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The Sword: How MPs and peers have used Freedom of Information in the UK

Abstract

As part of a detailed study of the impact of the Freedom of Information Act upon the UK Parliament, this paper examines to what extent FOI is used by Parliament to hold the government to account. The research is predicated upon a number of hypotheses based upon MPs' use of FOI in other regimes; that MPs and peers are creatures of habit, and will be slow to use FOI in preference to traditional tools; MPs and peers will use FOI in combination with other parliamentary tools to access information rather than in isolation; only a small minority of MPs and peers will make systematic use of FOI. The research assess how many FOI requests are made by MPs and peers, on what subjects, and compares the benefits and costs of using FOI against more traditional parliamentary methods of obtaining information. This paper presents some of the preliminary findings based upon interviews with MPs and researchers, analysis of PQs and debates and Freedom of information requests to central government departments. It will also compare and contrast the UK experience with the use of FOI by Parliament in other countries.

Introduction

The Constitution Unit is engaged in three research projects relating to FOI: the impact of FOI upon Whitehall (ESRC 2007-2009), the impact of FOI on local government in England (ESRC 2009-2011) and the impact of FOI on Parliament (Leverhulme Trust 2009-2011).

This paper presents the findings from the first six months of a two year study of the impact of Freedom of Information [FOI] Act 2000 upon the UK Parliament. The FOI Act extends across more than 100,000 public bodies, one of which is Parliament, which covers separately the administrative work of the two houses. Since implementation in 2005, the interaction between FOI and Parliament has been a source of high profile and long running controversy, not least with the leaked details of MPs' expenses triggered by an FOI request made in 2005.

FOI thus represents an opportunity for MPs and peers to use it and a potential threat as it can be used to access information held by Parliament. Our project examines both the 'sword', how members of Parliament have used FOI, and the 'shield': how Parliament as an institution has been affected by it. This paper focuses upon the 'sword', examining how parliamentarians' used FOI.

Hypotheses

The research outcomes are measured against a set of four hypotheses drawing upon the experience of FOI use by Parliamentarians in other similar political systems.

The four hypotheses are:

- MPs and peers are creatures of habit, and will be slow to use FOI in preference to PQs, adjournment debates and writing to Ministers
- MPs and peers will use FOI in combination with other parliamentary tools to access information, not in isolation
- Only a small minority of MPs and peers will make systematic use of FOI
- Government will subject MPs' FOI requests to special procedures

This paper will give a preliminary insight into whether these hypotheses hold or not and conclude with a comparison with four other Westminster systems with FOI legislation.

Methods

We are using a range of methods to examine how MPs and peers are using FOI and why.

First, we have used the FOI Act to ask departments for lists of requests they have received from MPs and peers in the first four years of the Act. Data Protection laws mean we cannot identify individual requesters, but we have obtained information about whether the requester is an MP or peer, what question they have asked and what the outcome of the request was (i.e. whether it was granted). The data below is drawn upon responses from five different government departments. It may also be, as a number of officials have suggested, that some MPs may be using proxy requesters to access particularly sensitive information (Hazell, Worthy and Glover 2010).

Second, we are studying the parliamentary record. Using the search facilities in Hansard, we have begun studying mentions of FOI in parliamentary questions (PQs). Our initial research shows over 1000 PQs which refer to FOI. Similar coding is being undertaken for interventions using FOI in parliamentary debates. Some provisional results from the examination of PQs from 2005-2008 and debates between 2008 and 2009 are shown below.

Third, we are interviewing MPs, peers and MPs' researchers. We ask how and why they have used FOI, how effective it has been in relation to other methods of obtaining information, and how they have used the information. We have interviewed five MPs as well as a number of officials. We have not yet spoken in any depth to peers or researchers, so our analysis focuses upon MPs.

To understand how government deals with FOI requests from MPs and peers, we will interview the head of the MoJ clearing house, and the heads of FOI units in four departments. To study how MPs use information obtained under FOI to gain publicity, we will study a sample of national, regional and local newspaper reports which mention 'MP' and 'freedom of

information'. Neither of these aspects has been yet undertaken, though we have some preliminary data from our earlier study of FOI and central government.

The data from these sources will then be compared and cross referenced against other sources. This will include official and parliamentary reports, such as the investigations by PASC into the effectiveness of the various accountability mechanisms available to MPs (PASC 2005; 2002). The paper will also draw on the Constitution Unit's previous study of the impact of FOI upon central government which examined some of these issues (Hazell, Worthy, Glover 2010).

