

# **Open House? The Impact of the Freedom of Information Act on Westminster**

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## **Abstract**

This paper presents the findings of a two-year study into the impact of the Freedom of Information Act 2000 on the UK parliament, looking at how MPs and peers have used the Act and how it has impacted upon parliament. This paper examines the latter, asking if FOI has made both Houses, MPs and peers more accountable and transparent, increased public understanding of parliament, public participation and trust. The findings represent some preliminary conclusions from our study, due to finish in July 2011.

FOI has made parliament more accountable and transparent. It has increased understanding on a low level, particularly parliamentary activities but has had no effect on participation and none on trust. Despite concerns, it has had no impact on privilege. The discussion of FOI is dominated by expenses and here a combination of resistance, an opaque system, parliamentary culture and its special governance structure meant the crisis was particularly severe. FOI has led to major changes in parliament, particularly with the creation of IPSA, as well as several lesser changes.

## **Introduction: transparency, openness and parliament**

Freedom of information laws can bring a range of benefits. Supporters hope FOI can bring increased transparency and accountability, leading in turn to better understanding of government, increased public participation and increased trust (Darch and Underwood, 2010; Hazell, Worthy, and Glover, 2010).

Given parliament's longevity, historical institutionalism offers a way of analysing the impact of FOI as it 'conceives of political change as a discrete process, characterized by extended time periods of considerable stability—referred to as 'path-dependency'—interrupted by turbulent 'formative moments' (Peters, Pierre, and King, 2005, p.1276). Discussion around FOI is couched in this 'transformative language', with FOI driving far-reaching changes in institutional and political cultures.

Adherents hoped openness innovations could present a 'formative moment' in the political development of institutions. Parliaments could act as a champion and model for openness (Mendel, 2005).

Yet the ingrained culture of parliament may present a barrier. Political institutions are 'usually change resistant' as formal rules combine with attitudes to 'lock in' existing arrangements and make reform both 'difficult' and 'unattractive' (Pierson, 2000) pp.490-1). Moreover, techniques and systems could be developed to undermine openness reform (Hood, 2007; Roberts, 2006).

The study of FOI is in its early days. A number of studies have utilized various techniques: high level indicators or aggregated data to measure openness (see Piotrowski, Zhang, Lin, and Yu, 2009; Rely and Sabharwal, 2009), compared the laws themselves (Mendel, 2008; Vleugels, 2009) or made use of the law itself to measure openness by making standardised requests (see Lagunes, 2009; Open Society Justice Initiative, 2006). Other studies have analyzed the impact of FOI in depth or within one country: Hazell et al looked at the UK (2010), Nicola White (2007) examined the New Zealand Official Information Act, and Suzanne Piotrowski (2007) studied the United States. China's 2007 Openness in Government Affairs Regulation is also beginning to be studied (see Piotrowski, Zhang et al., 2009). The Constitution Unit's study of FOI and central government in the UK concluded that FOI has met its core objective of transparency but not some of the wider 'transformative' democratic aims of trust or participation as these were shaped by other forces that FOI has little impact upon (Hazell, Worthy et al., 2010).

There has been less study of the impact of FOI on Parliament, not least because not all countries have their legislatures covered by FOI. The World Bank and CPA have promoted the use of FOI and emphasized how parliaments have a leading role as advocates but also as exemplars (Mendel, 2005). Some general studies of FOI have examined the impact on parliament as part of their work. Nicola White's book (2007) on the Official Information Act in New Zealand examined the issue of parliament, though it focussed more upon how MPs used the Act. Wood also began research on FOI and parliament in the UK (Wood, 2006). A study of the impact of FOI in the UK examined MPs use of FOI (Hazell, Worthy et al., 2010). The other part of this study has offered some provisional conclusions regarding parliamentarians' use of FOI (Hazell and Worthy, 2010).

Snell and Upcher (2002) examined the 'manifold problems' that placing FOI atop a Westminster parliamentary system can create:

The relationship between FOI and the Westminster system is problematic and complex... FOI is often depicted as a threat or hindrance to effective administration or as undermining important constitutional and other conventions of traditional governance (Snell and Upcher, 2002, p.35).

They concluded that some of the principles of the Westminster system, not least parliamentary sovereignty, need to adapt to FOI rather than vice versa.

The paper will examine both Houses' preparation for FOI and give an overview of requests. It will then examine each of the objectives in turn before examining the impact of FOI upon parliamentary privilege and a brief explanation of why the expenses crisis of May 2009 happened how it did.

## **Parliament and FOI**

The UK FOI Act was passed in 2000, and after a long process of gestation it came into force on 1 January 2005 across 110,000 public bodies. It provides a basic right-of-access to official information subject to a set of exemptions, some of which are subject to a public-interest test.

The Act has a two-stage appeal process, the first stage being the Information Commissioner's Office (ICO) and the second being the Information Tribunal, with the government holding a veto over the appeal system. The biggest FOI related event

came in the spring of 2009 - after a four-year FOI campaign - with the leaking and then release of MPs' expenses that destabilized the government and led to a wave of resignations, including the speaker of the House of Commons (see Kelso, 2009).

