

# JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

PUBLISHED BY THE DONALD E. BIEDERMAN ENTERTAINMENT  
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IN ASSOCIATION WITH THE  
AMERICAN BAR ASSOCIATION FORUMS ON COMMUNICATIONS LAW AND THE  
ENTERTAINMENT AND SPORTS INDUSTRIES

Volume 7, Number 1

2016-2017



## SYMPOSIUM FREEDOM OF INFORMATION LAWS ON THE GLOBAL STAGE: PAST, PRESENT AND FUTURE

### EDITOR'S NOTE

### ARTICLES

From Sweden to the Global Stage: FOI as European Human Right?

*David Goldberg*

Why the French FOIA "Failed"

*Tom McClean*

Sunlight Where It's Needed: The Case for Freedom of Media Information

*Roy Peled*

Legislating Usability: Freedom of Information Laws That Help  
Users Identify What They Want

*Mark Weiler*

SOUTHWESTERN  
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**SYMPOSIUM**  
**FREEDOM OF INFORMATION LAWS ON THE GLOBAL STAGE:  
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## Editor's Note

I am pleased to report that our November 2016 conference, *Freedom of Information Laws on the Global Stage: Past Present and Future*, exceeded our expectations in both attendance and presentations. As a result, Volume 7 of *JIMEL* will be entirely devoted to scholarship generated by the symposium, which attracted practitioners and scholars from every continent except Antarctica.

This issue contains four articles that underscore the diversity of scholarship that was present at the Freedom of Information Conference. The first article, *From Sweden to the Global Stage: FOI as a European Human Right?* by U.K.-based media law professor David Goldberg, sets the stage for the historical context of the conference. A groundbreaking scholar on the history of freedom of information laws, Professor Goldberg poses the question: Does the European Court of Human Rights have an opportunity to declare freedom of information as a stand-alone human right? Tom McClean, in *Why the French FOIA Law Failed*, argues that France's 1978 statute has effectively been a "failure," despite its similarity in text to FOIA laws in other countries. Dr. McClean, the head of the Uniting Organization in Australia, traces low use of the French statute to the institutional, social and political context into which the law was introduced. In *Sunlight Where It's Needed: The Case for Media Information*, Professor Roy Peled posits an "accountability gap" between the media's role in democratic societies and its scrutiny-free operation. Mindful of press freedoms, Professor Peled, an information expert who teaches at the Hebrew University, calls for creating disclosure requirements for news organizations and social media to reduce censorship and curb irresponsible media behavior. This issue's final article, *Legislating Usability: Freedom of Information Laws that Help Users Identify What They Want*, by Dr. Mark Weiler, offers a fascinating analysis of the description conventions that must be in place before the government can identify and retrieve information. Dr. Weiler, a library studies scholar at Wilfrid Laurier University in Canada, contends that government officials and civil oversight groups could improve usability of FOI statutes by recognizing the importance of statutory clauses that require government bodies to publish descriptions to facilitate access. A second group of symposium articles will be published in Issue 2 of this volume.

As we look forward to Volume 8, I am pleased to announce that JIMEL is organizing a 2018 symposium conference entitled *Fake News and “Weaponized Defamation”: Global Perspectives*, in partnership with the *Southwestern Law Review* and *Southwestern International Law Journal*. The symposium will be held in Los Angeles on January 26, 2018.

Fake news is often associated with the rise of extremist voices in political discourse and, specifically, an agenda to “deconstruct” the power of government, institutional media, and the scientific establishment. It is also a phenomenon that has long historical roots in government propaganda, jingoistic newspapers, and business-controlled public relations. “Weaponized defamation” refers to the invocation, and increasing use, of defamation and privacy torts by people in power to threaten press investigations, despite laws protecting responsible or non-reckless reporting. Armed with “lawyered-up” legal teams that journalists—and many news organizations—cannot match, those with wealth, or backed by wealth, can disarm the power of press watchdogs with resource-sapping litigation strategies.

Authors whose completed papers are accepted for publication will be provided with round-trip domestic or international air travel (subject to caps) to Los Angeles, California; hotel accommodation; and complimentary conference registration.

Deadline to submit an abstract is September 25, 2017.

Deadline to submit a completed paper is January 5, 2018.

For additional information, including a more detailed Call for Papers, please visit [www.swlaw.edu/globalfakenewsforum](http://www.swlaw.edu/globalfakenewsforum) or e-mail [jimel@swlaw.edu](mailto:jimel@swlaw.edu).

