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Title: FOI – A Damp Squib or a Culture Change in the making?

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Abstract

This article explores what culture means in the context of FOIA, the difficulties in assessing whether it has occurred and the reasons why it is important. It examines the background to FOI in the UK and contrasts it with foreign experience. It argues that cultures vary across the public sector and indeed within public authorities themselves, and that in the UK the context is that FOI is less a formal indicator of democracy and more a customer service designed to build up trust in government. The contradiction that FOI is supposed to bring about a culture change in government but that for FOI to succeed the culture change needs to come first is a theme explored.

Introduction

Much has been made of the concept of 'culture change' in the lead up to freedom of information legislation to the UK. The introduction of the Freedom of Information Act 2000 (FOIA) was itself supposed to bring with it a 'culture change' throughout the public sector. Conversely, proper compliance with the Act is impossible without a culture change. This article examines what culture change may mean in the context of FOI, the indicators of and obstacles to the implementation of culture change, and discusses generally how culture change is critical to effective compliance with the Act. The contradiction between FOI bringing a culture change with it and the need for there to be a culture change first is a key theme.

Background to FOIA

The FOIA was passed in November 2000 after calls for such legislation were made for some 20 years. For most commentators, there was a disappointingly slow implementation of the Act – publication schemes in stages across different parts of the public sector from 2002 onwards, and access rights not until January 2005. The long implementation period was supposed to allow public authorities adequate time to prepare – that is, to get their records in order, to implement electronic document

management and perhaps most optimistically to embrace a new philosophy of 'open government'. Although the Act has been criticised as not going far enough (e.g. with its many exemptions, the ministerial veto etc) it is generous in the breadth of its application, covering not only central and local government, but the Houses of Parliament, many non departmental public bodies including the Information Commissioner's Office, the police, schools and individual NHS general practitioners.

The Act brings the UK into line with other countries such as the US, Australia, Canada, New Zealand and Ireland in giving the public a right to access government held information. It is widely recognised that unnecessary secrecy undermines public trust in government. Although in countries such as the US and Australia, FOI legislation is overtly recognised as a tool of democratic engagement, in the UK there is a certain reticence in embracing this language of 'democracy'. (Eg. The UK Act does not contain any objects clause which explicitly recognises the value in defining the public interest with reference to democratic values of participation and accountability). Arguably the concept of 'trust' is something less than full blown democracy.

Instead FOI in the UK could largely be described as a 'customer service'. The Act does not require any great formality in making a request or any explicit mention of the intention to exercise rights under FOI legislation – that is, an applicant need only put a request for recorded information in writing with an address for correspondence (email will suffice). During the parliamentary debates on FOIA, members of both Houses of Parliament supported the idea that the Act should be accessible to all – so not only can anyone irrespective of age, citizenship or mental capacity make an FOI request, the person requesting information doesn't even need to know of the existence of the FOIA.

This relative informality of the Act can be contrasted with the position in Australia for example, where FOI requests are identified by the applicant specifically mentioning in writing that they are making a request under FOI. The UK approach has had several consequences for the culture surrounding FOIA. Firstly, the informal approach to the Act has meant that there is sometimes difficulty in identifying an FOI request with certainty. An approach taken by some public authorities is to distinguish between 'business as usual' requests (such as requests for opening hours) and those which

should be treated as FOI (e.g. those which raise some complexity and require consideration of exemptions, or ask about information which is not already in the public domain or which specifically mention the Act). However it is not always a clear divide. For example, many public authorities routinely receive complaint letters. A complaint letter may well be 'business as usual' however there may be a 'request for information' buried in there. This is particularly where the request relates to information which is not strictly pertaining to the individual complaint.

Secondly, this informal approach has meant that the day-to-day operation of the Act in the UK does not necessarily lie within legal departments. Instead, it seems that increasingly the bulk of the responsibility for answering requests under the Act rests with either a generic customer services unit where FOI is treated as just a particular type of correspondence, or with 'information specialists' – records managers, IT departments and others who are concerned less with the substance of the information in question and how it might assist people in engaging more actively with government, and more with the mechanics and logistics of how it might be stored, filed, or retrieved. The choice of location of responsibility for FOIA within a public authority may well have an influence on the culture within which the Act is applied.

For example, good records management is indeed the underpinning needed for the successful operation of FOI, and with it hopefully comes a culture of responsible information handling and record creation. Indeed records managers are often keen advocates for FOI and the public's expectations about accessibility of information. However the emphasis on records/information management can detract from the need to achieve a substantive culture change toward the release of information. This is because an assumption may be made that a good records management system is all that is required. There may be limited value in having well organised records if the political will within public authorities does not exist to release information which previously was not made public. Good practice in records management is an important first step in FOI – but it is only the first step. Equally critical is the commitment to move away from old attitudes toward the release of information to the public – the spirit of the FOIA requires more than just an attitude that FOI as a formalisation of previous practice of releasing innocuous material and exempting anything remotely controversial (ie the thinking reflects 'if we wouldn't ordinarily release it then it must be exempt'). On the other hand, locating FOI in a legal

department may lead to a culture of looking for exemptions and technical legal interpretations without enough emphasis on customer needs or user friendliness.

