



**Open Government:
A Journal on Freedom of Information**

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Editorial Volume 3 Issue 1

April 2007

Welcome to my final issue as editor, I will soon be handing over to a new team to run the journal and a new editor. I have left the Liverpool John Moores University for a new post at the UK Information Commissioner's Office. I would like to thank everyone who has supported and helped the journal to grow. The readership is still growing and I'm hoping that its profile can be raised further during 2007. The range of articles the journal is attracting continue to be of excellent quality and covering a wide range of issues.

In issue 1 for 2007 we have two articles from the UK and two from the US, covering the journalists' use of the UK Freedom of Information Act, the precursor to the UK Act -John Major's Code of Access, the passage of the 1966 US Freedom of Information Act and finally an examination of open meetings legislation in New Jersey.

Steve

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Title: Journalists' use of the UK Freedom of Information Act

Volume 3 issue 1

Abstract

The Freedom of Information (FOI) Act 2000 came fully into force in January 2005. There have been few studies exploring the users' experience of using the Act, whether in the UK or abroad. This paper seeks to explore how one of the most visible 'categories' of requesters, journalists, used the Act during the first 21 months of implementation. Based primarily on interviews with journalists in the UK, the paper investigates and describes journalists' motivations for using the Act, journalists' experience of the administration of the Act, and the Act's performance as measured against the objectives and benefits that are often ascribed to it. Information gleaned from the interviews is supplemented by data collected through a content analysis of UK newspaper articles based on information obtained under the FOI Act 2000 in 2005. The paper finds that although there was significant disappointment with the FOIA 2000 in operation, journalists used the Act to good effect in investigative stories, particularly articles of a historical nature, articles based on statistical or performance

Introduction

The Freedom of Information (FOI) Act 2000 came fully into force in January 2005.¹ In implementing the law, the UK joined a growing group of countries that have granted the public legal access to government information, the majority of which have done so in the last 10 years. Although nearly 70 FOI laws now exist worldwide, there has been relatively little investigation of who makes requests, why they make requests, how effective and efficient they find the FOI response process, and what they do with the information they receive.²

¹ Readers should note that this paper looks almost exclusively at journalists' use of the FOI Act 2000 and not the FOI (Scotland) Act 2002. The FOIA 2000 and FOISA 2002, to which public authorities within the Scottish Parliament's jurisdiction are subject, are broadly similar. A neat table of their differences can be found in Appendix 1 of CILIP's 2004 guide 'Freedom of Information (Scotland) Act 2002: A guide for the Information Professional' (<http://www.slainte.org.uk/files/pdf/cilips/foisa04.pdf>).

² A survey of all FOI laws in existence is available in David Banisar's 'Freedom of Information around the world 2006: A global survey of access to government information laws' at <http://www.privacyinternational.org/foi/foisurvey2006.pdf>.

Surveys of those who make FOI requests are difficult to carry out because most FOI laws are 'requester blind', which makes it hard to identify categories of requesters, much less contact individuals about their use of the legislation. However, journalists who use FOI – some of the most visible and prominent requesters – can often be identified through their by-lines. In addition to the fact that they are the most easily identifiable group of requesters, journalists' use of FOI is interesting because the information they obtain is often put in the public domain and it is through them that most members of the general public learn about the law. This paper, based on interviews with journalists and a basic content analysis of articles that appeared in British national newspapers in 2005, seeks to explore why and how journalists used the FOIA 2000 during the first 21 months following implementation, how effective and efficient they found the administration of Act, and to what extent they thought the law 'succeeded' in meeting the objectives set out for it.

Exploring journalists' experiences of using FOI allows us some insight into the administration of the FOI Act 2000. Is a satisfactory amount of information being released? Is it being released in a timely fashion? Is the Act truly requester-blind? Studying their use of the Act also allows us to explore whether FOI is succeeding in relation to some of the benefits that are often ascribed to it. Has it made the government more 'open'? Is it increasing government transparency and accountability? Has it enabled better public understanding of government decision-making and more effective public participation in the political process? Has it increased trust and confidence in government? As users of FOI and well-practiced observers of government, journalists are well placed to comment on these issues.

Literature review

Most people only hear of FOI or about information obtained through FOI via the media. When journalists receive information through use of the legislation and use it in their stories, they often cite the law as their source. They also publish stories and editorials about problems with and, to a lesser degree, about the advantages of FOI.

Reliable and systematic data on who uses FOI are nearly impossible to obtain because most FOI laws do not require requesters to identify the capacity in which they make their requests. Identifying journalists who use FOI is easier because there is often a by-line attached to published articles. However, this only catches those who use the information they have obtained – accurately determining the exact volume and nature of requests placed by journalists is difficult. There have been few extensive studies on how journalists use FOI,³ and there are no comprehensive quantitative data. Even so, it is possible to outline some trends and patterns from the studies available.

³ M. Rosenbaum's 2004 *Open to Question – Journalism and Freedom of Information*, a qualitative study of journalistic use of FOI in Sweden and Ireland, is one of the exceptions.

In most countries the proportion of journalists using FOI to total requester population is low. The Access to Information Review Task Force in Canada suggests that journalists account for around 10% of requests to federal government (Attallah & Pyman 2002). Similarly, the Heritage Foundation in the US estimates that approximately 5% of all requests to the federal government come from the media (Tapscott and Taylor). Stephen Lambie compared journalists' use across Australia, New Zealand, Canada and the United States and found that the use in Australia was particularly low (1.9 articles per 100,000 people), as was that in the US (1.0 per 100,000 people). However, New Zealand bucked the trend (13.3 per 100,000 people). The most notable exception in journalists' use of FOI is Sweden. Although authorities in Sweden do not record the number of requests they receive, Johan Lidberg suggests that between 40% and 70% of journalists articles use information obtained through FOI (Lidberg 2001).

Anecdotal evidence suggests that the number of requests made by the media under the FOIA 2000 and FOISA 2002 is slightly higher than in other countries, with half of requests to central government in the first month of operation of FOI filed by people identifying themselves as journalists (Mathieson & Chamberlain 2005). The Scottish Executive revealed that 60% of all FOI requests received by Scottish authorities in the first quarter of 2005 came from journalists. However, it must be noted that 60% of the media's requests came from one individual (Scottish Executive 2005). The Scottish Information Commissioner, in contrast, reports that only 7% of appeals made to his office in 2005 and 8% in 2006 were filed by journalists (Scottish Information Commissioner 2007).

The reasons for the relatively low levels of use are clearly identified (Rosenbaum 2004, Evans 2003, Lidberg 2001). FOI response processes are perceived as slow and cumbersome, especially for journalists who have daily deadlines. The twenty-working-day response time allowed authorities under the FOIA 2000 feels like an eternity in a 24/7 news environment. In contrast, speaking to press officers or members of government off the record can be a quick and easy source of information. There are also complaints about the Act's scope. Exemptions, in particular, are viewed as too broad and too readily applied. Journalists are put off by the fact that access to whole classes of information, such as high level government papers like Cabinet papers or policy advice, is generally denied. In some jurisdictions, complaints are made about the excessive costs of requests. In Australia, for example, one journalist was asked to pay AUS70,000 for requested information (Evans 2003). Sweden is the exception in all cases. The high level of use in Sweden is attributable to the speed with which information is disclosed. Journalists are given almost instant responses to their requests, and almost all requests are granted (Rosenbaum 2004). In other countries the use of FOI has been most beneficial to investigative reporters working on projects with medium- to long-term deadlines.

Some studies have shown that journalists' requests receive treatment that is different to that of other FOI requests. Alasdair Roberts has demonstrated that officials in Canada's Department of Citizenship and Immigration adopted a range of measures to handle politically sensitive requests, such as those from journalists (Roberts 2005). The 'amber light process' is ostensibly used to provide Ministers and senior officials with a 'heads up' and time to prepare a communications strategy and/or package to respond to the issue in question. However, once the request lands on a desk in the Minister's office the line between the decision to disclose and departmental communications strategy becomes somewhat blurred. These 'amber light' requests take longer to process, and a Minister's special interest in a request is likely to mean a more cautious approach when deciding to disclose or withhold information (Roberts 2005). In contrast, in a study of 14 countries' FOI laws, the Open Society Justice Initiative found that journalists who made requests 'received more information than business persons or [others]...between 26% and 32% [of what they requested]' (Open Society Justice Initiative 2006).

Roberts suggests that the UK experience of sensitive FOI requests, especially when considering the Labour government's reputation for highly centralised control of communications and the early work of the Department for Constitutional Affairs (DCA) FOI Clearing House, is likely to be similar to Canada's.⁴ Rick Snell (2002) and Roberts (1998) also note that such an approach to 'sensitive' requests represents a form of administrative compliance that undermines the spirit of access to information legislation. If administrative compliance with FOI laws were mapped onto a continuum one could conceive of varying shades of compliance from one end to the other - from malicious non-compliance (intentional, sometimes illegal actions to undermine the legislation) to proactive compliance (enthusiastic pursuit of the social purposes of the Act). In between would be adversarial (an 'us and them' approach, testing the limits of the legislation without engaging in any illegalities), administrative non-compliance (undermining of access with deficient administration and/or inadequate resources) and administrative compliance (timely compliance with the letter and spirit of the law) (Snell 2002).

Despite the low use of FOI by generally sceptical journalists outside Sweden, most journalists do see FOI as a good tool for journalists and the public (Evans 2003). Many journalists and commentators refer positively to the media and their use of FOI as an important part of the democratic process and a 'special' or 'independent' counterweight to the government's information machine. However, this view is not without its critics. The 24-hour news cycle has

⁴ The Department for Constitutional Affairs states that the role of the Clearing House is "to ensure a consistent government- position on requests which have gone to more than one department, and potentially precedent-setting cases; to provide guidance on all sensitive cases with a potentially high public profile; to align the response to such cases with government policy and guidance; [and] to revise government guidance in the light of emerging case law and new policy imperatives." (Department for Constitutional Affairs website, <http://www.dca.gov.uk/foi/clearinghouse.htm>)

brought with it a constant demand for new narratives and minute-by-minute news and has led to a public discourse in which attention (the focus of which is on 'politics-as-entertainment') is fragmented and partial. In other words, the increasing flow of information through new networks of information like 24-hour news channels has a negative impact on the public's ability to hold the government to account because the 'quality' information is drowned out by the constant barrage of personalities and scandals (Balkin 1998).

Methodology

This study is based upon nine semi-structured interviews with journalists as well as basic statistical data that describe journalists' use of the FOIA 2000 in 2005. The statistical data were culled from an analysis of national newspaper articles in which information obtained through FOI appeared. Articles were coded according to whether they appeared in the broadsheet or tabloid press, the name of the publication in which they appeared, their type (news, feature, editorial, etc.), whether they were published on the front page, and to which government department or organisation the FOI request was submitted. The articles were also coded according to the content or type of information requested. Based upon an initial sample of articles the following categories of story were identified: costs/expenses, institutional rules, procedures and policies, performance measures, historical in nature, whimsical/trivial in nature, crime related, health and safety related, malpractice or impropriety, international relations, contracts with government, and domestic security matters.

In the autumn of 2006, after completing the coding exercise, nine one-hour semi-structured telephone and face-to-face interviews were conducted with national newspaper and broadcast journalists.⁵ The interviews were then transcribed. The selection of journalists was informed by the coding exercise through which several, whose name appeared more than once in article by-lines, were identified. This group is not a representative sample of journalists in the UK or even of journalists that use the FOIA 2000. Their responses are only intended to give a 'flavour' of journalists' experiences and opinions about the FOIA 2000 during the first 21 months of the Act's implementation.

Data and findings

Statistics on the use of FOI in 2005

In 2005, 38,108 requests were made to central government under the FOIA 2000, 19,717 (52%) of which were received by Departments of State (Department for Constitutional Affairs

⁵ Interviewees were promised anonymity in any write-up of the study results.

2006).⁶ As one might expect, there was a significant peak in request numbers when the Act was first implemented – 36% of requests made in 2005 were received in the first quarter. The second quarter saw a significant drop in the volume of requests. However, the number remained stable for the rest of the year.

The FOI Act 2000 places a statutory obligation on public authorities to respond to requests within 20 working days. The DCA notes that in 2005 87% of requests received a response within the 20 days or were subject to a permitted deadline extension. The timeliness of responses improved over the year and particularly after the initial first quarter surge.

