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A Shock To The System:
Journalism, Government and the
Freedom of Information Act 2000

Jeremy Hayes

FOREWORD:

The Freedom of Information Act 2000 has changed journalism in Britain. Four years after it was introduced the flow of news stories relying in whole or in part on information gained through a request to a government department, agency or statutory body has become continual.

Although government ministers insist that the Act was not created for the benefit of journalism, there is no doubt that for a number of journalists the Act has altered the way they work and their expectation about the information they can gather through it.

The purpose of this research is to evaluate the way in which the Act is being applied by officials and the uses to which it is being put by journalists. I have carried this out at a time when the stakes over the future definition of public interest as it applies to FOI have never been higher. 2009 may prove to be a decisive year for the Act through the rulings of the Information Tribunal and the responses evoked in government, and as the scope of the Act as it applies to organisations working in the public sector, including central government, is redefined.

I have been greatly assisted by the willingness of many partners in FOI – journalists, campaigners, officials and politicians – to share their experiences and insights with me.

Because of the limit of time available to me I have not been able to consider the implementation of the Freedom of Information Act (Scotland) 2002 in any detail. Although its legal provisions are broadly similar, its administration has proved a different experience. For reasons of brevity, Freedom of Information is abbreviated to FOI and the Freedom of Information Act 2000 to FOIA throughout.

ACKNOWLEDGMENTS:

In a comparatively short period for research on a complex and developing subject, I have been extremely fortunate in encountering so many people in the FOI world – particularly journalists and campaigners – who have been willing to share their thoughts and insights into how they have used the Freedom of Information Act 2000.

Officials and political researchers have also been of great assistance, although many of their insights and comments were ‘off the record’ and as a result they cannot be personally acknowledged.

I would like to thank David Levy, Director of the Reuters Institute for the Study of Journalism, John Lloyd, James Painter and the staff and colleagues who have helped produce this report. My supervisor, Vernon Bogdanor, Professor of Government at Oxford University, Maurice Frankel, Director of the Campaign for Freedom of Information and Steve Wood, Assistant Information Commissioner are owed special acknowledgement for their guidance and advice. I am indebted to Alistair Burnett, the Editor of *The World Tonight*, BBC Radio 4, who sponsored my Fellowship at RISJ. Lastly my wife, Alix deserves special thanks for her loving support and encouragement.

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1. Background to the Act

A Freedom of Information Act would entitle the public to government information and would leave it to government to justify why information should not be released. I don't believe that its impact would simply be in the pure matter of legislation, in the detail of the legislation. It would also signal a culture change that would make a dramatic difference to the way that Britain is governed. The very fact of its introduction will signal a new relationship between government and people: a relationship which sees the public as legitimate stakeholders in the running of the country and sees election to serve the public as being given on trust.¹

Aims

Labour's 'Freedom of Information' policy sought to combine constitutional reform with the aspiration for a new social contract, a central theme of the 'New Labour' project. The idea had germinated in John Smith's time during Labour's long opposition. A White Paper, *Your Right to Know*, was published in December 1997 but it took almost three years until November 2000 before the Act received Royal Assent and the legislative process itself was marked by a struggle with what Blair might later have termed 'the forces of conservatism'.

The Act provides for anyone seeking information

- a) to be informed in writing by the public authority whether it holds information of the description specified in the request and,*
- b) if that is the case to have that information communicated to him.²*

But the Act which communicated this right, after a long legislative haul, eventually contained more than twenty separate grounds³ for exempting public bodies from supplying this information.

The Act was not the first attempt to place a duty on government and public authorities to reveal information. A Code of Access for information which the Act replaced had been introduced by John Major's government in 1994. But it only covered agencies answerable to the Parliamentary Ombudsman and it provided none of the apparatus which has proved an important feature in upholding the rights of inquirers. Nor did it create a legal right to know.

The measure was a response to a number of Private Members Bills introduced in 1992 and 1993, most notably Mark Fisher's 'The Right to Know' Bill⁴ in 1993 which attracted support from MPs from all parties, as well as the Campaign for Freedom of Information and the National Union of Journalists. Supporters pointed out that it was possible for British citizens using American Freedom of Information legislation to obtain information about British public institutions which had been withheld by government ministers in response to questions from MPs.

¹ Speech by the Rt Hon. Tony Blair MP, Leader of the Labour Party, at the Campaign for Freedom of Information's annual awards ceremony, 25 March 1996.

² FOI Act 2000 s. 1.

³ A full list of exemptions can be found at the end of this chapter.

⁴ A guide to Mark Fisher's 1993 Bill can be found at www.cfoi.org.uk/rtk7pguide.html

Passage through Parliament

The White Paper began life in the Cabinet Office but in July 1998 following a reshuffle the brief passed to the Home Office. Following this transfer the planned legislation found itself in a less benign environment. Its passage through Parliament saw additional exemption clauses inserted to provide reassurance to senior Civil Servants and some ministers concerned that the Act would allow the citizen to pry on the inner processes of government.

As the balance of the Act swung from the right to know to the duty to withhold in the national interest, the issue of a public interest test became the focus for FOI campaigners. The test was proposed to be applied only on a voluntary basis by the bodies holding the information but campaigners argued successfully for the Information Commissioner to become the arbiter of public interest in cases where qualified exemptions were applied. This compromise has, as I will go on to argue, set up a contest between officials and inquirers which has put the judgment of the Commissioner and the appellant body, the Information Tribunal, under critical scrutiny by government.

Four years on, the arguments over the proper definition of public interest are no nearer resolution. It is little exaggeration to say that the project of 'Open Government' which the Act was intended to foster may ultimately depend on achieving a balance between the national interest as perceived by Whitehall and the public interest as interpreted by those bodies empowered to defend it.

Implementing the Act

The date for the Right of Access to become operational was delayed from March 2002 until January 2005. This allowed for five years of consultation as public bodies prepared themselves for inquiries to begin, making it the tardiest introduction of FOI in any comparable state. Ireland, New Zealand, Australia and Canada all enacted similar legislation within one year.

The question of how the Act should be introduced became another vexed topic. In 1997 David Lock, the then Parliamentary Under-Secretary at the Lord Chancellor's Department, put the case early on for a phased approach, 'gradually by type of organisation. It would make sense to start with central Government and it is right that central Government should provide models of good practice.'⁵

But although the newly created Information Commissioner Elizabeth France gave official advice recommending this approach, implementation of the Act was set back after the Prime Minister, Tony Blair, rejected a phased timetable. An official at the Department of the Environment, Transport and the Regions noted in 2001 that a date of June 2002 'has been abandoned in favour of across-the-board implementation supported by the PM'.⁶ This decision meant that more than 100,000 public bodies fell under the FOI regime on the same date. It can be argued that the Big Bang which ensued, as a wave of inquiries led in significant numbers to refusals and referrals to the Commissioner's office, contributed to a backlog of decisions (see Chapter 2) which remains stubbornly high to this day.

Exemptions

The Act requires public authorities which receive a request for information to

- respond within 20 days (although the time to obtain the information may exceed this limit)
- impose no requirement that the purpose of the request be revealed, nor seek to impose conditions on the use of the information;
- actively help those seeking information;
- direct the requesting party to the information if it is already published;
- provide information in the form requested if practicable.

But the Act also grants the right to these bodies to withhold information on the basis of twenty-four separate grounds, eighteen of which are qualified by a test of public interest. Unqualified grounds for exemption include information supplied by security bodies such as the intelligence agencies and personal information covered by the Data Protection Act.

The long list of qualified exemptions includes information required for safeguarding national security (section 24), information likely to prejudice defence of the UK, colonies and armed forces of the Crown (section 26) and information likely to prejudice international relations (section 27). In addition sections 35 and 36 protect information related to the formulation of government policy and conduct of public affairs.

⁵ Mr David Lock, Parliamentary Secretary, Lord Chancellor's Department, Standing Committee B, 10/2/00, col. 479.

⁶ Rob Evans and David Hencke, 'Blair "Big Bang" Theory to Delay Freedom Act', *Guardian* (26 Oct. 2001).

Although much criticism was made by campaigners and members of the House of Lords over the very general nature of some of the clauses, and the scope this might afford recalcitrant officials to withhold information, in other ways the Act is remarkably liberal. It does not create a categorical exemption to information in Cabinet papers as is the case in Australia and Canada, for example, and it empowers an independent tribunal to consider whether disclosure of documents might prejudice international relations.

Appeals and reviews

On the other hand the mechanisms for governing the release of information are so numerous and potentially cumbersome that they can be considered an additional means of denying the release of information in their own right. Public bodies have the right to refuse to supply information if they believe the costs of attaining it exceed £450 (£600 in the case of central government).⁷ If they refuse to provide information the requester can ask for an internal review. There is no statutory time limit to this procedure.

If a requester considers he has been unreasonably refused information the Commissioner is required to adjudicate over whether public interest dictates that it should be released. But his decisions do not have to be accepted by the authorities or bodies concerned, or those making the request. They have the right to appeal to the Information Tribunal, a body which can review the Commissioner's decisions in matters of fact and law. (By the same token an unsuccessful inquirer can also ask the Tribunal to review the Commissioner's decisions where he has deemed public interest does not justify a release of information.)

In turn the Tribunal's ruling can be appealed to the High Court in England, Wales and Northern Ireland (or the Court of Session in Scotland) on a point of law, and ultimately to the House of Lords. But before it reaches that stage the government has in reserve a right of veto if it considers it against the national interest for information to be disclosed.

As far as public bodies' compliance with the spirit of the Act is concerned, the Commissioner also has the right to issue 'practice recommendations' to public authorities but not to enforce them.

Let us take one example: a recommendation made to the Department of Health in March 2008. The Commissioner noted:

The Department repeatedly applies blanket exemptions to requested information with the effect of withholding entire documents from release [and] fails to establish the full extent of information held before responding to a request, resulting in the application of exemptions to information which is not held in its entirety.

The Commissioner hoped that 'this practice recommendation will encourage further improvements and reduce the need for formal intervention, such as Information Notices, in future investigations'.⁸ But that was as far as he could go. No charges or penalties could be levied. This is in contrast to the Commissioner's Decision notices for which non-compliance is a contempt and can lead to a fine.

⁷ In Scotland fees are capped at £600, with the first £100 of research expenses not chargeable.

⁸ Practice recommendation ref FPR0187217, Information Commissioner's Office, 28 March 2008.

The cost of free information

In 2006 the Department of Constitutional Affairs under Lord Falconer proposed a new scheme for assessing fees for gathering information in response to inquiries.⁹ Identifying 'nuisance requests' – the 5 per cent of requests which necessitated 45 per cent of time spent on FOI casework – as a significant problem, the proposal was made to include 'consideration and consultation time' as chargeable periods which could be included when assessing the cost of researches as the result of requests for information. It was also proposed that requests from one person within a sixty-day period would be aggregated to determine whether the £600 limit was exceeded. The aim was ostensibly to restrict 'trawling' for information in one subject area but the effect would have been to personalize charging, basing it as much on the volume of inquiries as the extent of research required to deal with each individually.

On the basis of evidence from Ireland where such charges had been levied, it was estimated that the use of the Freedom of Information Act could have fallen by as much as 75 per cent.¹⁰ But in 2007 following a change of government under Gordon Brown the plan was abandoned. Brown was at pains to identify his support for this change of policy in a keynote speech on liberty and constitutional change in October 2007. The policy on fees would not be altered because, as he put it, 'Public information does not belong to Government; it belongs to the public on whose behalf government is conducted.'¹¹

Widening the net

In the same speech he signalled his intention to widen the scope of the Act as laid down in section 5 to cover private and voluntary bodies working in a public capacity. In its consultation document the Ministry of Justice argued:

Some organisations receive large amounts of taxpayers' money to carry out functions of a public nature but are not currently subject to the Act. In fulfilling those functions it would seem appropriate that they be subject to the same scrutiny as public authorities within the scope of the Act.¹²

Examples of organisations ripe for inclusion are Network Rail, Group 4 in its function as a manager of prisons and charities providing a contracted social service. It is clear from the responses from charity organisations during a consultation process in 2007–8 that there is little enthusiasm to sign up to the Act and much concern over the potential burden of servicing inquiries. Although consultation ended in March 2008 the likely extent of inclusion is still to be determined.

⁹ <http://www.justice.gov.uk/publications/cp2806.htm>

¹⁰ *Independent Review of the Impact of the Freedom of Information Act*, Report for DCA by Frontier Economics (Oct. 2006).

¹¹ Gordon Brown, Speech on Liberty, University of Westminster, 25 Oct. 2007.

¹² Ministry of Justice, *Freedom of Information Act 2000: Designation of Additional Public Authorities* (Consultation Paper CP 27/07).

Appendix: List of exemptions under Freedom of Information Act 2000

* denotes unqualified exemptions.

