

ALTERNATIVE SYSTEMS OF DISPUTE RESOLUTION AND THE RIGHT TO FREEDOM OF INFORMATION: ANALYSIS OF THE SCOTTISH, ENGLISH AND IRISH EXPERIENCE

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Abstract

This paper explains the negotiation and facilitation models applied by the Information Commissioner Officers in Scotland, England, and Ireland to informally solve—and at an early stage—freedom of information complaints or appeals. The first part describes the alternative dispute mechanisms used in these countries. The second part discusses the convenience of informal resolutions on freedom of information cases. A critical revision of those models is also presented here in order to identify the elements that can be useful for Latin American public agencies which protect the right of freedom of information.

Key words: Alternative dispute resolution, informal resolution, freedom of information, Information Commissioner.

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INTRODUCTION

This paper explains the models of negotiation and facilitation, which are used by the Information Commissioners in Scotland, England and Ireland to informally resolve freedom of information complaints and appeals at an early stage. A legal system should do more than just recognise the right to freedom of information. In order for the relevant laws to be effective, it is imperative that any appeals against public agencies that do not supply the information requested by the applicant are resolved in a timely manner. If the public agency responsible for resolving freedom of information appeals promotes an overly formalist culture, focused mainly on public law, the review and case analysis of the disputes could take longer than is reasonable. In addition to impairing the effectiveness of the law, delays in resolving the cases lead to public dissatisfaction with freedom of information procedures, and a lower level of confidence in the authorities and civil servants responsible for them.

As a consequence, several countries have explored alternative mechanisms to the formal decision notice that the competent entity would normally be required to issue to deal with the claims and appeals on freedom of information. We understand by the term "alternative dispute resolution", all the mechanisms which are voluntarily employed by the parties with the aim of reaching an agreement to settle a dispute. By using such methods the institution responsible for resolving the conflict can often avoid having to issue a

decision notice. Depending on the level of formality, it is possible to distinguish several different alternative systems, such as direct negotiation between the parties, facilitation, mediation, conciliation, arbitration, restorative justice, etc. The main advantages of resolving the conflicts by "informal resolutions" (hereafter IR) are as follows: 1) reduction in the time taken to process the cases; 2) less congestion of accumulated cases to be resolved in the competent entity; 3) greater satisfaction levels of the parties;

4) greater flexibility to explore possible solutions to the dispute; 5) confidentiality of the negotiations; 6) lower costs for the public. The search for, and application of, alternative mechanisms to legal and administrative decisions has further advantages for public policy and finances, as it reduces the costs of processing the cases. Therefore, the institution responsible for hearing the claims and appeals can make better use of the public funds it receives. The main disadvantage of the IR's, which involve the use of alternative dispute resolution methods, is the lack of public awareness of outcomes, and ultimately, the impossibility of using the agreements reached as precedents. (Rojas, 2011).

In part one the text gives a description of the alternative systems of dispute resolution for freedom of information claims and appeals in Scotland (*Sect. I*), England (*Sect. II*) and Ireland (*Sect. III*). The second part presents a series of discussions about the provenance and suitability of the IR's concerning freedom of information. In addition, we undertake

a critical analysis of these models, with the aim of identifying those elements that might be of use to the public agencies responsible for guaranteeing the right to freedom of information in Latin America³.

**PART ONE:
 DESCRIPTIVE ANALYSIS**

I. SCOTLAND

The public agency charged with resolving freedom of information appeals in Scotland is the Scottish Information Commissioner (SIC). In the period 2013-14, the SIC received 578 appeals, 185 of which were declared inadmissible. In terms of the contested authority, 41% of the appeals were presented against local authorities, 25% against central government, 11% related to other public authorities, 9% against the National Health Service (NHS), and the remaining cases were against other public agencies (SIC, 2014).

a) Procedure

Once the appeal has been made, a validation officer assesses whether it is admissible. If the appeal does not comply with the legal requirements for validity, it

is declared inadmissible within 30 days. Admissible appeals are reviewed by three senior officials of the SIC, who categorise them on a scale of 1 to 3, according to their degree of complexity and public importance. The commissioner only participates in the discussions on the most complex cases, whilst the decisions on cases classified as 1 and 2 are reviewed by the heads of the respective sections. The SIC must issue a decision notice for valid appeals, or if possible come to an agreed settlement. The case is assigned to a case officer, who must carry out all the necessary steps to resolve the case within a reasonable time frame. If the case officer considers that it is possible to reach an agreement, then they intervene as a facilitator. The possibility of settling the appeal through alternative mechanisms is explicitly recognised in Section 49 (3b and 4) of the *Freedom of Information (Scotland) Act*, passed in 2002 and in force since 2005 (SIC, 2014).

The appellant may withdraw their appeal once all the requested information has been provided. They may also withdraw if they are partially satisfied with the information received. It may also occur even if no information is provided to the appellant, but the reasons why the appeal is not likely to be upheld are accepted. On other occasions the case officers of the SIC offer advice so that the claimant can understand the best course of action to take to satisfy their interest, as the obtaining of public information may not be the most relevant course. They can even advise them on how to complete the freedom of information requests more

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appropriately the next time they make a request.

It is permissible for the appellant and the entity to negotiate directly. However, in the majority of cases, the SIC will facilitate an agreement between the parties. The advantage of direct negotiation between the parties is that information is delivered more rapidly. In addition, it increases confidence and reduces the institution's costs, since it prevents any procedures involving the appellate body. The risk in a negotiation between the parties, is that the contested entity will determine what information will be provided to the appellant. There is also the risk that the SIC will not be able to make use of the precedent in future cases, even if disclosure occurs.

