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View from the newsroom: the value of FOI requests and of other publicly available data

Colin Coyle, News Editor, *The Sunday Times*

If you've never worked in a Sunday newspaper you might be wondering why the news editor of *The Sunday Times* on one of the busiest news weeks of the year is standing in front of you at 2pm instead of frantically writing or editing a story. In reality, very little of a Sunday newspaper's news content derives from anything that happens on Saturday. By Friday night, we in *The Sunday Times* have usually decided where each story will appear.

Very little of news value happens on Saturday, except for the odd occasion like a general election count or large public protest. There are no set-piece events like political announcements; press conferences or court cases. Crime never sleeps, of course, and, tragically, it is a dangerous day on the roads, but listen to an Irish radio or television news bulletin on Saturday and the odds are that it will lead with a foreign story.

So unlike daily newspapers, with their digest of Oireachtas reports and court cases, Sunday newspapers need to break fresh stories. So where do they come from?

I'm going to explain to you how there is a wealth of publicly-available information that can yield solid, and occasionally spectacular, news stories. I'll mainly be focusing on how our newsroom uses the Freedom of Information Act to source stories: for a Sunday paper this is a necessity rather than a luxury, with up to five stories every week appearing as a result of an FOI request.

FOI is one of several tools I use on a weekly basis. I describe it as a tool because that's how I see journalism: as a craft. Yet some journalists never master these basic tools. Some journalists live for the thrill of catching a quote from a politician, a Garda, a freshly-convicted criminal or embattled chief executive at a doorstep or press conference and filing it before anyone else.

But for a Sunday journalist, the emphasis is on setting the forthcoming week's agenda rather than being minutes or even seconds faster with a breaking story.

So why don't more journalists use these tools I'm talking about? Partly because we're not great at teaching each other about them. Those that use them rarely disclose how they get their stories. If you have an edge in your business, you guard it closely. Most journalists are competitive animals. They will guard sources, and story-getting tools, from even their own colleagues or editors. Perceptive journalists read other newspapers as much for an insight into how other journalists go about getting stories as for the stories themselves.

Much as it pains me today, I'm going to share with you a few of my tricks of the trade, knowing I might regret it because one of you might scoop me some day.

Among the tools I use on a regular basis are land registry and planning records. I don't have to tell you that in Ireland, many of the great stories come from land and property. They're usually the ones you find being likened endlessly to John B Keane's *The Field*.

I probably write two to three stories every month about land or property: Who's buying, who's selling? Who's planning what and who's objecting to it? In a world where the rich and powerful are increasingly asserting their privacy through the courts, the planning system still demands transparency: whether you live on Dublin's Shrewsbury Road or in a modest estate, if you plan to carry out significant work on your home, you must publish the plans in a newspaper and online. Planning disputes between the rich and famous are a weekly staple of *The Sunday Times*.

Apart from land and property, another great ingredient for a story is money. So learn how to use company accounts to find out who is earning what, or how much they're losing or what companies are avoiding paying tax.

Learn how to access wills and probate documents and you can find out who is leaving what, and to whom. I once wrote a story about the writer Maeve Binchy's will expecting it to be about how much money she had accumulated during an extraordinary career, which had always remained a mystery because, unlike other authors, she never channelled her earnings through a company. Instead, the story focused on her beautifully-written will, with dedications to friends and family and strict directions about where each family heirloom would go.

If you learn how to access bankruptcy records, and unusually for court documents they are available to the public, then you can find who owes what and to whom.

During the year, for example, I reported how Colm Keaveney, a former Labour and Fianna Fail TD, had gone bankrupt owing €1.23m. His bankruptcy file explained how he got into financial trouble and to whom he owed the money and led to a front-page story that was followed up in the rest of the press.

Go to the General Register Office and you can check records of births, deaths and marriages.

Then there are lobbying registers, the newly-created register of charities and politicians' and their advisers' registers of interests, which are published each year.

All of these databases contain information that can lead to strong public interest stories if you learn your way around them.

Nobody thought me how to use any of these facilities: I learned by trial and error.

Sometimes good stories come from a combination of these sources and reveal conflicts of interest or double standards.