Hypothesis 1: MPs and peers are creatures of habit, and will be slow to use FOI in preference to PQs, adjournment debates and writing to Ministers

Only a small number of MPs, and virtually no peers, use FOI. However, views differ as to whether this consists of a small group of regular users or a slightly larger group of MPs using it less frequently.

Our study of the impact of FOI in Whitehall found that MPs made up only a very small proportion of requesters to central government (Hazell, Worthy, Glover 2010:104). A study by Alasdair Roberts of requests to the Ministry of Defence [MOD] between 2005 and 2008 found that 1.2 per cent of all requests were by MPs or peers, which equated to 194 requests out of the 15,687 FOI requests received by the MOD (Roberts 2009:3). Table 1 shows the number of requests by MP and peers requests to departments who generally experience the highest volumes of FOI requests. Our annual survey of FOI officers in local authorities show that MPs have also been using it to access information about local government, though again only a small proportion (Constitution Unit 2006: 2007: 2008: 2009). A PQ revealed that between 2005 and 2009 members had taken 146 FOI requests through the appeal system to the Information Commissioner's Office (HC Debates 9 September 2009).

Table 1: Number of identified FOI requests from MPs/peers against total requests to three heavily requested central government departments for 2008

Department	Total FOI requests	No. from MPs/peers	%
Defence	2,992	39	1.3
Health	1,349	39	2.8
Work and Pensions	1,469	36	2.4

(Ministry of Justice 2009)

The fear expressed by a number of MPs and others was that FOI would begin to replace PQs and other methods of holding government to account, thus undermining Parliament's privileged position in obtaining information and calling the executive to account (Gay 2008: 15-17). A former leader of the House expressed this concern in 2007:

We knew when the Freedom of Information Act came into force that it would pose a challenge to the relationship between that legislation and parliamentary questions and... it is important to get this right (House of Commons Procedure Committee 2009: 23)

If statistics can be any guide, the number of PQs asked per year is between 3 and 5 times higher than the total number of FOI requests (see Table 2). Though the numbers fluctuate, usage remains very high. The number of written questions tabled daily has risen from 414 in 2007 to 434 in 2008, and had reached 514 by March 2009 (House of Commons Procedure Committee 2009: 5-6). Moreover, the FOI numbers below represent total requests and, based on experience abroad, request by MPs will account for no more than 5 per cent of the total and we have used this estimate to illustrate how few requests there are compared to PQs.

Table 2: Comparing FOI and PQs as an accountability mechanism (PQs per Parliamentary session rather than calendar year).

	2005	2006	2007	2008
Number of PQs	104,030	63,972	80,255	78,508
Total number of FOI requests (central government departments)	19,717	17,924	16,903	19,175
Maximum likely number of FOI requests made by MPs (estimated as 5 per cent of total)	986	896	845	959

(adapted from Hazell, Worthy and Glover 2010)

A further question is why MPs or peers use FOI or PQs. Our preliminary research indicates there may be a difference of opinion as to why MPs do and do not use FOI as opposed to more traditional methods. MPs that have used FOI seem to see both tools as useful for different things; officials are confused about why MPs chose to use FOI at all given the plethora of mechanisms already available.

MPs who use FOI felt PQs were quicker than FOI and a more 'basic' means of obtaining information. They are used on a day-to day basis to obtain information quickly and in a focused way that can serve as 'a ready made press release' (Interview). PQs seek an answer, and generally receive a brief one. Written Answers to PQs (the vast majority) are generally only a sentence or a short paragraph long. As one MP put it PQs are 'short term and are publicly available to everyone, quicker than FOI and provide basic scrutiny' (Interview).

By contrast, FOI requests are useful for 'long term' issues are often 'driven by more personal agendas' and involve 'deeper issues' (Interview). The Procedure Committee pointed out that:

A common criticism is that replies to PQs tend to be designed to minimise the opportunity for further scrutiny, by being brief, curt and limited to a narrow

interpretation of the question (House of Commons Procedure Committee 2009: 24).

Where the answer to a PQ is a brief and highly edited explanation, FOI can be used to obtain more in-depth information or a broader set of leads. FOI appears to have two further advantages over PQs. First, while the refusal of a PQ is discretionary FOI has an in-built appeal system to the Information Commissioner [ICO], Information Tribunal and further. It can be used to 'push the boundaries' of what information can be accessed. A number of the examples of FOI use below illustrate the importance of the appeal system in accessing information. Second, FOI has a wider coverage than of PQs, covering organisations like the BBC and local councils.