Both the SIC and the appellant or the contested authority can request to seek an alternative solution. The facilitation is always informal, with communication usually made by telephone or email. When the parties accept the possibility of looking for an alternative resolution to the conflict, they must give their written consent. If an agreement is reached by this route, generally the parties consider that the agreement is preferable to a decision notice. This is due to the fact that the parties have greater control of the terms of the agreement. Often, the case officer relays informally and impartially what could be the content of a decision notice, based on his experience and knowledge of the legal position. The case officer must inform the parties that they can desist from attempting to reach agreement and opt for the issue of a decision notice at

any time. The parties must confirm that they are satisfied with the result proposed by the SIC, which is an important point as regards the official statistics. One of the advantages of an agreement between the parties is there is no formal notice of the outcome, as the SIC website carries no mention of the case nor any record concerning the parties.. This provides an incentive for the public body, because it avoids being seen by public opinion as an entity that has refused a freedom of information request.

If it is not possible to reach an agreement, the case officer will draw up a draft decision notice, which is then reviewed by the line managers according to the level of complexity of the case. If the case is classified as category 1, the Deputy Head of Enforcement will review and sign off the decision; if the case is classified as category 2, the Head of Enforcement will review and sign it off, and if it is category 3, the Commissioner will handle it.

b) Previous Statistics

In the Financial Year 2013-14, 628 appeals were settled. 191 of these were closed within the first days of processing for various reasons, for example, for non-compliance with the admissibility requirements. 118 appeals were closed during the investigation stage (56 because the appellant desisted and 61 by agreement of the parties), and in 319 cases, a decision notice was issued. Of these decisions, 123 were in favour of the appellant. On 107 occasions the public agency was found to be in the right, and in the 89 remaining cases the decision partly accepted the claims of both the

appellant and public body.

c) Performance Indicators

The SIC target is for 75% of appeals to be resolved within four months from the filing of the appeal, and 95% of the appeals must be closed within twelve months. In the period 2013-14, the average duration of cases was 3.9 months. Of the 628 appeals that were resolved that year, 470 were processed within a period of four months (84%) and 158 in more than four months (16%). In only two cases was the indicator of twelve months exceeded, due to the complexity of the issues concerned.

d) Case Officers

22 officers operate in the SIC, twelve of whom concentrate solely on the resolution of freedom of information appeals: a validation officer, eight investigators, two Deputy Heads of Enforcement and one Head of Enforcement. The officers belong to various professions and only about 10% of the team is made up of lawyers. Therefore, they benefit from the knowledge and experience gained from various disciplines in the processing of claims. The SIC considers that the competencies of the people they contract are more relevant than their professions. They must have the skills to quickly analyse complex information. They must also have the ability to write reports to a high standard of quality. Their communication skills must be strong. In addition, they must possess an ability for negotiation and persuasion.

As regards the distribution of cases, it should be noted that the SIC investigators do not specialise in particular areas. Each staff member has enough experience to handle the processing of any of the appeals put before them. It is more a question of balancing the workload between the investigators so that they receive cases involving all three categories. Efforts are also made to assign them a variety of case types, thereby preventing the work from becoming routine and repetitive.

II. ENGLAND

The Information Commissioner's Office (ICO) of the United Kingdom is empowered to resolve disputes between public agencies and the public regarding freedom of information and data protection. The independence of the ICO is enshrined in legislation. The Commissioner is appointed by the HM The Queen for a period of five years and is accountable to Parliament. Since 2001, the mission of the ICO has been to defend the right to freedom of information in questions of public interest, promote transparency in public agencies and protect the privacy of its citizens' personal data. The most important of these areas in terms of workload relates to data protection. The ICO has a total staff of 450 employees, of whom 10% work exclusively on freedom of information cases.

a) Legislation⁴

The regulations that govern freedom of information and data protection have been established in six pieces of legislation:

1. Data Protection Act. In 1984, the first Data Protection Act was passed; however, currently the 1998 act prevails. This law establishes how an individual's private information should be stored and processed, including how it is obtained, protected, used and distributed.

2. Freedom of Information Act. Passed in 2000, it regulates the disclosure of information in the hands of public authorities or the entities that provide services to them.

3. Environmental Information Regulations. The Environmental Information Act was passed in 2004 and was enacted with the aim of implementing the directives of the European Union concerning freedom of information on environmental matters.

4. Privacy and Electronic Communication Regulations. This act has come to complement the Data Protection Act 1998, guaranteeing the public greater protection of its privacy in electronic communications.

5. INSPIRE Regulations. This act,

approved in 2009, incorporated into UK law the 2007 European Directive (INSPIRE Directive 2007/2/EC), that acknowledges the right to "discover and visualise spatial data sets" (for example, data maps). This has enhanced the regulation of the use of large databases.

6. Data Regulation and Investigatory Powers Act 2014 (DRIPA). Passed in 2014, the Act regulates the retention of relevant data by telecommunications service providers and establishes the investigatory powers granted to the authorities charged with enforcing the law.

b) Main Activities regarding Freedom of Information

As the ICO must promote and enforce the right to freedom of information, it achieves this through four main activities: 1) instilling best practice in public agencies; 2) analysing the claims of citizens if they do not obtain the requested information; 3) advising individuals and public agencies, and 4) taking appropriate action to ensure that freedom of information law is effective.