Yet parliament never expected itself to be covered by FOI. It was only added after a recommendation of the Public Administration Select Committee (Public Administration Select Committee, 1999) during the pre-legislative stage (Interview 30, ; Interview 38). FOI covers both Houses separately in Schedule one of the Act. MPs or peers are not covered as individuals; only the information that the institutions of parliament hold is covered. Amongst its Westminster contemporaries, the UK parliament is unique in being covered by an FOI Act (The Independent, 2007), but several Commonwealth and 19 other European parliaments are covered by similar laws (Coliver, 2011).

Parliament's inclusion led to the addition of the Parliamentary Privilege exemption (s.34) to ensure 'avoiding an infringement of the privileges of either House of Parliament' (Freedom of Information Act, 2000) so that 'no outside tribunal would be 'judging whether parliament has the right to a particular piece of information' (Rogers and Walters, 2006, p.315). Section 36 (7) also allows the Speaker of the Commons or Clerk of the Parliaments to refuse disclosure where release would inhibit the free and frank provision of advice, or prejudice the effective conduct of public affairs (Freedom of Information Act, 2000).

Parliament presents several unique issues because of its structure. For the Commons the House of Commons Commission (HCC) is the 'corporate body' of the institution, but 'running' the House is delegated to the Board of Management, comprised of the heads of the corporate departments (finance, the Library, Hansard etc) and head clerks (Rogers and Walters, 2006, pp.59-63). In 2002 the Members' Estimate Committee was created, comprised of identical members to the HCC but protected by Parliamentary Privilege (Interview 19).

The House of Lords' administration is similar: financial decisions, and the running of all the other affairs of the House rests with the House Committee, made up of senior peers from all sides of the House, and the Clerk of the Parliaments. The Committee is assisted by a management board consisting of senior officers of the House. The Clerk of the Parliaments is the 'chief executive' and 'legal personality' of the House (Rogers and Walters, 2006, pp.74-7).

Parliament's particular structure makes for difficulties as the political and administrative aspects overlap and intersect. For example, parliament 'ceases to exist' for the purposes of FOI when it is dissolved. Members, when collected, are subject to a number of influences from parties and elsewhere (Wright, 2010). Similarly, senior officials are appointed by members themselves. Tony Wright (2004) explained the significance of this:

There is no Parliament in collective sense at all...there is no voice of Parliament that can be collectively orchestrated. Parliament is a place where the parties do permanent battle and this fundamental reality trumps attempts to build up Parliament itself (Wright, 2004, p.871).

This situation would have significance for the expenses scandal of May 2009 (see below).

## **Methods**

The study uses a range of methods, each with its own advantages and limitations. Not all the methods are complete and the findings need to be regarded as provisional.

### *FOI requests made to parliament*

Firstly, to study how open parliament has become since FOI, we have analysed the records of FOI requests made to both Houses. Each request made to both Houses from January 2005 to December 2009 was coded for topic, subtopic and result. We have followed up this coding with subsequent analysis.

### *Media analysis*

Few people ever make an FOI request and most people find out about FOI via the media. To study how the media use FOI stories about parliament we have analysed a sample of national, regional and local newspaper reports which mention 'parliament' or 'MPs', and 'freedom of information'. There have been over 5,000 stories in the national press and more than 3,000 in the regional press from Jan 2005 to December 2009. We have coded a sample, according to their subject matter, their relationship with the objectives of FOI and the tone/style of reporting. The analysis is not yet finished so is included briefly and provisionally here. One problem is that media coverage is dominated by the expenses scandal.

### *Interviews*

We conducted interviews with officials in both Houses, peers, MPs (former and current), and political researchers about their experience of being subject to FOI, and have also spoken with external observers of parliament: journalists, regulators, former parliamentary staff and academics with a speciality in parliament. Thus far we have spoken with 15 MPs, 10 peers, 9 officials, 5 researchers and 6 external observers.

### *Legal Rulings*

Our fourth research method is to analyse the legal rulings of the Information Commissioner, Information Tribunal and High Court which have affected parliament. We are looking into the wider relationship between the Information Commissioner and parliament, which is currently subject to reform.

## **FOI preparation and requests**

A working group of Commons officials was created shortly after the passage of the Bill to discuss and implement an FOI system for the House. The Working Group worked on a publication scheme (whereby public bodies publish specific, basic information), updated records management processes and thought about the practicalities of the FOI system (Interview 19). The potentially 'enormous' impact was poorly understood by most members (Interview 32). Both Houses began to publish, both hard copy and online format, information in 2002 (House of Commons Commission, 2006). Requests began to come in January 2005 and have increased since (see table 1).