Section 21: information accessible to the applicant by other means*

Section 22: information intended for future publication

Section 23: information supplied by or relating to bodies dealing with security matters*

Section 24: information likely to prejudice national security

Section 26: information likely to prejudice defence of the UK, colonies and armed forces of the Crown or cooperating forces.

Section 27: information likely to prejudice international relations

Section 28: relations within the United Kingdom

Section 29: the economy

Section 30: investigations and proceedings conducted by public authorities*

Section 31: law enforcement

Section 32: court records

Section 33: audit functions

Section 34: parliamentary privilege

Section 35: formulation of government policy

Section 36: conduct of public affairs

Section 37: communications with Her Majesty and honours

Section 38: health and safety

Section 39: environmental information

Section 40: personal information*

Section 41: information provided in confidence*

Section 42: legal professional privilege

Section 43: commercial interests

Section 44: prohibitions on disclosure (subject to external e.g. legal or constitutional prohibitions)*

2. The first four years

The Freedom of Information Act 2000 came into effect on 1 January 2005. Not surprisingly the five years of waiting had created pent-up demand. As predicted, a tide of inquiries washed over organisations ranging from government departments, broadcasting organisations, police forces and health trusts. In a review of the first year, Maurice Frankel of the Campaign for the Freedom of Information, one of the prime movers behind the new law, commented with satisfaction.

Mexican waves of stories have rippled across the newsstands as papers discovered they could obtain restaurant hygiene reports, figures about speeding police cars, parking fines, compensation payouts, attacks on authority staff, excluded pupils, staff suspensions, expenses claims and spending on contracts, consultants and headhunters.¹³

He pointed to the revelation of the food industry's efforts to persuade the Food Standards Agency to minimise publicity when withdrawing unsafe products and how much the Child Support Agency had had to repay men, wrongly accused of fathering children, as examples of real insight gained through FOI.

In its first three months of operation government departments and agencies (known as 'monitored bodies' under the Act) received over 13,500 inquiries. But although the figures fell back later in 2005, demand for information held by public authorities remained at a high level. While 38,000 requests to monitored bodies were made in 2005 (see Figure 1), figures for the succeeding years registered only a small drop at 34,000 in 2006 and 33,000 in 2007.¹⁴

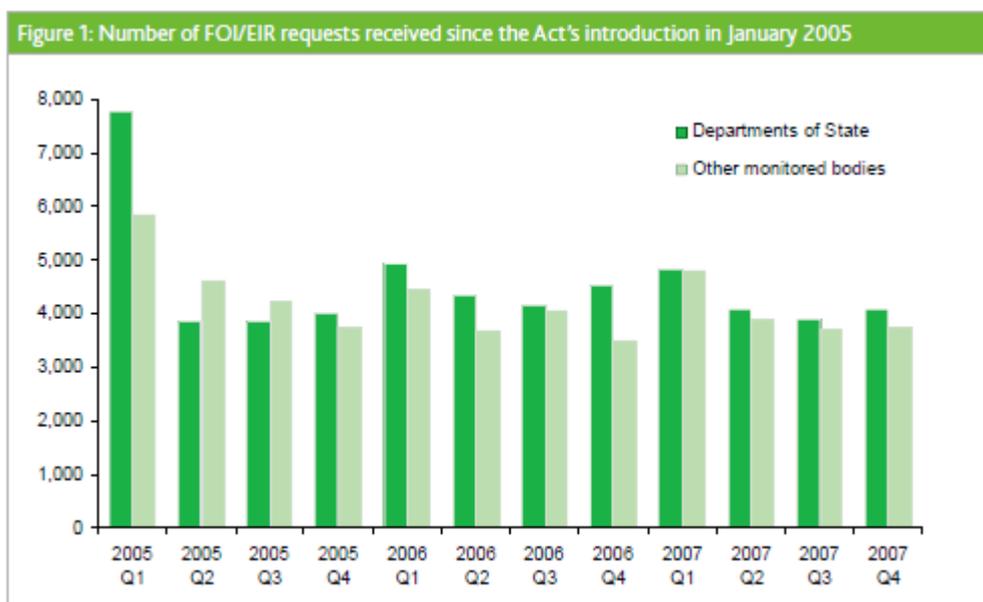


Figure 1

¹³ 'FOI – The First Year', *Press Gazette* (13 Jan. 2006).

¹⁴ Figures compiled from Freedom of Information Act 2000 – Statistics on implementation in central government (DCA and Ministry of Justice). These include requests for information under Environmental Information Regulations.

Figures in 2008 indicate a continuation of the trend with a figure of approximately 8,000 requests for information per quarter from monitored bodies. Numbers for all 130,000 public organisations covered by the Act cannot be measured with certainty but research commissioned by the Department of Constitutional Affairs in 2006 estimated non-governmental inquiries at 87,000, which would indicate a total number of approximately 120,000 per annum.¹⁵

Although popular demand meant that FOIA could be judged a success, its introduction was by no means widely welcomed. Authorities burdened with the tasks of searching for information on request did, in some cases, complain of the volume of work.

Journalists were noted as some of the most assiduous users of the Act but their efforts were not appreciated by all in government. In a speech in March 2007 the Lord Chancellor, Lord Falconer who as Secretary of State for Constitutional Affairs was responsible for FOIA, attacked the media for overuse of the right to information.¹⁶

The Government did not introduce freedom of information in order to do something 'for journalism'. We did it for the public. The job of the Government is not to provide page leads for the papers, but information for the citizen. Freedom of information was never considered to be, and for our part will never be considered to be, a research arm for the media.

He complained that journalists accounted for about 16 per cent of the total costs of central government FOI requests – a cost of around £4 million.¹⁷ Research commissioned by his Department estimated the cost at a lower figure of £1.6 million.¹⁸

At the time of his speech the Government was engaged in a review of the Act, planning to introduce a new scheme for fee charging for inquiries which, it was argued by campaigners, would put the Act out of the reach of ordinary individuals.¹⁹ In the event, following further consultation and a change of administration under Gordon Brown, the plan was dropped, leading Jack Straw, who as Minister of Justice in a redesigned Cabinet was now in charge of Freedom of Information, to comment in his first Annual Report:

*Freedom of Information is an intrinsic part of the landscape of government, a key facet of the relationship between citizen and state . . . This is the right course, and a course upon which we will remain set.*²⁰

¹⁵ 'Independent Review of the Impact of the Freedom of Information Act', Report for DCA by Frontier Economics, October 2006

¹⁶ Speech by Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Falconer of Thoroton, Lord Williams of Mostyn Memorial Lecture, 21 March 2007.

¹⁷ Ibid

¹⁸ Report for DCA by Frontier Economics (Oct. 2006)

¹⁹ See above, 'Background to the Act'

²⁰ Ministry of Justice, *Third Annual Report on the Operation of the FOI Act in Central Government* (2007).

Appeals and delays

The verdict of the media was also mixed. While information was coming to light in a way which justified the claims of campaigners who had seen the Act as a means to more open government, it was also becoming evident that officials, mostly in high office, were making full use of the exemptions contained in the Act in order to withhold information.

This was leading in turn to a backlog of appeals before the Information Commissioner, Richard Thomas, the official charged with arbitrating on inquiries which had been turned down. Maurice Frankel of the Campaign for Freedom of Information noted the alarming trend.

*A substantial backlog of cases has now built up. Some applicants have had complaints with the Commissioner for 6 months without sign of progress. As a result, there has been little challenge to authorities which have misunderstood or abused exemptions – allowing bad practice to become even more firmly entrenched.*²¹

He noted that the Commissioner's Scottish counterpart, Kevin Dunion was making faster progress.

In the first Annual Report by the Commissioner since Freedom of Information had become a reality, Richard Thomas had to admit that his Office had undergone a steep 'learning curve'.

*The volume was demanding but even greater challenges came from our unfamiliarity with the subject matter, uncertainty about what the requester was really seeking, and our need to get a full understanding of the public body's position. We had to learn fast as almost every case of any substance involved novelty and originality with the application of the law. And new skills, with mature judgement, have had to be developed to articulate and balance competing public interest considerations.*²²

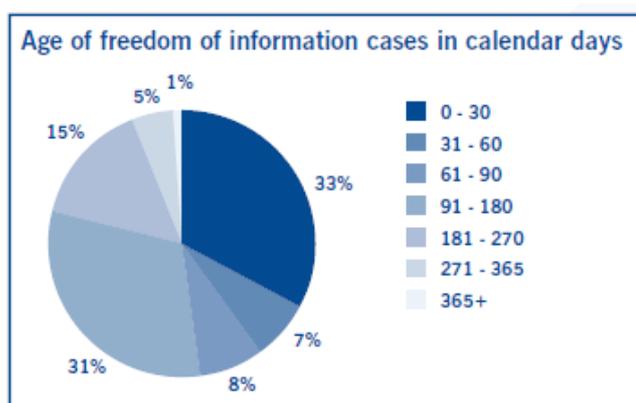


Figure 2

²¹ 'FOI: The First Year', *Press Gazette* (13 Jan. 2006).

²² Information Commissioner's Office *Annual Report 2005–2006*, foreword.

After one year complaints could be heard that decisions by the Information Commissioner were in some cases taking over six months. (Figure 2 shows the backlog in 2005–6.²³)

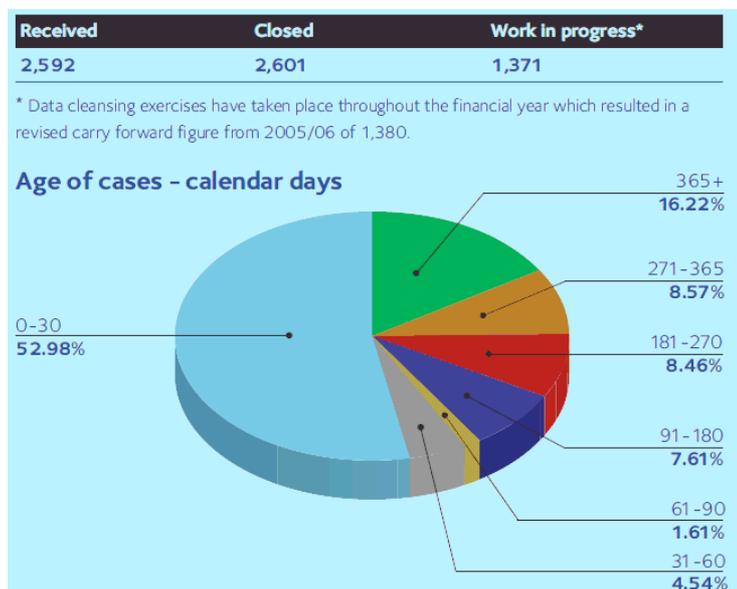


Figure 3

A year later, it was clear that the delays were now extending beyond a year in over 16 per cent of cases, with a quarter extending beyond nine months. (Figure 3 shows the backlog in 2006–7.²⁴) Criticism was made of the adequacy of staff at the Information Commissioner's Office both in terms of numbers and ability to deal with the casework.

But the blame for delays could not only be laid at the Commissioner's door. Questions were being raised about decisions by officials to refuse information in the first place, thus leading inquirers to turn to the Information Commissioner's Office for adjudication.

In its 2007 Annual Report the Ministry of Justice, commenting on requests for information which had been turned down, admitted that the use of exemptions was highest in Whitehall.

Of the 222 appeals to the ICO related to information requests, 186 were received by Departments of State, suggesting that Departments of State are markedly more likely than other monitored bodies to have information requests appealed.²⁵

Making the news

Journalists getting to grips with the Act for the first time were sometimes accused of glamorising relatively anodyne discoveries with a FOI tag. It was suggested that others were more interested in writing up their failures to obtain information so as to highlight perceived weaknesses in the legislation.²⁶

²³ Ibid.

²⁴ Information Commissioner's Office *Annual Report 2006–2007*.

²⁵ Ministry of Justice, *Third Annual Report on the Operation of the FOI Act in Central Government* (2007).

²⁶ Holsen et al., 'Journalists' Use of the UK FOIA', *Open Government: A Journal on Freedom of Information*, 3/1 (24 April 2007).