As always, your comments, suggestions, and feedback of any kind are welcome.

Professor Michael M. Epstein  
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# From Sweden to the Global Stage: FOI as European Human Right?

David Goldberg\*

*The birthplace of positive law prescribing the right to information is in Europe—specifically, the Nordic countries of Sweden and Finland. “His Majesty’s Gracious Ordinance Relating to Freedom of Writing and of the Press” (1766) sets the ball rolling. It was predicated on the ideas of, amongst others, Peter Forsskal—though it was, arguably, not solely an intellectual product. It took many decades before other European states adopted their own equivalent laws. Currently, the site of the main legal battle is the Council of Europe’s Court of Human Rights. Will this Court rule (as has been done, for example, by the Inter-American Court of Human Rights) that the right to information is a stand-alone, fundamental, and general human right? On present evidence, not any time soon.*

## I. INTRODUCTION

2016 was the 250th anniversary—the sestercentennial—of the enactment of the world’s first freedom of information law: *His Majesty’s Gracious Ordinance Relating to Freedom of Writing and of the Press*.<sup>1</sup> Adopted by the Swedish/Finnish Parliament (the two territories were one country at the time), it gave birth to the positive law of the right to

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1. Astonishingly, it was only in 2006 that the first-ever translation—into English—was made of the text. The present author collaborated with colleagues at the Scandinavian Studies Department, University of Edinburgh, and published a new translation on October 7, 2016. HIS MAJESTY’S GRACIOUS ORDINANCE REGARDING THE FREEDOM OF WRITING AND OF THE PRESS (Ian Giles & Peter Graves trans. 2016), <http://www.peterforsskal.info/documents/1766-translation.pdf>. For the first translation, see *His Majesty’s Gracious Ordinance Relating to Freedom of Writing and of the Press (1766)* (Peter Hogg trans. 2006), in *THE WORLD’S FIRST FREEDOM OF INFORMATION ACT: ANDERS CHYDENIUS’S LEGACY TODAY* 8 (Juha Mustonen ed., 2006), [http://www.chydenius.net/pdf/worlds\\_first\\_foia.pdf](http://www.chydenius.net/pdf/worlds_first_foia.pdf).

information (called freedom of information in the United States of America).<sup>2</sup> The Ordinance also dealt with the abolition of prior censorship of books and newspapers. The law did not last long. Gustav III amended it in 1774, even though it had been commended by Voltaire, prompting the thought: Did he read it? Or realize the difference between the two versions? It was restored in 1802.

Jonas Nordin states, “The express purpose was to give the public a better view of how the state was run.”<sup>3</sup> It underpins *offentlighetsprincipen*, “the general principle of openness” or perhaps “publicity.”<sup>4</sup> The direct importance of this is that from 1766 to the present day, “all minutes, protocols and documents relating to the public sector and the running of state are to be public and may be examined by each and every citizen without restrictions.”<sup>5</sup>

Marie Christine Skuncke points to the difference between the existence of the principle and the existence of the word:

The actual word “offentlighetsprincipen” dates from the twentieth century—first recorded in 1931 according to Svenska Akademiens Ordbok. The principle that documents pertaining to public life should be accessible to the citizens, on the other hand, is clear from the 1766 Tryckfrihetsförordning. There is a basic difference between the possibility

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2. For the less-noted or remarked-upon common law about access to records, see Robert L. Hughes, *The Common Law of Access to Governmental Records*, OHIO UNIV. (Spring 1995), <https://www.1215.org/lawnotes/lawnotes/foicl.htm> and *The Common-Law Presumption of Access*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/dc-cir-open-courts-compendium/b-common-law-presumption-access> (last visited Feb. 21, 2017). See also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 261 (Max Farrand ed., 1911) (Madison’s Notes, Aug. 11, 1787) (St. Andrews-born James Wilson stating, “it should not be in the option of the Legislature to conceal their proceedings”). The U.S. 1966 FOIA was predated by the 1946 Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237.