The decision to use one or the other is also influenced by a number of political factors. Unlike PQs, FOI requests are not publicly available and so cannot be picked up or used by another member. There is also an issue of the political sensitivity of the topic or information:

A far higher portion of PQs give you the answers you want, but that's because it's non-threatening stuff you're asking [such as] "What percentage of people living in each region of the country were disqualified last year?". There's no particular political sensitivity about that. FOIs are used where there is political sensitivity (Interview)

These preliminary findings mirror the experience of New Zealand, which has had an equivalent to the FOI Act in the Official Information Act [OIA] since 1982. New Zealand has seen increasing use by MPs (see below). White found that among political requesters, there was a general preference for using the PQ system, because it produced answers more quickly but OIA was used to obtain a 'more detailed story' (White 2007:109).

How MPs and peers have used FOI

The role of an MP has long been purposely left ill-defined. However, their broad role includes representation, accountability and scrutiny. Consequently, MPs constantly need information in order to seek publicity or news coverage, to support a campaign or as a means to bring accountability, scrutiny and assist the work of opposition. FOI offers the potential to assist in all these activities.

Our study of Whitehall and examination of parliament has highlighted the variety of ways in which FOI can be used. First, FOI requests can be used to ask a direct, specific question or questions in a particular area. Second, a broad question can be asked to obtain a large amount of information or data that can then be examined. Third, requests can also be used simultaneously to ask the same question of many public bodies through 'round robins', such as asking local authorities or Primary Care Trusts for a piece of information that can then be cross-compared or aggregated to give a nationwide picture. Finally, as seen below, it can be simply used to generate publicity, controversy or create a nuisance. The following examples display the range of uses of FOI.

FOI and the Chequers guest list

The first example is the most straightforward use of FOI, to obtain information on a particular issue. Norman Lamb MP's attempt to obtain details of who the Prime Minister entertains at his country residence began as a Parliamentary Question in 2003, which was refused, and was pursued as an FOI request since 2005. Details of visitors on 'official engagements' were released in January 2005. However, it was not a full description of all visitors that Lamb sought in order to create a public register of visits (*Sunday Times*, 19 June 2005). The full logs were released in the summer of 2007 and are now regularly released pro-actively, having become a perennial source of interest for the press (*Telegraph*, 23 January 2008; *Daily Mail*, 22 September 2007).

FOI reveals Lord Ashcroft's non-dom status

FOI is most commonly used by the opposition. However, in this case it was used by a government supporter against the opposition, because the relevant documents were held by the Cabinet Office. FOI was used to access correspondence relating to the ennoblement of Conservative donor and deputy party chairman Lord Ashcroft. Lord Ashcroft, who donated funds specifically to assist Conservative candidates in marginal seats in 2005, was elevated to the peerage on the second attempt in 2000. His first application was rejected following doubts about his tax status as a 'non-domicile' resident in Belize (*Guardian*, 2 March 2010).

The Cabinet Office says that Lord Ashcroft's status has long been the target of questions from MPs. In 2007 Labour MP Gordon Prentice made an FOI request for correspondence relating to his appointment. The request was refused. However, an appeal to the Information Commissioner led to the release of the information (*Guardian*, 1 February 2010). Lord Ashcroft made a statement on his website in anticipation of the release explaining that he was not domiciled in the UK. It caused considerable damage to the Conservatives in the fragile pre-election atmosphere, with allegations that Lord Ashcroft had broken a promise apparently contained in the correspondence to become a UK tax payer once ennobled (*Guardian*, 2 March 2010).

A further point of interest is that the FOI request was supported by other mechanisms of accountability. Alongside Prentice's FOI request, an investigation was launched in 2008 by the Electoral Commission into Lord Ashcroft's status as a source of political donations. Prentice himself also tabled a series of Parliamentary Questions after making the request to add contextual information about other peers who had business links to Belize, to pursue the status of the requests and to pressure for an amendment to ensure peers were domiciled in the future (HC Debates 15 July 2009: 19 November 2007: 16 December 2009).