**Table 1: Requests to both Houses of Parliament, by year and result, 2005-2009**

Requests	Information released in full	Information released in part	Information withheld in full	'everything else'	Total requests
2005	98 (38%)	27 (10%)	70 (27%)	64 (25%)	259
2006	81 (42%)	19 (10%)	45 (24%)	46 (24%)	191
2007	93 (37%)	38 (15%)	58 (23%)	60 (24%)	249
2008	134 (34%)	73 (17%)	132 (31%)	82 (20%)	421
2009	310 (34%)	208 (23%)	188 (21%)	187 (23%)	893
total	716 (35%)	365 (18%)	493 (24%)	439 (23%)	2013

Note: 'Everything else' category includes requests that are transferred or lapsed, where the information is not held, where clarification of the request is not provided by the requester, or where the requester is helped outside the formal FOI process.

FOI is requester blind so it is difficult to accurately identify requesters. It is estimated by Commons' officials that in 2010 that 17 per cent of requests are from the media, 12 per cent are made through FOI-portal WhatDoTheyKnow.com, and 71 per cent are from an unidentifiable source, probably members of the public and NGOs.

Less than 20 per cent of requests are directed at the Lords while 81 per cent go to the Commons. Interest in the Lords began with focus on legal and judicial decisions but this shifted in 2008/09 towards peers' behaviour. The focus from the beginning in the Commons has been on MPs. There has also been interest in the administrative functions of both Houses.

### **Has FOI met its objectives For parliament?**

The study will now examine each of the objectives of FOI in turn.

### **Has FOI made parliament more transparent?**

Transparency broadly means an institution operating in a way 'that makes decisions, rules and other information visible from outside' (Hood, 2010). It is hoped that FOI will lead not only to more information being released, be it from requests or pro-actively, but also create a more open culture.

In general, officials believe that FOI has made parliament, already an open institution, more open. 'It would be hard to find an organization who provides more information than us,' notes one official (Interview 9), and the daily publication of Hansard, committee reports, submissions and library papers bears this out (Interview 15; Interview 30; Interview 35). Aside from FOI, over 40,000 requests were made by the public to the Commons Information Office in 2009 (House of Commons Information Office, 2009). Peers spoke of traditional 'openness' tools – parliamentary television coverage, Hansard – as making parliament more transparent. MPs also mentioned wider administrative change for increased openness – changing standards of professionalism – and a desire to avoid FOI requests by proactive publication and use of websites, whether parliament's own or TheyWorkForYou.com (Interview 20; Interview 27; Interview 28; Interview 44).

FOI has led to more information provision. Both Houses have revealed information previously not public through FOI, from restaurant tabs of MPs (The Daily Telegraph, 2010); CO<sub>2</sub> emissions of its buildings (Guardian, 2009b) policies relating to pest

control in the Palace of Westminster (The Independent, 2008), costs of construction of the Visitors Centre (House of Commons, 2008); Peers with criminal convictions (House of Lords, 2007); 'golden parachute' payments to former MPs (ePolitix.com, 2011) and the use of parliamentary facilities by outside organisations (Times, 2010). While some officials play down the significance of this information being public – 'Is the world a better place? Probably not' (Interview 32) – they identify a sea-change in attitudes towards the public because of FOI. 'FOI has made us focus on the public's desire to know about parliament *itself* working... it took us a long time to wake up to that' (Interview 9). FOI has also led to shifts in policy regarding payment of unpaid bar bills and parliamentary passes (Daily Telegraph, 2010; Financial Times, 2009).

Yet while more information is released, officials felt the culture change had not followed. 'The impression is not one of transparency' as some members had to be 'dragged' into being open. There is a lack of political will to become 'culturally' more transparent (Interview 14). One journalist spoke of how 'parliament sees itself as above the law' (Interview 18). One interviewee describes this kind of transformation as 'mechanistic', as opposed to cultural (Interview 35). FOI has had an impact on 'house-keeping' arrangements, but culturally the Commons and Lords have changed less.

Parliament's reluctance was exemplified by David MacLean's Private Members' Bill, designed to remove both Houses from Schedule 1 of the Freedom of Information Act. Many MPs and peers opposed the Bill vehemently, but supporters maintained that FOI posed a threat to the ability of MPs to work on their constituents' behalf (Hansard HC Deb., 2007, 18 May, c.893). Newspapers would later print the names of MPs who had voted for the MacLean Bill when the expenses scandal broke two years later. The Bill failed to find a sponsor in the Lords and did not become law, but progressed much further than is common, partly through a quirk of parliamentary timing, and partly through a lack of obstruction from either the government or Conservative members (see Gay, 2007). Officials contend that the MacLean Bill was driven by personal considerations, as did some MPs (Interview 11; Interview 17; Interview 38). Peers too labelled it a 'cynical' move over a complete 'non-issue,' (Interview 10; Interview 29) and noted within the House 'there was a very strong feeling that parliament should be treated equally...not be privileged over other institutions' (Interview 23).

FOI can be seen to have increased the transparency of parliament, though not necessarily have shifted the culture. FOI has formed part of a wider drive to make what was an open institution more so. However, small areas of secrecy are where problems have occurred.