Were these accusations fair? Were journalists failing to measure up to the Act? Let us consider three examples, taken at random.²⁷

Traffic cameras earn Treasury £21m

Motorists caught on camera speeding or jumping traffic lights made a £21.7 million profit for the Treasury last year. Statistics for the 2003-4 financial year, released by the Department of Transport under freedom of information legislation, showed that total receipts from fines were £113.5 million, of which £91.8 million was reinvested in road safety and covered the cost of the safety camera partnerships. (Daily Telegraph, 26 July 2005)

Hospital 'negligence' payouts revealed

Hospitals in north Essex have paid out nearly £13 million in three years to settle clinical negligence claims. Two hundred patients brought claims between April 2001 and April 2004, while up to 50 NHS employees also sought damages for ailments such as stress and back problems. In the same period, Essex Rivers Healthcare NHS Trust paid out £9.4million in damages and £3.4million in legal costs. Thirteen of the claims were brought for alleged plastic surgery mistakes at the Mid Essex trust, while 25 related to incidents in casualty, 38 in obstetrics and gynaecology, 26 in general surgery as well as two in anaesthesia. (East Anglian Daily Times, 6 June 2005)

Role of PM's envoy to Mideast is revealed

The diary of Lord Levy, a long-time representative of Prime Minister Tony Blair, has been disclosed under the FOI Act. It reveals that Levy has visited the leaders of Israel, Syria, Jordan and Egypt, and saw Yasser Arafat 11 times. The diary is the first of a senior official to be released under the FOI Act. (Financial Times, 19 Feb. 2005)

These examples show that journalists were not using FOI for purely sensationalist purposes but to report on important issues such as the misuse of expenditure by public authorities in their statutory functions. Expenses on taxis figured more than once, one such exposure leading eventually to the resignation in Scotland of the leader of the Conservative Party, David McLetchie (see Chapter 3).

Obtaining telling information as part of deeper investigations was proving harder. Details of the meetings of ministers and public officials – a favoured means of joining the dots in some deep investigations – remained sketchy. Bizarrely a request to Lord Falconer, the minister responsible for FOI, for information about his diary was met with only partial disclosure as the Lord Chancellor refused to list anyone he had met other than those with involvement in the administration of justice. He argued that disclosure would result in 'stakeholders unwilling to enter into discussions . . . and may lead to greater pressure and increased expectations for a Secretary of State to meet with others'.²⁸

Other inquiries under FOI produced revelations concerning matters of almost historical interest which had not come to light under the thirty-year rule on the publication of official documents, including the revelation that Britain has dumped more than a million tons of munitions into the Irish Sea since the 1920s. Others were more recent, as for example a Treasury figure on

²⁷ Taken from Campaign for Freedom of Information, '500 Stories from the FOI Act's First Year'.

²⁸ *Observer* (24 July 2005).

the cost to public finances of Britain's vain efforts to remain in the ERM during Black Wednesday in 1992.

The first year also produced a crop of local stories on the prevalence of MRSA in hospitals – information which is now centrally collated and published by the NHS. To that extent FOI was doing its job of prising out information into the public domain but was making few big headlines.

Some of the stories which were obtained through use of the Act, however, suggested the true cause for secrecy was public embarrassment, as for example the disclosure that the BBC could not account for the commissioning of a work of art by Tracey Emin at a cost of £60,000 and had been forced to invent a 'plausible' line.

Although some journalists were being criticized for over-use of the right to Freedom of Information, some public bodies could equally be criticized for over-ready recourse to exemptions under the Act.

Year two

2006–7 by contrast yielded more momentous stories among the crop of FOI regulars on expenses, overtime pay for police and local crime statistics. In good measure this was the result of persistence by journalists and delaying tactics by officials (as in the story on Gordon Brown's 'pension raid' below²⁹) which had dragged out publication for well over a year.

Brown knew pension fund raid would rob employees of £12bn

Gordon Brown was warned he would rob pension funds of nearly £12 billion when he decided to bring in a tax on private pensions in 1997. The Chancellor's raid on funds is widely blamed for creating the crisis that has left huge shortfalls in pension pots and forced hundreds of firms to wind up their final salary schemes. Mr Brown's decision abolished tax relief on income from share dividends, a key source of cash for pension funds. But Treasury documents, released under the FOI Act, show Mr Brown was well aware of the financial consequences this would have on those saving for their retirement. (Daily Mail, 15 Feb. 2006)

Faulty nuclear reactor was allowed to operate without safety alarm

Britain's nuclear watchdog last month allowed a faulty nuclear reactor to start up even though it had not been fitted with an important safety system, internal documents reveal. The documents also show that the Nuclear Installation Inspectorate (NII) judged that the reactor, at Oldbury nuclear power station in Gloucestershire, was not safe enough to operate for the next 18 months, but allowed it to go onstream until November anyway. (Independent on Sunday, 17 June 2007)

'Supervised' criminals continue crime wave

Criminals who are spared prison and given community punishment under the supervision of probation officers commit more than 6,000 offences a month, Home Office research has revealed. An internal Home Office report, obtained under the FOI Act, reveals the extent of re-offending by criminals under supervision. (Sunday Telegraph, 22 Oct. 2006)

²⁹ Taken from Campaign for Freedom of Information, '1000 FOI Stories from 2006 and 2007'.

As stories emerged documenting real failures, as for example the disclosure via a report by the Nuclear Installation Inspectorate of a faulty nuclear reactor (*Independent on Sunday*), FOI could now be acknowledged as an important instrument in uncovering issues of real importance. The Campaign for the Freedom of Information commented approvingly: 'These disclosures reveal the substantial contribution to accountability made by the FOI Act.'³⁰

The story so far

By its fourth full year FOI had significantly advanced as a tool for journalists as more stories came to light and reached the front page. An investigation by Chris Hastings of the *Sunday Telegraph*, one of the most assiduous users of FOI, into the circumstances of Tony Blair's decision to exempt Formula One motor racing from the European wide ban on tobacco sponsorship made headlines in October 2008. It revealed that Blair, contrary to previous assurances, had been involved in meetings after a donation was made to the Labour Party by Formula One boss, Bernie Ecclestone and had intervened to get Formula One exempted. Despite the long haul in getting the story out the news was potent enough to attract attention even though Mr Blair had been out of office and the House of Commons for over a year. Not everyone was impressed. It only evoked a yawn at *Private Eye* which described it as 'Shock New News'. The quip makes a serious point as the story had taken two and a half years to elicit and came too late for Mr Blair to answer the charge of misleading Parliament.

The *Sunday Telegraph* commented in a leader:

*It is a serious indictment of the way FOI operates that it should have taken Christopher Hastings, our reporter, more than two years to obtain the relevant documents. We wonder what other truths the guardians of 'freedom of information' are protecting from public scrutiny until they can no longer harm the Government.*³¹

A three-year campaign by Heather Brooke and two other journalists had forced MPs to publish their expenses on their second homes, known as Additional Costs Allowance claims (ACA) after a determined rearguard action by the Speaker of the House of Commons had failed to persuade the High Court to overturn a ruling by the Information Tribunal requiring disclosure. Although the first batch of expenses yielded few shocks, further publication in 2009 presented the Home Secretary, Jacqui Smith,³² and the Employment minister, Tony McNulty,³³ in an embarrassing light. The resulting row led to a review by the Committee on Standards in Public Life and moves by the Prime Minister to reform the system for these expenses.

Ian Paisley Jnr had resigned from office in Northern Ireland after documents obtained under FOI revealed that the Northern Ireland minister had used his position to lobby for a business venture for a close associate. His

³⁰ CFOI press release, 30 Sept. 2008.

³¹ 'Tony Blair and Bernie Ecclestone, a Truth Revealed Ten Years Too Late', *Sunday Telegraph* (10 Oct. 2008).

³² 'Fury over "Stitch-up" as Jacqui Smith Escapes Sleaze Investigation into £116,000 Second Home Claim', *Daily Mail* (11 Feb. 2009).

³³ 'Labour MP Tony McNulty at centre of expenses scandal', *Daily Mirror* (23 March 2009).

father the First Minister had described the requests made under the Act as being 'sent in by lazy journalists, who will not do any work'.³⁴

Claims that FOIA were encouraging moves to more open government were more open to question as the numbers of disclosures under the Act were contrasted by the lengthening queues for decision by the Information Commissioner mostly over government departments' use of exemptions. At the same time there was indication that officials were becoming more wary about recording minutes of meetings which could be disclosed through FOI applications.

Giving evidence to the House of Lords Communication Committee in October 2008, the political commentator, Jackie Ashley remarked.

*People will tell you privately that whenever they get a freedom of information request they groan, it is an 'Oh dear, these people are coming after us.' I do not know how you ever change that culture, I think it is very difficult. Although it is better now than it used to be, there is still that culture of it is our information and I am doing you a favour if I am telling you and I will probably try and delay giving you information until it is a bit too late anyway. There is a lot of that goes on.*³⁵

Amending the Act

The Act was amended in July 2008, to exclude MPs' addresses from the scope of FOI requests and to prevent the disclosure of any regular spending on travel or future travel arrangements. These changes were justified as being necessary to protect MPs' security resulting from the reluctant decision by the Speaker of the House of Commons to publish the Additional Costs Allowance claims for the second homes of fourteen named MPs following a High Court judgment.

In January 2009, as the House prepared to publish details for such expenses for all members, plans were laid by the Leader of the House, Harriet Harman to pass a Parliamentary Order exempting this information from the Act.³⁶ It was proposed instead to publish summaries of expenditure by individual MPs. However the move was abandoned the day before the vote when the government realized that it did not have the support of the Conservative and Liberal Democrat parties in Parliament.

Ministerial veto

On 24 February 2009 the Secretary of State for Justice Jack Straw announced to the House of Commons that he had decided to use the power of veto, under section 53 of the Act, in connection with a request for information about two Cabinet meetings which took place in 2003 when the legal case for going to war in Iraq was up for consideration.

The request by Dr Christopher Lamb, who is not a journalist, had been considered by the Information Commissioner in 2007 after it had been refused by the Cabinet Office on because of the need to protect the confidentiality of policy discussions between ministers in Cabinet.

³⁴ First Minister's Questions, Northern Ireland Assembly, 8 Oct. 2007.

³⁵ Evidence, House of Lords Communications Committee hearing, 8 Oct. 2007.

³⁶ FOI (Parliament) Order 2009.

In his statement to the House of Commons on 24 February 2009,
Mr Straw stated:

*We have done much to meet the public interest in openness and
accountability. But the duty to advance that interest further cannot supplant
the public interest in maintaining the integrity of our system of government.*

3. Fishing for information

After four years of Freedom of Information researches, some techniques and approaches particular to journalists have become evident. There is no FOI journalists' clique as any journalist may use the Act in the course of research but there is definitely a club of investigative reporters who have made themselves adept and have the stories to prove it. To them the obstacles created by reluctant officials have become familiar.

Some have mounted challenges through the appeals process and have even found their requests subject to adjudication in the High Court. Others have preferred to mine for nuggets of information, approaching public bodies from police forces to government departments using a mixture of guile and persistence, amassing small pieces of information to build a larger construction.

The basics

There is almost certainly no right way to proceed in the task of extracting information, although there are many wrong ways. But speaking to a number of practitioners I have been able to explore different approaches to FOI which have their respective contributions to the journalist's palette of information.

Starting with the basics, this is how some practitioners have summarized the necessary conditions for a competent FOI inquirer

- a capacity to formulate well phrased requests;
- an understanding of what is likely to be released;
- a knowledge of what information is held and by whom;
- an understanding of what is going to be useful.

Fly-fishing versus trawling

Two opposite paradigms for gathering information have been portrayed to me by one campaigner as that of the 'fly-fisherman and the trawler'. The fly-fisherman knows precisely what information or detail he is looking to secure and uses skill and precision to locate it and extract it. The trawlerman on the other hand casts a net in the form of a general request for information relating to a topic area of interest and then sifts the catch to see what comes to light.

This latter approach has attracted a fair measure of criticism from those in authority who have tended to portray it as unconsidered delving and little more than a means to gather information which might or might not prove to be of interest.

Undoubtedly the fact that some journalists have made copious use of the Act reflects the fact that it is the work of moments to put in a request. A study carried out for the Department of Constitutional Affairs in 2006 estimated that across central government and the wider public sector, journalists accounted for at least £3.9 million, or 16 per cent, of the total costs of FOI delivery. Lord Falconer as Secretary of State complained in 2007 to journalists, editors and producers:

*Recognise that FOI comes at a cost to other public services. Work with public authorities to produce requests that are precise and targeted – which will result in the release of information of benefit to the public.*³⁷

In 2007 as the costs of administering FOIA were debated as part of a consultation process related to the fee regime for inquiries, the Information Commissioner published a Charter for Responsible Freedom of Information Requests.³⁸ Its first point was: does the request impose a significant burden on the public authority in terms of expense or distraction? The Scottish Commissioner Kevin Dunion issued a similar plea to journalists.³⁹

Superficially there is a clear contrast between the skilful forensic approach of the fly-fisherman and the indiscriminating dragnet of the trawlerman. But the evidence in terms of journalistic results, i.e. the number of published stories and their importance, is that an over-selective use of the Act can be a mistake. In essence it is easy for a journalist to suppose he knows what the telling information might be and where it is to be found, when in fact his limited knowledge can lead him to miss crucial or more interesting information which is only contingently related to his initial research.