3. E-mail from Jonas Nordin, Assoc. Prof., Stockholm University, to David Goldberg, Senior Associate Research Fellow, IALS, University of London 3 June 2011, on file with author [hereinafter Nordin e-mail]; TRYCKFRIHETSFÖRORDNINGEN (Freedom of the Press Act) [TF] [CONSTITUTION] 2 (Swed.), <https://www.rti-rating.org/wp-content/themes/twentytwelve/files/pdf/Sweden.pdf>. On the public nature of official documents, Art. 1 states that every Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information. On the public nature of official documents, Art. 1 states that every Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information. See TRYCKFRIHETSFÖRORDNINGEN (Freedom of the Press Act) [TF] [CONSTITUTION] 1 (Swed.), <https://www.rti-rating.org/wp-content/themes/twentytwelve/files/pdf/Sweden.pdf>.

4. See NILS FUNCKE, OFFENTLIGHETSPRINCIPEN: PRAKTIK OCH TEORI (2014) (title translated as “Principle of Openness: Practice and Theory”); see also ALF BOHLIN, OFFENTLIGHETSPRINCIPEN (9th ed. 2015) (title translated as “Principle of Openness”).

5. Nordin e-mail, *supra* note 3. Although often associated with the general concept of “democracy,” the Ordinance and its successors are, arguably, more specifically correlated with an “open public administration.” See Bojan Bugaric, *Openness and Transparency in Public Administration: Challenges for Public Law*, 22 WIS. INT’L L.J. 483 (2004).

for individuals to publish documents from lawsuits from the 1730s, and the demands of radical publicists in the political struggles of the late 1750s and 1760s which led to the 1766 Act. The former documents concerned private matters, while the latter concerned matters pertaining to public life. Moreover, the 1766 Act covered many more areas than legal material—for example documents from the Council of the Realm, the Riksdag, and the civil service . . . the online edition of the SAO . . . says . . . offentlighetsprincip(en). (i fackspr.) princip(en) att vissa förhandlingar, i sht rättegångar o. d., skola vara offentliga. Offentlighetsprincipen i rättegångsväsendet. 3NF 15: 167 (1931). The abbreviation “3NF” refers to the third edition of the Swedish encyclopedia Nordisk familjebok: Vol. 15, p. 167 (1931).<sup>6</sup>

Less well known is the proximate timeline of events:

- August 7, 1766: The Grand Deputation votes on the abolition of censorship and issues its proposition for the estates to consider;
- September/October 1766: the assemblies of the four estates vote on accepting the law. This took place on various dates (the peasantry voted on September 30 and October 11, and the nobility on October 14).

The three commoner estates voted in favor of the law and the nobility rejected it; the clergy approve it conditionally (no criticism of evangelical doctrine allowed).

- October 15: The Diet sends a letter to His Majesty (i.e., the Council) ordering him to promulgate the law.
  - That’s when the Diet had reached a decision; the king’s signature was only a formality. If he would have refused to ratify the law, he could easily have been overruled with the rubber stamp (which never happened in such matters);
- December 2, 1766: The law is adopted—the rubber stamp with the King’s signature is applied to the text in the room of the Council of the Realm.

Of course, the law did not emerge ready-made, out-of-the-blue. One should distinguish between, on the one hand, the intellectual currents that were swirling around in the years running up to 1766, and on the other, the *realpolitik* processes out of which the law emerged (though some of the

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6. E-mail from Professor (ret.) Marie Christine Skuncke, to David Goldberg, Senior Associate Research Fellow, IALS, University of London, 19 March 2012 on file with author; *see also* James Michael, *Freedom of Official Information*, 5 OSCE OFF. FOR DEMOCRATIC INSTS. & HUM. RTS. 23 (Winter 1996/1997) (“The *offentlighetsprincip* is a 15th century juridical principle and is itself divisible into two parts: [first] the right for whomever it may be, to be present as listener at court and other public proceedings.”). The rule is at least from the 15th century. E-mail from Gunilla Jonsson, National Library Sweden (ret.) to David Goldberg, Senior Associate Research Fellow, IALS, University of London, 28 March 2012 on file with author (translating the SAO entry as “*Offentlighets-principen*. (in professional language) the principle that certain negotiations, especially processes in court etc., shall be public. *Offentlighetsprincipen* in the system of justice.”).

literature was authored by players who were also in the Riksdag).<sup>7</sup> Key names in the first category include Peter Forsskal,<sup>8</sup> Anders Nordencrantz,<sup>9</sup> Baron Gustaf Cederstrom, Anders Schonberg,<sup>10</sup> and Johan Arckenholtz.