The Freedom of Information Act (FOIA, 2000), grants public access to information that is recorded in the public institutions of the United Kingdom, except for Scottish authorities. The FOIA allows the proactive and reactive disclosure of state information, and regulates the filing of appeals before the ICO and against the institutions that do not supply requested information. The applicant, has the right to request information that is retained in

⁴ For an exhaustive analysis of United Kingdom legislation, see the work of Birkinshaw, P. (2010), Freedom of Information the Law, the Practice and the Ideal. Cambridge University Press

any format by the public body, regardless of the date on which it was generated. The FOIA requires that public authorities take a proactive role in the publication of information on their websites (active transparency), and also permits anybody to request information of a public nature, in which case the public body must determine if it has a duty to provide the requested information, or not, within 20 working days (extendable for another 20 days if necessary). A freedom of information request can be refused if it results in a substantial cost for the institution, the request is repetitive and vexatious, or for reasons of secrecy, as occurs in matters of defence and national security, international relations, formulation of public policy, confidential information, criminal records, health, etc. (Ganotis, 2015).

The body, to which the request for information is directed, has a duty to carry out a public interest test, if certain exemptions are claimed. As a general rule, the information must be disclosed, unless a greater public interest in non-disclosure exists. If the public agency considers that it does not have a duty to provide the information, it then must send notice to the applicant refusing their request, in which case it must mention in writing the basis of its decision. If the applicant is not satisfied with the reply from the body, they can request a review or a reconsideration of the decision by the same public agency. The internal review procedure is not set out in law, but it has been recommended as best practice. This simple measure enables other officials of

the public agencies to review requests which have been denied or have not received a reply, decreasing the possibility that the dispute ends at the ICO. However, if the internal review is not successful then the applicant can appeal (Ganotis, 2015).

c) Case Officers

To fulfil its mission, the Commissioner relies principally on the Management Board and case officers. At the ICO's head office, 35 officers work exclusively on the review and resolution of claims against public agencies that have infringed the right to freedom of information. The workload in 2014 was around five thousand claims filed. Half of these claims were declared inadmissible, a quarter were resolved through IR's and the remaining quarter were resolved through a decision notice.

Once the claims arrive at the ICO, they are channelled to the Performance Improvement Department. This unit employs six best practice teams, each one is made up of fifteen officials (ten of whom analyse data protection cases, while the five remaining teams concentrate on freedom of information cases. The assignment of cases depends on various factors. Firstly, the cases are distributed between the teams according to the contested body (for example, one team takes charge of local authorities, while another is responsible for certain central government ministries). The main benefit of this system of distribution lies in the bonds of trust that develop between the case officers of one particular team

and their contacts in the public agencies. Secondly, the assignment of the cases within each team depends on their level of complexity: because of their experience and mastery of an area, the senior case officers are usually given responsibility for handling the most complex cases. As a general rule the sign off is delegated: decisions are signed off by a coordinator of the respective team, although the highest profile or most complex cases are signed off by the main directors, and in exceptional situations, by the Commissioner.

The selection process for officers in charge of freedom of information cases in the ICO is competitive and based on personal and academic merits. The institution looks beyond the particular profession of a candidate and looks for a profile based on the following criteria: officers interested in public affairs, committed to transparency and the right to freedom of information, who possess a range of intellectual skills and competencies to analyse relevant information, question work practices and innovate in the search for solutions. It is important that the ICO hires officers who can think for themselves and have enough self-confidence to take independent decisions.

d) Informal Resolution

IR is understood as actions taken by a case officer, at any point in a freedom of information case investigation, with the aim of finding an alternative solution to a formal decision. Such actions, in general, normally consist in making telephone

calls, and sending emails, letters, and documents. The attempt to find an IR creates closer links between the parties, with the positive external result that IR's establish reciprocal relations of cooperation between the ICO and the public agencies.

The first step for the case officer is to send a note to the other parties signalling that the ICO's preference is to reach an IR, for which it requests their consent. Although the law does not expressly make any mention of IR's, in practice it is a mechanism commonly used by the ICO to reach an agreement and close cases at an early stage. In fact, the law states that once a claim is declared admissible, it must be resolved. For this reason, a consent form must be signed in which both parties express their willingness to find an IR. If an agreement is reached, the IR leads to a negotiation between the case officer and the claimant, so that the latter withdraws their claim. For example, the case officer may explain to them that most probably the requested information will not be supplied for reasons of confidentiality which prevent its disclosure. The case officer can intervene as a facilitator and advisor between the parties during the dialogue but they must maintain the secrecy of the informal conversations. A technique used by the case officers is to inform the parties about the precedents and law concerning the case in hand.

The IR does not occur when: 1) no review process has taken place in the contested public agency; 2) when the filed claim

does not meet the criteria to be admissible; 3) the requests are frivolous and repetitive; 4) the claimant discontinues their appeal; 5) the public authority decides to disclose the requested information; 6) the parties do not grant consent to the attempt to find an alternative solution or IR; 7) doubts exist on what the ICO's decision might be to resolve the matter. If the parties do not reach an agreement or if it is not viable, the case officer who has been dealing with the claim is charged with issuing the formal decision. The language used in the decision must be clearly written so that it is readily understood by any member of the public. The nature of the dispute, as it remains, must be clearly described, since through the IR it may have been possible to bring the positions of the parties closer together and even provide part of the requested information to the applicant.

If an IR is reached, the ICO does not disclose details of the complaints. Consequently, the applicant is satisfied by the request being dealt with in a shorter time period and the public body avoids a mention in the case register which is published on the website. The criticism that could be made about this method of proceeding is that the IR prevents a precedent being created on the matter, as the ICO cannot use a specific IR to resolve similar disputes.

e) Performance Indicators

Although the law does not set a maximum time limit in which the claims presented to the ICO must be resolved, the following performance indicators have

been fixed: all inadmissible appeals must be determined as such within 30 days; 90% of cases must be resolved within six months; 100% of cases must be resolved within a year from the date on which the claim was filed. These indicators have been achieved in the last four years.

