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Freedom of information in the UK: Opportunity and Threat

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Former British Prime Minister Tony Blair described it as his worst mistake in government. 'You naïve, foolish, irresponsible nincompoop' he wrote in his autobiography Open Secrets in 2010. Blair had come full circle on his views, having championed freedom of information in opposition and introduced it on taking office, the former PM derided the decision, slamming journalists' use and lashing its impact on the decision making ability of government.

And therein lies the eternal tension: freedom of information, defended by open government campaigners, journalists and NGOs, is arguably the most hated piece of legislation on the statute books by those who work in Whitehall. FOI proponents laud it as a sunshine law, shining light on the dark recesses of closed government, levelling the playing field between citizen and the state. Those opposed argue it does more harm than good, damaging the processes of government, denting the ability of officials to offer frank advice to ministers, and reducing all decisions to newspaper exclusives about internal doomsday warnings that were ignored, or rows about spending on toilet paper and chocolate biscuit expenses.

FOI is, in essence, intensely political. An Independent Commission on Freedom of Information set up to examine if the legislation by the UK government following the 2015 General Election may be about to recommend wholescale changes that opponents say are

much needed, but campaigners say would destroy the Act and its laudable accountability and transparency principles.

Understanding FOI

Freedom of information laws have their foundations in Sweden in the 1766 Freedom of the Press Act. The principal philosophy behind FOI laws is that government attains its legitimacy from the people it represents, and FOI is designed to shed light on the processes of government, making them more open and transparent. FOI legislation exists in most western democracies where the right of citizens to know how and why governments make decisions on their behalf is a well-established precedent, and one that is recognised internationally, for example in the Swedish Constitution, the First Amendment to the US Constitution as interpreted by the US Supreme Court, and in international conventions such as the European Convention on Human Rights and in the UN Convention on Civil and Political Rights. This view is at odds with the traditional Westminster view of government, more inclined toward secrecy.

FOI can be viewed as part of a raft of legislation such as public service reform; ombudsman laws; strengthening powers of public auditors; police oversight; and ethics laws that have been introduced in democratic countries during the last three decades. Proponents argue the law has the potential to lead to more open and accountable government, less corruption and better democratic outcomes for states.

The first modern access to information laws come from the post-McCarthy era in the US. When FOI legislation was introduced there in 1966, the trickledown effect of that openness spread. To Australia, Canada and New Zealand in the early 1980s, then to other European states, and eventually to the UK in 2000. Around the world today, more than 100 countries

have some version of an FOI law on their statue books. FOI overturned the long-held presumption of a government's right to keep secrets from its people. And despite the embarrassments and the political damage caused by FOI disclosures, the legislation has proved enduring.

It is at the citizen level – the majority of requesters are ordinary citizens – that FOI has had its greatest achievements. It is often overlooked, but there are two 'freedoms' of information operating simultaneously in most countries. One is the access freedom of information laws grant to ordinary citizens. Their right to know – to inspect a planning document; obtain personal medical files; to see safety reports of public utilities; to examine inspection reports of crèches, schools and care homes; to view restaurant hygiene ratings – is commonplace around the world. These freedoms have become the norm in the last decade, and might now be considered part of the package of fundamental liberties that any citizen can expect, and should demand. They promise an element of openness from bodies that interact with the general public, and they assure trust and transparency for civil society.

There is another freedom of information, that practised by journalists, opposition MPs, NGOs, activists, and similar groups – and that is the right to know which secrets governments are keeping hidden. That right goes to the heart of the role of an accountable democracy – to hold those in power to account, to ask uncomfortable questions, and to speak truth to power. Freedom of information laws, while they differ by jurisdiction, are remarkably similar in their design. Most allow for the release of all information held by public bodies, save for specific exceptions around national security, defence, privacy, commercial interest, and ongoing deliberations and decision making.

Most states allow for the release of policy documents and other sensitive material on public interest grounds, though on politically sensitive issues this can often create tension. By their

very nature governments are susceptible to lobbying from vested interests and party donors; decisions by ministers may ignore sound policy advice for political reasons; and public money is sometimes wasted on white-elephant projects, or is just poorly managed. Of course not all governments are corrupt, and not all government decision-making is poor. Rather FOI has the potential to discourage corruption and maladministration by assuring accountability and transparency, and exposing poor practices via the press when they occur.

FOI in the UK

While the UK's administrative system was framed in an era of official secrecy, there have been a number of waves of incremental openness in the UK since the 1960s, mainly because of public backlash from scandals, pressure from NGOs, campaign groups and the media, but also because of the modernising of bureaucracy. The catch-all Official Secrets Act 1911 (the successor to the 1889 Act) framed the relationship between government, bureaucracy and the public for almost 100 years, but the prevailing sentiment existed long before the legislation was even passed.