During 2006 numerous FOI inquiries were made by journalists into the relationship between the Northern Ireland minister, Ian Paisley Jnr, and the businessman, Seymour Sweeney. The *Belfast Telegraph's* David Gordon points out that it was the accidental discovery of rental expenses claimed by Assembly members for their constituency offices, of which the Paisleys' (father and son) was by far the most expensive, and not the suggestion of lobbying for Mr Sweeney's projects, which led to Mr Paisley's ministerial resignation.⁴⁰ It cannot be ignored that seemingly 'pointless' information can contain the detail which leads to something larger and more salient, such as evidence of a conflict of interest.

Moreover condemning the trawlerman for wasting the time of officials who could otherwise be occupied in more productive researches ignores the fact that officials can attempt, on occasions, to block or delay the release of information if they sense an ulterior motive behind the inquiry. As a result some of the most newsworthy stories gathered under FOI have emerged from what can only be described as a 'trawl' and the most capable reporters have learnt to avoid revealing what they know so as not to alert officials to their purpose.

At the same time it is also true that an insufficiently specific request for information can lead to a deluge of information in which the salient detail is hard to detect.

³⁷ Speech by Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Falconer of Thoroton, 21 March 2007, Lord Williams of Mostyn Memorial Lecture.

³⁸ 'It's public information', ICO Charter for Responsible Freedom of Information Requests, 2007.

³⁹ 'Dunion Appeals to Journalists to Show Restraint', AllmediaSCOTLAND.com. Article quotes from *Sunday Times Scotland* (March 2007).

⁴⁰ 'Why Northern Ireland's Journalists don't Look So Lazy Now', 'Journalist', *NUJ Journal* (April 2008).

Widening the net

How targeted does an inquiry have to be in order to be useful? I want here to explore the case for the more generalised approach. A FOI inquiry can typically begin with quite a general question. 'How much money is Rutland Constabulary earning from its new speed cameras? Have road accident rates been affected in the same period?' 'Ex-Minister M has just joined the board of "Healthy Solutions plc". Did he meet the CEO often as a minister? How frequently do Health & Safety officials check hospital kitchens in Nottingham?'

From an official view it could be argued that if a journalist is sufficiently interested in finding answers to questions such as these, he needs to explore all available information, consider which aspects of the question remain unanswered and whether those aspects are themselves interesting, and then – and only then – formulate a request under FOI. Indeed section 21 of the Act entitles officials to refuse an inquiry if the information is accessible 'by other means'.

But there is abundant evidence that stories can come to light through the sifting of bundles of information provided on the basis of unspecific requests.

McLetchie's taxi ride to resignation

Paul Hutcheon, Scottish political editor of the *Sunday Herald*, is unquestionably Captain of the FOI trawlermen. In the first year of the Act he was responsible for 40 per cent of all requests to the Scottish executive. He was also responsible for the first significant political scalp using FOI when his investigation into MSPs' taxi expenses forced the resignation of the leader of the Scottish Conservative Party, David McLetchie, in 2005.

The seed of the inquiry lay in accounts published by the Scottish Parliament of expenses claimed by MSPs. In McLetchie's case this showed him to have claimed unusually high travel expenses for an Edinburgh-based MSP. Prompted by this piece of information, Hutcheon then set to work asking for figures for McLetchie's expenses claims over a five-year period. The information was only supplied in a redacted form and it took appeals to the Scottish Information Commissioner before the information was supplied containing details of destinations, in particular to his law firm's offices. The Parliament had sought to claim that this information could threaten Mr McLetchie's personal security. When the details were published it emerged that McLetchie had claimed £11,000 in taxi expenses from 1999 to 2004, of which £5,000 had no details of departure or destination, in breach of parliamentary rules. Some of these were for journeys to his legal firm.

The citation for his award of Scottish Political Journalist of the Year in 2006 commended Hutcheon for 'having pored through McLetchie's voluminous expense forms to unearth the anomalies that triggered the Tory leader's downfall'. It was also noted that 'It took four months of work before the *Sunday Herald* could publish the first story and another four months of follow-up stories before McLetchie resigned.'⁴¹ So while requesting information and gathering it can be relatively straightforward, the business of examining it can be very time-consuming.

While few other journalists would adopt Hutcheon's omnivorous approach, many accept that a general request for records on the basis of little more than curiosity can yield dividends. Rob Evans of the *Guardian* makes regular use of the Act as an investigative journalist. 'We do a lot of fishing. If

⁴¹ Citation, Scottish Press Awards 2006 reported on www.yrpk.org 19 May 2006

I'm looking into an issue and I know there's a report held somewhere, then I'll ask to see it. You won't know what's in it until it comes.'⁴²

Sifting the catch

A front-page story in the *Guardian* on 23 March 2005, headlined 'Royal Farms Get £1m from Taxpayers',⁴³ co-authored by Evans and David Hencke, was the result of a request to the Rural Payments Agency. Originally Evans proposed to ask for the names and addresses of the 100 farms in receipt of the highest annual payments under the Single Farm Payment scheme which provides subsidies from EU funds to farmers. Hencke persuaded him to ask for all the information. To his surprise the RPA provided everything they had asked for, including invoices, in weeks. It was a classic 'fishing' expedition.

Other journalists have found it necessary to have little more than a working hypothesis to initiate a FOI inquiry which does yield useful results. In 2008 Social Service departments in local authorities in England and Wales were approached by Matthew Davis⁴⁴ of John Connors Press Associates of Lewes, Sussex. He wanted to know how many children had been placed in care on the grounds of parental neglect as a result of their children's obesity. The inquiry was stimulated by one report of such a decision being taken by a local authority.

The resulting story, '7 Obese Kids Put in Care', bylined by Ryan Parry, in the *Daily Mirror*, detailed cases of young children placed in care because their obesity was deemed morbid. A local authority spokesman said: 'Councils would step in to deal with an undernourished and neglected child, so should a case with a morbidly obese child be any different?' Included in the information provided by local authorities was the revelation that the youngest was aged 6 and now in the care of Derby City Council.

This prompted BBC Radio Derby to run its own version of the story, including more information from the Council, giving the story a local dimension and adding to the circulation the story received. There was no inside information behind the inquiry. The story resulted simply from asking a pertinent question under FOI and sifting the results.

Building a case

A pertinent question directed at the appropriate authorities can on occasions yield useful results. But more commonly journalists in search of a scoop will use FOI to build a case. Typically, if a journalist is alerted by an informant over an issue of public interest it may be impossible to publish the 'tip off' for reasons of confidentiality or to rely on it as more than mere anecdote. One way to buttress the information will be to gather the circumstantial evidence which demonstrates that one reported incident can be shown to be an example of a repeated failing.

Nicola Stanbridge of BBC Radio 4's *Today* programme was tipped off that patients in Special Hospitals, some of whom posed a threat to public safety, were allowed to remain at large by health trusts who failed to alert the police to their absconding. Her inquiries were prompted by the account of Darren Harkin, a convicted killer, who escaped from Hayes Hospital, a secure private hospital near Bristol, and raped a 14-year-old girl in 2007. Posing a series of questions to all NHS Trusts in England and Wales about escapes, she

⁴² Interview with author, Oct. 2008.

⁴³ *Guardian* (25 March 2005).

⁴⁴ Matthew Davis's remarkable insights into using the FOI Act are detailed in the next chapter.

was able to report after five months that ninety-four people had escaped from medium and low security psychiatric units in 2007, in contrast to five absconders from prisons.⁴⁵ In essence the FOI research had allowed her to demonstrate that one serious incident was evidence of a more systemic failure of security.

Local journalism has also benefited from FOI. Deborah Wain of the *Doncaster Free Press* jointly won the Paul Foot Campaigning Journalism award in 2007 for an expose of mismanagement and wasteful spending by Doncaster College and Doncaster Metropolitan Borough Council in a £100m government-funded project designed to transform education in the district. Her starting point was information from an insider at the college.

It was a complex jumble of complaints about the way the further education centre had been managed. As a part-time member of a small editorial team, I am already stretched juggling news and features, and the temptation was to sling the missive – erm, I mean file it – in my creaking in-tray. Actually that’s exactly what I did until word reached us via another channel that the college had run up a sizeable deficit. Ah, here was a tangible starting point.⁴⁶

Her next move, using FOIA, was to request a copy of an internal report by the Learning and Skills Council into the crisis. Further use of the Act to follow up information in the report set her on the way to assembling her investigation headlined, ‘A Lesson in How to Spend (Other People’s) Money’.

This might be considered a classic example of dogged journalism relying on inside information. Where FOI has contributed important new elements is in providing official insight in the form of documents which have both hardened up the story and suggested new lines of questioning.

Unsurprisingly Wain is an enthusiast: ‘Thanks to the Freedom of Information Act, there are currently some easy pickings for journalists who are willing and able to seek them out.’⁴⁷

Net or fly?

Is this an advertisement for trawling or fly-fishing for information?

Ultimately the distinction may be lost on a journalist armed with a hunch for a story. As Rob Evans of the *Guardian* puts it, ‘If you put your net out you don’t want it to be so wide that you’ve asked for and get too much. On the other hand you don’t want it to be too narrow that you miss stuff.’⁴⁸

A number of journalists I have spoken to are sceptical of the value of FOI researches, except as part of a larger inquiry, because of the hours of reporter resources they can consume and the uncertainty of the outcome in terms of headline value. (In contrast it is notable how many campaigning organisations, political parties and single-interest groups are prepared to invest the time in FOI inquiries in the hope of interesting journalists.) But to a core of investigative journalists the Act has shown itself to be an opportunity to burrow into the corridors of power. In the hands of a deft inquirer the Act provides a probe into dark and unseen areas.

⁴⁵ ‘Today’, BBC Radio 4, 9 Sept. 2008.

⁴⁶ ‘FoI and Tip-offs Made our College Exposé a Class Act’, *Press Gazette* (5 Nov. 2007).

⁴⁷ Deborah Wain, ‘Communities Need Local Heroes’, *Guardian* (22 Oct. 2007).

⁴⁸ Interview with author, Oct. 2008.

Jon Ungood-Thomas, senior reporter of the *Sunday Times*, uses it as an instrument of research on a continuing basis with inquiries running all the time. He estimates he will get two stories a week from these inquiries, not all of which will find their way into print. Instead he archives his researches creating a library of inside information which can be brought to bear to give more substance and direction to inquiries of larger interest. 'You may not make a story now but you may get a story out of it at some point', he says. In time a trickle of information in time turns into a channel. And once that channel has been established the information will continue to flow. 'Once information is given to you on one occasion then the precedent is set and you can go back for more and it becomes hard for them to refuse.'⁴⁹

A waste of time?

Are these journalists and others like them guilty of wasting officials' time? The question might not be considered a serious one were it not for evidence that those on the receiving end of requests for information do, on occasions, make the charge. In 2007 the Scottish Information Commissioner Kevin Dunion expressed his concerns that journalists might be soiling the FOI nest:

There's no doubt, to be frank, that journalists are the group that most disgruntle public officials. One, because of the volume of information they request. And two, because they get the information, decide there's no story and make no use of it whatsoever – so the official thinks that a lot of public expense has gone into finding the information. I believe that journalists are the backbone of any FOI regime. But I would like to see journalists making use of the information in a way that engages with the genuinely difficult dilemmas that governments face.⁵⁰

It is perhaps hard for journalists to accept that their inquiries should necessarily lead to publication or broadcast, whether or not their discoveries are interesting or surprising. It is after all part of a journalist's day-to-day work to 'waste' other people's time by asking questions which may yield little more than background briefing. It is also difficult to imagine that journalists, and other users, might forgo a legal right to make inquiries under FOI to avoid inconveniencing public servants. Once a right is enshrined in law it is impossible to require citizens to use it sparingly.

What the concerns of Kevin Dunion and other supporters of the 'Public's Right to Know' express in my view is an anxiety that the mission of Open Government which they support might be compromised because of the expense it imposes on the public sector. In 2007 while the Blair government considered a new regime for charging fees for inquiries there was disquiet that FOI in Britain might wither after a promising period of fruition. Despite the setting aside of this new regime these worries remain.

Certainly the view at the Ministry of Justice is that FOIA was not invented for journalists but for all members of society. Although research indicates that the costs of servicing journalists' requests for information are higher because they are more persistent, requiring reviews when disclosure is refused and challenging the application of exemptions, no more than 15 per cent of the overall costs to government of FOI can be laid at their door. And

⁴⁹ Interview with author, Oct. 2008.

⁵⁰ 'Dunion Appeals to Journalists to Show Restraint', AllmediaSCOTLAND.com. Article quotes from *Sunday Times Scotland* (March 2007).

on the evidence to date, through their stories and disclosures journalists using FOI can claim to have landed some decent-sized fish.

4. 'The rules have changed':

How one journalist has made the Freedom of Information Act work for him

You won't find Matthew Davis's byline on many articles in the British press. But he is probably the most prolific user of FOI in British journalism today. Discoveries he has made through the Act are regularly recounted in local and national newspapers. He discovered that Terry Wogan was paid by the BBC to host the Children in Need charity appeal. He found out the numbers of children being taken into care because of their obesity. To him the Act is the 'best thing which has happened in my twenty year professional career'.