Last year in the Dáil register of interests I saw that Michael Healy-Rae, a TD for Kerry, had bought a new property during the year that he had subsequently let. However, he didn't list the address. So I checked what properties he owned in the land registry and found the address of the newly-bought house.

I googled it and discovered it had been sold at an Allsop auction of so-called distressed assets. Then something rang a bell. Deputy Healy-Rae had once protested at an Allsop auction because it was selling indebted properties in Co Kerry. I pulled up an old report of his comments at the time and so a front page story was born using publicly-available records that anyone could have accessed.

I broke that story in a matter of hours while sitting at my desk. When I began as a reporter, it would have required a visit to Leinster House to view the register of interests and also a trip to the Land Registry in the north inner city. But many of these databases and search facilities are now accessible online, saving time and money.

The great thing about finding stories using your own initiative and search tools is you know you're not being spun. When you are leaked a story, there is always a slight doubt at the back of your mind, even if you are passed a document or email backing up the supposed story. What information are you not being given? Why are they leaking to you? What's their agenda? If you can't see the agenda, it's disconcerting.

Get something wrong and it's your neck on the line. Due to Ireland's draconian defamation laws, a mistake can cost hundreds of thousands of euro to your publication.

There is comfort in written records, particularly those from an impartial body without a vested interest. This is where Freedom of Information comes in.

Of all the tools I've mentioned, I probably use FoI the most. And the good news is that since 2014, when the Act was updated, putting in an FoI request has never been easier. Previously requests had to be accompanied by €15 cheque, necessitating posting the request. The initial fee has since been abolished and bodies included under the act, of which there are far more now than when the original act was introduced in 1997, will accept requests by email. Most public bodies list their email addresses for FoI requests online: save yourself time, create a spreadsheet of these.

Yet many journalists – in fact most in my experience – don't use FoI on an ongoing basis because the process can be incredibly frustrating.

Putting in a request is the easy bit: simply request the records you want, point out you are making your request under the Freedom of Information Act, and wait for your reply.

Despite this, many journalists grow dispirited by the refusal of records. More than one has told me that they stopped using FoI because they simply did not have enough time to chase up their requests, which seemed to always be refused anyway.

So where are they going wrong?

An Garda Síochána finally came under the FoI Act for the first time last year. Journalists were understandably delighted and about half of all requests made to the gardai so far have been from journalists. But in the force's first 14 months under the act, only 7% of its FoI requests were granted. Most of those refused – 67% - fell outside the scope of the legislation.

So it's clear that many seem not to have read what garda records are actually included in the act i.e. only records relating to human resources, finance and procurement. If so, they wouldn't have asked questions such as these two (and these are actual requests from journalists to the gardai under FoI in 2016):

I wish to request statistics on reported assaults in which a stiletto shoe was used in an assault last year.

I wish to request records relating to cases of Necrophilia and/or Interference with Corpse and Theft of a Corpse/ Human Body recorded between 1996 to March 2016.

Obviously, neither of these has anything to do with HR, finance or procurement.

Nobody sets out to waste an FoI officer's time and nobody wants their request refused. So before you submit a request, make sure you know that the body to which you are applying comes under the Act. Most public bodies, with a few exceptions, do but some are only partially included.

Take RTE, for example. The Sunday Times led the way with discovering how much the broadcaster's top stars were earning. But you cannot request under FoI what is going to happen in the next season of Fair City. One is an administrative record; one relates solely to programming.

The main mistake made by journalists using FoI is asking a question: FoI is about records. You need to know if the records exist before going after them. But remember records can mean anything: a hurriedly written record, an internal email, a memo, a minute, a briefing prepared for a meeting. I am currently appealing a decision with a public body about whether messages in a civil servants' WhatsApp group are covered under FoI.

So what can't you get? Wouldn't it be great to know what the Irish Ambassador to the US reported back to Dublin on Wednesday morning after Donald Trump's election victory? This record more than likely exists but requesting it is a waste of time.

You need to know your exemptions, particularly the blanket ones that are difficult to challenge, even on public interest grounds. There are many and they are often intimidatingly broad in definition.

So count out most records relating to the Office of the President; those applying to meetings of the government; ongoing deliberations; court proceedings; law enforcement and public safety issues; security, defence and international relations; or records that could damage the financial interests of the state.