Conservatives allege civil servants' neutrality damaged

The third example is a more classic example of FOI use to cause a nuisance and excite controversy. The Conservatives used FOI to obtain details of work by Civil servants on opposition policy proposals, particularly relating to the Conservative commitment to freeze council tax. The Conservatives alleged that the documents proved that this work was not connected to 'normal' Treasury work but was simply intended to counter Conservative criticisms. Such activity, the Conservatives argued, eroded civil servants neutrality (Conservative Home 2010).

Extraordinary rendition

In this case FOI was used when the usual or traditional channels were shown to be ineffective or subject to enough doubt as to require verification. The All Parliamentary Group on Extraordinary Rendition [APPG] used FOI in investigating the legally ill-defined movement of individuals across international boundaries that may be linked to torture. The Parliamentary group, led by Andrew Tyrie MP, followed up what appeared to be evasive answers about the UK's role:

The reticence of governments on both sides of the Atlantic to disclose information about the rendition programme has hampered attempts to establish the full extent of the programme and the involvement of other governments (APPG 2008: 3)

Consequently, the APPG made FOI requests to the Foreign and Commonwealth Office to obtain flight logs for the island of Diego Garcia for evidence of rendition flights (APPG 2008: 3-4). Requests were also made to the MOD seeking clarification on arrangements of individual agreements relating to insurgents captured in Afghanistan. The information obtained threw considerable doubt onto the original government answers, demonstrating the difference between PQs and FOI described above (APPG 2008: 3-4). Furthermore, the group has lodged FOI requests under the United States FOI Act with the CIA and FBI amongst others and has received over 1000 pages of documents from the FBI (APPG 2008: 3).

FOI and hospital beds

Finally, FOI has been used in an innovative way by the Conservative opposition to create health policy. A series of round robin requests were made to Primary Care Trusts for the cost of building single rooms for the use of particular patients. The aggregated costs were then used as the basis of a Conservative an election commitment to build a set number of single rooms in hospitals (*Times* 30 October 2008).

To conclude, it appears that only a minority of MPs are using FOI and that the concern that FOI would erode the capability of similar mechanisms was unfounded as the two instruments appear to be used in very different ways. Despite the superficial similarities, the two methods of accountability contain distinct differences. PQs are used for routine requests that require a rapid and brief response. FOI is used for obtaining more long term or detailed information. This does not, however, preclude them being used together.

Hypothesis 2: MPs and peers will use FOI in combination with other parliamentary tools to access information, not in isolation

There is also a difference in opinion about whether MPs are using both methods in tandem with each other. Some officials felt there was no link. A few officials in our Whitehall study identified an FOI request as following a failed PQ (Hazell, Worthy, Glover 2010). The House of Commons Library reported that ‘it is apparent that a number of Members are following up what they perceive to be inadequate responses to parliamentary questions by written FOI requests to departments’ (House of Commons Library 2008: 17). We have examined the overlap between FOI and PQs and FOI and debates.

FOI and PQs

To investigate a link and establish the extent to which PQs and FOI interact, we have first examined a sample (25 per cent) of PQs for records of mention of FOI asked between 2005 and 2008. In the years 2006 and 2007 this represented respectively 0.02 and 0.01 of total PQs asked (Hazell, Worthy and Glover 2010).

Table 3 contains the provisional analysis of the PQs involving FOI. The majority of questions were ‘about’ FOI and concerned how the Act was working in terms of its operation or inquiring after requests. Only a few actually drew upon FOI requests and the information they disclosed to ask a PQ.

Table 3: PQs sampled that mention FOI between 2005 and 2008

PQs concerned with FOI	No.	%
About	232	92
Use	10	4
Others	9	4
Total	251	100

Of those that use FOI, below are two typical examples. Conservative MP Justine Greening has used FOI and the similar Environmental Information Regulations over the expansion of Heathrow airport. In this example she drew upon information disclosed to challenge the government to a debate:

Papers that I have obtained under the Freedom of Information Act show possible collusion between BAA and the Department for Transport. Is it not time that the Secretary of State for Transport had the guts to come to the Chamber and debate the matter with Members of the House? (HC Debate 13 March 2008).

The second example concerned a Liberal Democrat peer drawing upon a report obtained by FOI relating to cracks in nuclear reactors:

My Lords, will the Minister accept that neither the operators nor the inspectorate actually knows either how the cracks will develop or what effect they will have on the core? Will he further accept that it does not give the public much confidence that this report on aspects of essential nuclear safety was buried and had to be dragged out under the Freedom of Information Act? (HL Debate 11 July 2006).