### **Has FOI increased accountability?**

Accountability concerns 'the duty of an individual or organisation to answer in some way about how they have conducted their affairs' which we separated into two: 'giving an account' by explaining and 'being held to account' by justifying (Hood, 2010, p.989). As with transparency, parliament, particularly the Commons, is an accountable body and FOI exists alongside many other accountability mechanisms, from the media to the electorate and its own members (Worthy, 2010). Our interviews also named new technology as an increasing influence on accountability, mentioning TheyWorkForYou.com, WritetoThem.com, and Twitter: 'with technology like this, one way or another, even without FOI, the [expenses] material would have got out.' (Interview 13).

The House of Commons, through elections at least every five years, is ultimately accountable to the electorate. However, the unique way 'parliament' is constructed means this accountability is imperfect: MPs are held accountable for whatever actions or views of theirs are known, and then considered, by the electorate. *The Daily Telegraph* claimed that the leakers of expenses information felt MPs were abusing the system and 'no one could hold them to account' (Winnett and Rayner, 2009, p.359). Moreover, not all MPs judged as expenses 'abusers' were punished by the electorate; nor were 'anti-expenses' candidates successful (Sunday Times, 2009).

For peers, FOI offers an opportunity for a body 'always under pressure to justify why we exist,' (Interview 43) and keen to dispel the idea it is a closed gentleman's club. Peers felt FOI requests helped create an in-built accountability trail (Interview 31). A number of peers noted the FOIs made about the tax status of Lord Ashcroft increased accountability in the Lords by helping to create pressure for a Code of Conduct and stricter rules (Interview 6). It was also hoped that FOI requests, through the media, could help the Lords be held accountable and be responsive to the public, though there was little media coverage of the House of Lords in our media coding sample.

The majority of MPs saw FOI as an add-on to existing accountability mechanisms. Members of the public and media were now entitled to ask for information and parliament must account for its activities (Interview 5; Interview 17; Interview 38). However, some worried that FOI requests often focused on minutiae, such as office costs or restaurant bills, and it would be this, rather than *Hansard* or voting records, that would be used to judge performance. Accountability through FOI was thus 'patchy' and driven by media interests (Interview 20). Early analysis of the national and local media showed how the media, particularly for expenses but also for issues over bill payments or parliamentary passes, did use FOI information to demand explanations of members or officials.

In the Commons there was generally more scepticism about FOI from officials. One was sceptical that, as the House already releases so much information that is ignored by a great majority of the population, information gleaned through FOI would not be any different (Interview 32). Others saw structural aspects of the Commons as a barrier to accountability. They noted the Speaker of the House does not fulfil a role like other public sector leaders, as 'it is not the same as those between a Minister and a ministry.' (Interview 32) Unlike the civil service, there is no 'structure' to drive through a programme, no single dominant 'corporate identity' (Interview 14). Not only is the Commons' leadership and accountability structure in a sense fractured and subject to competing influences, it is deeply misunderstood by the public and the media. As one official put it: 'parliament as an institution has a vacuum at the heart of it' (Interview 14). This meant that any mechanism of accountability would face gaps or confusion that could hinder it.

Accountability has been strengthened by FOI, particularly for the Lords but also for MPs, though often in a small scale way. Yet difficulties around governance structures meant FOI was grafted onto existing problems, as the expenses scandal demonstrated (see below).

### **Has FOI led to increased public understanding of parliament and its decisions**

The decisions parliament makes on behalf of the people of Britain are on the record. *Hansard* records the votes and the arguments for bills; the press lobby file their stories. Many of parliament's internal decisions have been opened up by FOI; yet still

more are covered by privilege.

If FOI was to increase understanding in parliament and any of its decisions, it is coming from a very low base. According to the Hansard Society, despite the expenses crisis, people are 'no more likely to be able to name their own MP correctly this year than they have been in previous years' (Hansard Society, 2010, p.31).

Increasing understanding is inhibited, argued some MPs, peers and officials, by 'sensationalist', 'personality-driven', or 'irresponsible' news reporting (Interview 6; Interview 24; Interview 34). Coverage neglected to explain context and focused on negative behaviour and a narrow range of topics (Interview 7; Interview 17; Interview 27; Interview 28; Interview 38). Consequently, 'parliament is more visible, but not more understood,' said one official (Interview 14). Not all interviewees agreed with this sentiment. A small minority said the expenses information being in the public domain was of itself an increase in understanding, including the journalists we spoke to (Interview 18; Interview 35; Interview 44).

The result for FOI is therefore very limited regarding what parliament or members of parliament do in general. This was reflected in requests: 'people didn't know what there was to ask for, and still don't to some extent. They don't know what parliament is and what it does' (Interview 9). Interviewees noted basic misunderstandings inside requests, like the difference between 'parliament' and 'government' (Interview 3; Interview 14).

Many felt other methods of interacting with parliament are considered more likely to increase understanding such as the outreach programme, the information office and schools visits (Interview 3; Interview 9; Interview 32). Others thought that third parties could help – IPSA, the Hansard Society or a change to the school curriculum (Interview 43).