But the public interest can trump some of these and often does. But expect a long hard slog. Other exemptions are easier to overcome, such as “commercial sensitivity” or even “personal information”, if you can prove public money or the public interest is at stake.

It’s hard to believe that some of the information that remained secret prior to long-running FoI campaigns by newspapers was once not in the public domain:

Politicians’ expenses and Dail attendance records were once considered “personal information”.

School inspection reports were similarly off-limits as if they were made public teachers would stop co-operating with department inspectors. Similarly inspections of pre-schools and nursing homes.

The names of recipients of the Artists’ Tax Exemption Scheme was once deemed personal tax information.

The salaries of RTE’s top earners used to be so commercially sensitive that they might all leave RTE if we knew how much they were earning.

Breaking down leaving certificate results by school would result in school league tables that would force schools to close.

Details of lobbying by, or on behalf of, judges to be appointed to the bench would bring the criminal justice system into disrepute.

Audits of charities in receipt of state funds were once deemed too commercially sensitive to publish.

Most of these records only came into the public domain during the last decade. Some are now so prosaic they are published online by the organisations themselves without recourse to FoI, without much fanfare. But each one of these took a long-running challenge, usually by a media organisation, to force them into the public domain.

You might look at this and think most of the FoI landmark decisions have been made. Not so. If you use FoI regularly, you will find boundaries that are there to be pushed. But it’s a long and tortuous process.

The key to using FoI well is being in it for the long-haul and doing your research: understand the chain of command in the organisation you’re probing, who makes decisions, who is the interesting correspondence going to be between?

Each public body has 20 working days to answer a request. If your request is refused, you have another four weeks to seek an internal review. This costs €30. If you’re still not happy, you got to the Information Commissioner. That’s another four weeks for them to decide whether they take on your case or not. If they do, there’s a €50 fee.

After that they aim to answer your question within four months. In 2015, the last year for which there are figures, they achieved that deadline in only 20% of cases. Suffice to say, the challenging ones probably took a lot longer and with good reason because they may have to stand up to scrutiny in court.

For a journalist, the lesson here is to avoid appeal unless the information is still going to be relevant in a year or even two. Some journalists, and FoI activists, such as Right to Know, an organisation set up by Fred Logue, a solicitor, and Gavin Sheridan, a journalist who spoke at this conference last year, actively want to go to appeal to explore grey areas in the law or test weaknesses. But for a journalist, stories are currency and you should play the odds to get a steady stream of stories under FoI.

In The Sunday Times, we publish between 25 and 30 Irish stories every week. In any given week up to five of these could come from FoI. Some aren't groundbreaking and we try to get them year after year: the annual garda overtime bill, political pensions, briefing documents for new Ministers. These are your bread and butter Fols.

When you stray off this beaten track, it's often a case of trial and error. But always think about how to improve your success rate. Fail again, fail better.

Even if you are refused a document, you will typically get a schedule of the records that were refused. Can you go back and look for another of these documents at a future date, for example, if they were refused because the public body is still deliberating?

We try to avoid appeal because even if the OIC rules in your favour, there is still an eight-week period during which a public body can appeal the ruling to the High Court on the basis that the OIC has made an error in law.

In these cases, the public body takes the OIC to the High Court, not the person seeking the records. So one public body takes on another in the High Court where costs start at about €10,000 per day.

For example, at the moment The Sunday Times is trying to gain access to inspection reports of facilities that use animals for scientific testing but the Health Products Regulatory Authority has decided to go to the High Court to block this. The whole process has already taken almost a year and we don't even have a court date yet.

The HPRA argued against the release of the inspection reports, claiming some of the material could be commercially sensitive and that the information was given in confidence. It also suggested that, as animal testing was an "emotive subject", there was a danger that release of the records could endanger the lives or safety of staff at facilities that used animals for scientific testing. HPRA inspectors could also be targeted, it warned, if their names appeared in the public domain.

In its decision, the OIC rejected many of the HPRA's arguments, saying it did not accept that releasing the records could "prejudice or harm the effectiveness of future investigations of animal testing establishments by the HPRA".

The OIC likened the reports to school inspection reports which were published following a ruling of the OIC that was appealed to the Supreme Court. In that case the Supreme Court ruled the release of school inspection reports would not prejudice future inspections because teachers and school staff were statutorily obliged to co-operate with inspectors.