Assessing interaction between PQs and FOI is made difficult by the fact that the separation between them is not wholly clear. In theory FOI and PQs work equally with no disparity between information released by one and not the other. PASC reported that

No information should be refused under a WPQ that would be released under an FOI request. In 2007 the then Leader of the House said that such a situation would be 'totally unacceptable' and would 'undermine the special privilege that Members of Parliament get along with being an elected representative' (House of Commons Procedure Committee 2009: 24).

However, there may be a gap between theory and practice. The Procedure Committee claimed that 'We heard of instances where information was indeed refused under a WPQ, but later released through a Freedom of Information request' (House of Commons Procedure Committee 2009: 24). Indeed

Some evidence even suggested that this inconsistency could occasionally be deliberate. David Laws MP told us that it sometimes seemed as though departments, by making the FOI route the only option for obtaining an item of information, were purposefully trying to delay disclosure or wear down a Member's resolve (House of Commons Procedure Committee 2009: 25).

This is an issue to be investigated further. The problem is exacerbated by ongoing debate about guidance. PASC recommended that Cabinet Office guidance be clarified so that a withholding of a PQ could be answered in parallel to an exemption refusing an FOI request:

For example an answer withholding information for a particular reason could state that "the parallel exemption under the Freedom of Information Act would be ...". Such phraseology would be helpful without prejudicing the separate and distinct character of Parliamentary proceedings (House of Commons Library 2008:16).

However, the government rejected this suggestion, claiming 'the Government does not regard it as "possible to interpret the public interest by analogous reference to Freedom of Information Act exemptions"(House of Commons Library 2008:16).The government went on to point out why it was keen to maintain the distinction:

The Government is concerned that any reference to Freedom of Information Act exemptions in responses...will give the Member or peer the impression that the request for information in the Parliamentary Question has been subject to a full public interest test (House of Commons Library 2008:16).

Debates

We have also begun sampling debates within Parliament between 2008 and 2009. As with PQs, the majority of FOI mentions across all debates concerned how the Act was working rather than drawing upon information disclosed.

Table 4: mentions of FOI during Parliamentary debate (Commons) 2008-2009

Mention of FOI in debate	%
About	76
Using	24
Total	100

In terms of those that ‘used’ FOI in the Commons and drew upon it, it was most often mention during business of the house (26 per cent), followed by bill debates (15 per cent), opposition day (12 per cent) and then oral answers (11 per cent). The most popular topic was expenses (21 per cent), followed by banks (9 per cent) and the justice and prisons system (7 per cent). Of those using FOI, 46 per cent were Labour, 36 per cent were Conservative and 16 per cent Liberal Democrats. This runs contrary to our other findings that FOI, in use and mention, is very much a tool of opposition. It will be interesting to see if this year is an aberration or not.

Mentions of FOI were made in a variety of contexts. The most common method appears to be drawing upon FOI results to make a point. The first example is typical, with Derek Wyatt MP’s intervention on a constituency issue ‘after making a freedom of information request, I found out that the local authority was not prepared to spend a mere £3,000 to allow free swimming’ (HC debates 2 March 2009). Similarly, Paul Holmes quoted information obtained by the media ‘the most recent quarterly crime statistics and figures released following a freedom of information request by The Independent, show increasing crime’ (HC debates 4 February 2009). By contrast Paul Burstow used the failure of an FOI request to illustrate a point relating to an NHS project and government spending ‘We will never know how much was spent on the abortive work on "Investing in Excellence", because as the trust said in reply to a freedom of information request, "any invoices related to this project will have been destroyed" (HC debates 17 November 2008).

To conclude, there does appear to be some overlap between FOI and other mechanisms such as PQs and debates with some clear examples of FOI being used in debates and to drive PQs. However FOI is more often being discussed or questioned than being drawn

upon. The situation is further complicated by the lack of clarity regarding their interaction.

Hypothesis 3: Only a small minority of MPs and peers will make systematic use of FOI

As shown above, it appears that only a minority of MPs, and even fewer peers, are using FOI. Of the FOI requests data received from the five departments, the majority of users are in the opposition with Conservative and Liberal Democrat use virtually equal (see Table 5).

Table 5: Party affiliation of MP requesters to five government departments 2005-2008

Party affiliation	%
Conservative	38
Labour	12
Liberal democrat	36
SNP	3
Ulster Unionist	1

Why are more MPs and peers not using FOI?

One of the key questions is thus why more MPs and peers are not using FOI. We can offer a number of provisional explanations, though each requires further investigation.