Mr Davis worked for many years for John Connors Press Associates in Sussex but has now established his own press agency DataNews based on Freedom of Information inquiries. Why, when so many Fleet Street reporters lament the obstacle course of the FOI inquiry process, is he so enthusiastic?

The key is the expansion of news management in the public sector in the last decade which has, in the eyes of many journalists, separated them from those in the know. 'The relationship has been eroded by the mushrooming of press officers and information officers', says Mr Davis, pointing to a tenfold increase in the staffing of Sussex Constabulary's news department as an example. 'Now if they say, I am not prepared to comment on that, you don't have to deal with them anymore. You don't have to take No for an answer. You can put in a FOI request. It's dug a dirty big tunnel under them.'

And even if he is critical of the time it may take to get the Information Commissioner to back a journalist's request when it has been refused, he is grateful that the process for an appeal exists thanks to the Act. Armed with this weapon of disclosure he has created hundreds of stories which he has sold to newspapers. It's fair to say that he is not interested in planting the 'killer' question which will unmask a 'conspiracy at the heart of government'. As a freelancer relying on having goods to offer to his clients he goes where the information is likely to be forthcoming, even if it takes some time to achieve a result. His journalism is therefore conditioned by the ease of access to information via FOI. 'I'm more interested in knowing how many people have been fined for using a mobile phone in the car', he admits.

A sharp and inquisitive eye

His field of interest could be described as the public and its interaction with public authority. Typically an incident or a report in the local press will trigger a query about how common or frequent this example might be on a wider basis. The task then is to formulate the right set of questions and pose it to the relevant authorities. In some cases a single well-directed inquiry will reveal enough to write a story. More commonly a request for information, for example to a national agency such as 'NHS Blood & Transplant', will elicit a batch of data which leads to questions to individual hospitals or health trusts which is focused on specific incidents or procedures, in turn producing the material for a story; for example, 'Transplant Patient has NEW Kidney Removed After NHS Computer Blunder'.⁵¹

It takes a sharp and inquisitive eye to spot the unusual or out of the way but it requires a very particular know-how in the phrasing of questions

⁵¹ *Mail on Sunday* (20 Jan. 2008).

and the background knowledge of what information is likely to be recorded and where to get consistent results under FOI.

Mines of information

One of the less well recognized developments in making information available under FOI is the duty under the Act for public bodies to produce and use Publication Schemes. These are requirements to publish information about the discharge of their responsibilities without the spur of an inquiry from a journalist or member of the public.

Matthew Davis points to the releases of information by the Ministry of Defence about compensation payments made to service personnel and civilians as an example of good practice, yielding mines of useful information. He based one report on the payment of compensation because of nuisance from low-flying aircraft on information which had simply been uploaded on the MoD's website without publicity or a press notice.

This reinforces a simple but infrequently recognized maxim, that to find the facts that make a story you have to know where to look. You have also to insist on getting those facts.

One development which will make FOI even more fruitful as a research tool in Mr Davis's view is the expansion of databases held by public bodies and the recording of data which is now standard for any centre or service with an IT system. Almost any enquiry to a public office appears to involve the recording of personal data. Although personal information such as name, address and age cannot be revealed under the Data Protection Act, the statistical record of this data can be accessed if it is held by a public authority.

As a result, as Matthew Davis points out, hospitals and health trusts will have information on, for example, patterns of pressure on Accident and Emergency Departments. 'If I want to know how many 16 year old girls have been treated in A&E for acute alcohol poisoning, that information can be found.'

Even if the authorities do not exploit this data for their own purposes, under FOI they can be required to access it in response to an inquiry. A decision in August 2008 by the Information Tribunal required the Home Office to run a programme on data concerning work permits issued by named employers in the IT sector even though the Department had not itself accessed the data. The Tribunal dismissed the argument that to use available programmes in response to the inquiry would exceed the maximum non-chargeable cost of £600. It concluded that 'There is in reality no distinction between "information" held by a public authority and "raw data" held on a data base.'⁵² This means that if information is held by public authorities or agencies then it must be disclosed unless it is illegal to do so or is exempt under FOIA.

For Matthew Davis and anyone who wants to emulate his style of journalism, FOI really has changed the rules.

⁵² Information Tribunal Decision EA/2008/0027, 15 Aug. 2008.

5. Getting in on the Act

Awareness of FOI among the public is gradually increasing, largely through its use in news reporting, but the number of requests for information is not growing commensurately. It seems likely that for the next few years the most systematic use of the Act will be journalistic. But that does not mean that journalists themselves will necessarily use the Act in greater numbers.

Increasing use is being made of the Act by campaigning organisations and political parties. Friends of the Earth and other environmental campaign groups have been assiduous for years in trying to obtain information both about policy-making and statistical data, for example about the performance of public bodies in improving their efficient use of fuel. These researches have been linked to campaigns but the importance of publicising them has led organisations to share their discoveries with journalists. Since FOI has been introduced the volume of these 'exclusives' has noticeably increased.

To take one example from 2008, Greenpeace obtained documents from the Department of Transport revealing a scheme under discussion between it and DEFRA to water down or delay a European air quality directive due to come into force in 2010, so as to avoid creating difficulties in the planning process for a proposed third runway at Heathrow airport. The notes were offered to a freelance journalist with strong FOI credentials for his evaluation. He wrote up the story and offered it to the *London Evening Standard* where it made the front page.⁵³ Essentially the journalist had been offered a 'free lunch', in that none of the time taken to unearth the information had been his. Greenpeace had effectively acted as unpaid researchers.

'News on a plate'

Environmentalists' use of the Act has been mirrored elsewhere in the voluntary sector. A survey of voluntary and community organisations in 2006 placed getting information 'to inform campaigning activity' as the second most important purpose of FOI (27 per cent) after discovering 'how public bodies arrive at funding decisions' (47 per cent).⁵⁴ Their use of the Act as they become more familiar with its workings appears to be on the increase.

New civic campaigning groups like the Taxpayers' Alliance have made copious use of the Act in trying to identify examples of wasteful expenditure by public bodies. The discoveries they have made have invariably found their way in to the newspapers through an aggressive use of press releases coupled with research findings. Matthew Elliott, the Chief Executive of the Alliance explains the approach his organisation has adopted to raise its profile through FOI:

What we've tried to do since 2004 is understand how the media works, so we've tried to give news stories to journalists on a plate. . . . We use the Freedom of Information Act and a team of researchers to get fresh figures from government and local councils, which we package up into brief, media-friendly

⁵³ 'Pollution Law Delay for Heathrow Expansion', *Evening Standard* (28 Oct. 2008).

⁵⁴ Matthew Gitsham, Chris Gribben, and Belinda Pratten, *Called to Account: The Impact of the Freedom of Information Act* (Ashridge Centre for Business & Society and NCVO: available at [www.ashridge.org.uk/Website/IC.nsf/wFARATT/Called%20to%20account/\\$File/CalledToAccount360.pdf](http://www.ashridge.org.uk/Website/IC.nsf/wFARATT/Called%20to%20account/$File/CalledToAccount360.pdf))

*research papers, complete with eye-catching headline figures to give reporters a ready-made top line.*⁵⁵

In an age of cutbacks in newsrooms the offer of new, original material on a plate is proving very hard to resist. The investigative reporter, Paul Lashmar sees this use of the Act by campaign groups as taking the place of the work that readers might have expected journalists to do themselves in the past.

*Journalists are often now so overstretched that a lot of work that used to be carried out in the newsroom is carried out by groups like the TPA. What you see now is journalists who are grateful for news which is almost perfectly packaged to go into the paper with a ready top line. In that sense, journalism is becoming very passive.*⁵⁶

Party politics and FOI

One reason that the Act is becoming more politicised is its increasing use by politicians. In its first week in January 2005 members of the Shadow Cabinet filed 130 requests. There is evidence that parliamentary researchers are making greater use of the Act to supplement and in some ways supplant the use of the parliamentary question, which has been the traditional means for MPs to obtain official information about matters which are of concern to them.

Political researchers from different parties agree that FOI is the first choice when it comes to obtaining information from public authorities like the police and health trusts. But its use through questions directed at government departments has proved less productive, as MPs and their researchers encounter the same objections over revealing matters related to policy-making as journalists and other inquirers.⁵⁷ One of the main advantages of using FOI is that the information they receive from public authorities is comprehensive, factual and authoritative, whereas with PQs the information provided through government departments can be highly selective.

The results in some cases have proved highly effective. One example is of a major police operation at the Kingsnorth power station which had been the site of a week-long 'Climate camp' protest in July 2008. Police were accused of using aggressive tactics, confiscating everything from toilet rolls and board games to generators and hammers. But the Home Office Minister, Vernon Coaker, justified the cost and scale of the operation to the House of Commons by claiming that seventy officers had been injured in the course of their duties.⁵⁸

A Freedom of Information inquiry by David Howarth MP (LibDem) to Kent Police revealed that only twelve injuries by the police had been reported, none of which had occurred as a result of contact with protestors. They included a possible wasp sting and the effects of the summer heat. The information was offered to the *Guardian* journalist, John Vidal who published it as a news story.⁵⁹ When cornered by another MP on the floor of the House after the article had been published, the minister was obliged to retract the

⁵⁵ Jamie Merrill, 'How the Taxpayers' Alliance is Making Headlines', *Independent* (4 Aug. 2008).

⁵⁶ *Ibid.*

⁵⁷ Interviews with Liberal Democrat researchers and others.

⁵⁸ House of Commons: Oral Answers to Questions, Home Department, 27 Oct. 2008 (Hansard col. 549).

⁵⁹ 'Those Kingsnorth Police Injuries in Full: Six Insect Bites and a Toothache', *Guardian* (15 Dec. 2008).

claim. Again journalism was the beneficiary of research carried out by a third party under FOI.

MPs or party spokesmen may at other times present their discoveries through press releases for general distribution. Here use of the Act is more overtly political. To take one example: in December 2008 the Conservative Party issued a release headed 'Gove: Police Called into Schools 7,000 Times to Deal with Violence.'⁶⁰ It was based on a FOI survey of thirty-nine English police forces – of which twenty-five had given information – and listed the number of times police officers had been called to school premises in response to an 'attempted or actual violent crime'. The survey was given wide coverage in newspapers, nationally and locally as well as on television and radio. Although the information listed in the Notes to Editors section was presented fairly and in detail, the release was clearly tied to the party's policy on dealing with violence at school. The Shadow Secretary of State for Education, Michael Gove, quoted in the release, said that the information showed that

'(teachers) do not have sufficient powers to nip discipline problems in the bud. We want to give teachers more authority to remove disruptive and violent children from the classroom and to tackle problems of bad behaviour before they spiral out of control.'

The measure of 'success'

One of the most assiduous users of FOI in Conservative ranks is the Shadow Health Secretary, Andrew Lansley, who has conducted researches through the Act to highlight deficiencies in the health service, including a shortage of midwives and a failure to recoup NHS costs from foreign patients. Researchers working for him estimate that it takes four days to distil and present the results of FOI inquiries which might involve requests to all 171 hospitals in England and Wales, as most data is not held centrally.⁶¹ This is in addition to the time taken to write off for information and follow up on requests.

The likelihood of media interest is held to be the most important factor in determining the type of information requested. It is rare for such researches to be used principally to enhance or buttress policy detail. Their success is judged on the basis of the level of media response and the number and prominence of articles or broadcast items resulting. The launching of the findings is often also coordinated with media organisations to help gain the most productive outcome in terms of publicity.

Although these political researchers consider they are doing journalists' work for them, at least as far as carrying out researches and processing the results is concerned, the response of journalists in mainstream media organisations to these releases, in the experience of the research workers, cannot be taken for granted. It is rare for press releases to be recycled without an attempt to test the information by for example checking the facts with hospital trusts.

⁶⁰ Press Release, Conservative Party, 27 Dec. 2008: ref. 2261/08.

⁶¹ Interview with researcher, Conservative Central Office, Jan. 2009.

FOI and 'spin'

Are journalists who feed off exclusives from activists and politicians relinquishing the use of FOIA to third parties when they should be asking the questions themselves? Plainly the conflicts of interest which arise from journalists retailing these kinds of 'scoops', for which they are not the originators, are not new. Correspondents traditionally rely on inside information from sources who divulge it, often for their own ends. Arguably a story from a political party or pressure group which originates from FOI research is less immune to being used for 'spin' since the facts involved have a documentary basis independent of the source.

Given the financial pressures which are becoming ever more a feature of British journalism, comment and reactive news reporting are likely to become ever more dominant in terms of coverage, while investigation and pursuit of the inconvenient truth may become ever more specialized. Certainly on documentary evidence the numbers of journalists habitually using FOI remains small.

