with such information in the possession of the person as he or she may reasonably require for the purposes aforesaid and to make available to him or her any record in his or her power or control that, in the opinion of the Commissioner, is relevant to those purposes, and

(b) examine and take copies of, or of extracts from, any record made available to him or her as aforesaid or found on the premises.

(3) Subject to subsection (4), no enactment or rule of law prohibiting or restricting the disclosure or communication of information shall preclude a person from furnishing to the Commissioner any such information or record, as aforesaid.

(4) A person to whom a requirement is addressed under this section shall be entitled to the same immunities and privileges as a witness in a court.

(5) The Commissioner may, if he or she thinks fit, pay to any person who, for the purposes of a review under section 34, or an investigation under section 36, attends

before the Commissioner or furnishes information or a record or other thing to him or her—

(a) sums in respect of travelling and subsistence expenses properly incurred by the person, and

(b) allowances by way of compensation for loss of his or her time, of such amount as may be determined by the Minister.

(6) Subject to the provisions of this Act, the procedure for conducting a review under section 34 or an investigation under section 36 shall be such as the Commissioner considers appropriate in all the circumstances of the case and, without prejudice to the foregoing, shall be as informal as is consistent with the due performance of the functions of the Commissioner.

(7) A person who fails or refuses to comply with a requirement under this section or who hinders or obstructs the Commissioner in the performance of his or her functions under this section shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 6 months or both.

(8) This section does not apply to a record in respect of which a certificate under section 25 is in force.

UNITED KINGDOM

Freedom of Information Act 2000 (2000, c. 36)

Section 3

3(1) In this Act “public authority” means—

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—

(i) is listed in Schedule 1, or (...)

SCHEDULE 1

Public authorities

Part VI

(...)

The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature.

Section 50

50 Application for decision by Commissioner.

....

(3) Where the Commissioner has received an application under this section, he shall either —

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a “decision notice”) on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority—

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b) has failed to comply with any of the requirements of sections 11 and 17, the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

(5) A decision notice must contain particulars of the right of appeal conferred by section 57.

(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.

(7) This section has effect subject to section 53.

Section 51

51 Information notices.

(1) If the Commissioner—

(a) has received an application under section 50, or

(b) reasonably requires any information—

(i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Part I, or

(ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under sections 45 and 46, he may serve the authority with a notice (in this Act referred to as “an information notice”) requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.