III. IRELAND

IR has been used by the Office of the Information Commissioner (OIC) of Ireland since 1998. The OIC is an autonomous public agency, whose regulations were reformed by the passing of a new Freedom of Information Act 2014. According to Section 45(6) of this law, the procedures must be informal but consistent with the functions that have been entrusted to the OIC. Therefore, the legislation offers a flexible and informal space to find an agreement between the parties from the point when the claim is declared admissible up until the issue of a decision notice. The OIC has the necessary discretion to suspend the investigation whilst an informal solution is sought. If no agreement is reached, the decision of the OIC has mandatory force, although it can be appealed in the High Court. The OIC does not possess a litigation team, and so it must contract external lawyers to defend its decisions⁵.

a) Previous Statistics

⁵ To contract external lawyers to litigate at the High Court is expensive for the OIC, so they have an additional cost incentive to seek an agreement.

In the previous financial year, 355 claims were filed with the IOC, of which 252 were declared admissible (70.9%). In 22% of the admissible cases an agreement was reached, to which should be added the 13% of cases which were abandoned by the claimant or they withdrew their claim. Therefore, 35% of the admissible cases were concluded informally. In cases where the negotiation was only partly successful, they are not considered as an IR because the OIC has to issue a decision notice concerning the points where no agreement was reached. All cases must be resolved within four months from the time the claim was filed.

b) Work Teams

Three work teams have been created in the OIC that are involved in the processing of cases:

1. Support Unit: team responsible for examining whether the claims are admissible. Once the claim has been declared admissible, a senior officer determines if it should be passed on to the Assessment Unit - to try and reach an agreement between the parties - or the Investigation Unit - to draw up a decision notice.

2. Assessment Unit: team responsible for reviewing the documentation, identifying the points of the dispute between the parties, and encouraging them to come to an early agreement.

If an agreement is not possible, the case officer must either prepare a draft decision notice, or the case is reassigned to a specialist investigator.

3. Investigator Team: team responsible for preparing decisions for the most complex or voluminous cases.

c) Selection Criteria for Cases where Agreement is Sought.

According to Lyons (2015), the OIC has set the following criteria for selecting the cases to be analysed by the Assessment Unit, with a view to seeking an agreement between the parties:

1. Existence of precedents: if the question under discussion has previously been the subject of a decision by the OIC, when seeking an agreement between the parties, links to previous decisions on similar issues are sent to the parties⁶.
2. It is possible to identify the misunderstandings or the lack of clarity between the parties. The dispute could be due to an incorrect interpretation of the legislation in force by either the applicant or the contested body. It is preferable that the OIC case officer explains the real meaning of the regulations.
3. The circumstances have changed since the formulation of the information request to the public agency, such that the case officer considers that it is possible to reach an agreement. For example, if, during the process, the public agency was to issue a statement that might be of interest to the applicant, the OIC could decide that the information be supplied to

⁶ Decisions are published on the website <http://www.oic.gov.ie/en/>

them.

4. Any of the parties show an interest in finding an informal solution.

d) Investigators

15 investigators operate in the OIC, many of them recently hired as a result of the legal reform of 2014. As regards its formation, the investigators in the three teams possess a variety of academic qualifications, although several are lawyers and ex-civil servants who served in public agencies. Skills in persuasion, communication and negotiation are fundamental in searching for an IR. These skills are taken into consideration in the selection process, but they are also reinforced through training courses. It is not necessary to be accredited as a mediator or to be a professional negotiator to work in the OIC, but it is desirable to have experience of customer facing activities and dispute resolution. It is also important to have some previous knowledge about freedom of information and business process management (Lyons, 2015).

e) Advantages of IR's

1. Higher satisfaction levels of the parties, once the terms of any compromise have been agreed.

2. Cost and time savings for all parties.

3. If the parties agree, the dispute will not be subject to legal process as the OIC will not issue a decision and, ultimately, it will not be possible to file an appeal before the High Court.

4. The applicant might obtain more

information than they requested.

5. The OIC is entitled to charge the claimant for submitting the appeal. If agreement is reached between the parties, the OIC returns the sum paid by the claimant.

6. The agreement avoids the issue of a decision notice, which may have caused the contested body to be viewed adversely by the public, as an entity that does not respect the right to freedom of information.

7. The agreement also prevents the OIC from establishing or ratifying a precedent, which could be of interest to the contested body.

f) Procedure

The search for an agreement is informal, and communication with the parties is by telephone and email. It is not necessary to organise formal meetings. It is neither possible to order the public agency to supply the information, or to ask the applicant to desist in his application. The scope of the negotiation must be realistic, and therefore cases are not selected where it is obvious that no reasonable agreement can be reached. It is essential to make the correct decision in selecting cases suitable for reaching an agreement, in order not to waste the OIC's resources. In other words, cases should not be selected where it is foreseeable that an agreement will not be reached (Lyons, 2015). The OIC is authorised to suspend the case while informal conversations between the parties take place in order to support the search for an agreement. Normally the suspension lasts two or three weeks. If an

agreement is reached, it is necessary to follow up on the main points of the arrangement. If the public agency provides the requested information, the OIC must ask the claimant to withdraw. In the event that they do not, the OIC must close the case.