First and most simply FOI can take more time than other methods of accountability available to Parliamentarians. David Laws MP pointed out that use of FOI can be a long and frustrating process and that, despite its 20 day statutory deadline, can take up to six months:

You put in an FOI request, and that is almost always blocked the first time, and then you have to go through an appeal. All of this takes a long time. It is designed to wear you down (House of Commons Library 2008:17)

Using FOI requires time and attention and can be a frustrating experience that busy MPs, working to tight deadlines, may find is not a good use of their finite resources.

Second, MPs are ‘creatures of habit’ and will habitually use the traditional methods such as PQs. The same will also apply to constituency business, where the MP will be able to ask for most information needed from other bodies in his area without a problem (Interview). As one interviewee argued, there are ‘many established ways of accessing information. Why do they need FOI?’ (Interview).

Robert Hazell's 1987 study of FOI examined parliamentarians' use, or lack of use, in Australia, Canada and New Zealand. The explanation as to why little use was made may apply equally to the UK:

MPs continue to seek information by putting down parliamentary questions or writing to the minister. They are creatures of habit and many lack the patience to follow through an FOI request: it is said they do not turn up to inspect material made available to them, or lose interest when asked to pay charges (Hazell 1989: 209).

Third, use of FOI may depend upon the individual MP. It may be, as one interviewee suggested, most MPs are not 'curious, cynical or suspicious' so do not use FOI above what tools are available (Interview). Those that do seek to uncover or expose issues through FOI are likely to be of the investigative or 'crusading' type.

Fourth, related to this is the issue of context: what FOI can be used for may influence its usefulness. 'Some subjects lend themselves to FOI' as one interviewee put it (Interview). Those subjects, the politically sensitive, long term, may be the sort of private investigations only used by a small group of MPs, of whom only a minority due the factors above will use FOI.

To offer a sketch of the minority of MPs that use FOI, it is likely to be a member of the opposition and one less attached to the culture or habit of traditional methods. It also seems likely to be an MP engaged in a long term campaign on an issue. This can be a policy issue, as with the Conservative plan on hospital beds, a political issue, such as Lord Ashcroft's tax status, or a more personal one, such as Norman Baker's investigation into the death of Dr. David Kelly. However, there is also evidence for FOI use in constituency issues, where motivation and use may vary. Those subjects where the MP chooses or needs to use FOI may be of a similar 'sensitive' or 'investigative' type to those used at Westminster.

FOI and the Lords

Though the study is only six months old, first signals are that peers appear to be making little use of FOI. Of the sample of 251 Parliamentary Questions mentioning FOI analysed between 2005 and 2008, only 16 out of 251 were asked by peers. Of the requests made to the five government departments by politicians, 64 per cent were identified as being MPs as against 2 per cent being from peers, with 20 per cent being researchers and the remainder composed of members of the devolved assemblies.

We can suggest a number of reasons as to why this may be so. First, the Lords is a revising chamber and does not carry the same role of representation, holding the government to account or scrutiny that drives accountability mechanisms in the Commons. The Lords, as a consequence, use all accountability mechanisms more rarely. To illustrate, between 2007 and 2008 73,356 written questions were tabled in the House of Commons compared with 6,537 in the Lords (House of Commons Procedure

Committee 2009: 96-97). Second, peers are not elected and do not need the publicity that MPs are motivated to find. Thirdly, the Lords is less of an arena for political conflict or party competition so peers are not driven by the need for competitive advantage.

However, this issue requires further investigation as the Lords does contain notable personal crusaders who pursued individual campaigns on a range of subjects and may have used FOI. One notable example is Lord Avebury's long running campaign to obtain records of telephone conversations between Rupert Murdoch and Tony Blair in the run up to the Iraq war (*Guardian* 19 July 2007). It is quite possible there may be more examples of these.

Select Committees and FOI

A further question is why select committees do not use FOI, particularly as they undertake the long term, in-depth investigations to which FOI is suited best. We have found only one example, that of a member the Scottish Affairs Committee requesting details on conversations between Jack Straw and British Petroleum that may relate to the release and repatriation of the Lockerbie bomber (*Independent* 31 January 2010).

First, on a practical level, a number of MPs and officials pointed out that Committees have many pre-existing powers to access information and do not need FOI. Moreover, one interviewee pointed out that, should a conflict develop, it could possibly affect and confuse other powers. It was, as one interviewee put it 'simpler to ask and get via normal power' (Interview).