Of the 29,271 'resolvable'⁷ requests, 66% were granted in full, 13% were granted in part, and 18% were refused. In each quarter, Departments of State responded to between 10 and 15% fewer requests by releasing information in full.

There were also 1,267 internal reviews requested in 2005. Of the 1,057 reviews for which the outcome was known when the DCA's report was published, the initial decision was upheld in 77% of cases and partially upheld in 15%. In 8% of cases the requester's complaint was upheld.

At the end of 2005, there were 127 appeals to the Information Commissioner's Office (ICO) concerning central government's refusal to release information. Only 25 of these appeals had been settled at the time the DCA's report was published. Of those 25, the ICO upheld the department's decision in 18 cases, and partially upheld the department's decision on one occasion. In six cases the requester's complaint was upheld.

Content analysis

In 2005, 602 national newspaper articles in which information obtained through FOI appeared were published. Of those, 387 (64%) appeared in the quality press and 215 (36%) in the popular press. *The Guardian* (15%), *The Times* (15%) and *The Sunday Times* (12%) published the largest number of FOI-information-based stories. Of the popular press papers, *The Daily Mail* (7%), *The Daily Mirror* (6%) and the *Daily Express* (8%) were notably active in using FOI. There was a predictable spike in the number of articles published in the first quarter of the year as journalists used the Act for the first time. However, usage remained relatively stable for the remainder of the year.

⁶ Departments of State include all the main departments of HM Government (Foreign & Commonwealth Office, Ministry of Defence, etc.) while other monitored bodies include organisations such as the Office for National Statistics and the Foods Standards Agency.

⁷ This excludes requests for which information sought was not held, further clarification about the nature of the request was being sought, or those in which a fee was required but had yet to be paid.

As table i shows, the most prominent 'types'⁸ of stories were those relating to costs and expenses, institutional rules, policies and procedures, and performance measures. More than one-fifth of the articles related to costs or expenses incurred by government. A further 20% related to the government's conduct within certain institutional rules or procedures. Stories about contracts with government, international relations, and domestic UK security matter were the least prominent.

Table i

Content/nature of article	Percent
Costs / Expenses	21.2%
Institutional rules, procedures and policies	20.8%
Performance measures	10.7%
Historical	9.4%
Whimsical / Trivial	9.1%
Crime	7.1%
Health and safety warnings	7.0%
Malpractice or impropriety	6.4%
International relations	4.2%
Contracts with government	2.5%
Domestic (UK) security matters	1.5%
	100.0%

Forty articles based on information obtained through FOI made the front page, *The Guardian* (23%), *The Daily Telegraph* (18%) and *The Sunday Times* (15%) published half of these front page stories. The types of stories that won this coveted spot focused on the most prominent types of information – costs and expenses, institutional rules, policies and procedures, and articles relating to performance measures or data. Approximately half the articles using FOI were about central government, though stories about the police and police activities were also common.

⁸ Please note that the categories are not mutually exclusive.

Interviews

Why do journalists use the Act?

As the large number of requests during the first quarter of the FOI Act's operation demonstrates, one reason journalists made FOI requests just after implementation was because of the law's novelty factor. The Act presented journalists with a new means of gaining information and they were keen to test it. As one journalist noted, 'I am one of those that are guilty of making a whole flurry of requests in the early stages' (Interview, 20 October 2006). Another noted, 'The bulk of my requests were made in the early phase of the Act, [since then] I have made fewer and fewer' (Interview, 24 October 2006). This early enthusiasm sometimes took the form of what one interviewee referred to as 'fishing' for stories (Interview, 20 October 2006) - putting requests in on subjects without any real leads in the hope of 'capturing' something newsworthy.

A more substantial motivation for using FOI, noted by nearly all journalists interviewed, was the statutory right to access information conferred by the Act. Several journalists mentioned the 'extra leverage' (Interview, 20 October 2006) offered by FOI. As one explained:

It was an opportunity to ask questions from the basis of having the right to receive answers to questions that are otherwise just blocked. We get so many "no comment" answers in this country, "can't discuss that", etc. It does give you a little bit of extra leverage, but only a little bit...Press officers often say "we can't disclose that because of data protection", they can just make stuff up and block you. And actually when you can say, well, I'm going to do this under FOI and at least you have the statutory right, they at least have to consider it. (Interview, 20 October 2006)

Such views were common among the interviewees. Some gave specific examples of this 'extra leverage'. One journalist received information from the Metropolitan Police about the costs of policing Abu Hamza's preaching outside the Finsbury Park mosque and explained, 'if you went to the press office they would usually say the figure is not available, and they certainly wouldn't go and get it for you' (Interview, 20 October 2006).

Another journalist also explained the difference the statutory backing made:

It's made a noticeable difference in that you can go and ask for things where previously you would just have given up or thought it was dead end. I think it has made a real difference in giving you the opportunity to pursue things if

you are really intent on a particular issue or angle. It gives you that scope, and you do have the knowledge at the same time that to a certain extent you're backed up by the law and what the Act says so that even if you're refused twice over you can take it to the commissioner. I think that does make a difference. (Interview, 22 September 2006)

One journalist also noted how the Act had, in some circumstances, slightly changed his relationship with inside contacts. 'Certainly contacts of mine have said you might want to put in a request for XYZ, so I suppose it's made a difference from that point of view, whereas previously they've said you won't be able to see that material for 30 years.' (Interview, 11 October 2006)

Another reason journalists used the Act was its helpfulness in longer-term, investigative stories. 'When you're not dealing with a particular time frame, no real deadline, or you want the information as well investigated or [as] full as possible, you seek it through an FOI request. If it's a story for the day, then you find it through press office' (Interview, 19 September 2006). Others also noted that FOI was most beneficial to those doing investigative reporting. 'I think it's people who are interested in investigations, original journalism, in following long-term ideas rather than next-day stories. That's what the difference [of having FOI available] is,' suggested one (Interview, 10 November 2006). Another commented, 'I think it would be wrong to say that it is something that impacts on every day reporting, in the sense that by and large in the day-to-day, run-of-the-mill reporting, the FOI act is not going to come into play every day or every week. But there are times when it makes a real difference' (Interview, 22 September 2006).

Several journalists also noted that the Act was particularly useful for getting hold of primary source material which would have previously been unobtainable. 'We are better off because any new way of getting information, particularly first-hand primary sources, is a good thing. It was rare to get actual minutes, etc. in the old days. Even when they don't produce stories, it's interesting to see first hand documents, which you rarely got to see before' (Interview, 13 September 2006). The ability to get such material has also opened up a 'new' set of stories to pursue. 'Journalists have a whole new area of news: historical news stories, the ability to look back on events that are no longer politically sensitive about which public bodies or government departments will feel relaxed about releasing information' (Interview, 19 September 2006). While this is not quite a 'new' area of news, the Act does apply to material in the National Archives and at least one other journalist was using the Act for that purpose. As well as historical or original documents it was also frequently noted that FOI 'seems to be of most use to get hold of statistical/factual information' (Interview, 24 October 2006). This was borne out in the content analysis, which showed information relating to costs or expenses

and performance measures as the type most frequently used in FOI-information based articles.

There was a further, perhaps surprising, reason for media use of FOI. One journalist observed that some peers were using the Act in a manner that sought to undermine it or portray it as weak. For some journalists not getting a story through FOI was the story:

Looking at the requests other journalists have made, that some other papers have put in, some journalists are putting in requests to try and prove...they're putting in requests for information they know they are not going to get in order to try and show how weak FOI is. They're putting in requests in a kind of campaigning way. My interest is purely to get information which I think is of practical use for stories, not to show that the law is weak or strong. (Interview, 10 November 2006)

Journalists' experience of the Act 'in operation'

Timeliness

Journalists reported that many responses to their requests arrived after the 20-day statutory deadline had passed. Some of these delays occurred because authorities are permitted to go over the 20-day statutory deadline in order to consider the public interest.⁹ However, evidence from journalists suggests that requests for which authorities request further time to deliberate often end up being delayed for a long time. One journalist waited nine months for a response. Another waited 12 months for a reply from the Foreign & Commonwealth Office (FCO), prompting the Information Commissioner to intervene. These were not isolated cases. Indeed, under the FOI Act Martin Rosenbaum obtained a list of the worst cases, which detailed excessively long delays by central government departments in their responses to individual requesters or the ICO itself (Rosenbaum 2006).

Several of the interviewees suggested that the system was so slow and chaotic that it was easy to lose track of the requests that they had submitted. None had anything positive to say about the amount of time it took to receive a response. In sum, for journalists the FOI request process is plagued by missed deadlines and extensive delays. With the exception of Sweden, this is in line with evidence from other countries: FOI is by and large a slow and cumbersome means for obtaining government-held information.

One factor presumed to be responsible for many delays is of particular interest. Several journalists drew attention to the DCA Clearing House and the excessive involvement of

⁹ Time extensions granted to consider the public interest test are not included in the DCA's monitoring statistics.

Ministers in the response process. Journalists reported that many of their requests ended up on the Minister's desk and/or in the Clearing House. It is reasonable to assume that in most cases the Act is working in the 'requester blind' fashion, and that journalists are more likely to ask sensitive questions of the sort that might need to be referred to a Minister for consideration. However, in the eyes of journalists the Clearing House is over-zealous in its approach and acts as a further buffer that is used to undermine the effectiveness of the Act. Said one journalist, 'It seems to me the role of [the Clearing House] is to block the release of information. It does not seem to be there to facilitate the release of information' (Interview, 20 October 2006).

Appeal system

It is the appeal system that perhaps generated the most disappointed comments from journalists, although, as the Information Commissioner's Office's own figures show, this is by no means a problem encountered solely by journalists. Of the appeals made to the ICO in 2005-06, more than half were open for longer than three months and a fifth were open for longer than six months (Information Commissioner's Office 2006). Journalists were unanimous in their criticism of the length of time it took their requests to make it through the system. Only one journalist could report that his appeal had reached the Information Commissioner, and a substantial number had yet to see their cases opened. The delays, sometimes over a year in length, were a great deterrent to making further FOI requests. Most journalists remarked that the process took so long that it was a 'waste of time' and that they could no longer be 'bothered'. Once the request was referred to the ICO most gave up.

There was similar scepticism about the internal review process. Only one journalist had had a decision overturned at the internal review stage. The process was almost unanimously viewed as an 'institutional buffer' (Interview, 24 October 2006) and another means for delaying the release of information. One likened the process to asking the question 'Are you sure?', to which the answer, a month or more later, was - 'yes' (Interview, 11 October 2006). There is no statutory limit on the length of time an internal review can take, which frustrates requesters not only because of the delay in getting a response but also because they cannot appeal to the ICO before an internal review is complete.

The process of making a request, challenging the decision in an internal review, and appealing to the Information Commissioner's Office (and for some, the Information Tribunal), is long and slow. If one were to go by what was said only in these interviews, the appeal system, by virtue of its slowness, is not working. The absence of an effective appeal system that works in a reasonably timely fashion is at the root of journalists' cynicism regarding the Act. The long, drawn-out process of making an FOI request and working one's way through the appeals system is unappealing and mostly unrewarding. While there was an expectation that

government departments might be reluctant to release some information, there was some hope that an independent Information Commissioner would give the system some 'teeth' (Interview, 19 September 2006). However, the year-long delays have led to widespread disappointment and disillusionment. This acts as a deterrent for journalists, even those who are not working to day-to-day deadlines. However, despite the problems they have faced, most journalists acknowledge that overall the Act is a force for good and recognise that information has been made available that would not have been prior to FOI.

Journalists' perspective: is the Act meeting its objectives?

The objectives of the FOIA 2000 are not included in the text of the legislation, though many politicians, government officials and campaigners have offered their thoughts on what the Act should 'achieve' in speeches, editorials, select committee reports and other communications. Besides providing a statutory right to access official information, the legislation is expected to increase the openness, transparency and accountability of government. Journalists' perspectives on whether the FOIA 2000 is doing so were mixed. Some believed that FOI had changed nothing and that 'the promise to usher in a new age of freedom of information has seemingly failed to materialise' (Interview, 24 October 2006). Others believed that government was changing, albeit slowly, and that over time, as public authorities release more information and realise that 'the sky has not fallen in' (Interview, 19 September 2006), there will be a move towards greater openness in government.