The increasing use of the Act by pressure groups and political parties also poses questions over the purpose of Freedom of Information rights. The government still maintains that the Act is 'not intended for journalists'. The argument was first made by Lord Falconer in 2006 but I heard it repeated by officials at the Ministry of Justice in 2008. On the evidence of the growing use of FOI by pressure groups and voluntary organisations, it is not impossible to imagine a future, in an age of reducing newsrooms, in which the predominant use of FOI for journalistic purposes is via researchers acting for campaigners.

6. Cat and mouse

News is a perishable commodity and delays in obtaining information can undermine a journalist's efforts to 'get the story'. Correspondingly journalists' commitment to using the Freedom of Information Act will be diminished if the chances of obtaining the timely release of information are reduced. At first glance the sheer number of stories which have come to light through Freedom of Information makes a positive case for the workings of the Act.

But while information has flowed in response to requests from journalists and other inquirers, some have argued that there has been systematic obstruction by some public officials either to delay the release of information or to prevent its release altogether.

These journalists suspect that their inquiries are treated differently from other inquirers even though the implementation of the Act is meant to be 'purpose-blind'. Some evidence has emerged to support this contention.

The clearing house

A 'Clearing House' for FOI requests was created in Whitehall in 2004 to ensure consistency in departmental responses as well as efficient management of inquiries. This system of coordinated response-making is managed by the Cabinet Office and based on an obligation on the part of departments to refer requests on if they meet criteria laid in published procedural guidance.⁶² According to the Department of Constitutional Affairs in 2005 only 10 per cent of all FOI inquiries to government departments were referred to the Clearing House.⁶³ Since the criterion of 'high likelihood of media interest' is sufficient to prompt such a referral it follows that media inquiries are significantly more likely to be handled via this route and with greater consideration. Anecdotal evidence from former civil servants supports this.⁶⁴

The inadvertent release of an internal email by the Home Office in 2008 revealed a system for notifying ministers of releases resulting from journalists' inquiries but not from other inquirers.⁶⁵ The explanation from the Ministry of Justice that ministerial notification merely relates to the 'handling' of disclosures and not the processing of inquiries does not provide complete reassurance.

Separate revelations point to an element of political control over FOI in Whitehall which is likely to be well established. Lord Turnbull has told *The Times* journalist, Rachel Sylvester that he would spend an hour a day when he was Cabinet Secretary deciding which documents should be released in response to FOI inquiries.⁶⁶

⁶² Department of Constitutional Affairs, *Clearing House Toolkit* (May 2008), Annex B. Available at: www.dcms.gov.uk/Images/freedom_of_information/3014CHToolkit.pdf

⁶³ House of Commons Select Committee on Constitutional Affairs, *Seventh Report* (2006).

⁶⁴ Interview with former Treasury official.

⁶⁵ Martin Rosenbaum, 'Ministers Approve FOI Answers', Open Secrets blog, 10 Dec. 2008.

⁶⁶ 'The Memo Martyr was Not the Real Target'; *The Times* (2 Dec. 2008).

Exemptions and delays

A common perception by journalists targeting Whitehall for information about issues relating to central government is, 'The closer to power you get, the more obstructive they are'. And the evidence of the more contentious and disputed cases points to a standard gestation period of over two years before disclosure, where that is the outcome.

It is apparent when one examines the grounds cited by departments such as the Cabinet Office in its dealings with the Information Commissioner that various clauses can serve to impede the release of information and that these may be altered or substituted in the course of correspondence and negotiation. Examination of the decision notices by the Office of the Information Commissioner (ICO) supplies chapter and verse on the propensity of officials to use exemptions in the Freedom of Information Act to prevent disclosure.

Is this being done tactically or simply as the result of civil servants 'doing their job'? Background information in the decision notices published by the Information Commissioner shows in case after case that the exemption clauses cited are often many in number, applied blanket-style, and have the effect of creating layers of defence, each of which has to be considered in its turn, thus adding to the complexity of the process and the time needed to complete it. This strategy may be most commonly applied in Whitehall but its influence can also be seen lower down the tree elsewhere in the public sector.

A toolkit for obstruction

One particularly blatant case concerns efforts by the Housing Corporation in May 2005 to ensure that potentially embarrassing information about an IT modernization programme would not be revealed to journalists or other inquirers. The programme, which began in 2003, had a projected cost of £17m but had run into serious technical problems and delays. The Corporation's Freedom of Information Officer, Matthew Sabourin had been asked by the newly appointed chief executive to approach the Government's legal services department, the Treasury Solicitors, for advice on how to deal with requests for information under FOI about the programme. This was done at the same time that a review began of the project by a firm of external consultants. The new Chief Executive of the Corporation, John Rouse, was unhappy at the prospect of its own internal findings becoming public knowledge. In a memo which was sent to executives Mr Sabourin detailed the advice he had received.⁶⁷

First to be considered was section 36, where disclosure 'would prejudice the effective conduct of public affairs', although this exemption, it was suggested, would probably be a last resort.

Next he explored section 40: 'If individuals are specifically named in the report, then such information will constitute personal data for the purposes of the data protection act, and possibly even sensitive personal data, if it clearly links individuals to the alleged commission of an offence.' But he had been advised that the report could still be published in a redacted form.

The clause (section 43) on commercial confidentiality offered the possibility of an exemption but depended on whether the Corporation had made an agreement with Elonex, the contractor, or whether one could be

⁶⁷ Bill Goodwin, 'Revealed: Strategy to Prevent FOIA Disclosure', *Computer Weekly* and FOIA Centre, 17 April 2007.

implied, to keep information confidential. If that was not the case, however, all was not lost. He suggested:

The corporation might want to consider at this stage, making a decision, about whether it intends to publish the report in its entirety, as this opens up the possibility of using Section 22 of the Act. This section provides an exemption from disclosure for information intended for future publication.

In the event the report was made available in March 2008 after seventeen months of argument and refusal before a decision could be arrived at by the Information Commissioner.

The memo contrasts with a letter sent by the corporation's chief executive to the Commissioner, Richard Thomas highlighting its 'proactive approach in trying to be as open and transparent as possible'.⁶⁸ It is hard to interpret this document other than as a toolkit for preventing disclosure under FOI. It indicates deliberate guidance from central government to public sector bodies on how to avoid embarrassing disclosures.

Playing for time

There is also evidence of a tactic of delay relying on the multiple stages of the appeal process, each requiring several months, to delay disclosure until the 'sell-by' date has occurred. A public body is obliged to conduct an internal review if it refuses to disclose information on request but the process has no time limit,⁶⁹ even though an overlengthy period can trigger an appeal to the Information Commissioner. Appeals to the Information Commissioner in turn in contested cases can easily exceed one year. Currently his Office cannot begin consideration of complaints before six months owing to a chronic backlog. If the decision of the Information Commissioner is not accepted, an appeal to the Information Tribunal, which acts as a court of appeal, can take a further nine months. So if an official wishes to block the release of information he has the means to delay it for over two years before approaching the High Court. One example of this tactic is fairly clear-cut.

In April 2005 the Liberal Democrat peer, Lord Avebury asked the Cabinet Office for information about the frequency and timing of telephone calls and other contacts between Tony Blair and Rupert Murdoch in the run up to the Iraq war in 2003. His request was turned down under section 36(2) on the grounds that disclosure would inhibit the 'free and frank exchange of views for the purposes of deliberation' or 'prejudice the effective conduct of public affairs'.⁷⁰

After much negotiation and discussion the Information Commissioner ruled in July 2006 that this information should be provided. In response the Cabinet Office refused to accept the ruling and set about lodging an appeal with the Information Tribunal. But before the Tribunal could meet, the Cabinet Office underwent a change of heart and released the information in June 2007. It was the day after Tony Blair stood down as Prime Minister. A

⁶⁸ Ibid.

⁶⁹ A practice recommendation to the Department of Communities and Local Government by the Information Commissioner FPR0189170 revealed that four internal reviews were incomplete after 400 days on 22 Aug. 2008.

⁷⁰ Press release, Bindman & Partners: 'When Murdoch Met Blair – Information Released', 17 July 2007.

Cabinet Office spokesman said: 'We decided it was in the public interest to release it.'⁷¹

There are other examples reported to me by journalists of information being made available after a period of delay, once the critical moment in terms of news value has passed.

The chilling effect

It would be naïve not to suppose that in some of the cases which appear to show a strategy of delay at work, the stimulus to block disclosure is fundamentally a concern about political embarrassment. We know enough about news management at No. 10 Downing Street to recognize that information and its release is a crucial tool of the art of politics. But there is an additional element behind concern in the Cabinet Office at the potential for unwelcome disclosure through FOI. At its heart is the contention that the disclosure of information related to policy-making in one instance would have a 'chilling effect' on Civil Servants inhibiting them from offering candid or potentially contentious advice to ministers in case in future it could be revealed with possibly embarrassing effects. The same effect could inhibit ministers as well.

Evidence given by the Cabinet Office to the committee under Sir Paul Dacre, which considered reform of the 'Thirty Year Rule' governing the release of confidential Cabinet papers, stated that 'If ministers cannot confidently expect their deliberations on policy will benefit from a high level of protection against future disclosure, they may well be reluctant to put forward dissenting and divergent views.'⁷²

Examples of the 'chilling effect' taking practical effect in this way are hard to find. But there is evidence that the Freedom of Information Act may be having unintended consequences as a result of such concerns in the upper echelons of the Civil Service. Rachel Sylvester noted in December 2008:

Even in e-mails civil servants use codenames, or replace some letters with asterisks when discussing individuals – so that a search for the person's name under the Freedom of Information Act, would draw a blank. Legislation that was meant to encourage more openness has, in fact, led to greater obfuscation.⁷³

A fight worth having?

If the purpose of Freedom of Information legislation is to promote Open Government then it is those journalists who specialize in issues involving policy decisions who are in the vanguard. Yet all the evidence is that this field is less productive for a journalist in terms of discoveries and stories than the simpler business of getting statistics on the performance of public services.

There is no record of the quantity of investigation by journalists using FOI in this type of research, and whether it is increasing or decreasing, and it would be a discredit to some reporters to suggest that their appetite for information through FOI might be diminishing as a result of the difficulties they have faced. What is apparent is that journalists who have the opportunity to pursue investigations of this type tend either to be special

⁷¹ Tania Branigan, 'Revealed: Blair's Talks with Murdoch on Eve of War', *Guardian* (19 July 2007).

⁷² 'The 30 Year Rule Review', s. 5.19

⁷³ 'The Memo Martyr was Not the Real Target', *The Times* (2 Dec. 2008).

reporters with a licence from their editors to carry out in-depth investigation or determined freelancers for whom the investigation is almost a matter of personal importance. In either case the dividends of this type of reporting are diminished if the process of getting information is significantly delayed. Even the drama of the battle for withheld information, as with the very public combat between Heather Brooke and the House of Commons over the publication of expenses on MPs' second homes, may be small compensation for the time invested. At a time of straitened finances in newsrooms it may be that delay will be a successful tactic for those in public authority who question the public's 'Right to Know'.

7. Confidentiality versus the public interest

The decision by the Justice Secretary, Jack Straw to veto the release of documents relating to two Cabinet meetings in 2003 has created a watershed in the development of FOI in Britain. At issue was legal advice given to the Cabinet by the Attorney General, Lord Goldsmith, concerning the case for going to war in Iraq. The requester was not a journalist but the outcome, as a result of Straw's statement of aims for amending the Act, has profound implications for journalists in the exercise of the Right to Know where it concerns policy-making and decision-making at the heart of government.

The controversy over this FOI request has been reflected on the front pages of newspapers and in lead stories in broadcast news bulletins. But the frustration and unhappiness in government which has led to the use of the veto in this case are evident in earlier, less contentious requests by journalists.

Confidentiality or secrecy?

The clauses for exemption under FOIA which lie at the heart of this anxiety are sections 35(1){a} Information held by a government department relating to the formulation of public policy and {b} Information relating to ministerial communications, and 36, where disclosure 'would prejudice the effective conduct of public affairs'. Some measure of the concern in government can be gathered from arguments presented in cases which have reached the Information Tribunal and the seniority of the figures chosen to make them.

The first significant test of section 35 occurred in a case before the Information Tribunal between the *Evening Standard* and the Department for Education and Skills in February 2007. The former head of the Cabinet Office and the Civil Service, Lord Turnbull, was called upon to argue, in the words of the tribunal record, that:

*Disclosure of minutes of bodies as close to ministers as those involved here had not been foreseen and would strike at the heart of civil service confidentiality. Such a relationship was an important constitutional safeguard and had served all governments well over many years.*⁷⁴

But the Deputy Chairman of the Tribunal, David Farrer QC found in favour of the newspaper and the Commissioner. Carefully weighing up the arguments presented by Lord Turnbull and other senior civil servants he reminded them that the rules had changed. While accepting that the Act was never intended to undermine the role of an impartial Civil Service, Mr Farrer concluded that the FOIA was intended to 'change it fundamentally by replacing a Parliamentary Code with a statutory right to government information, imposing a degree of transparency ... to which it had never previously been exposed and for which it sought to prepare'.⁷⁵

In essence the message from the Tribunal was that the Civil Service would have to learn to live with the new duties imposed under the Freedom of Information Act.