PART TWO DISCUSSION AND CRITICAL ANALYSIS

a) Legal Foundation of the IR

The first point to consider when establishing alternative mechanisms to a decision notice in freedom of information cases is whether there is the necessary legal framework to permit the procedure. It is preferable that the legislation on freedom of information states explicitly that the competent body to resolve complaints and appeals is empowered to seek an agreement between the parties. The Scottish Information Commissioner (SIC) can “endeavour to effect a settlement between the applicant and the authority” rather than having to issue a decision.⁷ The Office of the Information Commissioner of Ireland (OIC) has the possibility, at any time, of suspending its judgment while an agreement is sought between the applicant and the authority.⁸ The Scottish Public Services

Commissioner can take any "action with the aim of resolving the complaint."⁹ The regulation of the Scottish Legal Complaints Commission specifically permits this public agency to act as a mediator in complaints. However, IR can also be conducted without the need for any explicit legal authorisation. For example, the UK *Freedom of Information Act (2000)* does not make any reference to IR's and requires that the Information Commissioner makes a formal decision, unless the complaint is withdrawn. However, as described previously, the ICO feels able seek the consent of the claimant to pursue IR, and if successful in doing so, to bring the case to a close by securing the withdrawal of the complaint. In practice, this happens in most of the public agencies consulted in the course of this investigation, as generally they require that the claimant withdraws their claim or appeal in order to conclude that the IR has been successful.

Where IR is specifically referred to in legislation, it is often recognised as an appropriate or even preferred course of action. However, it should be noted that sometimes the legislators themselves choose to prohibit the search for an IR in certain circumstances. For example, in the Scottish Legal Complaints Commission the parties cannot seek an agreement through a mediation process in a case in

⁷ *Freedom of Information (Scotland) Act 2002* s49(4)

⁸ *Freedom of Information Act 2014* s22(7), Ireland

⁹ *Scottish Public Services Ombudsman Act (2002)*, Section 2 (5).

which aspects of lawyers' conduct towards their clients (not related to the provision of professional services) are involved.

b) IR in the Management of Cases

There are two key aspects of the selection of cases where an attempt at IR will be made. Firstly, is it realistic that an IR can be reached within a reasonable period after the claim has been filed and declared admissible? If so, the case officer will conduct bilateral negotiations with each of the parties and explore the possibility of bringing their positions and an agreement closer. However, it is also possible to look for an alternative outcome in those cases which have taken longer to process and are to be found in an investigation phase prior to the drawing up of a decision notice. It should not therefore be ruled out that case officers and formal investigators can also facilitate and negotiate late IR's. It is recommended that the investigator first converses with the contested body and afterwards with the applicant or claimant for the negotiations to be successful. As Dunion explains (2015), "even if the attempt to reach a formal agreement fails, or if the claimant does not desist in their claim, there is in any case a benefit for the parties since the discussions permit better management of initial expectations" (p.23).

The initial evaluation of whether or not the search for an IR is suitable is a key factor in the management of cases. However, even where early resolution is not seen as likely, it may be advisable to

have a procedure which does not rule it out at a later stage, as the prospect an informally agreed outcome may only emerge once the case has come under investigation by the case officer. The opposite scenario should also be avoided when it is decided to prolong a search for an IR which is unlikely to succeed. However, once the investigation is in progress, the IR can be attempted at any moment at the suggestion of the investigator in charge or at the behest of one of the parties. This implies that the case officer promotes a negotiated agreement between the parties.

As we have seen, there are occasions when an IR is not suitable for settling a conflict. The effective handling of cases involves the assessment of this situation once the admissibility of a claim is declared. For example, if existing precedents are insufficient, the most appropriate course from a legal and also institutional point of view may be to issue a decision notice that may contribute to a correct interpretation of the current legislation on a particular matter. An IR should also be ruled out in those cases which broach questions of significant public interest. Other circumstances might also lead us to conclude that an early resolution of the case would not be the most appropriate, especially if the search for an IR is going to take longer than to issue a decision notice. For example, the SIC rapidly issues decisions in cases where the authority has simply not responded to the original request for information. Rather than initiate a process of negotiation on the substance of the

request, it is deemed more effective to issue a decision notice and require the body to respond by a specified deadline.

From the claimant's perspective, it is worth questioning if an IR is the most suitable solution. All the public agencies that we have researched in Scotland, England and Ireland have it as a priority that the informal result should satisfy the interests of the applicant. The case officers should not suggest to the claimant that they settle if they consider that the position of the contested body is inadequate or incomplete. However, often negotiated resolutions provide new and valuable information to the claimant, which would not have obtained other than by IR. For example, a Commissioner might establish that the contested entity is now disposed to release certain information that it had previously withheld as circumstances have changed since the appeal was lodged.. However, if a formal decision were issued, it would have to be based on the circumstances at the time of the application and could lead to the conclusion that, at that moment, the information was correctly not disclosed and the agency could not be required to give the information.

c) The IR Process

It is worth posing the question as to how formal or informal the IR process should be. In its most basic form, an IR can be characterised as a process for resolving valid complaints such that the Information Commissioner does not have to issue a formal judgment or decision notice. In so doing the officer responsible

for the case needs a margin for manoeuvre, which in practice will define the level of formality or informality of the communications with the parties.

For the IR to be a proactive mechanism the officer in charge of a case needs to build trust between both the parties involved. Communication by telephone and the exchange of emails is preferable to arranging work meetings or sending official or formal letters which reiterate the original complaint. A proactive way of proceeding may include explaining to the contested body the reasons for the citizen's request, even though the law does not require the reasons to be expressed when submitting the request. Also, the case officer could check on the proposed use for the requested information, and convey the authority's particular concerns in looking for alternative options or assurances. Indeed, various options can be explored, and accepted voluntarily, arriving at outcomes which might not otherwise form part of the content of a formal decision notice.

Agreements between parties also tend to be informal. It is usually not seen as necessary to formalise a procedure that is essentially informal, for example, by asking the parties for formal declarations concerning the agreement reached. The withdrawal or agreement of the claimant can simply be understood in a broader sense, and even be communicated by a telephone call or an email. However, the case officer in charge always needs to record in a document or enter an internal file note that states that the case has been closed by agreement between the parties.

This text would have to be directed at his line managers, and it might even be considered necessary to place a brief reference to the issue on the website, although without mentioning the contested body or the identity of the claimant.