The OIC agreed that the safety of staff working at testing facilities, as well as HPRA staff, could be affected by a "minority" of activists who were willing to use violence. However, it ruled that redacting names, addresses and contact details of facilities and staff would be sufficient protection against this threat.

It also rejected the suggestion that the contents of the reports were commercially sensitive, noting that while the results of tests could be of interest to competitors, inspection reports consisted largely of observations regarding animal welfare. We are hopeful of winning this one.

Similarly The Sunday Times is seeking access to the names of lobbyists being signed into Leinster House by TDs and Senators. This request has now been running for over two years. The Houses of the Oireachtas Commission, the body that runs Leinster House and includes TDs and Senators from across the political spectrum, is seeking to keep this information secret.

They say it could impair the ability of TDs or Senators to speak with constituents or whistle-blowers privately. The OIC initially sided with The Sunday Times, ruling that it was possible to keep the identities of those visiting Leinster House in a private capacity secret while releasing only records relating to those being signed into the building by politicians in a representative capacity. The way that these people are signed-in is different, they noted, with those visiting in a representative capacity given a blue badge. So they ordered the release of the records concerning only blue badge holders but the Oireachtas still went to the High Court.

After several adjournments due to ongoing legal argument, it was decided that because of a technicality, the OIC should rule on the decision again to speed up the court process. Two years on, I'm currently awaiting that ruling.

Some important decisions come easier and it's usually to do with timing or with asking for the right records at the right time. In March last year, for example, myself and my colleague Justine McCarthy, sought under Fol a series of memos about the controversial Siteserv deal after Michael Noonan, the finance minister, mentioned their existence while answering a parliamentary question from Catherine Murphy, the Social Democrats TD.

One Friday, a month later, I called the Department of Finance's Fol officer and asked if the records were almost ready. He said he was about to put them in the post but I could collect them by hand if I wanted. I walked down to government buildings and came back with a chunkier-than-expected brown envelope.

That Sunday Justine and myself revealed that the publicly-owned Irish Bank Resolution Company (IBRC) could have received a bigger payback from the sale of Siteserv to

businessman Denis O'Brien if the bank had not allowed the company to control the sales process. The FOI documents also revealed previously unknown tensions between the board of IBRC and the Department of Finance, describing them as "strained". It warned that the entire senior management team of IBRC may resign and a contingency plan should be put in place. It further made reference to a large number of "poorly executed" transactions that were "damaging the credibility of the institution and by extension the state".

The story was later awarded the Smurfit media award for business story of the year and was instrumental in the establishment of a Commission of Inquiry into both the deal and a range of other debt write-offs given by IBRC. It was also shortlisted for investigative story of the year at the recent National Newspaper of Ireland awards.

You could say that a simple FOI query doesn't really amount to an investigation. I would disagree. The key to a successful FOI is to know what you're looking for. The reason we asked the right question at the right time was because we had been tracking the Siteserv story for over two years.

Little did we know at the time but we were very nearly scooped. As a Sunday newspaper one of our great fears with FOI is that someone will get wind of a request and simply piggyback on it. This is how it works: you hear that another newspaper asked a question days or even weeks before you. So you request the same information under FOI. Both parties may then get it at the same time, even if one began the process three weeks earlier. If a daily newspaper does it to a Sunday, you have lost your story.

The public body releasing the information isn't doing anything wrong in this scenario: their obligation is to release the information, not to the journalist that sought the records first. In the case of the Siteserv story, the Irish Times had heard that the Department of Finance was about to release some very interesting documents. If we had waited for them to arrive in the post, the Irish Times would have had theirs first and could have scooped us. It was worth the walk to government buildings.

But what if you suspect that the public body isn't being completely transparent about the records they hold? In my experience, that is rare but there is evidence it does happen.

All institutions instinctively protect their own, including newspapers, as anyone who has ever tried to get a story corrected knows.

But try to imagine working for a public body under an FOI regime. A colleague can ask you at any time to hand over an email or memo, however casual or throwaway it seemed at the time, because it falls under the scope of an FOI request. This email, and your name and job title, could subsequently be published in a national newspaper in an unflattering light.

No wonder most bodies have resisted coming under FOI. Some that have worked in public bodies have revealed the suspicion, even hostility, about having to work under the FOI regime.