Second, it also runs contrary to the 'ethos' of committees. They shouldn't *need* to use FOI. If a committee wanted information, the government department is expected to provide it. To use FOI may signal that the information is not within the normal 'remit' (Interview).

To conclude, it appears that, in line with the hypothesis, only a minority of MPs use FOI and those that do may be of a particular type. Neither peers nor select committees chose to use FOI for a mixture of political, cultural and attitudinal reasons.

Hypothesis 4: Government will subject MPs' FOI requests to special procedures

A concern both in the UK and elsewhere, is that FOI requests from MPs and peers will be subject to special procedures and either treated with particular care, analogously to a PQ, or subjected to political influence to minimise damage.

The figures for our analysis may indicate some 'special' treatment. Of the requests made by Parliamentarians analysed to date 49 per cent were answered in full, 13 per cent in part and 15 per cent withheld. This compares with FOI generally in the UK where roughly 62 per cent are answered in full and 18 per cent withheld (Hazell and Worthy

forthcoming). Roberts's analysis of requests to the MOD also shows that MPs' requests experienced higher levels of delay, though this may have been for a number of reasons (Roberts 2009).

David Laws MP claimed his FOI requests were 'almost always blocked the first time' (House of Commons Procedure Committee 2009:17). Evidence from our previous study indicated that FOI requests from Parliamentarians were treated to special procedures, though 'positive', in the sense of MPs receiving preferential treatment, as well as 'negative'. Requests, where identified, were frequently signed off by a minister and often brought to the attention of others (such as the press officer). One official explained:

It was a fairly high profile issue so it was seen by Ministers, by the Permanent Secretary, by Special Advisors; it had the full Private Office clearance process before replies were given (Interview).

Another official gave a very similar explanation

MPs will actually get a reply from a Minister even though the letter would be regarded as a request under the Act. We undertake to respond to MPs and peers within 15 working days so they would in theory get their answer in advance of when they would under the Act (Interview)

There was also some evidence of negative activity and 'game playing' with departments, for example, seeking to delay requests from opposition researchers. The opposition responding by sending requests under fictitious names (Hazell, Worthy and Glover 2010).

This is a subject upon which our research has only just begun and will require far more detailed analysis.

Parliamentarians and FOI Elsewhere

To support our findings, we will briefly examine experience in a selection of Westminster systems with FOI; Australia, Canada, Ireland and New Zealand. Hazell's 1987 study of FOI in Canada, Australia and New Zealand outlined the potential of FOI for Parliamentarians explaining how FOI potentially gave 'access to great attack material [and] publicity'. However, he concluded that 'strangely, FOI has been used relatively little by the parliamentary opposition in all three countries'. He also noted that the number of PQs had not diminished with the advent of the legislation in any of the three countries, where similar concerns were expressed about FOI eroding traditional accountability mechanisms (Hazell 1989: 203).

Hazell's finding in 1987 appears not to have changed over the past twenty years. The pattern across all but one of the countries is low level use of FOI by Parliamentarians, with requests comprising between 2 and 5 per cent of total FOI requests made. These levels have remained stable over the course of the Acts operation. However, one country, New Zealand, offers an exceptional trajectory.

Australia

Australian statistics find Parliamentarians' FOI use was around 5 per cent of overall requesters in its early years (Hazell 1989: 201). A 2007 study noted that this has continued and 'as a general rule, the use by [Australian] parliamentarians of FOI... has been comparatively minor' (ASPG 2007:55). Use is often sporadic, or used for 'point scoring' which then makes it easy for the government to characterize its use by MPs as 'misuse' or even 'abuse' of the FOI system (Snell and Upcher 2002). These tactics meant that the "spirit" of freedom of information laws had been 'abused by oppositions seeking to make political mileage by a range of tactics' (ASPG 2007: 55). Snell and Upcher argue the very nature of Westminster systems undermines FOI as a tool for parliamentarians:

When FOI operates in an adversarial climate, the conflictive nature of party politics typically gives rise to non-compliance and evasion, a tendency to adopt a broad interpretation of exemptions, time, delays, and more emphasis on 'spin' and controlled dissemination of information (Snell and Upcher 2002: 37).