All these conversations are confidential, and in case an agreement is not reached, cannot be used at the time of issuing a decision notice. The notes made in the case file or folder must clearly distinguish between the claimant's demands and the replies of the contested body, regarding the conversations that take place with the aim of reaching an agreement which is not successful. To invoke confidential conversations not only has ethical and legal implications but also damages the credibility of the case officers and investigators.

However, it should be noted that some public agencies have established more formal procedures for closing cases through IR. For example, the Scottish Public Services Ombudsman has set the Early Resolution Team the target of closing cases within 50 days of the filing of the claim, or later if the cases are at a more advanced stage in their processing. However, the decisions are always recorded as a formal decision and not IR.

Another aspect of case management that should be stated occurs when the contested authority does not comply with the agreement made in the IR. Experiences observed in Scotland, England and Ireland indicate that this scenario hardly ever happens, but such

behaviour might not be replicated in other countries. The authority might, for instance, only supply part of the information that it promised to deliver to the claimant. To avoid subsequent problems, a recommended safeguard is not to close the case until the parties have completely fulfilled their promises and the claimant declares his satisfaction with the information received. Otherwise, the case would have to be re-opened and a reference made in the decision notice about non-compliance and lack of due diligence by the contested body.

We have been able to observe that the competencies and skills of the case officers and investigators are a condition for the success of any initiative that attempts to employ alternative dispute resolution mechanisms. In the three countries we observed that training in soft skills (in e.g. mediation techniques) is rarely offered to the case officers. However, in the selection process, recruitment panels tried to establish that the candidates possessed negotiation, communication and persuasion skills. They were expected to be capable of quickly analysing complex information, and producing reports to a high quality standard. Other sought after qualities included the ability to think independently, the ability to innovate and resolve problems in a self-sufficient and creative way. Experience of serving customers and users - in public and private sectors - and of case management was often required.

The critical factors for an IR model in freedom of information cases are as

follows:

- 1.** The case officers in charge must be capable of establishing bonds of trust, so that they are viewed as fair and impartial professionals.
- 2.** The case officers have an appropriate knowledge of the legislation in force and any precedents.

It is not necessary that the case officers and investigators are accredited mediators nor that they have received training on lengthy institutional negotiation programmes. It could be considered that the terminology used to describe IR lacks academic rigour. The term mediation is often applied colloquially to refer to a negotiated resolution or a facilitation process, even though it really is a different concept. Formal mediation, that is, an activity performed by accredited and trained mediators, is rarely used by the bodies in this case study. One of the reasons for this is that formal mediation is a confidential process and, if the debates and proposals formulated are not successful, these foregoing conversations cannot be considered in the investigation phase. In the business world the perception is that mediation functions better when it involves private mediators, who can offer savings or price reductions, and who also have an incentive to reduce processing time, which does not necessarily occur in the public sector. In the end, the question is who will pay for the mediation? As we have seen, only the Scottish Legal Complaint Commission employs external mediators, covering the

mediation expenses through the levy income they receive from qualified lawyers.

Given that the case officers are not required to be professional mediators, but rather that their skills as agreement facilitators need to be verified, the institution could take some steps in improving the required competencies. For example, by creating a system of tutorials by senior case officers who are prepared to advise less experienced case officers in the institution. In addition, they can create internal mechanisms for transferring information of value to all the case officers, for example, an internal blog providing information on institutional precedents, software for rapid searching on legal questions, short courses on updates to legislation, etc.

How can the quality and consistency of the case officers' IR actions be monitored? The officials responsible for claims should have the ability to make decisions on the cases they manage. However, there is little data related to the quality control of conversations between the parties. For example, the public are rarely informed about the internal procedures of the public agencies used to obtain an IR. Commissioners and directors of the agencies that monitor the effectiveness of the right to freedom of information are not usually involved in the negotiations. Despite being limited, in some public agencies it is possible to see some evidence of the checking of quality standards. For example, it is expected in the SIC that the Deputy Head of

Enforcement identifies the cases that are suitable for an IR at the assignment stage. He/she is also expected to intervene in the formulation and review of proposals that are to be submitted for consideration by the parties. Another method of quality evaluation is undertaken by the SIC's Head of Enforcement, who selects a case at random every month for the purpose of reviewing it thoroughly.

In general, it might appear that much still needs to be done to provide a secure procedure that, without affecting the flexibility on which IR relies, functions within an efficient and appropriate management environment. Some of the mechanisms are as follows: setting out the institutions objectives, periodic publication of statistics, recording systems, review processes, training and feedback.

In particular, the process for selecting the cases, the nature of IR and the proposals made by the investigator to the parties should be presented in a much clearer way to those involved. Guidance and existing procedures show that this can be done in a relatively clear and succinct manner. A United Kingdom parliamentary report on IR concluded that “[the Commission] needs to be completely clear how the distinct processes operate and differ as well as the criteria against which complaints are allocated to these resolution processes” (House of Commons Communities and Local Government Committee Report, 2012, p.25).

d) Potential Disadvantages

It is evident that the IR's are viewed as a faster way of achieving a practical, proportional and effective result. However, there is a risk that they are being used as a mechanism whose only purpose is to speed up the closure of outstanding cases. There must be safeguards to ensure that IR's are not simply used as a means of clearing the workload. IR's must be appropriate according to the circumstances of each case and cannot become an end in themselves.