Those that believed nothing had changed suggested that the government and officials treat the Act and its obligations as a 'game' (Interview, 24 October 2006). The perpetual blocking and delays of requests was cited as evidence that the government was not serious about making FOI work. 'The government treats it like a game and is very defensive – look at the Clearing House for instance' (Interview, 24 October 2006). The role of the Clearing House generated scepticism and was cited as evidence of government's reluctance to change. 'They are clearly coordinating and blocking responses across Whitehall – I have had responses to FOI requests, from different departments, that are the same - word for word' (Interview, 24 October 2006). The opinion that the government is as secretive as ever was prominent. One journalist suggested that the behaviour of civil servants in this respect has changed little over the last 30 or 40 years and that FOI has made little difference.

Some journalists had more nuanced views, and noticed different approaches in different parts of government. 'Based on my own personal experience, the further away from the centre of power you are, people tend to be more helpful' (Interview, 19 September 2006). Another agreed. 'The further away from the centre of power you get, the more liberal people are with

information. So frequently you do get a better response from local councils or NHS bodies' (Interview, 19 September 2006).

Even those who were disappointed with FOI in its first 21 months acknowledged that there has been some progress, and that government departments are now perhaps slightly more accountable than before. It was also noted that the public, who have little contact with central government's civil servants, would notice this more than journalists. There was recognition that changing the 'culture of secrecy' in Whitehall would be a long, slow process. '[It's] a very long process, but every time you ask for some information and they say "oh no" and it's released, and the sky doesn't fall in, every time that happens it's a slight lever towards changing the culture towards, "oh, maybe we could publish that then"' (Interview, 19 September 2006).

There were also realistic expectations on the part of journalists about what FOI could actually deliver. A few suggested that FOI was just one of many tools available, to be used in a 'supporting role' (Interview, 11 October 2006). This was different, however, to how many journalists had used the Act, which in the early stages was getting an 'FOI story' – one that stood alone – as either X information was released under FOI or Y information was withheld. The notion that FOI could deliver accountability, transparency and openness on its own was dismissed by these journalists. Instead there was a consensus that FOI should be judged in more modest terms, as one of a range of ways in which the government could be made more accountable, transparent and open. But most journalists tended to see the delay and refusals of their requests as evidence that nothing had changed.

Conclusions

Most journalists suggested that the Act has made little difference to their reporting. Even so, it was widely remarked that journalists are 'slightly better off' (Interview, 11 October 2006) because they now have another avenue of information-gathering open to them. The few journalists who were relatively positive about FOI were investigative reporters – those not working to the daily deadlines of news stories. Indeed, those reporters who do focus on longer-term investigative stories said that FOI had made a 'noticeable' (Interview, 22 September 2006) or 'huge' (Interview, 10 November 2006) difference to their reporting. FOI provided journalists with the opportunity to obtain information or pursue story angles that previously they might not have. While not a tool to use in every day reporting, FOI occasionally proves very useful. All journalists welcomed the added leverage that comes with the statutory right to information that the FOI Act confers, even if they were disappointed by the administration of the Act itself.

The insights gleaned from the interviews suggest that in the early phases of FOI in the UK, journalists have been using the Act with most effect in investigative stories, particularly those of a historical nature, those that entail statistical or performance data, or those for which access to original documents or papers are required. The fact that the FOI Act 2000 provides a statutory right to access such documents has, in some cases, provided a new means to develop stories that prior to the Act may have stalled.

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Title: An Examination of the Conditions Surrounding the Passage of The 1966 U.S. Freedom of Information Act

Volume 3 issue 1

Abstract

There is a historical, built-in tension between the public's right/need to know and the desire of many governments to restrict access to government information. Curiously, the first Freedom of Information legislation in the United States was signed by President Lyndon Johnson, widely regarded as both an information miser and a keen practitioner of the knowledge-is-power school of thought throughout his government career.

In FOIA's 41st anniversary year, this research paper examines the conditions that contributed to the 1966 passage of the original U.S. Freedom of Information Act (FOIA). Much of the paper examines from several perspectives the period beginning with the creation of the U.S. House of Representatives Special Government Information Subcommittee in 1955 through the signing of the FOIA legislation by President Johnson on 4 July 1966. Primary government documents and contemporary press accounts comprise the bulk of the resources used.

Introduction

All Governments, authoritative, democratic, or somewhere in between, have a penchant for secrecy. Congressman John Moss [Democrat, California] once said "I think the first cases [of withholding information] came up in George Washington's administration ... the very size of the federal government makes them almost an adversary to the people in the area of information." (Berdes, 1969: 65) Government information is withheld for all the variety of reasons known to man, ranging from national security concerns and embarrassment, to simple bad judgment or timidity. In FOIA's 41st anniversary year, this research paper examines the conditions and contradictions that surround the passage in 1966 of the original U.S. Freedom of Information Act. This paper examines the topic primarily from the perspective of the information available, positions taken and opinions expressed at the time. Therefore the paper heavily relies on both government documents

and press accounts contemporary to the period beginning with the creation of the U.S. House of Representatives Special Government Information Subcommittee in 1955 through the signing of the original FOIA bill by President Johnson on 4 July 1966.

Historical Background

In the early days of the U.S. Republic free flowing information was valued, i.e., the First Amendment's attention to freedom of speech and of the press. James Madison, wrote "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." (Madison, 1910: 103) However the American concept of "popular government" predates Madison. The "Generall Court of Election" at a March 1641 meeting in Rhode Island held that "the Government which this Bodie Politick doth attend unto in this Island, and the Jurisdiction thereof, in favour of our Prince is a DEMOCRACIE, or Popular Government." (Colony of Rhode Island and Providence Plantations in New Ellglalld, 1641: 111-115)

Popular sovereignty is the premise that citizens are ultimately the collective sovereign of their own government. "The soul of such a system [democracy] is the ability of ordinary citizens to hold government officials accountable for their actions. Known as "transparency," this essential democratic process takes many forms, but all allow concerned citizens to see openly into the activities of their government, rather than permitting these processes to be cloaked in secrecy." (Katz, 1999)

Legal Underpinnings

From 1789 until 1958 the legal authority for the right to withhold information was/is known as the "Housekeeping Statute" [currently Title 5, Section 301 of the U.S. Code ... in 1958 it was Title 5, Section 22]. Originally passed in 1789, the statute gave Federal agencies the right to organize their offices by authorizing department heads "to prescribe regulations, not inconsistent with law, for ... the custody, use and preservation of the records, papers and property appertaining to it." (Amending Section 161: p1) The word whose interpretation was in dispute was "custody." Many agencies interpreted "custody" to mean they could deny government information access to anybody, including Congress. Between 1955 and 1958, the "Housekeeping Statute" was cited as the authority for withholding information by multiple Federal departments including Commerce, Defense, Interior, Justice, Labor, the Post Office, the Department of State, Civil Service, Housing & Home Finance, the Interstate Commerce Commission and the Smithsonian Institution (p3) Congress felt the Housekeeping Statute "through misuse ... has become twisted into a claim of authority to

withhold information” and in 1958 amended the wording to include the sentence: “This section does not authorize withholding information from the public or limiting the availability of records to the public.” (pp12-13)

There have been several Supreme Court cases regarding the right to information. In *Griswold v. Connecticut* [1965 – physicians have the right to give contraception information to married couples], Justice Douglas’ opinion cited two earlier cases. Referring to *Martin v. Struthers* [1943] Justice Douglas said “The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read.” The Justice also cited *Wieman v. Updegraff* [1952] which confirmed the right to “freedom of inquiry, freedom of thought, and freedom to teach.” (Douglas, 1965) The phrases of particular interest are “the right to receive, the right to read” and “freedom of inquiry.” The actual wording of the First Amendment to the Constitution [“Congress may make no law ... abridging the freedom of speech, or of the press” (National Archives and Records Administration, ND) does not specifically mention the right to receive information. However it has been argued that the right to information is “a peripheral or penumbral right without which the primary right would be less secure.” (Mart, 2003)

1945-1955

The decade between the end of the 1939-'45 War and the creation of the House Special Government Information Subcommittee in 1955 was seemingly tranquil in America. Troops came home to a country free of physical devastation. The dream of a house with a white picket-fence became realities for many veterans. However the exhilaration felt at the conclusion of the War was short lived. In March 1946 Winston Churchill heralded the beginning of the Cold War with his “Iron Curtain” speech at Westminster College [Fulton, Missouri]. (Churchill, 1946). In 1948/49 the Soviets blockaded Berlin and in 1949 Russia exploded their first nuclear bomb. Fallout shelters began to appear at the bottom of the gardens of some of those white picket-fenced houses and the U.S. Government constructed a bunker beneath the Greenbrier Resort in West Virginia to shelter Congress. In 1950 Senator Joseph McCarthy [Republican, Wisconsin] contributed to the public anxiety about a possible nuclear war when he announced that there were secret Communists in the State Department. In 1951 this classic “Us” versus “Them” situation resulted in a sweeping restriction on access to government documents when President Truman’s Executive Order 10290 gave every Federal agency and department the authority to classify government information.

Anxiety and fear was compounded by language. The War years saw the Axis nations described in terms that today would most certainly be considered politically incorrect. The Italians were Wops, the Germans were Huns and a famous sign erected on Tulagi in

the Solomon Islands quoted Admiral Bull Halsey's admonition to "Kill Japs, Kill Japs, Kill More Japs!" (Halsey, 1943). A decade after the War the "Them" had changed to "Pinkos" and "Commies" and the ideological divide between Russia and the United States was wide and deep. Fear of the Soviets, the Alger Hiss and Rosenberg Trials and the McCarthy Hearings all combined to create a feeling for many in the public that government information should be safeguarded from our enemies. Many Federal employees also felt that it was critical to keep government information safe. In such a climate President Truman's Executive Order encouraged the zealous, sometimes over-zealous classification of government information.

Censorship via Overclassification

Censorship can be blunt, as when a government official simply says no to a request for government information. Censorship can also be more subtly exercised by overclassification and managed news. George Creel, Chairman of President Wilson's Committee on Public Information, said that by the end of the First World War "virtually everything we asked the press not to print was seen or known by thousands." (9/11 Commission, 2004: pA-57) The classification landscape has not changed all that much over the years. The 9/11 Commission identified overclassification as an impediment to information sharing among government agencies. (p147) Overclassification was a problem in the 1950s as well. A 1955 Time Magazine story referred to overclassification as a "brownout" of government news. "The brownout ... often concerns news that has nothing to do with defense, e.g., a Department of Health, Education and Welfare conference to discuss distribution of the Salk [polio] vaccine was closed to newsmen." (Time Magazine, 1955: 78, 80). Reporters testifying before the Moss Subcommittee in 1956 described overclassification as "a paper curtain" behind which "lies an attitude novel to democratic government - an attitude which says that we, the officials, not you, the people, will determine how much you are to be told about your own Government." (Nimmo, 1964: 173-174).

Censorship via Managed News

Managed News is another subtle way of censoring government information. The term Managed news has been described as "all of the means, direct and indirect, the government employs to manufacture, control, manipulate and shape the news relating to its activities so as to affect opinion, either at home or abroad, in a manner advantageous to itself." (Johnson, 1967: 20). Arthur Krock of The New York Times seems to have been the first to use the phrase. In August 1937 President Roosevelt nominated Hugo Black from Alabama to be a Supreme Court Justice. Black was confirmed by the Senate even though Senator Copeland [Democrat, New York] said he knew a man who had seen Black in a Ku Klux Klan

lodge (United States Senate, 1937: 9097). Black remained on the Court but finally in October he admitted to having been a Klan member, but said he “dropped” the Klan before becoming a Senator. (Justice Black’s Speech, 1937) That same week Krock had written, “Throughout this country there seemed to be of late a growing thirst for information ... they [the American people] want facts as they have never wanted them before ... whether guilty or innocent, it is contended by the New Deal Liberals, the Justice [Black] should be upheld because information about him came from the enemies of his regime ... Public opinion, if it supported such a thesis – would, by closing the ears and eyes to truth from certain sources, effectively set up a system of politically managed news.” (Krock, 1937)

News can be managed in a number of ways by governments including “increasing resort to overclassification of documents for purposes of national security, the extensive use of executive privilege and the development of ‘an attitude’ toward concealment rather than dissemination of nonclassified information. ” (United State Congress, 1956: 5)The reasons for managing news are also diverse. In 1955 Congressman Moss said he felt some information was withheld by Federal agencies “to avoid criticism rather than for reasons of national safety.” (Avoiding Criticism, 1955: 29)

We’ve seen how reporters testifying before the Subcommittee in 1956 used the term “paper curtain” to describe the barrier between reporters/the public and government information. In 1958 John B. Oakes, [New York Times Editorial Board member] gave his view ... “by manipulation of news I mean the techniques of releasing information as and when it suits the political purpose of an administration ... the net result of this tendency to manipulate is to release information to the American people in a manner chosen by the government on its own terms. ” (Johnson, 1967: 21-22)

The Moss Subcommittee

Support for the ultimate passage of the Freedom of Information Act very much was the result of a combination of what came to be known as the Moss Subcommittee (a.k.a. the House Government Information Subcommittee) and the publicity generated by the public media on the subject. The Subcommittee was established in 1955 in large part because there was one person who very much believed in the public’s right to know what their government was doing and strongly felt there should be limits set on the classification of government information. Congressman John E. Moss [Democrat, California] later told an interviewer that the 1955 establishment of the House Government Information Subcommittee really grew out of a “case of a freshman member being somewhat outraged over Executive arrogance.”