⁷⁴ Decision notice, Information Tribunal EA/2006/0006, 19 Feb. 2007.

⁷⁵ Ibid.

The pensions 'grab'

One month later, in March 2007, The Treasury unexpectedly and belatedly agreed to accept the terms of a ruling by the Information Commissioner over guidance given by civil servants to the Chancellor of the Exchequer about the likely effect of abolishing Advanced Corporation Tax on pension schemes. The measure, which was enacted in 1997 shortly after Gordon Brown became Chancellor, had the effect of scrapping tax relief on dividends paid into pension funds and was blamed for enlarging deficits in company schemes. The annual loss to pensions was assessed at £5bn.

Helen Nugent of *The Times* had requested information in 2005 about the estimates that were prepared for Ministers 'on the loss to revenue to pension funds in 1997 and subsequent years'.⁷⁶ The response from the Treasury was to refuse disclosure, citing section 35(1)a.

It was held that:

'Disclosure of this information would damage officials' and Ministers' confidence in the confidentiality of the budget process and have an adverse effect on the nature of the advice given'

as well as making it difficult to make 'informed policy decisions' in the 'sensitive' area of pensions.

The argument failed to persuade the Commissioner who ordered disclosure, predictably triggering an appeal to the Information Tribunal. But before the Tribunal could meet, Brown ordered the release of the guidance notes. At the time he was preparing to stand as leader of the Labour Party. Whatever the reasoning behind the U-turn, the decision ensured that any embarrassing evidence given at the Tribunal hearing and any media reporting of proceedings was avoided while his party prepared to vote in June 2007.

As expected, when the information was released, *The Times* report ('Pension Timebomb – Brown Ignored Advice') was critical of the Chancellor of the Exchequer, describing the revelations as 'highly embarrassing' for Brown.⁷⁷ But the disclosures presented the Civil Service in a positive light, pointing to clear warnings given by officials of the risks of this course of action.

*The lower paid would be worse off under the new rules. Pensioners due to retire would lose out immediately. Businesses would struggle to adjust to the change. It would cost pension providers £4 billion a year.*⁷⁸

The picture presented of Treasury officials, willing to pass on harsh advice on a controversial policy, was well received within the Civil Service. And the result, buttressed by a vigorous counter-attack by the Treasury, describing charges of irresponsibility as 'abject nonsense', appears to have encouraged Brown in his defence of Freedom of Information in his speech on liberty, made shortly after he took office.⁷⁹ It has been put to me by an official that Brown regarded the experience as purgative. His reputation had been

⁷⁶ Decision notice, Information Commissioner, FS50088619, 7 June 2006.

⁷⁷ Helen Nugent, 'Pension Timebomb – Brown Defied Advice', *The Times* (31 March 2007).

⁷⁸ Ibid.

⁷⁹ Speech on Liberty, Gordon Brown, University of Westminster, 25 Oct. 2007.

relatively undamaged despite the negative reporting based on the FOI disclosures. In the thick of political life far worse things have happened as a result of leaks.

Cabinet confidentiality and the case for war in Iraq

If the 'pensions grab' story showed that reputations could survive Freedom of Information researches into policy-making, the lesson appeared lost on Cabinet members involved in the most controversial decision of Tony Blair's period of office, the decision to go to war in Iraq.

On 27 December 2006, Dr Christopher Lamb wrote to the Cabinet Office requesting the minutes of two Cabinet meetings in 13 and 17 March 2003 before the decision was taken to go to war in Iraq. Specifically he wanted to learn from records of Cabinet meetings:

*Information appertaining to Cabinet knowledge of, and deliberations about, differing and conflicting legal opinions and assessments of the Iraqi situation from such sources as Downing Street, the Joint Intelligence Committee, Foreign Office legal officers and UK negotiators at the UN.*⁸⁰

As before, the grounds for refusal centred on sections 35 and 36 of the Act, with the addition of section 27, relating to information likely to prejudice international relations. Weighing up the arguments the Information Commissioner, Richard Thomas came down on the side of Dr Lamb, although he decided that handwritten notes of the meetings made by the Cabinet Secretary, Sir Andrew Turnbull, should be withheld and that notes should be redacted in compliance with section 27.⁸¹

Richard Thomas's decision centred on 'The gravity and controversial nature of the subject matter, Accountability for government decisions, Transparency of decision making and Public participation in government decisions'.⁸² Explaining his ruling afterwards, he commented that there *was* 'a widespread view that the justification for the decision on military action in Iraq is either not fully understood or that the public were not given the full or genuine reasons for that decision'.⁸³

The case for confidentiality at the Information Tribunal hearing in November 2008 was put by its most senior witness, the current head of the Civil Service, Sir Gus O'Donnell. He argued strongly that the principle of Cabinet confidentiality needed to be upheld: 'If Ministers anticipated that Cabinet Minutes would be prematurely disclosed they would disrupt genuine debate by speaking for the official record and/or ensure that sensitive issues were addressed in small group discussions outside the Cabinet.'⁸⁴

But his argument was undermined by the fact that four members of the Cabinet present at the meetings, as well as the then Prime Minister's spokesman, Alistair Campbell, had all commented on the meetings in memoirs and articles.⁸⁵ The International Development Secretary, Clare

⁸⁰ Information Tribunal Appeal Decision, EA/2008/0024 and 0029, 27 Jan. 2009.

⁸¹ This decision was appealed to the Information Tribunal in Nov. 2008.

⁸² Information Tribunal Appeal Decision, EA/2008/0024 and 0029, 27 Jan. 2009.

⁸³ 'Government Ordered to Release Minutes of Iraq Discussions', *Guardian* (26 Feb. 2008).

⁸⁴ Information Tribunal Appeal Decision, EA/2008/0024 and 0029, 27 Jan. 2009.

⁸⁵ See: David Blunkett, *The Blunkett Tapes: Life in the Bear Pit* (London: Bloomsbury, 2006); Robin Cook, *The Point of Departure* (London: Simon & Schuster, 2004); Clare Short, *An Honourable Deception? New Labour, Iraq and the Misuse of Power* (London: Free Press, 2004); John Prescott,

Short, quoting from her diary, alleged that her efforts to question the Attorney General were effectively blocked.

I then attempted to initiate a discussion. I asked why it was so late and whether you had changed your mind. There were then many voices calling for me to be quiet and not ask such questions and no discussion was allowed.

If the minutes were published, she believed they would reveal an absence of discussion at the Cabinet table, rather than vigorous testing of the argument for the legality of war.

Faced with the evidence of disclosure by memoir, Sir Gus told the Tribunal he regretted the publication of these accounts but said there was little that could be done to prevent them. In any case, he argued, 'These types of disclosure created much less risk than would disclosure of an authoritative, objective statement, in the form of official minute.'⁸⁶

On a majority of two to one the Tribunal decided that the Information Commissioner's decision was sound. The Chairman Chris Ryan and Dr Henry Fitzhugh considered that 'the opportunity ... for the public to make up its own mind on the effectiveness of the decision-making process in context' outweighed the need to preserve confidentiality in this case. The dissenting member, Andrew Whetnall, a former senior Civil Servant, saw

*limited value in releasing the Minutes simply to confirm a possible negative that there may have been little probing or extended discussion of the Attorney's advice in Cabinet on 17th March and no discussion of the longer minute from the Attorney that had not been circulated.*⁸⁷

This is not a view with which many historians might concur.

First use of the veto

As a result of the ruling, the government found itself faced with a choice of publishing the minutes, appealing to the High Court, or vetoing the decision using powers in section 53 of the Act.

On 24 February 2009 the Justice Secretary Jack Straw told the House of Commons why he, with the agreement of the Cabinet, had decided to take the unprecedented step of opting for the veto. In deciding that the public interest was served by publication of the minutes, he asserted, the majority on the tribunal had placed insufficient weight on the public interest in defending the principle of Cabinet confidentiality.

If permitted to demonstrate their degree of attachment – or otherwise – to any given policy, ministers could absolve themselves from responsibility for decisions which they have nevertheless agreed to stand by. The conventions of cabinet confidentiality and collective responsibility do not exist as a convenience to ministers. They are crucial to the accountability of the executive to parliament and the people. The concomitant of collective responsibility is that debate is conducted confidentially. Confidentiality serves to promote thorough decision making.

Prezza, *My Story* (London: Headline Review, 2008); Alistair Campbell, *The Blair Years* (London: Hutchinson, 2007).

⁸⁶ Information Tribunal Appeal Decision, EA/2008/0024 and 0029, 27 Jan. 2009.

⁸⁷ *Ibid.*

Disclosure of the cabinet minutes in this case jeopardises that space for thought and debate at precisely the point where it has its greatest utility. In short, the damage that disclosure of minutes in this instance would do far outweighs any corresponding public interest in their disclosure.⁸⁸

The fact that Straw had been a member of the Cabinet in the meetings under consideration led some MPs, including the Labour members, Andrew McKinlay and Alan Simpson, to accuse him of presiding over a cover-up. For the Conservatives, the Shadow Justice Secretary, Dominic Grieve, expressed some sympathy with these suspicions: 'Does the Secretary of State appreciate how it will appear to the public for someone so closely involved in the key decisions to be now personally blocking the release of that information?' Nonetheless he offered the party's support for Straw's decision.

Protecting 'categories of information'

The use of the veto, it appeared, was not the only measure which the government was considering in protecting information in this case from disclosure. Straw hinted at further moves to place 'certain categories of information' from premature disclosure.

Referring to the findings of a report under Sir Paul Dacre,⁸⁹ published a month earlier, into reform of the Thirty Year Rule governing the publication of government documents, which proposed a reduction from thirty to fifteen years, he continued in his statement:

The report also recommended we consider protection under the act for certain categories of information. There is a balance to be struck between openness and maintaining aspects of our system of democratic government.

To some observers this was a clear hint that the government would act to amend the law to put sensitive information beyond the reach of FOI. 'Ministers and officials are considering using the Dacre review to try to introduce new restrictions on releasing information after a huge backlash in Whitehall over the material they are being forced to release by the Information Commissioner and Tribunal', wrote Sam Coates, *The Times'* chief political correspondent.⁹⁰ Maurice Frankel of the Campaign for Freedom of Information said: 'Today's announcement raises the prospect of an unacceptable trade off, greater secrecy about current information in return for more access to old government files.'⁹¹ He foresaw future use of the veto 'in other cases involving the examination of policy at lower levels in government'.

The reference to the Dacre Report in Jack Straw's statement introduces an element of conjecture which is difficult to resolve. The report itself contains little explanation for the recommendation and Straw's citing of it in the context of his statement to the Commons on the use of the veto inevitably lends itself to political interpretation.

The most likely explanation of the purpose of the recommendation is that Dacre was referring to Cabinet documents which might under his central

⁸⁸ Statement to the House of Commons, Lord Chancellor and Secretary of State for Justice, the Rt Hon. Jack Straw MP, Freedom of Information Act 2000, 24 Feb. 2009.

⁸⁹ 'The 30 Year Rule Review', s. 7.6.

⁹⁰ 'Jack Straw May Curb Freedom of Information', *The Times* (25 Feb. 2009).

⁹¹ Press release, CFI, 24 Feb. 2009.

recommendation be published after fifteen years even though they might normally be exempt from disclosure under FOIA. The idea of restricting 'certain categories of information', on this reading, would be to allow government to withhold certain types of documents which could safely be published after thirty years but not after only fifteen. It is perhaps not surprising that Straw's mention of this recommendation in the context of his statement announcing the veto of the disclosure of the Iraq Cabinet documents has aroused suspicion.

In a testy press release days after the Commons statement the Ministry of Justice retorted:

We have committed to reducing substantially the thirty-year rule and thereby to increasing openness. We have also committed to giving careful consideration to all the Dacre review's recommendations. Those commitments do not in any way represent an intention to hijack the review for some other means.⁹²

With a pipeline of cases working their way on appeal to the Information Tribunal it will not be very long before other cases involving the use of sections 35 and 36 are heard. Following the use of the veto and given the arguments presented by the Justice Secretary it is highly unlikely that the Cabinet Office will take a more emollient line over future disclosures. Moreover, it is not hard to see why, despite the Ministry's statement, there are concerns among journalists and FOI campaigners that if the Tribunal were to reach similar conclusions on the basis of 'public interest' in future, an amendment to the Act putting minutes out of reach might offer an attractive 'solution' to government.

⁹² Press release, Ministry of Justice, Feb. 2009.