The role of another name that pops up frequently in this context, Anders Chydenius, has been, in the present author's opinion, rather exaggerated. His reputation in this *specific* regard—creating the idea of, as well as bringing about, the right to information—has been inflated by the highly effective lobbying of the Chydenius Foundation and the expressed views of others.<sup>11</sup>

Marie-Christine Skuncke offers a properly balanced account: on the one hand, Chydenius was the driving force on the Parliament's Third Committee, which elaborated the proposals for the Ordinance during the Riksdag of 1765-66. It was *probably* his achievement that the principle of open access extended to the proceedings of the four estates of the Riksdag and those of the government (the Council of the Realm). It was certainly his achievement that the office of "Censor librorum" (i.e., pre-publication censorship for secular writings) was abolished, but that is not about the right to information

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7. Much is revealed in the commemorative publication *On the Freedom of Press Act of 1766*, launched on December 2, 2016 at an event in the Swedish Parliament. *Sveriges Och Finlands Riksdagar Firar Fritt Ord 250 Med Boksläpp* (Nov. 28, 2016), <https://frittord250.se/2016/11/sveriges-och-finlands-riksdagar-firar-fritt-ord-250-med-bokslapp>. The text was commissioned by the Constitutional Committees of the Swedish and Finnish Parliaments; after lobbying, an English translation (open-access, downloadable and free of charge) will also be published, sometime in 2017. The present author would like to acknowledge the collaboration in this particular regard of Staffan Dahloff and Mark Weiler. Weiler's global online petition is here: <https://docs.google.com/forms/d/1VbPBAS6wZvxa-uNntT6gvFbr17I-IUki7pRJG6-ocgk/viewform?c=0&w=1>.

8. Peter Forsskal's banned 1759 pamphlet, *Thoughts on Civil Liberty*, states, "it is also an important right in a free society to be freely allowed to contribute to society's well-being. However, if that is to occur, *it must be possible for society's state of affairs to become known to everyone . . .*" PETER FORSSKÅL, THOUGHTS ON CIVIL LIBERTY, <http://www.peterforsskal.info/thetext.html> (last visited Feb. 17, 2017) (emphasis added); see also DAVID GOLDBERG, PETER FORSSKÅL: GOETTINGEN PRODIGY AND AUTHOR OF ONE OF THE LEAST KNOWN JEWELS OF ENLIGHTENMENT LITERATURE (2013), [https://rep.adw-goe.de/bitstream/handle/11858/00-001S-0000-0023-99D4-D/Peter%20Forsskal\\_pdfa2u.pdf?sequence=1](https://rep.adw-goe.de/bitstream/handle/11858/00-001S-0000-0023-99D4-D/Peter%20Forsskal_pdfa2u.pdf?sequence=1).

9. See *Anders Nordencrantz*, WIKIPEDIA, [https://sv.wikipedia.org/wiki/Anders\\_Nordencrantz](https://sv.wikipedia.org/wiki/Anders_Nordencrantz) (last visited Feb. 7, 2017).

10. See Rolf Nygren, *The Citizen's Access to Official Records – A Significant Principle in Swedish Constitutional Life Since 1766*, in ACCESS TO PARLIAMENTARY RECORDS AND AUDIO-VISUAL MATERIALS IN ARCHIVES OF PARLIAMENTS AND POLITICAL PARTIES 15 (Günter Buchstab ed. 1999).

11. See, e.g., Stephen Lamble, *Freedom of Information, a Finnish Clergyman's Gift to Democracy*, 97 FREEDOM OF INFO. REV. 2 (2002) (emphasis added) (stating that "notions of freedom of information, freedom of speech and transparency of government together with the principle of a free press were linked to Swedish legislation and forged by Finnish clergyman, Anders Chydenius—a visionary who should must be regarded as the true father of Fol"); see also Otto Vervaart, *250 Years Freedom of the Press*, RECHTSGESCHIEDENIS BLOG (May 30, 2016), <https://rechtsgeschiedenis.wordpress.com/2016/05/30/250-years-freedom-of-the-press> (stating that "Anders Chydenius, the Swedish minister [*sic*] responsible for the epoch-making law, came from Finland.").