"I came to Washington in 1953 ... You may recall ... charges leveled against the Truman administration citing X number of federal employees who had been dismissed for "security reasons." ... I insisted in committee that we get the facts from the Civil Service Commission. Well, the Commission refused to supply the information requested by the committee. ... I was convinced that if there was such a readiness to withhold from Congress, they must be withholding on a massive basis from the public and from others with less leverage to force the production of information. ... That's how the investigation into information activities was started." (Berdes, 1969: 61)

Congressman Moss' enthusiasm for the public's right to government information was certainly a factor, but probably a more important reason the Subcommittee was established was the strong support of the then Majority Leader of the House, John McCormack [Democrat, Massachusetts]. In the political climate that is Washington, D.C. the House Majority Leader had at the time (and still has) enormous clout. There is an ongoing tension and jockeying for position in every Administration between the three branches of the U.S. Government, (the Presidency, the Congress and the Supreme Court) and McCormack felt the Administration showed a lack of respect for the power of Congress by refusing to release information requested by Congressional Committees. McCormack saw an opportunity to make political hay. With the enthusiastic Congressman Moss as its head, the Subcommittee was sure to gain the attention of the press. McCormack felt if he could get the media interested in the Administration's denial of information not only to the public, but to Congress as well, that he would have a point of leverage against the Administration (Foerstel, 1999: 21-22).

Actually the press was already aroused over the government's denial of information in general as well as the release of incorrect or misleading information. One example of journalistic exposure of incorrect information released to Congress and the public was the White House announcement that under the aegis of the Internal Security Act 2,486 Federal employees discovered to be "security risks" had been fired between October 1953 and March 1954. Both Houses of Congress almost immediately asked the Civil Service Commission for specific details, but the Commission's answers were evasive at best. Journalists eventually discovered ... and to the embarrassment of the Administration ... published the truth. The White House number was inflated and untrue. The reality was that a number of the "security risks" had never been fired from government jobs at all because they were already dead during the period in question! (McCarran Moves to Clarify Risks, 1954: 8)

1955-1966

The eleven years between the establishment of the Moss Subcommittee (1955) and the passage/signing of FOIA (1966) covered portions of three Administrations, Eisenhower, Kennedy and Lyndon Johnson. A short examination of the highlights of these Administrations relating to both freedom of information and public access to government information follows.

The Eisenhower Years

When Eisenhower became President, information classification was governed by President Truman's Executive Order 10290 [24 September 1951] which gave every Federal agency and department the authority to classify government information. President Eisenhower narrowed this incredibly broad authority in early November 1953 with his own Executive Order #10501 "Safeguarding Official Information in the Interests of the Defense of the United States." (Text of White House Statement and Executive Order Promulgating New Security Code, 1953). Eisenhower's Order kept the three top classifications, [Top Secret, Secret and Confidential], eliminated the "Restricted" [lowest] level of classification and sharply limited the number of agencies with authority to classify information. Attorney General Herbert Brownell Jr. said a "very substantial amount of information will flow freely to the public" and described the now abandoned "Restricted" category as a "huge and undesirable catch-all." (Leviero, 1953: 1)

Eisenhower's Order was an important step toward FOIA, but a very public exposure of a long-standing White House accommodation with subtle censorship is also part of this Administration's history. In March 1955 the custom of "off-the-record" or "background" press gatherings came to public attention. Contrary to General Brownell's comments, Federal information wasn't really flowing all that freely. "Background" or "off-the-record" gatherings were part of Washington political life. About 20 reporters were usually invited and the generally accepted rule for these events had been that "reporters do not reveal that the session was held [and] do not divulge that they ever talked with or to" the Government official involved (Riggs, 1955). Reporters were allowed to refer to an "authoritative source" for example, but were never to identify the specific official involved. At such a "background" dinner Admiral Robert Carney [Chief of Naval Operations] gave as his opinion that the Red Chinese would attack the Quemoy and Matsu islands in the Taiwan Straits by mid April. This time the Admiral's comments were published on page 1 of The New York Times. "A significant change in policy and defense planning is under consideration here in the belief Red China will begin its campaign to capture Matsu and Quemoy about the middle of April." (Leviero, 1955) Carney was not identified as the source but President Eisenhower was furious. A second "background" dinner was promptly scheduled two nights later with James Hagerty, the President's Press Secretary. The result of the second gathering was a front page

story the next morning in the Washington Post that the President did not agree with the prediction of an attack by Red China. (Riggs, 1955)

The Kennedy Years

During the first year of the Kennedy Administration most of the Moss Subcommittee as well as proponents of accessible government information were pleased when the President signed Executive Order #10964, "Amendment of Executive Order No. 10501: 'Safeguarding Official Information in the Interests of the Defense of the United States.'... When classified information or material no longer requires its present level of protection in the defense interest, it shall be downgraded or declassified." The order also provided "for continuing review of such classified information or material ... for the purpose of declassifying or downgrading whenever national defense considerations permit." (Kennedy, 1961). While most of the Moss Subcommittee lauded the President's action, politics being politics, this evaluation was not universal. One of the minority members of the Subcommittee, Congressman Clare Hoffman [Republican, Michigan] remarked rather tartly that "under Kennedy, the problem of Government secrecy stems from the nature of bureaucracy, but that under Eisenhower, it was the fault of the President's personal policy." (Kennedy Praised as Foe of Secrecy, 1961: 81)

As with the Eisenhower Administration's somewhat contradictory approach to freedom of/access to information, this President also seemed to have mixed feelings about the public's right to government information. Earlier that year Kennedy had suggested that the press "cooperate voluntarily, as it does in wartime, to prevent the unauthorized disclosure of news helpful to enemies of the United States ... He recalled that enemy leaders had boasted that American newspapers had supplied them with valuable facts they could not have obtained elsewhere except by espionage." (Porter, 1961: 1). While the Milwaukee Journal thought President Kennedy's remarks to be "reasonable and proper," most newspapers responded negatively to the President's proposals. The Herald Tribune said, "The country needs more facts, not fewer," the Baltimore Sun said much of the blame would be laid at the door of "leaks" from the Government itself and the Louisville Courier-Journal noted that "self-restraint, like virtue, is a matter that lends itself to individual interpretation." (Press is Divided on Kennedy Talk, 1961) In the end, no "voluntary" system was established.

Probably the major "censorship by managed information" contretemps during the Kennedy years was the Cuban Missile Crisis. On 16 October 1962 President Kennedy saw reconnaissance photographs of Russian medium and intermediate range ballistic missiles in Cuba aimed at the United States. On Saturday 20 October the President

returned early to Washington from a pre-planned trip. The press was told he had come back because he had a "cold." Two nights later the President addressed the nation [22 October]. The New York Times headline the next morning was "U.S. Imposes Blockade on Cuba on Finding Offensive Missile Sites; Kennedy Ready for Soviet Showdown." (U.S. Imposes Blockade on Cuba, 1962: 1). Ultimately the Russian bombers and missiles were removed from Cuba, but during the Crisis no reporters had been allowed to be with any American military units. Defense Department briefings were the only source of information for reporters. Many in the press had complained about being held at arms length and being kept in the dark about the President's true reason for returning to Washington. The complaints really escalated shortly thereafter however when Assistant Secretary of Defense for Public Affairs Arthur Sylvester "frankly admitted that the Government had managed, controlled and dammed up the flow of news about the Cuban Crisis and he indicates it expected to do so. He envisaged news as 'part of ... weaponry,' and declared flatly that 'the results ... justify the methods we use.'" The cacophony of outrage by the press was deafening. The New York Times said that such "'management' or 'control' of the news is censorship described by a sweeter term." (Managing the news, 1962). The Washington Evening Star was somewhat less temperate. "It subsequently was revealed that only those portions of the news were made available by Mr. Sylvester which he and other omniscient manipulators of public opinion decided in their infinite wisdom, would best serve to create the 'image' of this country's activities they wished to manufacture and place before our people and the world." (Editorial Comment on Pentagon News Weaponry, 1962). Adding insult to injury, on 6 December Secretary Sylvester reiterated his position by saying "it was the inherent right of a government 'to lie to save itself.'" (U.S. Aide Defends Lying to the Nation, 1962: 5)

It would be naïve in the extreme to think the Federal Government had been totally transparent from 1789 onwards, but for Secretary Sylvester to so publicly acknowledge the deliberate manipulation and management of news destroyed an illusion for many.

The Johnson Years

In the Johnson Administration many in both the public and the press came to regard the President as personally responsible for much of what went wrong regarding both lack of access to government information and misinformation. Arthur Krock described Johnson's attitude as the "tight official lip" ... President Johnson ... serves as the principle channel of public information, so that he can regulate the yield of the flow on his own estimate of what will help or hinder his objectives." (Krock, 1965: 20). Johnson preferred impromptu press conferences, often with only a few minutes notice or on a weekend. There

were complaints about off-the-record interviews to favored reporters. The President was accused of trying to influence the way reporters wrote stories by subtly putting reporters under some sort of obligation. One journalist said "The simplest way [of putting a reporter under obligation] is to see that the reporter gets a good story—particularly if it is on an exclusive basis. Another thing a President can do is to invite a reporter's wife to the White House—and if you don't think that obligates you, you have another think coming." (Johnson and the Press – What the Grumbling is About, 1965). On his part Johnson not only distrusted the press, but was "convinced that the press hated him and wanted to bring him down ... [journalists] talked about how they were cut off from White House offices if they disagreed with Administration policy." (Dallek, 1998)

From his earliest days in Congress Johnson had used information as an instrument of power (Kearns, 1976) to accomplish what he wanted to get done. Kearns also refers to "Johnson's capacity for control and domination." (p121). The behaviour patterns of a lifetime do not change just because one gets a new job. In early 1965 Arthur Krock wrote "one of its [the Johnson Administration] manifestations is resentment by the President of news disclosures, before he is ready to make them himself ... he is determined his ship of state shall be caulked with unexampled tightness against news leaks, large or small, harmless or troublesome." (Krock, 1965a: E11)

Such behaviour patterns served Johnson very well in the Senate, but they did not always translate successfully to the Presidency. Johnson hated the lack of power inherent in being Vice President but when President Kennedy died, Johnson was back in power. Johnson's contacts in Congress combined with what many people saw as his assumption of the mantle of a martyred President led to an amazing amount of significant legislation passed in Johnson's early Presidency, including a major tax-cut, Medicare, antipoverty legislation and the Civil Rights Act of 1964. The emotional impact of President Kennedy's assassination and the passage of more than 40 years has somewhat clouded for many people the impression of Kennedy's Administration, but contemporary accounts show that right before President Kennedy's death much of this legislation had been facing a possibly very rocky road indeed. Just weeks before the assassination for example, House Minority Leader Charles Halleck [Republican, Indiana] commented that "No President in history ever had a worse history of legislative results in a single session of Congress ... Mr. Kennedy's proposals command the support of neither the public nor the Congress." Halleck, 1963) Even allowing for partisan hyperbole, that's a pretty fierce condemnation.