What is 'culture change' in the context of FOIA?

Culture change in the context of FOIA could be described as the embracing of a new philosophy of 'open government'. The Irish Information Commissioner has described culture as referring to 'the ideas, beliefs and values which are shared by public servants and which affect their approach to their work' (Murphy, 1999). Although the term 'culture change' is inherently fuzzy, the critical aspect of the Act is that it gives a right to access information held by public authorities. It represents a significant shift from a 'need to know' where applicants would have to justify why they wanted or needed the information in question to a 'right to know' where no such justification is required. Importantly it also empowers applicants in that they are no longer subject to the whim of individual government bodies – the release of information is no longer just a discretionary issue.

During the implementation period of the Act, from 2001 through to January 2005, emphasis was given to the need for a culture change to make FOIA successful. The need for widescale staff awareness raising, specialised training of key staff, and an information champion at the highest levels of public authorities has been highlighted (Elkin (2003)).

In addition, it was recognised in the introduction of the FOI bill in the House of Commons that the Act would be instrumental in creating a culture change in government.

Moreover, the Bill will not only provide legal rights for the public and place legal duties on Ministers and public authorities, but will help to transform the culture of Government from one of secrecy to one of openness. It will transform the default setting from "this should be kept quiet unless" to "this should be published unless". By doing so, it should raise public confidence in the processes of government, and enhance the quality of decision making by the Government. (Straw, 1999: Col 714)

Culture change was one of the justifications floated for a long implementation period. Not only was it necessary to get records management in order but some sort of

massive change in the attitudes of public authorities had to be instilled. I am not alone in thinking this requires a massive shift – Lord Falconer, said that FOI involved a radical culture change for Whitehall and described it as a task of titanic proportions, akin to turning around the classic ocean liner (Falconer (2004)). It is hoped that the references to the titanic refer to the size of the task rather than to FOI about to hit some huge submerged obstacle and suffer an undignified sinking!

Culture change as an ongoing process

There is a slight conundrum in the discourse on FOI and culture change. In the same vein as 'chicken and egg' riddles, which comes first, culture change or FOI? It seems that FOI is supposed to bring with it a culture change and yet culture change is necessary for FOI to work properly. What is clear however, is that culture change needs to go beyond the implementation of the Act – it must extend to the culture of public authorities once they are in the process of answering requests for information. Culture change in this sense is critical to the overall compliance with the Act – it cannot be sufficient to comply with the letter of the law if the spirit of the Act is being ignored. For example – a letter responding to an applicant within 20 days and which gives the applicant a basic statement of the exemption being claimed and why it is being relied upon, together with a mention of the appeal procedure available may be technically correct, however it is questionable whether it complies with the spirit of the Act, if the substance of that response is in essence the same as it would have been before the legislation was passed. It may well be that if an exemption applies and the public interest test is weighted against disclosure that it is appropriate to continue not to disclose the information however it is critical to have a robust process in place for examining whether the information can be released. The key question for public authorities must be a shift from 'why should we give out this information' to 'what would be the harm if we did give it out?'

Differences in Public Authority Sectors

As mentioned above, the FOIA applies to a number of public sectors, including health, education, police, non-departmental public bodies, central and local government. Interestingly, Hubbard (2004) argues that the further one gets from central government and the civil service, the more difficult it is to find a culture, which is responsive to FOI. Hubbard is however writing about Tasmanian experience

in the context of government business enterprises. In the UK, it may be similar that the bodies which do not identify themselves as 'governmental' in the traditional sense and are run on a commercial basis (eg. trading funds) may find it more difficult to embrace legislation which is premised on democratic participation and accountability. However, some of the biggest cultural obstacles in the UK public sector arguably lie within central government. It could be argued that those parts of the public sector which are more focussed on service delivery and customer service at a grassroots or local level, will struggle less with accepting freedom of information. Central government has traditionally been less concerned with service delivery – it has instead focussed on setting the wider policy direction. The Act offers generous exemption for policy formulation and deliberative processes in ss.35 and s.36, with s.35 only being available to central government.

Indeed one of the key criticisms of the Act by the wider public sector is the 'special treatment' afforded central government by FOIA – e.g. the s.53 ministerial veto currently applies only 'government departments'¹ and the Welsh Assembly; certain exemptions are only available to central government or are available to other sectors only with additional effort²; and the requirement that a publication scheme be produced by each public authority results in the rather anomalous position that a large public authority like the Home Office for example only needs one scheme for itself and all of its executive agencies, whereas individual GPs are also expected to produce a publication scheme in their own right.

Dangerous Assumption in Government

There is a fundamental flaw in the thinking of many government bodies which is something along the lines of 'effective government is diametrically opposed to open government'. Central government speakers at FOI conferences although highlighting the importance of openness and culture change, have made clear that it is well understood that where policy options are being discussed it is not in the interests of 'effective government' for this information to be released. There seems to be a failure to acknowledge that in some circumstances it will indeed be in the public interest for an applicant to be able to access the records of those very discussions

¹ 'Government department' is defined in s.84 to include Northern Ireland departments.