The IR might be accepted by the claimant who is tired of waiting for the information, and who therefore gives up on receiving all the information they wanted. The claimant might even consider that the proposal made by the public agency is more convenient than waiting for a decision notice that will take longer, in spite of the fact that the arguments they deploy may be found to be valid. For this reason, the case officers and investigators should be impartial, and prepared to advise the claimant objectively on how they can best satisfy their interests. This argument should be taken into account when the case officer's incentives to use IR in a case are fixed, especially when it is a question of performance targets performance. If the evaluation of the case officer depends on closing cases as early as possible, the interests of the claimants may be affected by the body responsible for guaranteeing the right to freedom of information. Therefore, the supervision of the management of cases must guarantee that

the parties are not being pressurized to accept or concede disadvantageous terms. The applicant must always retain control of their appeal, and be able to require a decision notice for an admissible claim, although the case officer may consider that an IR is the most favoured outcome.

Another question when selecting an alternative mechanism to a decision notice, is the lack of publicity of the IR. The decisions of the regulated bodies can be questioned when faced with similar requests in the future, but the IR prevents the exploitation of a precedent from the past. Given that a formal judgment is public, the future performance of the authority might be more compliant with the regulations if a decision already exists which is available both to the entities and the public. Therefore, the potential damage to the body's reputation generated by a decision against it is a factor that influences its willingness to reach an agreement.

This leads to the argument that if the case involves matters of public interest or a recurrent failing that merits public attention, it is preferable that the early evaluation assesses the relevance of favouring a decision notice instead of expending time seeking an agreement. Similarly, the Information Commissioner can have greater powers to adopt general measures to drive through system improvements in the public body when it detects serious failings in sensitive areas for the public. For example, there are public agencies like the SIC that have powers to issue practice recommendations

and instructions for general application that must be respected by the regulated bodies. It is also feasible that a decision notice to resolve a specific case formulates generally applicable guidelines for the correct interpretation of the current legislation.

Another aspect that is called into question is the undermining of the learning process that could occur within the regulated bodies every time that the issues and compromises tackled in the IR's are not disclosed to the public. Even if the IR's are based on precedents, it is still not appropriate to publish the negotiations. However, best practice consists in publishing summaries of the questions raised by the parties and the lessons that can be learnt from cases resolved informally. Obviously the material that is published on the website must be in keeping with the best interpretation of the law and highlight the key questions that are of general interest. The key issue is to ensure that during the analysis and investigation the parties are treated impartially according to the law.

In respect of freedom of information law, critics of the use of IR to close cases might argue that the effectiveness of the law could be affected. In answer to this criticism, it should be clarified that the nature of the right to freedom of information cannot be circumscribed by the requestor's proposals or the identity of the parties. The result of the IR cannot undermine the ability of the body to decide the fundamental issues when required. One important factor in using an

IR, especially when we are aware of it, is that it does not constitute a precedent or admittance of a fault or error by the authority in the eyes of the public. IR should not be exploited to permit the regulated authority to reveal information to certain applicants and refuse the same information to others.

Therefore, to ensure that IR is used appropriately, an organisation policy and a definition of the workflow processes must exist. The methodology of the IR must be available on the institution's website, and the parties must be informed from the beginning that this method exists to settle the case without the need to issue a decision notice. The institutional policy for IR must determine the criteria for the selection of the cases, such as :

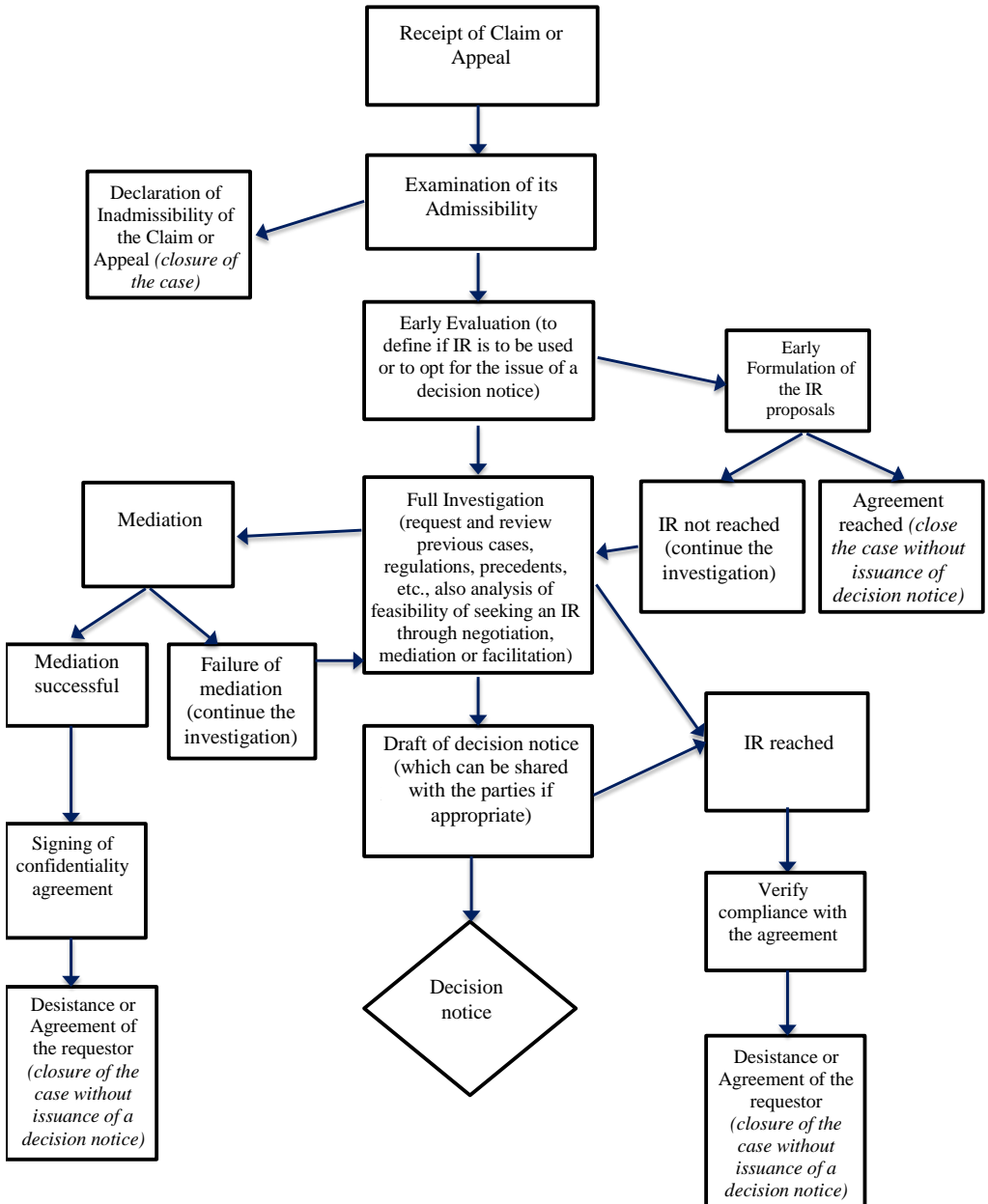
- 1) the early evaluation of the claim or appeal;
- 2) the information appears to be of special interest to the applicant, but is not a significant matter or of general interest;
- 3) the formal decision on the case will not lead to creating a precedent;
- 4) investigation identifies that possibility the applicant could receive additional information through the IR, which would not be possible with the issue of a formal, enforceable decision notice.