What happened between the achievements of 1964 and the withdrawal from power in 1968? While a quick answer would be Vietnam, a strong contributory factor was the President's information credibility gap. "In foreign or domestic affairs, the widespread sense of a

credibility gap came in part from the same facts: Lyndon Johnson's reputation as the incessant politician; his conspicuous delight in the secretive and the devious; his sky-high barnstorming when he got going before a sympathetic audience; his undeniable habit of simply playing fast and loose with facts." Goldman, 1969: 412). It wasn't just a loss of popularity, it was a loss of credibility ... such a loss was fueled by public recognition of his attempts at news management. "A majority of people believed he regularly lied to them." (Kearns, 1976: 337)

As successful as many of Johnson's personal political skills had been, they weren't enough for the arena of the White House. He was no longer in the controlled environment of the Senate. As President there were just too many "publics" for him to control. It is my opinion that in his later Presidential years Johnson was an example of the Peter Principle ... i.e., "in a hierarchy every employee tends to rise to his level of incompetence."(Peter, 1969). The Oval Office demanded a different skill set and he didn't have it. His masterful manipulation of information "made more effective, his drive for control over successively larger environments until the arena became so vast it could not be comprehended in the same fashion by even the most tireless and encompassing mind." (Kerans, 1976:74-75)

FOIA is Passed

Freedom of Information Act legislation had been passed by the Senate before 1966, but the House had up-to-then failed to concur. In 1966 FOIA legislation was again introduced in the Senate [S. 1160] and this time approved as well by the House of Representatives on 20 June 1966. Congressman Moss was on the floor of the House that day. His speech urged his fellow Congressmen to pass the bill because this bill contained three major changes to earlier legislation, i.e.,

Before FOIA, access to Federal records required proof that the requestor was "properly and directly concerned" with the requested documents. FOIA mandated that the majority of Federal records be available to "any person."

The second change created "specific definitions of information which may be withheld." Prior definitions of deniable information were imprecise [i.e., "in the public interest"]. Such language inevitably created differences of opinion on the part of both requesters and on the part of Federal Agencies.

The third change granted requesters the right to sue a Federal Agency that refused their information request. This was a first for information seekers. U.S. District Courts were given the "jurisdiction to enjoin the agency from the withholding of agency records and to order the

production of any agency records improperly withheld from the complainant." The Courts also gained the right to hold Federal officers in contempt if they did not comply with the Court's order. (United States House of Representatives, 1966a: 13641-13642)

Johnson signed the legislation on 4 July 1966 but he didn't seem to think much of the concept of freedom of information --- FOIA is not indexed in his book *The Vantage Point*, nor was the signing listed on his appointment diary for that day. President Johnson's view of Freedom of Information seemed to be was that he was all for it ... as long as it was information he was willing to release. I suggest the wording of his statement regarding the FOIA signing clearly indicates he thought that even after FOIA became law he would be able to control much of what information was released. Johnson's signing statement is full of the language of restrictions and conditions, i.e., "the welfare of the Nation or the rights of individuals may require that some documents not be made available ... Officials within Government must be able to communicate with one another fully and frankly without publicity ... the need of Government to protect certain categories of information ... Moreover, this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires." (Clark, 1967). His comment about the "President's power" to withhold information when the "national interest" requires is essentially the argument of Executive Privilege. Who would withhold information for the sake of the national interest? ... President Johnson. Who would decide what information would be harmful to the national interest? ... President Johnson.

Conclusion

No one circumstance or person was solely responsible for FOIA but a combination of factors joined to support the passage and signing of the Freedom of Information Act in 1966. A major factor was no doubt the 11 years worth of publicity and pressure engendered by the Moss Subcommittee, as well as the parallel publicity and coverage by the American media. The press not only strongly supported the Subcommittee, but over those 11 years published numerous articles touching on the subjects of the public's right to know and freedom of information. People's attitudes are influenced by what they read and hear. The publicity uproar engendered by Secretary Sylvester's blunt declaration (at the time of the Cuban Missile Crisis) that the government has the right to lie made quite a few Americans reconsider their up-till-then almost automatic belief in the inherent honesty of their government. The media and their coverage of President Johnson were also a primary contributor to what Kearns speaks of as his loss of public credibility. Many Americans, including Members of Congress, came to think of Johnson as a liar. Their growing lack of respect for him spilled over to a growing suspicion of the government in general. While Lyndon Johnson was certainly not enthusiastic about FOIA and his Administration tried varying tactics to derail the

bill, it was an idea whose time had finally come. This was recognized by the then Presidential Press Secretary Bill Moyers (now a television journalist) who had originally been against the legislation. Moyers worked behind the scenes with the American Society of Newspaper Editors and Congressman Moss. On 9 May 1966 House Report 89-1497 was released. This report included amended language increasing the number of classes of government information that would be excluded under FOIA. (United States House of Representatives, 1966b). Numerous negotiations resulted in amended language and an increased number of exemptions to be included in the bill which reassured most of the Federal Agencies who had originally opposed the legislation.

Another piece of the mosaic was the length of time that had passed since the ending of the 1939-'45 War. The 20 year span since the end of the War had allowed an entire generation to grow up with the anxiety of the War years and with the national commitment to secrecy as a public good that had existed during that time. Through Presidential Orders both Presidents Eisenhower and Kennedy eased the restrictions placed on the public distribution of government information. Even though the actual acquisition of information was not always as easy in practice as requestors would have liked, over time these Presidential Orders helped generate a public acceptance of the validity of the right of public access to government information.

The U.S. Freedom of Information Act became Public Law 89-487 because of the combination of public, Congressional and media attention to the need for and the right of public access to government information, the perceived dishonesty of government (in particular, that of President Johnson), the changing social views of post war generations and good old-fashioned behind-the-scenes politicking.

FOIA was not perfect and has been amended several times, but it was an enormous step forward in establishing the public's right to the information generated by their own government. An interesting contemporary commentary on FOIA is found in the words spoken on the day of the bill's passage in the House by then Congressman Donald Rumsfeld [Republican, Illinois].

"Certainly it has been the nature of Government to play down mistakes and to promote successes ... this bill will make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to

information on the conduct of Government ... I consider this bill to be one of the most important measures to be considered by Congress in the past 20 years ... public records, which are evidence of official government action, are public property." (United States Congress, 1966:13653)

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Title: John Major's Information Revolution? The Code of Access ten years on

Volume 3 issue 1

Abstract

John Major's 1994 Code of Access to Government Information was intended to provide citizens with more information about central Government and liberalise Britain's strict information control regime. The paper examines the impetus behind the reform and the nature of the policy, analysing why Major chose to pursue a non-statutory Code rather than a full FOI Act. In line with Major's dictum that the Code would need to be judged in a decades time, the paper investigates the impact of the legislation, taking the view that , although the Code did indeed open up Government information to an extent, as well as creating a more open culture within central Government, it was impeded by lack of support within Major's Government, a low public profile and a lack of statutory force.

The reasons for the policy

Major's Code of Access, created as a central part of the Citizen's Charter initiative, was the result of a number of pressures both external and internal. On the one hand world-wide and, in particular, European Union liberalisation of information, propelled by technological change, compelled Major's Government towards reform. The effect of the pressure could be seen by Thatcher's earlier passing of both the 1984 Data Protection Act 1984 and Computer Misuse Act 1985 (Birkinshaw 1991, 46). By the early 1990's the effect of this change was to gradually 'challenge the conventional boundaries of information control [and] traditional monopolies of knowledge' and threaten to render ineffective current instruments of information control (Vincent 1998, 282).

On the other, domestically the policy was shaped by a number of pressures. On a party political level, Major had to respond to a 'libertarian current of Conservative backbench opinion' expressed by Sir Richard Body, Richard Shepherd and Teddy Taylor that held 'excessive Government secrecy' to be a 'major attack on individual freedom' and which thus constituted a 'permanent source of pressure for change' (Evans 2003, 207).

Furthermore, backbench support for freedom of information has been demonstrated through repeated attempts to initiate legislation through a succession of Private Members Bills.

Between 1979 and 1992, six freedom of information Private Members Bills were launched by Labour backbencher's culminating in Mark Fisher's 1992 'Right to Know' Bill (CFOI 2001, 2). These Bills found support from Kinnock, Cook, Short and Hattersley among others (CFOI 2000, 2). The size and strength of the pressure was demonstrated in the progress of Mark Fisher's 'Right to Know' Bill, introduced in 1993, that proposed a right of access to Government information and information held by some companies, an independent commissioner able to order disclosure and proposed a parallel reform of the 1989 Official Secrets Act (CFOI 1992). The Bill garnered 'strong all party support', won an unopposed reading and survived the committee stage only to be 'blocked' by the Government (CFOI 1993). The Bill's progress 'has demonstrated the enormous support in the House of Commons -including a substantial number of Tories - for FOI legislation' (CFOI 1993).

On a philosophical level, Major 'inherited one central assumption of Mrs Thatcher's administration...that the performance of the civil service had contributed to Britain's decline [and] a new culture was needed' (Willman in Kavannagh & Seldon 1994, 74). The public services had 'neither the stimulus of competition nor true accountability for performance' (Major 2000, 245). The policy aimed to 'raise the standard of public services' through the creation of set standards from Government and associated institutions and agencies. Publication of performance targets, annual reports and accounts and other relevant information was an essential requisite 'there is a consensus that the

Charter programme can only work if there is a greater access to information' (Robertson 1999, 143). In Major's own words:

'...people who rely on public services...all must know where they stand and what standard of service they have a right to expect' (Willman in Kavannagh & Seldon 1994, 65).

This view was reflected in the fact that 'openness' was listed as one of the six key principles of the Citizen's Charter programme (Robertson 1999, 143).

On a personal level, Major himself was an advocate for increased openness in within his Government, asserting that he wished to 'sweep away the cobwebs of secrecy which needlessly veil too much of Government business' (Seldon 1997, 291). Major's attitude was in stark contrast to those of the preceding Thatcher Governments, which had been 'resolute in their defence of secrecy in high politics', as the Ponting GCHQ, Tydsall and Spycatcher cases all showed (Evans 2003, 201). Margaret Thatcher had given an indication of her attitude when still leader of the opposition in 1977. When asked whether Britain would benefit from an American style Freedom of Information Act she replied

'..not at all, our system is much more open than the American one [she then said the Official Secrets Act] should be reformed...but only to make some of its provisions against the disclosure of information stronger not weaker' (Cockerell, Hennessy & Walker, 1985, 14-18)

Margaret Thatcher later argued that FOI legislation threatened to undermine the British constitution

'.....under our constitution ministers are accountable to Parliament...a statutory right of access would remove this enormously important area....Parliament itself would be diminished' (Cook 1985, 13).

This argument, repeated by successive ministers, mandarins and later asserted during the Ponting case, is that freedom of information would prove to be 'unconstitutional. It would undermine, undermine the anonymity of the civil service and would be inappropriate to the British system' (Austin 1980, 8).

By way of a contrast, Major's liberalising credentials were demonstrated in his declassifying of the ministerial and 'bone structure of the cabinet committee system' in 1992 (Hennessy in Platten 2005, 34) There was 'no doubt that Major was behind the move' to liberalise information access as part of his 'citizen's charter' (Willman in Kavannagh & Seldon 1994, 75).

Finally, the succession of scandals of the Arms to Iraq, cash for questions and Westminster 'gerrymandering' allegations made the Government appear, in the words of Tony Blair one in which 'the culture of secrecy permeates almost every single aspect of Government activity' (Evans 2003 203: quoted in Vincent 1998, 322). The Code of Access thus served a tactical purpose of countering opposition allegations and public perceptions of the Government as secretive.

The Policy

The reform began in 1993 with the publication of the Open Government White Paper. The White Paper set out the reasoning behind the reform

'...open Government is part of an effective democracy..Citizens must have adequate access to the information and analysis upon which Government business is based [and] ministers and civil servants have a duty to explain [although] Governments need, however, to keep some secrets' (Cabinet Office 1993, 1).

This philosophy is later reiterated in the White Paper 'the Government believes people should have freedom to make their own choices. Information is a condition of choice and provides a measure of quality' (Cabinet Office 1993, 7).