Canada

Canada, with an Access to Information Act since 1983, has found similarly low levels of use by Parliamentarians as Australia. The Information Commissioner of Canada noted in 1994 'Parliamentarians as a group has made surprisingly little use of the Act,' and puts this down to a lack of role models:

While it was widely expected that Opposition Members of Parliament would champion the disclosure of tightly-clasped government records, the legislation has received remarkably little attention in the Commons or Senate. The Act awaits a new Parliamentary 'champion' (IC 1994:16).

Alastair Roberts argues Canadian MPs' requests are caught in the wider context of government information management and a strengthened executive branch

Unfortunately, the federal government...may feel that the interpretation that is imposed on document [by] opposition politicians is sensationalist or unfair. The urge to regulate the flow of information may be stronger in a governmental system such as Canada's, in which authority is already concentrated within the executive branch (Savoie 1999).

Roberts found that MPs were one part of the groups whose requests were subject to special measures to neutralize controversy or fallout, such as by alerting media officials with lines to take (Roberts 2005). However, Canada's experience needs to be seen within the context of an Act that has attracted very low levels of use generally and encountered substantial hostility and resistance from politicians and officials.

Ireland

Ireland has had FOI legislation since 1997. As with Australia and Canada, TDs have been a very small group of users, comprising around 1 to 2 per cent of total requests (Ministry of Finance 2009). Moreover, since 2003 the Act has been subject to a standard application fee which means that request numbers overall have fallen sharply. Ireland has also experienced hostility, particularly from government (Irish Information Commissioner 2008).

A search of the Irish press reveals a few high profile uses of FOI by opposition members, using the Act to reveal links between the Tourism Minister and contractors, over uncertainties over Irish banks before they collapsed (*Irish Times* 1 June 2005; *Limerick Leader* 4 February 2010; *Irish Independent* 5 November 2008). Moreover, since 2008-2009 the Act has received publicity as it was used, in combination with parliamentary questions, to gradually open up the issue of ministerial expenses in a slow motion version of the UK's expenses scandal. This led to the resignation of the Speaker of the Dail in October 2009 (*Sunday Tribune* 11 October 2009). Nevertheless use remains low as in the above countries.

New Zealand

New Zealand is seen as the world's most progressive FOI regime, within a context of an open and multi-party political system. It is also the only country from among our comparators in which the trend seems to have shifted and use increased.

The reason for the increased use seems to have been the introduction of MMP proportional voting system in the 1990s, which increased the number of members and, consequently, the competition for stories and publicity. As White explains:

As the political scene became more complex and more strongly contested, there was an immediate effect on the OIA. It became a core tool for parliamentary researchers and opposition members of Parliament who were seeking information. That search for information on the one hand supports their constitutional task of holding government to account. On the other, it feeds a political need to uncover scandal and create headlines (White 2007: 13).

This has also led to increased use of requests with other tools. In 2001 the New Zealand Ombudsman made the first mention in an Annual Report of the OIA and 'the development of an interplay with the use of parliamentary questions and select committee processes as opposition parliamentarians made use of the full range of tools to obtain information.' (White 2007: 56). In a further innovation, it is also alleged that some opposition members have used a combination of OIA and PQs to bombard and overwhelm particular departments (White 2007: 115)

Consequently, White notes how the use of OIA by opposition has led to unwillingness to assist researcher or opposition members (White 2007:92:113). In 2005 new guidance

issued by the government made it explicit that parliamentarians may be charged for information, though its impact is not clear (White 2007: 56).

Provisional conclusions:

As the project is less than a year old, any conclusions must be provisional. We can say at this stage that it appears that a small group of MPs, and virtually no peers, are using FOI. It appears that most MPs, and almost all peers, prefer to use traditional mechanisms of accountability due to a mixture of habit, attitude and practical issues. These MPs are disproportionately members of the opposition using FOI in a variety of different ways from long term campaigns to nuisance making. It also appears FOI is used for different reasons and to obtain different types of information than parliamentary questions, though they may overlap. The use of FOI in PQs and debates appears to show that the majority of interactions concern questions about FOI, rather than using it. Nevertheless, there appears to be some use of FOI both in PQs and in debates.

As should be the case at this stage, the above analysis leaves us with more questions than answers. It is to these questions which we will turn next.

- How can we find out exactly how many MPs and peers may be using FOI?
- How can we analyse how MPs use FOI to attract press coverage?
- Why are peers not using FOI? How can we best measure a negative?
- What role do researchers play?
- Are MPs requests subject to special measures or procedures in government? Is it positive or negative?
- Can we build a typology of Parliamentarian requesters and their requests?

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