Impact of the veto

An important feature of FOIA is that each case for appeal has to be considered individually. Indeed the Commissioner's argument for disclosure in the Iraq Cabinet case rested largely on the exceptional nature of the issues involved. The consequence of this is that no legal precedent can be set by the Tribunal.

On the face of it this means that the Right to Know can be asserted time and again without prejudice. Equally, from the point of view of authority, the principle of confidentiality can be defended time after time in cases where information has been sought for release on the grounds of public interest.

It can be argued that the lack of legal precedent achieves an impartial balance between authority and the citizen based on the notion that every case will be decided on its merits and not on a rule of thumb. But it would be naïve not to concede that by using the veto the Government has issued a declaration of intent and set out the criteria for its use *de facto*.

Richard Thomas's ruling on Dr Lamb's request represented his opinion based on his own understanding of what 'public interest' means in the context of Freedom of Information. When the Tribunal came to support his judgment, albeit on a majority view, he was entitled to see this as a vindication of his judgment.

Will the Information Commissioner in future be forced to reflect on the very firm view of 'public interest' expounded by Straw in the House of Commons when making future decisions on cases involving the Cabinet? While the veto may not overrule the Tribunal's ruling in the way a Higher Court might overrule the judgment of a lower one, it does, for practical purposes, define the limit of the public Right to Know as far as Cabinet confidentiality is concerned. It is hard not to imagine that Jack Straw's decision will influence the judgment of the Commissioner and his successor in the future. Whether the Information Tribunal panel, concentrating on matters of law, will be similarly influenced remains to be seen.

8. The future of freedom of information in Britain

In less than five years, the government has amended the Freedom of Information Act 2000 to allow MPs addresses to be kept private and attempted to amend it to allow details of MPs expenses to be withheld. It has mounted repeated challenges to the Commissioner over the disclosure of information relating to policy making and ministerial decision making. It has applied a veto against the disclosure of Cabinet minutes, ordered by the Information Commissioner with the support of the Information Tribunal. At the same time, information has been released on request from journalists and other inquirers which has shone a light into the processes of government, even if these glimpses have been partial and hard won. Highlights are the full publication of official papers relating to 'Black Wednesday', an early draft of the JIC dossier on Iraq's alleged weapons of mass destruction, the release of the Attorney General's advice on the legality of military action in Iraq, advice to the Chancellor of the Exchequer of the effects of abolishing Advanced Corporation Tax and the forced publication of MP's Additional Costs Allowance expenses on their 'second' homes.

Lower down the ladder of administration, in public authorities, FOI has yielded considerable information about public services, sometimes at odds with the official prospectus of achievement. As a means of allowing journalists and campaigners to question the assumptions behind important decisions the Act has proved an important means to achieve disclosure.

Can the users of FOI be confident that the Act will remain as effective an instrument in years to come as it has proved to date? Is Freedom of Information safe in Britain? This is a question which Mark Glover and Sarah Holsen, formerly of the Constitution Unit at University College London, consider in a study based on international comparisons.⁹³

Legal trench warfare

In Britain's case, factors adduced in favour of an enduring regime for disclosure are a 'robust' legislative framework, the independence of the Information Commissioner and the Information Tribunal, the public interest test and the introduction of publication schemes. But international precedents, they argue, suggest that this model will come under pressure and that the operation of the Act will be hampered by political pressures.

The most plausible of the scenarios they consider is 'legal trench warfare'. This could occur through the introduction of 'legislative amendments to reduce the scope of FOI and curb demands', coupled with a strategy of resisting disclosure by 'contesting every legal argument before the Information Commissioner, the Information Tribunal and the courts'. Those still able to do battle with government in this eventuality would be well-resourced requesters, 'such as business organisations, their lawyers, some media requesters and well organized interest groups'. Looking at other countries' experience, such as Ireland and Australia, following the introduction of FOI rights, Glover and Holsen consider it unlikely that Britain could buck a similar trend. Recent developments, especially the use of the veto to block release of Cabinet minutes relating to legal advice in advance of the war in Iraq, suggest that some of this scenario is unfolding.

⁹³ M. Glover and S. Holsen, 'Downward Slope? FOI and Access to Government Information', in R. Hazell (ed.), *Constitutional Futures Revisited: Britain's Constitution to 2020* (Basingstoke: Palgrave Macmillan, Nov. 2008).

Antipodean opposites

To test the thesis, it is useful to compare two neighbouring countries both of which introduced Freedom of Information legislation in 1982.

The purposes of Australia's FOI Act can be summarized as:

- improving the quality of decision-making by government agencies in both policy and administrative matters by removing unnecessary secrecy surrounding the decision-making process;
- enabling groups and individuals to be kept informed of the functioning of the decision-making process as it affects them and to know the kinds of criteria that will be applied by government agencies in making those decisions.⁹⁴

Its remit relates only to government departments and agencies. Its operation since its introduction has been marked by delays, a high number of refusals and serial use of the veto: fourteen times between 1996 and 2007. Problems with delivery have persisted despite the election of a new government in 2008. The Annual Report for Australia's FOI Act in 2007/8 showed a drop in one year in the number of documents released in full, from 80.6 per cent to 71.4 per cent. Requests to government for information in the same year dropped 25 per cent to the lowest level in sixteen years. This suggests that demand for information under FOI can be affected by persistent refusal by government departments.

Legislation was promised in 2008 by Prime Minister Kevin Rudd to withdraw the right of ministerial veto over disclosures which could damage security, defence, international relations or policy formulation. In March 2009 The Freedom of Information Amendment (Reform) Bill was outlined in draft form.⁹⁵ It promises to restrict grounds for exemption, to abolish fees for FOI requests and to create an Information Commissioner on the British model. But there remain concerns that the Act will not necessarily prevent civil servants from adopting an obstructive approach to inquiries. Typical is this comment by Matthew Moore, freedom of information editor of the *Sydney Morning Herald*: 'One of the really disappointing things is that the Rudd government has not issued any instruction or direction to public servants that they favour a more open and transparent bureaucracy.'⁹⁶

New Zealand's Official Information Act has produced very different results. The Act covers government ministries, hospitals, universities, schools, the Security Intelligence Service, and even state-owned enterprises. It applies a public interest test as with FOIA in Britain. The veto was used on fourteen occasions up to 1987 but has not been used subsequently. Demand for official information has not reduced as in Australia. Familiar criticisms over civil servants' reluctance to disclose documents have been heard but, despite some evidence of news management connected to journalists' requests, the evidence is that the rubric of FOI is understood in government.⁹⁷ The former New Zealand Cabinet Secretary Marie Shroff believes that after twenty-five

⁹⁴ Taken from first *Annual Report on the Operation of the Freedom of Information Act 1982 for the Period 1 December 1982 to 30 June 1983* (Canberra: AGPS, 1983).

⁹⁵ http://www.pmc.gov.au/consultation/foi_reform/docs/FOI_reform_bill_2008-Exposure_Draft.pdf

⁹⁶ 'Transparency : Can Rudd Walk the Talk?', interview with Peter Mares, ABC Radio, 6 Feb. 2009.

⁹⁷ Steven Price, 'The Official Information Act 1982: A Window on Government or Curtains Drawn?', Faculty of Law, Victoria University of Wellington, 2005.

years government in her country has learnt to live with Freedom of Information:

*Free, frank, and robust advice continues to be given. My strong view is that the costs of FOI are relatively minor compared with the benefits. Open government may take a little more time and effort from appointed officials. But in New Zealand we believe that this is a tiny price to pay for the power we have over citizens' lives. Open government is good government; it is now our job and we get on with it.*⁹⁸

Although time has plainly been a factor in allowing FOI to make its effect on Open Government in New Zealand, the contrasting experience of Australia shows that the Right to Know has to be respected in the upper echelons of administration for its effects to penetrate the business of government.

⁹⁸ 'The Official Information Act and Privacy: New Zealand's Story', speech at FOI Live conference 2005, University College London, 16 June 2005.

The way ahead

Is it possible that Britain's FOI trajectory might prove in time to be closer to the experience of New Zealand, and less similar to the more secretive culture of Australia? Plainly after only four years it is not possible to chart a path with certainty. As in New Zealand, Britain's Freedom of Information legislation places only qualified exemptions on the release of Cabinet documents, unlike Canada and Australia where exemption is total. But the right to obtain Cabinet minutes has on the evidence of the first use of the veto proved unachievable.

Some qualifications needed to be applied to Glover and Holsen's negative prognosis. First it focuses on a certain category of information request directed at government and the Cabinet Office in particular, while ignoring the broader spectrum of 130,000 bodies ranging across the public sector.

The level of inquiries under FOIA to public authorities in Britain has remained high. Demand for information from government departments has not reduced despite some uncooperative responses. The Labour administration which introduced the Act points to this evidence to declare the legislation a success.⁹⁹

Whatever the thinking behind the decision in 2006 to review the existing regime for estimating fees for inquiries, in the end the Brown administration heeded protests and decided against a change. Had new tariffs been introduced, all evidence suggests the effect on the citizen's 'Right to Know' would have been highly deterrent. There is therefore some justification for government's claim that the Freedom of Information Act 2000 has been successful and that ordinary members of the public have benefited.

But the observation of the Act by some senior Civil Servants and other officials points to an opposite impression. As I have documented earlier in this working paper the timing of the release of some information on request and delays in some sensitive cases indicates news management practices at work. Sections 35 and 36 have been repeatedly used to gain exemption from the Act on matters of policy-making and decision taking. It would be unrealistic on current experience to anticipate any let up in the game of 'cat and mouse', involving delaying tactics and appeals.

In the belief of Professor Robert Hazell:

Ministers have been successively more and more shocked at the decisions which have come out and several of them have said we didn't think that FOI meant this. Well it does ... and undoubtedly some of them have quite severe regrets.¹⁰⁰

Even after the use of the veto in the case of the Iraq Cabinet minutes, a queue of cases to come before the Information Commissioner and the Information Tribunal will ensure that arguments over sections 35 and 36 continue to be heard. How such future cases will be judged cannot be anticipated. But it is possible that rulings against government departments may prompt moves to amend the Act to place certain 'categories of information' beyond reach. The Conservative Party's support for the use of the veto in the Iraq Cabinet

⁹⁹ Michael Wills MP, Information Minister, Ministry of Justice. Keynote address to FOI Live 2008 conference, University College London, 3 June 2008.

¹⁰⁰ Interview, *The World Tonight*, BBC Radio 4, 24 Feb. 2009.

minutes case may indicate broader sympathy for restricting the use of the Act.

Delays and appeals

Another important difficulty affecting the Right to Know, namely the delays in appeals to the Information Commissioner which add at least six months to the inquiry process, seems unlikely to be resolved. This is of particular concern to journalists for whom topicality can significantly affect the value of a story and their researches.

Appeals to the Information Commissioner rose by 15 per cent in 2007–8, largely as the result of authorities and government departments' refusals. If this is a trend then little end to the endemic delays in the appeals process is likely. Although the incumbent Information Commissioner Christopher Graham has stated that dealing with this problem will be a priority, he conceded to the House of Commons Justice Committee that he has been promised no additional funding to deal with the backlog.¹⁰¹

While these delays persist, the utility to officials of refusing appeals as a means to induce delay will remain. This phenomenon is likely to remain a significant disincentive to journalists in the national media to use FOI as an investigative tool. One could formulate a principle concerning the utility of the Act as follows: that its usefulness to journalists is in inverse proportion to its proximity to centres of power in Whitehall.

Success or failure?

Should the Freedom of Information Act 2000 be judged overall as a success or a failure? On the criterion of its use across the board, taking in the full spectrum of inquiries it has permitted, rather than single examples such as the Cabinet minutes relating to the war in Iraq, the results are highly positive. For many journalists the volume of new information has proved considerable and productive.

By another measure as a means to Open Government, journalistic access on sensitive matters close to the heart of government must be considered a significant indicator, arguably a critical test for the project of Freedom of Information. On this criterion much needs to change in Whitehall before the 'Right to Know' is an established principle and in the process a reliable instrument for the journalist.

Three centuries ago the Kingdom of Sweden introduced the Freedom of the Press Act of 1766, the oldest FOI legislation in the world. Over time it has become custom and practice for the Swedish journalist. The result is that between 40 and 70 per cent of journalistic articles rely in some part on FOI content and 90 per cent of requests for information using the Act are granted.¹⁰² After four years in Britain it is hard to imagine FOI legislation being reversed but the prospect of journalists coming to rely on it as a stock in trade, as in Sweden, seems currently far off.

¹⁰¹ Evidence to the Justice Committee, 'The Work of the Information Commissioner', 27 Jan. 2009.

¹⁰² Johan Lidberg and Alec McHoul, 'Freedom of Information and Journalistic Content in Western Australia and Sweden', an unpublished paper presented to the 2002 Public Right to Know (PRK2) conference Australian Centre for Independent Journalism, University of Technology, Sydney.

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