The paper proposed three 'practical steps [to meet] the principal objectives of those who have sought a full statutory freedom of information regime...without the legal complexities such regimes entail' (Cabinet Office 1993,2) The White Paper thus claimed to offer de facto freedom of information without the Act itself. The three steps that governed the proposals were

'...handling information in a way which produces informed policy-making and debate...providing timely and accessible information [and] restricting access only where there is good reason for doing so' (Cabinet Office 1993, 2)

The proposals were fourfold. There was to be a new Code of Access, regulating access to information. The Parliamentary Ombudsman was to have a new role investigating complaints where information had not been disclosed when it should have been. There would be a statutory right of access for individuals to access information relating to them and, as shown below, a reduction in classified documents held past thirty years under the 'thirty year rule' (Cabinet Office 1993, 5).

The centrepiece of the new proposals was the Code of Practice, which came into force in 1994. The Code's purpose was to

'...support and extend the principles of public service set out in the citizen's charter [and] to protect individuals by ensuring reasons are given for administrative decisions' (Cabinet Office 1997, 1).

This principle extended across Government unless statutory authority or established convention argued 'to the contrary' (Cabinet Office 1997, 1).The Code applied to all 'natural persons' about whom the Government had information. It provided a right of access to information, within twenty days at a cost left to departmental discretion, to 'copies, compressed short hand notes' or summaries of documents pertaining to them with 'exempted areas left out if necessary' (Cabinet Office 1997, 42). The Ombudsman could be used to investigate in the event of problem or controversy (Cabinet Office 1997, 42). The Code for central Government was followed in 1995 by a similar Code for the National Health Service and local Government (Vincent 1998, 323).

Parallel to the Code began the release of a number of documents held longer than the thirty year rule. Documents declassified by 1993 covered a range of controversial topics from Rudolf Hess, Churchill's wartime correspondence with Roosevelt and the Derrick Bentley case (PCA 1993, 7). By 1995, under what became known as the 'Waldegrave initiative', over 100,000 'highly sensitive' documents held past thirty years had been released (Hennessy in Platten 2005, 35). Further symbols of the new 'open' political climate occurred in 1995 with the publication of a guide to the three intelligence services and the naming and holding of press conferences by the head of both MI5 and MI6 (Seldon 1997, 291).

Why did Major not pursue a full FOI Act?

The question is thus why Major opted for a non-statutory Code of Access rather than a full Freedom of Information Act of the kind, advocated at the time by Open Government campaigners and by the Labour Party and subsequently implemented by the first Blair Government.

The first reason was that given in White Paper itself. The Citizen's Charter policy aimed at simplification rather than complexity and cost-efficiency rather than expense (Willman in Kavannah & Seldon 1994, 65). A voluminous, intricate and costly piece of legislation, which New Labour's FOI Act arguably became, ran contrary to both the philosophy of 'Majorism' and the cost-cutting economic policy that underlay it.

The second reason was more practical, concerning the lack of support from within Government. As experience demonstrated, any attempt to liberalise information generated substantial resistance within central Government. This made even the passage of a non-statutory Code problematic. An element of political calculation thus influenced the shape of the policy. Major provided the policy drive behind the reform but, according to Seldon, received the support of only two cabinet colleagues, Waldegrave and Mackay (Seldon 1997, 399; Hennessy 2000, 451-2). A number of ministers in Major's cabinet opposed the openness policy 'on the grounds of realpolitik' (Seldon 1997, 399). According to Seldon, the opposition from within both the cabinet and civil service consistently 'continued to dismiss the cry for open Government' regarding the issue to be one 'confined to the chattering classes of north London' (Seldon 1997, 400). The chances of success for a more controversial statutory openness regime in the face of such opposition and apathy were slim.

Finally, Major's Government attempted to reform information control amid wider political crisis and dwindling popularity. The initiative was launched in the wake of 'Black Wednesday' which had left the Major's Government's 'policies in tatters' and following which the Government 'plunged into apparently endless unpopularity on the grounds of its competence' (Morgan

2001, 514-515). Subsequently, 'crisis followed crisis' as the Major Government's 'capacity for legislative initiative petered out' amid disintegrating party loyalty over Maastricht, sleaze, BSE and questions over Major's leadership (Morgan 2001, 516). In such circumstances, the simpler a policy the better would be the chances of survival.

Given these constraints, Major would have found it extremely difficult to pass a full FOI Act even if he would have wished to. The resistance, delay and prevarication that marked New Labour's three year long struggle to enact FOI, indicates that the a full FOI Act would have been very difficult piece of legislation to pass. Despite New Labour's Parliamentary majority, the Act encountered opposition from conservative elements within the civil service and, increasingly, members of the New Labour party leadership itself as they began to learn the realities of power. Indeed, the difficulties encountered by the passage of FOI support the view that the policy runs contrary to the British tradition of strict information control within Government and the 'secrecy...built into the calcium of a British policy-maker's bones' (Hennessy 1990, 346). Given these difficulties, it is not surprising that the Major Government lacked the willingness and, increasingly, the time and energy to undertake such a reform.

The success and failure of the Code

Major claimed that the effects of his reforms would not be discernable for a decade (Willman in Kavannah & Seldon 1994, 73). The publication in 2006 of the Ombudsman's review of the first ten years thus allows an analysis of the Code after this period. However, as the report points out, it does not constitute a complete overview of the operation of the Code as the Ombudsman was never intended to be a 'crusader for openness' and only saw 'disputed' or 'sensitive' cases (PCA 2005, 26: 36).

Academic opinion remains divided upon the impact of Major's reforms, overshadowed as they are by New Labour's Freedom of Information Act. According to Robertson, the initiative was 'welcomed by few and described as inadequate by many' (Robertson 1999, 141). Advocates of openness argued that 'the measures reflected the little boy with his thumb in the dyke trying to resist the flood of liberal democratic opinion' (Robertson 1999, 142). David Vincent, in his study of the British 'culture of secrecy', characterises the policy as a

'...revived and extended version of the failed Croham directive [the] last in a long line of reform attempts designed to reform in order to prevent reform...open Government was still being conducted on the Government's terms' (Vincent 1998,323).

By contrast, Peter Hennessy asserted that the

'.... first prize for openness goes to John Major [who] placed the first properly institutionalised openness regime on a codified basis [and] allowed someone outside the Whitehall loop a say in disputed cases' (Hennessy in Platten 2005, 34)

Overall, according to the report

'...during the decade or so of its existence...the Code had resulted in a significant enlargement in the kind of information that has routinely released into the public domain [but] it was not a smooth process [and] although the Ombudsman frequently dragged departments to water, departments often showed a marked reluctance to drink. This manifested itself through delays..sometimes showed itself in a refusal to even provide the Ombudsman with the relevant papers' (PCA 2005, 20)

Although the evidence for its success 'is mixed', the Code has realised its aims in a number of ways (PCA 2005, 31). The most important success has been 'no doubt...much more information now freely available [and] departments will also, in ways they would not have done so ten years ago, respond positively to requests for information' and has resulted in the release of a 'good deal of information' (PCA 2005, 31: 38).

The method by which this has been achieved is diametrically opposite to the 'big bang' approach of the FOI Act 2000. Major himself argued that the Code was part of a wider project that constituted 'true radicalism [but through] a patient piling up of bricks...the launch of a long slow process of change' (Major 2000, 260:262). The achievements of the Code has been to 'press successfully for information which might not otherwise have found its way into the public domain' through a succession of small decisions (PCA 2005, 26). Indeed, the Ombudsman supports Major's argument, claiming that if the work was to be of any 'enduring value [it] will be through the work done on a succession of small cases' (PCA 2005, 22). Such cases include the Birmingham Northern relief road scheme case that set a 'landmark precedent for release', a case regarding DSS internal guidance publication which set a precedent for the release of internal guidance and a succession of politically sensitive decisions such as that concerning Dounreay nuclear processing which, although it failed to obtain the requested information, led to reform (PCA 2005, 22: 24).

The report lists the further achievements of the Code. It has 'educated' departments in practicalities of releasing information and, in so doing, instituted a 'massive change' as 'the expectation is now that information will be provided' (PCA 2005, 37). In this sense, the Code

has helped bring about a 'cultural change' and the past eleven years has 'been a period of major change in how public bodies view information' (PCA 2005, 37:31). Furthermore, the use of the Code has explored the 'key issues FOI raises' and has given departments' invaluable experience, for example, in terms of handling requests and using exemptions correctly and has thus paved the way for the FOI Act (PCA 2005, 37: 35). Arguably, the relatively successful administrative operation of the FOI Act is due in part to experience of the Code. David Clark, the minister responsible for FOI policy between 1997 and 1998, described the Code as a 'dry run', claiming that 'especially when they know freedom of information is coming, many departments are using the Code as a dry run for the real thing' (Wood 1999, 127). The Ombudsman supports this view that the Code has served as a bridge between past practice and FOI, having gained the

'impression after a decade of the Code is that... departments are now much more receptive to arguments relating to the public interest when reminded of the need to consider them'(PCA 2005, 34).

However, many of the benefits have 'been fortuitous rather than planned (PCA 2005, 32). The report pointed to a number of problems, many of which had been alluded to during the Code's implementation operation.

For a policy reliant on public use, the 'low level of casework' indicated that, until the issue was given publicity through New Labour's arrival in power, few people were using the Code and there was a 'persistently low caseload' (PCA 2005, 14: 31: 32). The catalyst in changing this position was the election in May 1997 of a Labour Government 'whose election manifesto contained a clear commitment to the passing of a Freedom of Information Act. Ironically, therefore, it was the announcement of a Bill that would lead to the end of the Code that helped to publicise its existence and increase its greater use' (PCA 2005, 14). The PCA statistics support this view, showing that while the

Ombudsman received only 5 complaints in the first year of the Act, the number of complaints received in 1997 more than doubled from 12 in 1996 to 26 and remained very high (PCA 2005, 61). Under New Labour there were also fewer complaints not upheld, a result due in part to New Labour's shift of the Code's emphasis towards openness but also due to departments increasing experience of using the public interest test (PCA 2005, 32). Thus, one of the key problems with the Code in its early years was that the policy had 'depressingly little impact upon the public' (Seldon 1998, 309). Major himself admitted the charter 'failed to catch the public imagination...we were so quiet about our revolution that few noticed the wall being scaled' (Major 2000, 261). According to the report this lack of use was due to lack of drive from the Government:

'...it could be argued that the Code failed to take off because there was insufficient enthusiasm from those who created them in fostering the climate that would allow them to succeed...not only did virtually nobody know the Code existed but that suited the Government perfectly well' (PCA 2005, 32).

By contrast the FOI Act, in terms of its use, rate of successful applications and disclosures and in the quality and importance of information disclosed, caused many to take the view that the first year of the FOI Act has been a success. Despite problems of delay, flaws and loopholes within the Act and allegations of resistance and recalcitrance by certain central Government departments, the first year has seen the beginnings of a change toward 'openness'. Maurice Frankel, head of the Campaign for Freedom of Information, told the Constitutional Affairs committee

'...I am very pleasantly surprised by the amount of information that has come out and the importance of a lot of it...I think that we have a worthwhile, important piece of legislation'(CASC 2006).

The Constitutional Affairs committee itself found that one year into the Act, it had been a

'...significant success...already brought about the release of significant new information and this new information is being used in a constructive and positive way by a range of different individuals and organizations [also] been impressed by the effects of parliamentary authorities to meet the demands of the Act' (CASC 2006).

As well as having little impact upon the public, the Code faced the criticism that 'lacked champions' from within the Government that created it. The Ombudsman claimed that the policy was 'launched very quietly without much encouragement for anyone to use it [and subsequently had] no clear champions [even its creators were] without any obvious enthusiasm' (PCA 2005, 36). Indeed, for a policy reliant upon public response and 'active citizenship', it received 'little publicity' (CFOI 1995, 5). The Code was launched on a bank holiday during a parliamentary recess and journalists were given little opportunity to scrutinise or publicise the document before its launch, an 'inconspicuous start' (CFOI 1995, 5). The Government spent £ 51,527 on the project in the Code's first year compared with £2,000,000 spent on the first year of the Parent's Charter in 1991 (CFOI 1995, 4). While the Data Protection Act has received between £ 400,000 and £ 750,000 to publicise its existence each year since the Data Protection Act received Royal assent, the 1994 Code received 'no paid advertising' whatsoever (CFOI 1995, 5). Ironically, the report points out that the 'key catalyst in this changing position' has been since May 1997 and the announcement of FOI

legislation 'that helped publicise the existence' and lead to 'greater use' of the Code (PCA 2005, 14).