guaranteeing public access to official documents. Chydenius was also the person who gave the strongest and clearest rationale for freedom of print and information, as is clear from his written contributions during the Riksdag of 1765-66.<sup>12</sup> On the other hand, Chydenius did not invent the principle of open access. Important work had been done in connection with the previous Riksdag, 1760-62. The reformer Anders Nordencrantz had pleaded for the principle of transparency in a 700-page memorandum to the members of the Riksdag, published in 1759. During the 1760-62 Riksdag, a subcommittee on the freedom of printing proposed in 1761 that many categories of documents from the authorities become accessible for publication (yet not the proceedings of the four estates of the Riksdag and those of the government). However, no decision was taken. During the Riksdag of 1765-66, Chydenius was not alone, but instead collaborated skillfully with the lower estates (burghers and peasants), whose votes made it possible to defeat the nobility on crucial points in the proposals. In any case, the last stages in the elaboration of the Act, from July to October 1766, took place after Chydenius had been voted out of the Riksdag.<sup>13</sup>

The foregoing accounts of how the 1766 Ordinance came about depend on the so-called “Great Man” theory of history.<sup>14</sup> Focusing on another approach to explaining past events, the present author has written:

[T]he real secret of Sweden’s espousal of openness is that, on the most authoritative accounts available in English, the word that comes up most frequently in discussing the 1766 Ordinance is that it happened by “accident”, meaning, in this context, “the way things happen without any planning . . . or deliberate intent.”<sup>15</sup>

Five accounts by *Swedes* can be offered to illustrate this contention:

(a) *Ulf Oberg*:

The genesis of the constitutional provisions on public access to documents in Sweden at [*sic*] the middle of the eighteenth century probably remains a historical accident, entrenched in the prevailing political context of the time. In this respect, the link between the philosophies of

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12. See Juha Manninen, *Anders Chydenius and the Origins of World’s First Freedom of Information Act*, in *THE WORLD’S FIRST FREEDOM OF INFORMATION ACT: ANDERS CHYDENIUS’S LEGACY TODAY* 18-53 (2006). For the Foundation, see *250th Anniversary of the World’s first FOIA, Celebrations Launched in Finland, 4 December 2015*, ANDERS CHYDENIUS FOUNDATION (Feb. 2, 2015), <http://www.chydenius.net/eng/articles/artikkeli.asp?id=1728>.

13. See *Anders Chydenius on the Freedom of Information*, 250 COMMITTEE (May 1, 2016), <http://www.painovapaus250.fi/en/news/anders-chydenius-on-the-freedom-of-information>.

14. See *Great Man Theory*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Great\\_Man\\_theory](https://en.wikipedia.org/wiki/Great_Man_theory) (last visited Feb. 7, 2017).

15. See GOLDBERG, *supra* note 8, at 21-22.

enlightenment and the right of access to official documents that Swedes have now enjoyed for more than two hundred years has yet to be firmly established.<sup>16</sup>

*(b) Nils Herlitz:*

That it has grown up in Sweden is due to special circumstances; we may say it has arisen by accident.<sup>17</sup>

*(c) Rolf Nygren:*

As a legal historian I would like to say that the Freedom of the Press Act and the Public Access Principle passed in 1766 are the most significant contributions in European legal history ever made by the Swedish legislature. . . . But is it also important to conclude that neither [of these] were the results of profound legal philosophising. They were the immediate results of a profoundly felt need among the Caps [party] to clear the political stage after the defeat of the corrupt Hats [party]. Many important achievements in the field of law seem to have very poor and trivial backgrounds, and the Freedom of the Press Act as well as the Public Access Principle are, so far, no exceptions.<sup>18</sup>

*(d) Thomas von Vegesack:*

Only a few months after having issued its freedom of the printing press act, the Government published a warning to its citizens against “in larger or smaller companies . . . through the spread of suspicions and the dissemination of conspired lies to achieve complaints, discord and a detrimental dissension between the citizens of the realm.” In this statute,

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16. Ulf Öberg, *EU Citizens' Right to Know: The Improbable Adoption of a European Freedom of Information Act*, 2 CAMBRIDGE Y.B. EUR. LEGAL STUD. 303, 305 (1999) (“Some refer to English political thinking and to the writings of Montesquieu as the philosophical justification for the constitutional reform that took place. Indeed, many of the provisions of the 1766 Freedom of the Press Act have distinct marks of foreign influence. The abolition of censorship was clearly an idea with English origins. The framers of the 1766 Act made direct references to the then prevailing legislative openness in the English Parliament, when arguing for an increased right of access to Swedish parliamentary documents. It has even been submitted that a quote from Blackstone to the effect that the ‘liberty of the Press is indeed essential to the nature of a free state—no previous restraints upon publications’ inspired the formulation of the provision on freedom of press in paragraph 86 of the Swedish Constitution of 1809. Others claim that the origins of the 1766 Freedom of the Press Act must be sought in French physiocratic ideals of legal despotism, checked by an enlightened general opinion.”).