Yet at a lower level FOI has proved very useful in increasing their understanding of the institution. Its corporate governance has been opened up to a great degree. A fifth of requests made to the Commons between 2005 and 2009 referred to information about the administration and/or corporate functions of the Commons, like recruitment, security, facilities, HR, as opposed to those requests about *individuals* within the House. Of these, 56 per cent were answered in full, a further 21 per cent were partially answered. Only 10 per cent were outright refused, often on the basis of personal information or that the information was already publicly available. A fifth of requests to the Lords concerned administrative matters. 63 per cent of these were answered in full, and a further 19 per cent partially. Press stories about parliament's emissions, visitors centre or security may also help, at a low level, to understand how the institution works.

There were a few concerns about a negative impact on decision-making. Some members worried that they 'cannot be frank in writing without unintended consequences.' (Interview 7). Only one MP admitted that they purposely tell their staff not to record some things, and thought FOI 'definitely inhibits written advice'. 'The idea now is, 'what would happen if this was revealed?' People always have one eye on FOI, we're all much more careful.' (Interview 4)

But no interviewee thought that any fundamental decision-making processes were changed because of FOI and there was no systematic sea-change in record-keeping, as some were concerned FOI would do. FOI has not changed the publication and many of parliament's procedural decisions – select committee deliberations or advice given to the Speaker by clerks – remain protected by privilege.

## **Has FOI increased public participation in parliament's activities?**

By highlighting issues of importance, it was hoped FOI in the UK would stimulate involvement by those not previously involved through the release of information (Worthy, 2010).

Most interviewees felt that any increase in participation with parliament would be difficult given the current low levels. Some of our interviewees felt that FOI requests made to parliament were by the 'usual suspects' anyway; those campaigners, journalists and members of the public already engaged in parliament in another way (Interview 29; Interview 31; Interview 32; Interview 38; Interview 43). As one MP put it, 'FOI may be giving more power to the people who want to participate, but not necessarily increasing the number of people who want to participate.' (Interview 17) Most interviewees guessed the media were the most frequent requesters to parliament.

Some took a more nuanced view, believing FOI is not the way to find out about bills or policy, and this is the real mark of political engagement (Interview 3; Interview 29). FOI is not a tool here. But other interviewees felt the information revealed by FOI would only turn people away from politics, their disillusionment confirmed through what was revealed (Interview 18; Interview 44).

Some interviewees defined participation more widely to include abstention from voting as a form of protest, or online negative comments on press articles or blogs. This group felt that FOI information could and did prompt protests or petitions though they limited their real-world examples to the expenses information. They felt that as 'parliament has never been more in the spotlight', people seem to be more engaged than ever (Interview 14; Interview 28; Interview 30). During the expenses crisis both the national and local media did encourage readers to look over the expenses details themselves and the *Guardian* used crowd-sourcing to investigate expenses claims (Daniel and Flew, 2010).

FOI has probably not had a significant effect on political participation generally in terms of how creators imagined it would - with more people involved in the policy-process or debate. The expenses crisis, in part due to FOI, did trigger a variety of public involvement, often indirectly.

## **Has FOI increased public trust in parliament?**

The issue of openness and trust is problematic. Supporters of FOI, in particular politicians, hope that increased openness, by reducing secrecy and promoting understanding, will increase public trust (Falconer, 2004). Others are less convinced. Media focus on 'negative' stories and low levels of pre-existing trust that shape the requests, may actually undermine trust (see Hazell, Worthy et al., 2010; Roberts, 2005).

The issue of how to increase trust is bound up in the wider view that trust in developed institutions is in decline (see Dalton, 2005; Nye, Zelikow, and King, 1997). However, some research questions the implicit assumption that there ever existed a 'golden age', or takes the view that trust varies between institutions (Van De Walle, Roosbroek, and Bouckaert, 2008).

The case of parliament illustrates the difficulties. While the recent expenses scandal lead to a decrease in public trust according to contemporary polls, other research points to very little decline because levels of public trust were already at so low a level and even the 'high point' in the 1970s still contained a majority who distrusted politicians (Hansard Society, 2010). This is made more complex by the notion that a local, and locally active, MP is trusted but 'parliament' as a whole is not (Wright, 2010).

The issue of FOI is dominated by that of expenses, although FOI was only partially responsible. The 'expenses scandal has overshadowed everything else, it was a massive breach of trust', said one official. (Interview 14) Interviewees' attitudes to FOI and trust can be broadly placed into one of four categories; pessimists, optimists, fatalists and those who felt the issue was more complex.

The first set of views were pessimistic. FOI had reduced trust in parliament. This was for two divergent reasons. The first line of reasoning was that politicians had got their 'just desserts', having created, or at least failed to stop, a system of expenses open to abuse: 'Many MPs claimed with questionable honesty, and many changed or manipulated the way they claimed to gain advantage. It will take people quite a long time to get over that' (Interview 14).

The second view was that the media's negative coverage of this issue, as well as others, had led to a decrease because 'the news story is about what *is not* working well. People are mistaken if they think FOI information release will increase trust' (Interview 38). This was part of a wider issue around trust, media reporting and political communication whereby 'to a large extent politicians are not 'corrupt' or 'venal' but the idea they are 'venal' has a central place in the discourse' (Interview 39).