² Eg. In s.36 most public authorities outside of central government need to go through a special authorisation process in order to have an internal person designated as the 'qualified person'.

and that indeed the process of government could in fact benefit from a little public scrutiny.

The Practice

It is early days in the UK for FOI and so difficult to judge how much of a culture change has occurred. However, some positive indicators of culture change include:

- the fees regime – this has turned out to be more generous to requesters than first envisaged in the UK. Most requests are free, provided they take less than 2 ½ days (or 3 ½ days for central government) to respond to. Many public authorities are also not charging for disbursements such as photocopying and postage unless a high threshold is reached;³
- the duty to advise and assist – there is a legal requirement in s.16 FOIA to be helpful to the applicant;
- time it takes to respond – the statutory deadline is only 20 working days in the UK. Prompt responses suggest a willingness to assist the applicant. Rightly or wrongly, delays in responding seem to suggest an unwillingness to release information.

The Irish Information Commissioner has said that his experience had shown that for the most part the attitude of public servants was respectful of applicant's rights and generally conscientious, although noted that at times public authorities concerns that an applicant was going to cause trouble resulted in perhaps different experience for the applicant (Murphy (1999)). This seems to be particularly the case where the applicant is from the media – the concern is that the public authority will be presented in a poor light or that information will be deliberately distorted or misunderstood.

Overseas experience of culture change is less than inspiring – the Information Commissioner of Canada (1999) has stated that the Canadian FOI legislation has been successful in forcing public servants to disclose more information but that it hasn't changed the closed culture. He has identified the paternalism of government as being bound up in the 'culture of secrecy'. That is, the reason often quoted by

³ Although this is mainly a practical consideration that raising invoices can often cost a public authority more than it would be recouping from the applicant⁴ This is available from the FCO's website in the Disclosure Log: Other disclosure log links may be found at <http://foia.blogspot.com/log.htm>

public authorities for not releasing information is that it would not be in the public interest because of a belief that the general public will be incapable of understanding the information and reaching appropriate conclusions. Information Commissioners both in Queensland Australia and here in the UK have indicated in guidance that the inability of the public to understand information should not be regarded as sufficient justification for refusing release of information. Interestingly, Information Commissioner of Canada has made the point that the official line on ethics for public servants stresses their 'servant' role (ie being unseen, unheard, obedient, unaccountable) rather than their 'public' role (being accountable, professional, obedient to the law and the public interest) (Information Commissioner of Canada, 1999, p.5).

The Canadian Commissioner has also identified some myths which he considers to be detrimental in achieving a culture of openness (Information Commissioner of Canada, 1999, p.5):

"The major myths are these: the law is being abused; government is being overwhelmed by requests; the law is too expensive and the law interferes with the giving of unreserved advice on a full range of options."

Disappointingly, it is exactly these types of arguments that have been used in foreign jurisdictions as justification for 'tweaking' FOI legislation after a couple of years of operation. The 'tweaking' inevitably increases the cost to the applicant of making an FOI request or makes it easier for a public authority to exempt information.

It is also perhaps an unfortunate reality that FOI officers are often relatively junior individuals with little clout who have a difficult time persuading the powers that be within their public authority that information should be released or that even a robust system is necessary for justifying refusals. Without senior level 'buy in', real culture change (and hence proper compliance) is almost impossible to achieve. The problem is, that the idea that information needs to be kept secret is very ingrained. The incentives to keep information secret are clear. Releasing information can lead to unacceptable risks to any organisation – including those in the public sector. Most senior managers will not willingly expose their public authority to such vulnerability.

Most importantly, FOI requests can expose information which is embarrassing to a public authority.

It is likely that in the early days of FOI in the UK that a lot of very cautious decisions are being made. The possibility of being challenged to the Information Commissioner's Office is probably a far less daunting prospect than dealing with the consequences of media feeding frenzies about the public disclosure of information that is in any way sensitive; or alternatively damaging relationships with key third parties.

However it is possible that as more information which is not completely innocuous is released publicly that this will create some precedents and that the tide will turn – the reputational damage, scandals and media frenzies will eventually be around the withholding of information rather than its disclosure. Hopeful glimmers along this line are appearing in the disclosure logs of a number of public authorities which show that some interesting information has been released. For instance the Foreign and Commonwealth Office has released the resignation letter of the Deputy Legal Adviser Elizabeth Wilmshurst, prompted after the decision to go to war with Iraq without a second Security Council resolution.⁴

Conclusion

This article has explored what culture means in the context of FOIA, the difficulties in assessing whether it has occurred and the reasons why it is important. It has argued that cultures vary across the public sector and indeed within public authorities themselves, and that in the UK the context is that FOI is less a formal indicator of democracy and more a customer service designed to build up trust in government. Although FOIA is widely viewed as 'medicine' for public authorities, requests can have quite tangible benefits – when they expose mismanagement, bad decision making, poor use of public funds and the like, there is a strong incentive for public authorities to learn from the experience and improve. There is obviously still a long way to go but it is early days and there are some hopeful glimmers of change starting to appear.

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