In his memoir, *An Education*, John Walshe, a former Irish Independent journalist who became Ruairi Quinn's special adviser in the Department of Education in April 2011, wrote

of being given a few tips from "old hands" about avoiding FoI when he joined the department. If he wanted to put anything sensitive down in writing, Walshe was told, he should use a Post-it note, which could be discreetly binned in the event of an FoI request.

Similarly in 2014 during an interview with RTE's Drivetime, Pat Rabbitte, the then Communications Minister, said he "very deliberately" avoids recording all his official meetings in a ministerial diary, to prevent the contents being released under the Freedom of Information (FoI) Act. Instead, he said, he keeps a second diary.

In Ruadhan Mac Cormaic's recent book on the Supreme Court he reported how "a senior politician" who was involved in appointing judges kept a special drawer where he put lobbying letters from would-be judges so they wouldn't be accessible under FoI.

It's worth pointing out that deliberately concealing or destroying an FoI record is a criminal offence. In an earlier draft of the new FoI Act, it would have carried a prison term of up to seven years, although this was ultimately watered down to a maximum fine of €4,000 in the 2014 Act. To my knowledge, nobody has ever been prosecuted and no investigations have ever taken place into the concealing or destroying of records. For some reason, these sort of investigations only happen when complaints are made by politicians, civil servants or gardai about the leaking of documents to journalists, even when the stories subsequently published are clearly in the public interest.

With some departments and state bodies, you get the impression they are intent on destroying your investigative instincts with systematic tardiness. The OIC has repeatedly criticised the HSE and Department of Justice, for example, for their failure to deal with requests in good time.

In the OIC's annual report for 2015, the commissioner noted a "a systematic ongoing failure" in the Department of Justice's response to Fols.

In describing one HSE response to an ST request in 2014, he described it as "unusually poor" and accused it of giving "misleading and inaccurate answers".

Some departments seem to have a reflex answer to every query: that will cost you i.e. search and retrieval fees. Even though initial FoI requests are free, you have to pay fees if finding the information is likely to take more than five hours. These fees are meant to save civil servants from wasting time on unreasonably broad requests or "wild goose chases" as I've heard them described.

You can appeal the level of search and retrieval fees to the OIC but that will only delay the request. Instead of butting heads with an FoI officer or decision maker, see if you can negotiate a more refined request. The decision maker is sometimes your best friend in this scenario – sometimes they are genuine believers in transparency and want to uphold the spirit of the act and will point you in the right direction.

Sometimes releasing too much information is used as a tactic, however. One civil servant described this to me once as "killing them with kindness". They suspect you might be after one email: so release thousands and see if you have the stamina to read through them all.

Most frustratingly of all, even when you win you sometimes lose.

In 2009, I won a case with the OIC after over a year for access to the contract between Dublin City Council and the French advertising company, JC Decaux, which had been chosen to establish the then proposed Dublin bike scheme.

The council did not want to pay for the bike stations outright, so they did a deal with JC Decaux. In exchange for allowing the company to erect advertising billboards across the city, JC Decaux would pay to set up and partly-fund the running of the scheme. Yet nobody, not even Dublin city council's elected councillors, was told how much the bikes would cost versus the notional value of how much JC Decaux stood to make from the billboards.

When the information was eventually released it emerged that the French company stood to earn €9m more than the city council from the project. I thought I had a good story for Sunday. But the council decided to issue a press release on the Friday before we were due to publish outlining in detail the information we had spent a year trying to get.

Why did they do it? Pettiness? To discourage someone spending so much time and energy again getting a story? Or was it just a good public relations tactic?

Sometimes putting out a story in a general press release means it gets covered in all newspapers but maybe not on pages 1, 2 or 3 – indeed several news outlets covered the council's press release but nobody gave it the prominence we would have given it having spent over a year trying to get the story. The Council was also able to appear pro-active about transparency, releasing the material voluntarily without The Sunday Times claiming credit for dragging the information into the public domain.

Similarly when the Central Bank came under FoI for the first time last year, I requested minutes of its governing authority, known as the Central Bank Commission, going back to 2014. These minutes, I reasoned, would have been created prior to the Central Bank coming under FoI, so members may have been more forthright in their views during a time of crisis in the Irish banking sector. In reality, once a board knows what they say will be sought under FoI, minutes suddenly become a lot duller.