This lack of support and enthusiasm from both politicians and public was further compounded by confusion regarding the exact nature of the policy. FOI policy was clearly intended to supply information and subsequently many FOI advocates were surprised by the scope and breadth of some of the releases under the Act. By contrast Major's claim that the Code would create de facto freedom of information meant it fell far short of this aim and was heavily criticised for doing so. However, the Code's priority was to support public service improvement rather than provide an entrenched public 'right' to information. As Robertson points out, the 'main purpose' of the initiative was to 'supply factual information' to help consumers make judgements and 'enhance the ability of citizen's to pursue grievances' (Robertson 1999, 146). As a result 'the kind of information revealed by the charter process is about the delivery of services and not about policy-making or decision making' (Robertson 1999, 143-144). Moreover, unlike the FOI Act, designed to dovetail with European Environmental Access Regulations, both the White Paper and Code failed to draw upon, or indeed mention, the Environmental Access Regulations implemented by statutory instrument in December of 1992 that could be used alongside the Code (HMSO 1992). This criticism and disappointment stemming from this confusion and failure further undermined the policy.

The key problem with the Code lay in its weakness stemming from its lack of statutory force. Unlike the FOI Act, which, whatever its numerous weaknesses, carries statutory force, the Code had no 'legal basis' and thus 'could not override the 250 or so separate statutory restrictions' or constitutional conventions relating to information (CFOI 1995, 2). As a result, departments themselves displayed 'little evidence' that they 'embraced the opportunities for greater openness with much enthusiasm' (PCA 2005, 36). Major himself admitted that 'predictably, institutions were rarely enthusiastic about moving down this particular road. There was a widespread reluctance to publish information' (Major in Platten 2005, 73). A number of departments, such as the Ministry of Defence and Department of Trade and Industry, improved and 'respond positively' to requests and the poor handling of earlier cases was improved and the Welsh office was notable in pursuing a more rigorous policy than the Code (PCA 2005, 31:32). However, other departments refused to even give exemptions and 'simply said no' (PCA 2005, 35). As the Ombudsman points out it was

'....not surprising that Ministers and officials have had difficulty in adapting to a culture where there is now a right to see information that has always previously been concealed. Making that shift is proving to be a slow journey, full of lengthy

halts [although departments have improved openness practices, particularly when considering the public interest] the initial instinct to say no remains close to the surface (PCA 2005, 34).

There were still 'notable pockets of resistance' which involved departments 'clearly determined to play the "exemptions game' using 'any sort of exemption' and 'find others if one failed' (PCA 2005, 35). This process was 'deeply frustrating' (PCA 2005, 35). Furthermore, no 'department was willing to release information likely to embarrass the Government' a reluctance which led to a number of 'wars of attrition' that 'benefited nobody' (PCA 2005, 37).

The Ombudsman outlined his twin difficulties of departmental resistance combined with lack of enforcement power through an analogy

' ..if the Government wants me to act as a referee we cannot have a situation in which every time I award a free kick everyone troops off the field for an elaborate investigation of the rule book and to phone the F[ootball] A[ssociation] ' (PCA 2005, 14).

The manner in which a very similar Code has been used by the Welsh Assembly under First Minister Rhodri Morgan demonstrates the some of the weaknesses of the Major administration approach. Championed by the pro-openness Morgan, the Code commits the devolved body not only to the same strictures as Major's Code but also to 'maximising openness' through a continuous programme of pro-active releases, for example, the publication of facts and factual analysis behind policy on ministerial decisions, normally on the day when a decision is announced (NAFW 2004). The Code has also led to the publication of the Welsh Cabinet minutes on the internet within six weeks of meeting (CFOI [A] 2000). The publication of the minutes, 'unedited' except for references to foreign or devolved institutions and individuals and companies, demonstrates that 'much greater openness about decision making is feasible' even within the limitations of a non-statutory Code as well as serving to break the 'taboo' regarding the publication of Cabinet minutes (CFOI [A] 2000). Moreover, the Code rigorously applies the public interest test and sets a higher harm test than the FOI Act itself, meaning that a piece of information must be demonstrated to be likely to cause not only 'harm', as under the FOI Act, but 'substantial harm' to justify being withheld (NAFW [A] 2004). Given that both approaches involved a non-statutory Code, the limitations of the application of Major's Code are thrown into sharp contrast by the enthusiasm and dynamism later displayed by openness advocates within the Welsh Assembly.

Conclusion

Major claims that the Code was a central part of 'my desire was for nothing less than an information revolution' (Major in Platten 2005, 73). Given the Code's modest aims and numerous flaws, it was unlikely to bring about so radical an end.

However, despite the flaws in the policy and the wider problems of the Major Government, the Code succeeded in liberalising Government control of information and incrementally 'opening up' Government. The Code was a significant step forward on previous half hearted reforms of the Callaghan or Thatcher Government's whose respective Croham reforms and Data Protection Act's were reluctantly passed by successive administrations unenthusiastic about, if not downright hostile to, openness reforms. Furthermore, much of the success of the FOI Act is due in part to the decade long experience of openness and information handling that central Government gained by using the Code.

Yet, the Code could not and did not bring de facto freedom of information. The policy lacked support, publicity and advocacy from within Government and civil service and as a result failed to create the public interest essential to its success. Above all, unlike statutory legislation, the Code lacked the force, and its backer's the enthusiasm or power, to override the decade, if not centuries, old culture of closed Government which 'is the bonding material which holds the rambling structure of central Government together' (Hennessy 1990, 346).

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Title: Open Public Meetings in New Jersey: History and Current Issues*

Volume 3 issue 1

Abstract

The New Jersey Open Public Meetings Act, passed in 1975, is the foremost law promoting transparent practices with regard to meetings in the State of New Jersey. Also called the Sunshine Law, it was passed during the administration of Governor Brendan T. Byrne, in line with his "Government Under Glass" initiative. Within this case study, a history is presented of open meetings in New Jersey. The New Jersey State legislature is currently considering revising the Sunshine Law. With this in mind, an assessment of current open meetings practices within the State and a list of areas to possibly revise are offered. While the spirit of the current law promotes open government, revision is necessary to adapt it to current information technology, to promote uniform application in all jurisdictions, and to eliminate gray areas and ambiguities. However, a new law is not enough. It is imperative to train public employees and elected officials concerning their obligations under the Sunshine Law. Key areas that need to be considered when revising the current Sunshine Law are: meeting minutes, closed sessions, notices and agendas, public comment provisions, the video and audio recording of meetings, electronic meetings regulations, and the recovery of attorney fees after successful litigation. A change in the Sunshine Law is a good first step, but a series of initiatives is necessary to open up public meetings. Three such steps are the training and education of elected officials and public employees on public meeting requirements, a plain-language guide to the Sunshine Law, and the consideration of different models of open meetings oversight.

*This paper is based on a report written for the New Jersey Foundation for Open Government titled Partly Cloudy: A Report on the New Jersey Sunshine Law. The project was funded in part through grants from the Pratt Program for Freedom of Information at Rutgers University School of Law-Newark and the National Freedom of Information Coalition.

Introduction

Open public meetings in the State of New Jersey are receiving a significant amount of attention recently. The New Jersey State legislature is currently considering revising the Open Public Meetings Act, also known as the Sunshine Law. This is a case study of open meetings in New Jersey which takes a historical and contemporary look at the issue. Also offered are an assessment of current open meetings practices within the State and a list of key policy areas to possibly revise. This case study results from a larger report addressing the central issues of the State's Sunshine Law today. The larger report seeks to demonstrate the need for change to both the law and culture within the state of New Jersey with regard to open meetings.

Since at least the 1940s in the United States, the proper level of openness of public meetings, particularly with regard to executive sessions, has been debated. Numerous cities had open meeting provisions in their charters by the 1950s (Cross, 1953). In the early 1950s, Harold Cross argued that right to attend public meetings was not as well established as the right to inspect public records: "[t]he right of access to legislative and administrative proceedings, to the extent to which it exists, is of strikingly modern origin, was denied and was of dubious legal validity both in England and the United States throughout the eighteenth century . . ." (Cross, 1953). The issues of efficacy and access are still the primary ones surrounding open public meetings. Public meetings are the most common avenue for citizen participation in the United States, but this goal of participation is often unfulfilled (Baker et al., 2005, McComas, 2001, Adams, 2004). Most of the literature surround public meetings has focused on them as avenues of participation not as conduits of transparency.

The role public meetings can play in improving public participation in government is prevalent in the public administration literature (King et al., 1998). William Baker and his colleagues found five critical factors that contributed to successful public hearings: "(1) a greater number of prehearing educational methods, (2) more media types and greater media frequency in the formal presentation, (3) more control over speakers' presentation time, (4) greater use of open follow-up meetings, and (5) more use of newspaper and direct mail to communicate posthearing decisions to the public" (Baker et al., 2005). Brian Adams found that while public meetings are not necessarily successful at giving the public an outlet to directly influence decision making, they are successful as means of sending information directly to elected officials and agenda setting (Adams, 2004). Successful processes for public meetings do not necessarily lead to successful meetings but there is some evidence that public officials see the two as linked (McComas, 2001). Many of the changes currently being considered to the Open Public Meetings Act center around meeting processes and forms of participation.

The New Jersey Open Public Meetings Act, which promotes transparent practices with regard to meetings, was passed in 1975 during the Brendan T. Byrne Administration's "Government Under Glass" initiative. This initiative sought to open government and improve transparency in New Jersey state government. While the intention of the law is to promote open government, the law needs to be revised to adapt it to cover current information technology and to ensure that in practice, it is applied more uniformly across jurisdictions by removing unnecessary ambiguity and vagueness.

A change in the law is not sufficient enough to modify the current culture surrounding public meetings in New Jersey. Training and education should be required for both career government employees and elected officials of their obligations under the Sunshine Law. During the three decades since the law was passed, advancements in technology and communication have been rapid. Audio and video recordings can now be transmitted over the internet. The law should be revised taking into consideration new technology and how people are using them to conduct business. The use of electronic and digital governance tools is an international phenomenon with many municipalities outside of the United States taking the lead on these practices (Holzer and Kim, 2004).

In addition, the 30-year life of the Sunshine Law has proven that implementing open meeting legislation has some pitfalls. The requirement to take minutes of all meetings and then subsequently, to make them public is not always taken seriously by local governments, and the use of closed meetings is at times excessive and unjustified. There is a lack of uniformity throughout the State when it comes to implementing the Sunshine Law. The amount of time given to release minutes is interpreted differently by different municipalities and minutes are taken to different standards across the State. The nature and scope of public comment at meetings, which is determined by the municipality, is a useful tool for public participation and should be encouraged.

The Sunshine Law allows for citizens to bring action against a municipality that is found to violate the law. It does not, however, allow the recovery of attorney fees and other related costs. The cost of filing a suit is a deterrent for many individuals to challenge an open meeting violation. When a municipality is found in violation of the Sunshine Law, it can be fined, though; there have been very few fines imposed for violations. A court must find that the Sunshine Law was violated "knowingly," which has been difficult to prove.

This case study includes a brief history of the New Jersey Open Public Meetings Act, a description of the major problems with the law and its implementation, and suggestions on how to improve access to public meetings in the State. Not surprisingly, many issues present during the debate surround the passage of the 1975 law are still with us today.

History

Open public meetings have a long history in the United States and many states instituted open meetings laws beginning in the 1950s (Pupillo, 1993). New Jersey was not far behind with its "Right to attend public meetings" law of 1960. This law was proposed each year between 1954 and 1960 (with the exception of 1956), but was not passed into law until 1960. The purpose of this proposed law was to "further freedom of information to the public of the transaction of governmental business by insuring to the citizens of the State the right to attend public meetings"(1963 (repealed 1973)).

With time however, residents of the State found problems and loopholes in the law. Attorney General George F. Kugler authored *New Jersey's Right to Know: A Report on Open Government* in 1974. The Report's purpose was to distinguish between the right to know about governmental business and the right to privacy. One of the main concerns about the 1960 law was its limitation of primarily focusing on open meetings where official action was taken. Kugler argued that the alienation of citizens by public bodies leads to apathy, and that as government expands, there is a greater need for checks and balances (Kugler Jr., 1974). Open meetings laws provide an avenue for citizens to become involved in government in addition to acting as an active checks mechanism. Shortly after Kugler's report, new open meetings legislation was proposed.