The Westminster-style administrative culture viewed information as power, and the public could simply not be trusted with information. The famed BBC comedy Yes Minister lampooned the Whitehall processes, but the obsession with official secrecy was aptly captured through the sardonic wit of Sir Humphrey, who regularly warned against the dangers of an informed public.

For the British establishment, scandal was to be avoided at all costs. The D Notice committee, which was implicitly supported by Fleet Street's press barons and editors, served to control the press during the war years and for some time afterward, however by the late 1950s and early 1960s society was modernising, the BBC and ITV had both launched

television services, and the press was beginning to flex its muscles. The Suez crisis and the Profumo affair both led to heavy press criticism of the then Government and Cabinet. One of the first attempts to open up government came with the 1968 Fulton Report on reform of the civil service.

There were several other attempts at openness, and by the late 1970s, Labour produced its first draft FOI Bill. Pressure from opposition, the press and NGOs was growing to begin to open up government. In part, perhaps, to head off the clamouring calls, the then government introduced the so-called 'Croham Directive' that separated policy advice (still believed too important and secret to be released) and factual information, that need not fall under the purview of the Official Secrets Act and may be published. The directive proved a complete failure, because government departments published only a handful of documents and most were so innocuous to be of no value.

There was little change in the 1980s, with the Thatcher government resolute in their opposition to any changes to the long-held position of official secrecy. Despite this, the pressure for change was gradually building. The advocacy group the Campaign for FOI continued a high profile and highly regarded push for freedom of information legislation, supported by national newspapers, academics and several MPs. The impact of EU directives, as well as modernising legislation such as the Local Government Act and Data Protection Act, also helped to gradually open up bureaucracy.

By the 1990s, the John Major government rejected FOI but introduced a 'code of access' for civil service departments on publishing information. The heads of intelligence agencies MI5 and MI6 were publicly named for the first time, as well as the publication of guides to their operation.

The Opposition Leader Tony Blair committed to FOI and on entering government in 1997 began the process of introducing the legislation. However, the passage of the Act proved painstakingly slow. A 1997 White Paper was warmly received as bold by observers, however, the proceeding Bill was considerably watered down when it was published in 1999. It included ten pages of exemptions, a voluntary public interest test that would have been unenforceable, and a bizarre provision that would have required requesters to reveal why they wanted the information, and to agree not to make it public if released. These elements were eventually dropped following a barrage of criticism from campaigners, and the UK's FOI Act was introduced in 2000, becoming operational in 2005.

In the 11 years since its introduction, the 2009 MPs' expenses scandal remains one of the highest profile FOI exposés, though the information was leaked to the *Daily Telegraph* before it was released under the Act. The American journalist and FOI campaigner Heather Brooke had first requested access to MPs' expenses under FOI in 2004, months before the Act was even introduced. There followed a five-year battle by her and others to have their MPs' expenses published. The profligate nature of the expenses system, together with rule bending and law breaking by some MPs, left the public aghast when the story was published. Expense bills for refurbishing multiple second homes, cleaning a moat, and paying salaries to family members, left most ordinary people outraged.

The Pushback

Despite the many successes of FOI – some have argued because of it – FOI laws in Western democracies, including in the UK, are coming under increased pressure. Governments and bureaucrats in several Western democracies have mounted several determined and successful counterattacks to the open government agenda. In some cases, governments

have exempted large parts of their decision-making apparatus from disclosure under FOI. Letters received by ministers; papers prepared for cabinet; and documents that form the basis of important public policy decisions are increasingly not released, or states have changed their laws to exempt these documents altogether.

The Prime Minister, David Cameron, has complained that FOI 'furs up the whole of government'. Communication with the Queen and the next two in line to the throne has already been removed from FOI, though this came too late to prevent the release of the infamous 'Black Spider Memos' – correspondence between Prince Charles and various government departments, Cabinet secretaries and the Prime Minister. The letters themselves proved innocuous, but their release demonstrated the power of the legislation. Open government campaigners have expressed concern that the UK Government is now about to fillet the UK's FOI regime.

Upon its re-election last year, the Government set up an Independent Commission to examine the UK's Freedom of Information Act. However, the Justice Secretary, Michael Gove, was much criticised in the press, with critics claiming the Commission would only examine ways of watering down the legislation, rather than ways it needed to be strengthened.

Members of the Commission include former Labour Foreign Secretary Jack Straw, a vocal critic of the Act, as well as the former Ofcom Chair Dame Patricia Hodgson, former Liberal Democrat MP Alex Carlile, former Conservative Party leader Michael Howard. It is chaired by the former Permanent Secretary to the Treasury Lord Terry Burns.