The third set of views took a more long term and optimistic perspective. Interviewees held that FOI would act to 'purge' the political system of poison. This would be painful in the short-term but beneficial in the long term both by 'cleansing' the political system and ensuring it couldn't happen again. As one interviewee put it 'FOI has done the opposite [of increasing trust]. But this is necessary – bad comes before good, you need to see and remove all the bad stuff and then the good things happen' (Interview 27).

The fourth group held that nothing could really be done. In line with Hansard Society findings (2010) they felt that trust was, and always would be, low towards politicians. It was part of the nature of politics and very little could be done to alter it. It may also be inherent in FOI itself: 'I don't think any system of anyone checking up on anything leads to trust' (Interview 23).

The final view was that FOI was inadequate or inappropriate to deal with such a complex issue as trust: 'People are attaching too much importance to FOI if they think it can improve trust. There is a lack of trust across UK public institutions, and there are many different reasons for this...many other cultural changes need to occur' (Interview 11). A peer agreed that it was about 'outreach to the public, work with schools [and being] attuned to public attitudes on issues that matter to them' (Interview 6). As one interviewee put it, the difficulties of improving trust do not sit well with the discourse or the way in which politics works:

Trust is very complex and is often discussed in a 'context free' way which is artificial and with rather grand statements. Trust has to be

earned-it is not automatic. Politicians are 'ahistorical' and 15-20 years is very far away (Interview 39).

Given the diversity of views, and the long term nature of any shift in trust, any conclusions must be provisional. FOI and trust have been profoundly shaped by one single event, itself a demonstration of one of the difficulties around this issue. FOI has not automatically led to an increase in trust but nor would it be a direct influence on declining levels.

## **Parliamentary Privilege and FOI**

The parliamentary privilege exemption within the FOI Act is considered essential to maintain 'exclusive cognisance': The three cases which have made it to the ICO that concern Parliamentary Privilege bear this out (Information Commissioners Office Decision Notices FS50116013; FS50224829; FS50327178).

Most concerns about including parliament within the FOI Act centred around parliamentary privilege (Interview 3; Interview 30). One concern was that information provided to an MP by the House of Commons library, albeit impartial, might be used to politically attack an MP, hindering MPs carrying out the work of parliament (Interview 30). Others were concerned that FOI could be used to undermine privilege through access to constituent-related correspondence, MP-government communications or private aspects of select committee work.

The decision was made to treat FOI requests which touched on privilege on a case-by-case basis, rather than have a blanket policy (Interview 14). This makes more sense as much privileged material is not automatically qualified as 'secret' and FOI has not changed this (Interview 9; Interview 29).

Despite the concerns, the exemption has been used relatively rarely. According to our coding of the Houses' FOI disclosure log, the Lords has only used the Parliamentary Privilege exemption (s.34) on eleven requests since 2005, totalling only 2 per cent of all the requests they received up to 2009. Six of these requests were still released in part and other exemptions were applied to the requests in tandem with s.34.

The equivalent figure for the Commons is 89 requests, a total of 5 per cent of all requests received between 2005 and 2009. It is important to note that 38 of these requests were still answered in part, and other exemptions were applied to the same request in tandem with s.34. 49 of these requests were for select committee material, and four were for an individual MP's correspondence.

While originally a concern, few interviewees were concerned with privilege today, and could not cite examples of any impact. Attitude towards parliamentary privilege had modified over time from a 'defensive' concern to the encouraging of pro-active disclosure of previously secret areas (Interview 32). The Supreme Court judgment relating to MPs David Chaytor, Elliot Morley and Jim Devine in December 2010 has further clarified the limits of what is privileged. Before the ruling on the case, MPs from all sides of the House decried the failed attempt by the MPs to avoid criminal prosecution using privilege (BBC, 2010). Officials noted their own reluctance to go to the courts over matters of privilege, whether about FOI or not. If they lost, the 'resulting fallout' would be deeply damaging (Interview 3). Here the Lords and Commons were different. MPs remained concerned (Interview 29), whereas 'the Lords don't get so exercised about it.' (Interview 7). One important point to make is

that FOI requests for MPs Additional Cost Allowance expenses information were *never* subject to the s.34 exemption (Interview 3).

### **Explaining the expenses scandal**

The issue of MPs' expenses has been by far the biggest issue relating to FOI in Britain. It has shaped both politicians' and the public's perceptions of parliament to a far greater degree than any recent event. It invited comparisons with all embracing scandals elsewhere such as *tangentopoli* in Italy (Guardian, 2009a), and has been characterised as an 'incendiary device thrown directly at the political establishment' (Kelso, 2009, p.334). It is still too early to tell if it represents a 'watershed' on the path towards 'real' representative democracy but it has had significant impact leading to the resignation of the Commons' Speaker, a number of MPs stepping down and with three MPs imprisoned with others to possibly follow (Times, 2011). It has also, some argue, led to a further erosion of public trust in politics as well as an end to parliament's complete right to govern its own affairs.