The Central Bank didn't refuse my request: instead it refused to deal with it, saying the material in the minutes was not within the scope of the Act as it related to the bank.

The OIC subsequently described the Central Bank's decision as "entirely at odds with the spirit and intent of the legislation". The Central Bank subsequently relented and posted the minutes on their website one Friday afternoon in August. I had won the argument but lost the story, as rival newspapers and news organisations gobbled up all the juicy nuggets.

It's a competitive business but sometimes we are at our best when we work together. If you ask for records digitally, rather than in paper form, they are easier to store and share. Some journalists publish all their Fols online, posting the records so they can be used as a resource by other journalists or interested parties.

I'm usually happy to share my research with other journalists unless I think there is a further exclusive story I can get from them at a later date.

But by sharing, you can build on each other's work.

Last year Ken Foxe, a journalist who uses FoI very well, broke an interesting story. Using FoI, he asked for details of the most expensive calls made from Leinster House in the previous year and found out that someone had made €2,000 worth of phone calls to a phone in Kenya. He knew when the 19 calls were made and the lengthy duration of each call but not who had made them or the identity of the recipient.

Because of the telephone tapping controversies of the 1980s, when politicians were afraid to use their own phones in Leinster House in case someone was listening in, the current phone system is anonymised: even the civil servants that run Leinster House don't get a breakdown showing who is ringing whom. Ken went to the OIC to no avail because of these strictures. So, it seemed, we would never find out who made €2,000 worth of calls to Kenya.

Myself and a colleague, Sean McCarthaigh, who will be speaking here tomorrow on the power of databases, had an idea. We wondered if we could narrow the possible suspects by referencing the times of the calls with the clock-in attendance database published by the Oireachtas each year. This tells you which TDs were present and absent on any given day of the week.

After several hours cross-referencing the dates of the 19 calls, many of which were made while the Dail was in recess, including during the Easter break, with each TD' and Senator's attendance records, we concluded that the only TD or Senator in Leinster House when all 19 calls were made was Michelle Mulherin. We published the story and a day later she admitted to making the calls, as well as 111 others, and repaid the Oireachtas a total of €3,295.

But there is one area where journalists and by extension the public are being failed because of a lack of access to key public records. In this case, the records are out of the reach of FoI.

I want to sign off by highlighting the entirely unacceptable and arbitrary manner in which court documents, particularly affidavits that have been opened in court, come into the public domain. It is currently easier for me to gain access to an affidavit in a US court case than an Irish one. I was able to follow the recent bankruptcy and extradition cases of ex-Anglo Irish Bank chief executive David Drumm from my desk in Ireland using a public access search facility, which digitises all court documents and posts them online for a small fee.

In Ireland, getting access to court documents is at the discretion of individual barristers. Even if you sit through an entire trial, you may only get a flavour of some of the documents technically "opened in court" because they may not be read from beginning to end. Sometimes a judge will confirm he has read a submission in advance, meaning it does not have to be read in full into open court. This places journalists, and the public, at a huge disadvantage and essentially contravenes article 34.1 of the constitution which states clearly

that justice should be administered in public, "save in such special and limited cases as may be prescribed by law".

Without access to copies of written court filings, journalists cannot present to the public the complete context in which a case is being fought. Instead they must rely on the generosity of a participating lawyer and hope that what he or she gives them is a complete picture and not a partial one meant to reflect well on his or her client. In cases where both parties would prefer to keep embarrassing evidence out of the public domain, no such assistance is forthcoming.

A 2013 judgment by Justice Gerard Hogan in *AIB V Tracey* ruled that the court's permission was not required to disseminate affidavits because once they were referred to in open court "it follows that any cloak of confidentiality or protection from non-disclosure vanished at [that] point". Yet this ruling has effectively been ignored.

As things stand, if a journalist or member of the public is refused access to a court document, there is no OIC, Ombudsman or court body to which they can appeal. One day we will look back on this as a bizarre anachronism, as much of an affront to transparency as the politicians who once guarded the amount of expenses they secretly paid themselves. It is time court reporters didn't have to do their jobs with one hand tied behind their back.

ENDS