As regards the work processes, as revealed in the case studies reviewed, in practice the IR's reflect the findings of other investigations (Bondy & Le Sueur, 2012; Creutzfeldt & Gill, 2014; Doyle, Bondy & Hurst, 2014). The IR must form part of the administrative procedure of cases set out by the institution, in line

with the procedures established for the dictation of decision notices.

The nature of the IR must be explained clearly, indicating if it will be conducted by email or telephone, and not through mediation, meetings, etc. Also it must be explained that the officer in charge of the case is authorised to issue a decision notice, and can even determine if it is probable or not that successful progress in the investigation can be made. The conditions which allow it to be said that the case is terminated must be understood by both parties. In these three countries we have seen that the officer in charge of the case must verify the compliance of the agreement by the contested body, in order to then accept the desistance of the claim and the closure of the case through the IR. There are several ways in which the closure of the case through an IR is formalised. It appears to be good practice to keep a record of the agreement and evaluate the level of compliance in the agreements for the purpose of using previous cases as a reference.

DIAGRAM 1. PROCEDURE FOR MANAGEMENT OF CASES



CONCLUSIONS

Informal resolution, as an alternative solution to issuing a decision notice, is used by the Information Commissioners in Scotland, England and Ireland to informally resolve at an early stage a significant percentage of citizens' complaints and appeals. These mechanisms may be mentioned in the freedom of information law, but they have also been developed despite a lack of legal recognition. Nevertheless, it is recommended that the law considers the possibility of informally resolving freedom of information cases.

The use of an IR is readily understandable in circumstances in which the complaint relates to the service provided to a client or user, which is often a subjective question that an Ombudsman has to resolve. However, when it concerns freedom of information it might be considered that the IR has less of a practical application. If the right to freedom of information is acknowledged in law, normally it has a general application as regards the majority of public agencies, and ultimately, an appeal should be resolved through a public decision notice. However, it is clear that the Commissioners who must enter judgment are prepared to use the mechanism of IR's in the three countries analysed. Therefore, the methodology of the IR's could be replicated and refined in other countries.

With respect to the way the IR's function, it has been observed that once the

admissibility of the claim has been declared, cases should be quickly selected where an agreement will be sought between the parties. The selection and prioritisation is usually performed by one or more officers with extensive knowledge and accumulated experience from precedents within the institution. In addition, the process for seeking an IR is based on informal communications, mainly through telephone calls or emails. If the negotiation fails, these conversations cannot be used in any consequent decision notice. The search for an IR must be objective, impartial, informed, and respect the general interest, the guarantee to freedom of information, the precedents and the interests of the applicant. Finally, this path must not be used as a mechanism that simply seeks to reduce the number of accumulated cases.

The role and capacities of the case officer in charge are fundamental to the success of the mechanism. The case officer must reflect on the best interest of the claimant. Their opinion must be based on a solid understanding of the legislation in force, but also institutional precedents. To provide support to the less experienced case officers, the institutions in the three countries have created a system of tutorials run by investigators and case officers with greater experience. Soft skills are fundamental to the success of the negotiations, and therefore, in the recruitment process, the original profession of the candidate is not a critical factor. They select officers with a critical and independent mind, who are creative and innovative in the search for

solutions, empathetic and respectful, with a serious interest in government affairs and the validity of the rule of law, skilful communicators, capable of analysing complex information, working in a team, and writing reports to a high standard. The ideal is that the outcome of an IR is better for both parties than a decision notice. Our recommendation is that the IR's are defined in the following terms:

- 1) The procedure to be used in seeking an IR must be explained to the parties from the beginning, preferably through telephone conversations and emails.
- 2) The main interest of the case officer responsible for the case cannot consist in settling the dispute as rapidly as possible. On the contrary, the case officer must have public interest in mind, as well as the interest of the claimant.
- 3) The absence of public awareness of the IR must not affect public interest. Thus, it is appropriate every so often, that criteria are published that must be respected by the regulated bodies, and which formulate interpretations and clarifications derived from cases that have been informally resolved, but without revealing the identities of the parties.
- 4) The claimant must be assured that they have the right to demand a decision notice..
- 5) It is recommended that all the standards and steps to follow are clearly mentioned and explained in a Procedures Manual.

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