Today's Open Public Meetings Act (N.J.S.A. 10:4-6 to 4-2) was initially introduced on January 28, 1974 by Assemblyman Byron M. Baer (1976). It was a complement to then-Governor Brendan Byrne's "Government Under Glass" commitment. This commitment to transparent government came in the wake of the national Watergate scandal when there was perceived to be little public trust in government (Shure, 2006).

At the public hearing discussing this newly proposed law, the issue of meeting efficiency was raised as a concern. Some felt that wasted time would be common in open meetings. Baer countered that "our Founding Fathers never claimed that democratic means were always faster than undemocratic ones; it was sufficient that they were more just" (Byron M. Baer in 1974a). Another perennial issue raised was the fact that public issues were often discussed behind closed doors. Baer, argued:

This bill will have a favorable impact on New Jersey Government for generations to come. It is in harmony with the Byrne Administration's commitment to 'government under glass.' . . . deception by those who govern has become a grave concern. It is now clear to many citizens that the withholding of crucial information has been part of a pattern of

betrayal of the public interest by some public officials. In other cases, secrecy makes possible hiding official blunder, inefficiency, poor performance, injustice, arbitrariness or double dealing. The reality is that the public performance of some government bodies is pure theater; the decisions that will affect all of our lives are commonly being made behind closed doors. This often results in government dictated by special interests, carried out by the few to cater to the privileged.
(Byron M. Baer in 1974a)

In addition to the concerns of efficiency and the possibility of improperly closed sessions, the relationship between the public and the public officials was questioned. The sentiment at the time was that not only did citizens not trust public officials, but public officials did not trust the public. The legislative affairs chairman of Common Cause New Jersey thought that public officials "don't think the public has got the ability to sit in at some of these meetings or take an interest in what their government is doing" (Lewis S. Ripps in 1974a). However, "if people are to vote intelligently they must have access to as much information as possible about the actions of their public officials" (Byron M. Baer in 1974a).

Along with concerns directly voiced at the public hearing, many officials across the State wrote in support or opposition to the law. Large and small municipalities alike opposed the law. The mayor of the Borough of New Providence felt that municipalities should not be burdened by the law and that the bill would delay normal municipal operations. He also thought that the courts would have a backlog of cases and the cost of government would increase (Edward M. Bien in 1974a). The mayor of Trenton said that even though he was supporter of openness, he felt that the bill had major weaknesses. Such weaknesses he noted were the restriction of government bodies to do their business efficiently, the notification requirement creating a burden on municipalities, and government actions, such as entering into contracts, would be questioned (Arthur J. Holland in 1974a).

Taxpayer associations were among those who showed support for the bill. One such association member voiced that: "This bill will...help protect us from those who dare disenfranchise the public, the average citizen, from observing, investigating and participating more fully in government business" (Maywood Taxpayer's Association in 1974a). The Alert Parents for Good Schools organization also supported this bill. They expressed concern that at many emergency meetings, public business was discussed that was not originally on the agenda. In addition, they saw an agenda for the public to view prior to a meeting, as well as a yearly schedule of regular meetings as necessary, and had an interest in the ability to obtain minutes as a public record (Hancock and Paterson in 1974b).

On October 21, 1975, Governor Brendan T. Byrne signed the bill into law. In his statement, he pointed out that "public bodies exist for the public's convenience, not their own" (Governor Brendan T. Byrne's statement in 1976). The law gives citizens the right to be informed about governmental decisions, and possibly restores the trust between the two groups. Byrne suggested that the legislature act as a watchdog for open meetings, amending it when necessary. "This law ushers in a new era of openness for government at every level in New Jersey and demonstrates clearly the determination of the legislature and of this administration that the public's business can and will be conducted in public" (Governor Brendan T. Byrne's statement in 1976).

On June 12, 2006, the official name of the Sunshine Law was amended to recognize the pioneering work of Senator Baer "in promoting greater openness in government." Included in the bill to rename the law was a statement in support of governmental transparency: "It has long been recognized that openness in government promotes citizen participation in public affairs, increases public confidence in government, and makes public officials more accountable to the electorate" (2006). New Jersey P.L. 1975, C. 231 may now be cited as the Senator Byron M. Baer Open Public Meetings Act.

The New Jersey Open Public Meetings Act gives the public the right to attend meetings of public bodies. A public body under the law means a "commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body acting on behalf of the public" (1976, N.J.S.A. 10:4-8). The law requires public bodies to give advance notice of meetings for the purpose of giving the public time to arrange to attend. In addition, it requires that minutes be kept as a public record; these minutes also serve to inform those who did not attend meetings. These minutes "shall be promptly available to the public" (1976, N.J.S.A. 10:4-14). The Sunshine Law also gives citizens the right to bring civil action against a public body that is violating the law (1976, N.J.S.A. 10:4-15).

Ways to Improve Openness in Meetings

Many of the issues that were relevant during the passage of the Open Public Meetings Act of 1974 are still salient today. Municipalities are still doing public business behind closed doors that should be open. There is no oversight body and distrust between citizens and public officials is perceived to be high. The current law needs to be revised and brought up-to-date with the information age. It should be more strongly enforced, as courts tend to give municipalities only a slap on the wrist when they are found to violate the law.

Paula Franzese, the Peter W. Rodino Professor of Law at Seton Hall University School of Law, and Daniel J. O'Hern, Sr, a retired Associate Justice of the New Jersey Supreme Court, wrote an article in the *Rutgers Law Review* titled "Restoring the Public Trust: An Agenda For Ethics Reform of State Government and a Proposed Model for New Jersey." While this article touches upon ethics violations in general, it offers some valuable advice that can be appropriately applied to open meetings.

Franzese and O'Hern suggest distribution of a plain-language ethics guide for employees and third-parties, such as those who do business with the government (Franzese and O'Hern Sr, 2005). A similar guide for the Sunshine Law would benefit those who come into contact with the law on a regular basis. This plain-language guide to open meetings should be initiated in conjunction with widespread education and training of government representatives and attorneys. Currently, school board members throughout the state are required to receive ethics training within the first year of their term (James-Beavers, 1999). This type of training could be used as a model and made mandatory for all members of public bodies. While the training would not have to be restricted to open meetings issues, they should be a primary focus. Revised laws alone will not change a culture of secrecy. Education and training are also necessary for individuals to fully understand their responsibilities as a public official with respect to open meetings.

Some form of open public meetings commission, ombudsman, or oversight office should be considered for the state. As it now stands, there is no central body to conduct training on open meetings and educate the public as to how to file an Open Public Meetings Act violation. There is also no central authority to log and track complaints concerning open meeting violations. In the United States, there are several models of open meetings oversight. In practice, all of these oversight bodies operate differently and the models are quite complex. Some bodies can offer binding opinions while others can only write advisory and non-binding opinions.

The models include commissions, ombudsmen, commissions functioning largely like an ombudsman, offices with statutory involvement under the state's attorney general, and freestanding offices of information practices. Connecticut, Hawaii, Maryland, Minnesota, New York, and Virginia all have some sort of oversight body. Serious consideration needs to be given to what type of oversight model would work most effectively in the New Jersey context.

An Example of Openness

Though there are constant violations of the current Sunshine Law, some municipalities embrace the spirit of the law. The purpose of this example is to show that even

within the constraints of the current law some municipalities have instituted more open practices with regard to meetings. One such municipality is the Borough of Hightstown located in Mercer County, New Jersey. The small municipality with limited resources succeeds in catering to the public with respect to meetings, and has an inclusive website where meeting documents are posted. Candace Gallagher, the Borough Clerk and Administrator, stated that, "It has been my experience that, in any government project, the more open the process, the smoother things go. The public does not like to be excluded, and to do so suggests that bad things are happening behind closed doors, even if they are not" (Gallagher, 2006a). While other factors clearly also matter, having a town clerk with a commitment to openness seems to produce more progressive open meeting practices.

Hightstown has instituted a working model for open meeting practices. In order for the council members and the public to prepare for meetings, a meetings packet is posted online by Friday for the following Monday council meetings. This packet includes supplemental materials relating to the issues that will be discussed at the upcoming meeting. In addition, the previous meeting's draft minutes are in the packet for approval. This is noteworthy since many towns do not release minutes until after they have been formally approved. At the meeting, all council members receive this packet, and there are two copies circulated for the public to review.

At the beginning and the end of each meeting, the public is given a chance to comment. Each person may speak for up to three minutes during each designated public comment period. At one point in time, the second comment session had been removed from the meetings, but was brought back upon request by citizens. During these comment sessions, citizens may address any issue.

On the Borough of Hightstown's website (<http://www.hightstownborough.com/>), one can find a schedule of meetings, minutes, the aforementioned meeting packets, and much more information unrelated to open meetings. (Minutes are only kept online for 2005 and 2006 due to limited space.) The more the borough posts to its website the more open it is, which is thought to lead to greater trust with the public. The town also publishes a newsletter called the *Hightstown Crier* which includes meeting announcements. The Borough believes that since the website and newsletter have been used to publicize meetings, attendance has increased.

This example is particularly noteworthy since it shows open government practices can be implemented with even the most limited resources. Gallagher summed up her philosophy by stating: "I have found that the more information we provide to the public, the less critical they are. It is easy to criticize without having all of the information. To provide that broadens

their point of view and lets them see things from the inside out, and the view is different” (Gallagher, 2006a).

While the Borough is largely open, there are limits to its open meeting practices; for example, it does not videotape meetings and some meetings have executive sessions. Nonetheless, Hightstown is at the forefront of open meetings practices in New Jersey. While the Hightstown examples shows that progressive, open meeting practices are possible in the current environment, a series of changes would need to be instituted affect real change.

Recommendations

These recommendations for changes to open meetings practices in New Jersey are based off a report done by the authors for the New Jersey Foundation for Open Government (Piotrowski and Borry, 2007). Many towns around the State are doing a sufficient job of implementing the Sunshine Law. Unfortunately, others continue to get away with limiting access, either intentionally or through ignorance. If there was more uniformity in the application of the law throughout the State, the Sunshine Law would be more effective. When legislators look to revamp the Sunshine Law, they should pay particular attention to the following areas:

- *Minutes* of meetings should be complete and accurately reflect what transpired at the meeting. An explicit time limit is necessary to establish when minutes need to be released after a public meeting is held.
- *Closed sessions* should not be used for routine matters. There should be more of a check on closed meetings so that topics which are not exempt under the law are discussed in open session.
- *Notices and agendas* should be timely and complete. They should contain enough information so that anyone who wants to understand what will be discussed at a meeting is able to and whoever wants to attend a meeting can.
- *Public comment* is crucial for a good working government. While limits may need to be imposed, the public should have a timely outlet for suggestions, questions, or concerns they might have during a public meeting.
- *Video and audio recording* of all public meetings should be affirmed as a right of the public. Where feasible, municipalities should also consider taking it upon themselves to record meetings to keep as public records.
- *Electronic meetings* must be addressed in the law to keep it up-to-date with the current information and technology era. The longer the State waits to address this issue, the more inadvertent violations of the law will occur.
- *Attorney fees* should be recoverable, and where necessary, stricter *sanctions* need to

be imposed.

A change in the Sunshine Law is a good first step, but there needs to be a series of initiatives to open up public meetings in State. We are recommending three such steps.

- *Training and education* are necessary components to change culture. All individuals who serve on public bodies should be required to receive training on the key components of the Sunshine Law.
- A *plain-language guide* on the Sunshine Law should be developed and distributed to government employees and elected officials throughout the State.
- A model of *open meetings oversight* should be considered to train public employees and educate the public as to how to file an open meetings violation. Such a body could have the power to sanction and fine public bodies that do not comply with law, or solely offer advisory opinions.

Issues surrounding the processes of public meetings are not new or unique to New Jersey (Haight and Ginger, 2000, McComas, 2001) but have been gaining ground in the State recently. Given the State of New Jersey's renewed push for good governance and ethics reform (Franzese and O'Hern Sr., 2005), public meeting reform is likely to follow (Gallagher, 2006b). The New Jersey Sunshine law is an important component of democratic accountability and governmental transparency. It has great potential, but implementation and practice need to be better. With more enforcement, better training, more specific helpful guidelines public meetings in the can be more open.

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