The Commission was tasked with examining whether various aspects of the Act needed amending. Civil servants and government ministers have expressed concern for some time that the legislation did not allow for a 'safe space' to discuss policy, where officials could

give frank advice to ministers, without worrying that their advice would be released under FOI. There was also concern in Government that the Cabinet veto needed strengthening in light of the Supreme Court ruling on the Black Spider Memos.

At a local level, councils and other public bodies have complained that the legislation put an enormous drain on their resources, with large volumes of requests – many of these frivolous, they claimed – coming from local newspapers. Some councils even published lists of such requests they had received, including requests on preparations for alien invasions, and the amount of money spent of paper clips and toilet rolls.

The Commission received more than 30,000 submissions and held oral hearings in January this year. Ironically, the Commission is itself not subject to FOI. It is expected to report in the coming months, however open government campaigners have expressed concern that the Commission may recommend changes to the Act that would exempt large parts of government decision-making apparatus from FOI, and it may also recommend the introduction of fees along the lines of the changes introduced by the Irish government in 2003, when it amended its FOI regime.

Conclusion

FOI has achieved a lot in the 50 years since the first modern Act was passed by the US Congress. The results can be seen daily in the press, with FOI stories revealing lobbying by special interests; reckless spending by ministers, and authorities acknowledging in private what they have publicly denied. Investigations by journalists, activists, NGOs and opposition members of parliament have disclosed massive public spending overruns in Ireland and India; civil rights abuses by public authorities in the USA; corruption in Australia and Canada; citizen stripping in the UK; and many other international scandals.

Yes, FOI comes at a cost, but many would argue it is a cost well worth paying. The UK's FOI Act provides, in the words of the High Court, 'a radical change to our law and the rights of the citizen to be informed'. Blair's 'nincompoop' moment aside, the former PM later described his decision as 'a quite extraordinary offer by a government to open itself to scrutiny. Its consequences would be revolutionary'. How right he was.

FOI in Scotland

There are few differences at first glance between the UK's FOI Act and the FOI (Scotland) Act 2002. Both are in large part based on 1997 legislation from the Republic of Ireland, which has almost identical government, parliamentary and administrative systems to the UK. The public bodies covered, the main provisions, the time allowed for responses, the design of public interest tests and the exemptions are largely identical. However, there are some important differences of emphasis, in particular around exemptions, that make the Scottish legislation more open, as follows:

- The Scottish legislation tips the balance of public interest in favour of release (and in favour of openness) in two important ways, firstly because it puts an onus on authorities to exercise the public interest test within 20 days (no such limit is in place in the UK Act) and secondly – and most importantly, it requires authorities to prove that release of material would 'substantially prejudice' the effective conduct of public affairs. The UK's Act has a lower threshold.
- The Scottish Act takes a more forward look at FOI, requiring not just the release of information requested, but also places an onus on public bodies to prepare publication schemes, and regularly publish information. The Scottish legislation also requires public bodies to take account of the public interest in information relating to the provision of services, including the cost of provision and the standards of those services; and major decisions made by public bodies, including facts and analyses on which the decisions are based. The provisions in the UK's Act are less stringent.
- While both jurisdictions allow for the recovery of costs, neither jurisdiction in reality imposes costs on requesters, though cost limits of £500 (£600 on central

government) are enforced in the UK. Anecdotally, campaigners say the Scottish authorities are not as strict at enforcing cost limits.

- Finally, the UK Act allows public bodies to refuse to release information on the grounds that it is due to be released at some future date. The Scottish legislation limits the withholding of such information to a maximum of 12 weeks, save for specific exemptions.

Table:

YEAR	EVENT
1968	Fulton Report
1969-70	White Paper Information and the Public Interest;
	Labour and Conservatives commit to reform of Official Secrets Act
1974	Labour enters power with manifesto pledge to pass FOI
1977-78	Croham Directive introduced and controversial ABC trial takes place
1979	Government White Paper; Clement Freud's FOI Private Members' Bill
1984	*Data Protection Act*
1985	*Local Government (Access to Information) Act*
1989	*Official Secrets Act* (1989) strengthens secrecy legislation
1997	'Your Right to Know' White Paper
2000	*Freedom of Information Act* receives Royal Assent
2002	*Freedom of Information (Scotland) Act* is introduced
2005	*Freedom of Information Act* comes into force 1 January 2005
2009	*Daily Telegraph* publishes MPs expenses story
2012	Post-legislative scrutiny of FOI Act report by Justice Committee published
2015	Independent Commission on FOI is tasked with reviewing 2000 FOI Act