Generally, FOI requests focus on particular people or decisions, in line with the small scale way in which FOI works. Here it exposed apparently systematic expenses abuse by MPs from across the political divide, ranging from tax avoidance and fraud, to frivolous or even grandiose abuse, symbolised by the attempt to use expenses to cover the costs of buying biscuits and cleaning a moat.

The parliamentary authorities had foreseen that expenses would be an issue and began publishing limited details in October 2004, before the Act was implemented. In January of 2005 a number of journalists and one MP submitted similar requests for details of expenses use. During the course of the next four years, amid resistance from the Commons authorities, including the MacLean Bill, the cases went through the appeal system, gathering controversy and media attention as they went. Several MPs began publishing details of their expenses on their own websites. Although the ICO ruled only some details should be released, the Information Tribunal and then the High Court took a far stronger line. It was the Tribunal case which highlighted the existence of the so-called 'John Lewis list' available for Fees Office staff to use as a basis for acceptable expenses payments. Following the High Court ruling in May 2008, the Commons committed to publishing details of Additional Costs Allowance claims. However, while the expenses were being redacted to remove personal details, the complete details were leaked to a national newspaper, *The Daily Telegraph*, which began publishing them in May 2009 (see Kelso 2009 for a detailed overview).

The MPs' expenses scandal story has been mapped out in detail elsewhere and has been studied from a variety of angles: in regards to ethical standards (Allen and Birch, 2009; Rush and Giddings, 2010), its impact on journalism (Guardian, 2009c), parliamentary communication (Allington and Peele, 2010), and also documented by those involved (Brooke, 2010; Coates, 2008-2009; Winnett and Rayner, 2009).

This section will simply explain why the expenses scandal happened how it did. That FOI legislation is often used to expose small spending, such as expenses and allowances, was well known. Experience elsewhere (see below) in 2006 in Scotland and the exposure of chief executive salaries at local government level were signals as to how well directed requests could do this. In 2002 Robin Cook warned that 'few members have rumbled to the juggernaut heading their way' (Mullin, 2009, p.284). Martin Bell MP explained back in 2002, 'you are almost invited to sign a cheque to yourself each month...no one ever asks for a receipt', and a Fees Office official was

quoted as saying 'many of us are worried about the way it is administered, but when we raise queries we are told it's all above-board.' (Mail on Sunday, 2002)

Yet the expenses crisis appeared to be both severe and unexpected. To answer how and why requires examination of four areas: the system itself, the reaction and resistance, the nature of how the Commons is governed and the gap between mechanisms of culture and openness.

The first factor was the expenses system itself. MPs were the 'architects of the system as well as the principal beneficiaries' (Kelso, 2009, p.337). The system was based on an informal agreement between Margaret Thatcher and Michael Foot made in the early 1980s, permitting allowances to increase while salaries remained relatively static. The Additional Costs Allowance's longevity and lack of definition meant some MPs failed to understand how it may look if exposed to the outside world, even if the rules were 'being obeyed' (Interview 20; Interview 38; Interview 44). Over time, many MPs got the message that claiming the maximum was the norm (Interview 8; Interview 11; Interview 12; Interview 14; Interview 28; Interview 39; Interview 42), an example of the 'socialisation' process which was stronger than codified rules (Allen and Birch, 2009; Kelso, 2009; Rush and Giddings, 2010).

The second factor was the reaction of the authorities and their determination to fight the release of the information 'At each stage the political pressure to resist became stronger... "it's a brave general who surrenders"' (Interview 3). Undoubtedly any release would be damaging but the four year battle attracted attention and the added accusation of secrecy and resistance (Interview 17; Interview 28; Interview 29; Interview 44). This could be compared with the FOI scandal in Scotland where MSPs experienced a 'short, sharp shock' that did little permanent damage (see below).

The third factor was the structure of the Commons. As described above the Commons is not the same as any other institution. It is governed by its members (with senior officials also appointed by them) and its governance is also influenced by a range of complex influences including party competition and hierarchy. In the case of a local authority or central government department, a similar FOI would, eventually, be dealt with by senior officials and politicians.

The Commons does not work this way. A number of interviews spoke of a 'sense of drift' as members hoped someone would find a solution but were unsure who would or could do so (Interview 4; Interview 14; Interview 17; Interview 32; Interview 35). It also led to intense internal discussions over what needs to be done and a reliance, or indeed an over reliance, on legal advice. All this contributed to a lack of decision and sense of inactivity. This may have been reinforced by the Commons sense of its own uniqueness, a political equivalent of the 'too big to fail' thesis (Interview 18; Interview 20; Interview 39; Interview 44). John Bercow spoke of how the expenses scandal was due to the Commons' failure 'to make the transition from private club to public institution.' (Nicholls, 2010)

Finally, the Commons culture created a blind spot. Many members believed mechanisms for openness were being met by the publication of aggregated figures from October 2004 (Interview 3; Interview 8; Interview 17; Interview 42). There existed a blind spot both over how open or secret the Commons was and, as later investigation showed, the scale of expenses abuse. Here the notion that parliament was 'transparent' led to failure to appreciate the consequences of FOI exposing those areas that were not.

These four factors combined to create the expenses crisis that dominated the headlines, the effects of which continue to be felt. That such a revelation would always cause damage is certain. Yet certain cultural and structural factors, within the rather unique environment of a parliament, led to a severe political crisis.

As outlined earlier, the UK parliament is not unique in being included within an FOI regime. Similarly, other countries' parliaments have suffered 'expenses' crises, though none in such spectacular fashion as Westminster. Two institutions offer interesting comparisons with Westminster.

### **Scotland's Short Sharp Shock**

In February 2005, Paul Hutcheon, Scottish political editor of the Glasgow-based Sunday Herald, asked the Scottish Parliament for copies of all Conservative Party leader David McLetchie's taxi claims (Guardian, 2006). The information – initially withheld by the Scottish parliament – was ordered for release by the Scottish Information Commission in October. McLetchie's travel amounted to £11,500 over five years, a figure far greater than for any other MSP. After much pressure, McLetchie stepped down in October 2005, whilst also making a public commitment to repay the expenses in full (BBC, 2005). The resignation was noted as one of the first major political scalps FOI had claimed (Guardian, 2006).

Following the resignation of McLetchie, the Scottish parliament quickly acted to preempt the flow of expense claim revelations by creating a searchable 'on-line' database, to replace the Westminster-style annual figures of spending previously published.

Winetrobe (2008) sees the differences in wider cultural attitudes between Holyrood and Westminster as a contributing factor to the differences in reaction to an 'expenses' crisis. He describes Westminster as 'inward-looking; pragmatic and precedent-based', with 'little premium on a 'corporate' identity or overarching principles, goals or missions.' Holyrood, in contrast, having only been created in May 1999 (and in some ways determined to *not* be like Westminster) is characterised as having 'broader goals and motives', and a more corporate attitude. 'Even if resistant at first, it did eventually seize the initiative of making a virtue of the position it found itself in by the McLetchie decision and by the resource pressures of FOI work' (Winetrobe, 2008).

### **Ireland's Slow Burn**

Ireland has suffered a slow burn crisis between 1999 and the present. As in the UK, requests and revelations from 1999 onwards followed rulings from the Information Commissioner and repeated delays. In 2009, the Ceann Comhairle (equivalent to the Commons' Speaker) of the Dáil resigned after FOI requests from the media found he ran up a travel bill of €90,000 over a period of two years. Several other ministers and TDs were implicated for similar offences via FOI material. Interest in the subject continues, even after reform of the expenses system. In 2011 the Houses released details of correspondence to TDs 'querying or disallowing' expenses claimed from 2007 to November 2010 (Independent, 2011).

Here Ireland's experience shows some similarities to the UK. A strong parliamentary culture sought to resist disclosure to an increasingly interested media, despite the existence of openness mechanisms and rulings from the Commissioner. In the case

of Ireland, the revelations were more muted as they formed part of a wider ongoing expose by FOI of apparent clientalism and corruption across public institutions.

## **Conclusion**

Parliaments present particular problems for FOI, and the relations can be 'problematic and complex' (Snell and Upcher, 2002). They are relatively open bodies but with secretive areas, and with the Westminster system comes the doctrine of privilege that needs to be protected (though privileged material, despite concern before, has remained protected without fuss). Parliaments' status can create a sense of uniqueness and this, combined with a feeling that they are open, can create resistance as seen in Ireland and the UK.

As parliament is unique, how FOI has impacted upon it is bound up with the uniqueness of the governance structures of the two houses and the complexities and contradictory forces that shape them. A lack of accountability was central to how the MPs' expenses scandal unfolded, combined with the opaque system, resistance and the culture within the Commons, itself bound up within a wider conflict between politicians and parts of the media.

FOI has made parliament more transparent on a range of issues, not just expenses, and added on to the already open practices. It is not clear to what extent FOI has changed the culture within the Commons, with continued resistance from some quarters. It has made the Lords more open, albeit from a different level.

FOI has made parliament more accountable, with a focus on smaller activities. Though it appears to have had little impact on public understanding at a general level it has created a chain of accountability and revealed small scale activities of both Houses, particularly in terms of administration.

FOI has not increased public participation generally, and expenses related involvement may be exceptional. Nor has FOI increased trust in parliament because the expenses scandal has overwhelmed any possible benefits. Though it may change in the long term, it is unlikely FOI alone will significantly alter levels of public trust.

The case of parliament exposes some of the paradoxes about how FOI works. It often operates in tandem with other mechanisms such as leaks in the case of expenses. While it is not a tool to obtain an overview of how institutions operate, it can and does expose smaller scale activity not always noticed by officials or politicians. Finally, FOI will inevitably seek information that is secret, no matter how transparent an institution.

In terms of institutional development, parliament has, in some senses, experienced a 'formative moment' regarding openness. The expenses scandal, partially triggered by FOI, led to significant changes in how parliament works. Most importantly, IPSA has significantly eroded exclusive cognisance. Across range of issues, from bar tab payments to pass provision, parliament has shifted. This has also entailed at least the beginnings of a shift in attitudes and culture within both Houses, though not without resistance.

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