17. Nils Herlitz is the outstanding scholar of Swedish and Nordic public law. See, e.g., NILS HERLITZ, *ELEMENTS OF NORDIC PUBLIC LAW* (1969); NILS HERLITZ, *SWEDEN: A MODERN DEMOCRACY ON ANCIENT FOUNDATION* (1939).

18. Nygren, *supra* note 10, at 22.

citizens were requested, in return for a reward of 2000 daler silver coins, to inform against those who committed themselves to criminal expressions. I have quoted this statute of March 2nd 1767 to demonstrate that it was hardly a strong belief in the importance of freedom of speech that drove the decision of the Swedish Riksdag. The freedom of the printing press act was probably more the result of existing political controversies than of any deeply rooted conviction.<sup>19</sup>

(e) *Hans Gunnar Axberg*

Why did we [*sic*] get this FOI-lookalike legislation so early in history? The short answer is that in the early days of press freedom, printed matter to a large extent consisted of content from public documents. It was common, for example, that parties in legal disputes had arguments and decisions from court proceedings printed and circulated. At the time, press freedom, at least in Sweden, seemed more or less pointless if you were not allowed to copy content from public documents. And to do that you had to have access to these documents. The somewhat lengthier answer is related to the fact that the law in 1766 was adopted in a period when the country was in practice governed in a parliamentary way. The two political parties that were competing for power found a common interest in keeping government files open.<sup>20</sup>

## II. SUBSEQUENT DEVELOPMENTS

So, if Sweden/Finland was the world's No. 1 in adopting a freedom of information law, it's not uninteresting to ask . . . who was No. 2?<sup>21</sup>

However, even Sweden's claim to be the first jurisdiction with a freedom of information law has not gone unchallenged. According to Venkatesh Nayak, Coordinator, Commonwealth Human Rights Initiative, Indian Emperor Ashoka (c. 268-232 BCE) was the first to grant his subjects the Right to Information (RTI). Speaking at a seminar on RTI at the Sri Lanka Press Institute, Nayak said,

Ashoka had inscribed on rocks all over the Indian sub-continent his government's policies, development programs and his ideas on various social, economic and political issues, including how religions should co-

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19. See PETER FORSSKÅL, *supra* note 8 (commentary section).

20. Hans Gunnar Axberger, Lecture held by Parliamentary Ombudsman in Brussels at a conference arranged by the Council of Europe Commissioner for Human Rights, at 745 (May 3, 2011), [http://www.jo.se/Global/%C3%84mbetsber%C3%A4ttelser/2011-12\\_eng.pdf](http://www.jo.se/Global/%C3%84mbetsber%C3%A4ttelser/2011-12_eng.pdf).

21. See Brechner Ctr. for Freedom Info., *A Chronological Look at Freedom of information*, UNIV. OF FLA., COLL. OF JOURNALISM, <http://www.brechner.org/International/Historyfoia.htm> (last visited Feb. 21, 2017).

exist with each other. He insisted that the inscriptions should be in the local language and not in a courtly language like Sanskrit. And considering the fact that few of his subjects were literate, he enjoined officials to read out the edicts [sic. . . edicts?] to people at public gatherings.<sup>22</sup>

Another candidate is claimed to be in seventh century China. Stephen Lambie has written,

The concept underlying the ideal of freedom of access to government held information actually dates back to 7th Century China during the Tang Dynasty (618-907) and particularly during the reign of Emperor T'ai-tung (627-649). T'ai-tung established an "Imperial Censorate"—an elite group of highly educated "scholar officials" who recorded government decisions and correspondence and criticized the government, including the emperor. This institution, based on Confucian principles and philosophies, had a role to scrutinize the government and its officials, to expose "misgovernance, bureaucratic inefficiencies and official corruption."<sup>23</sup>

However, these claims have given rise to a lively debate about what exactly constitutes a right to information law and regime. The current context of the discussion is the United Nation's Sustainable Development Goals (SDG). SDG 16.10 states that all countries pledge to "*ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.*"<sup>24</sup> As Toby McIntosh states:

Setting minimum standards for what qualifies as a law therefore becomes crucial in deciding whether they have complied with this target. In the context of the RTI Rating, we have had some debates about this, and arguably some of the bottom feeding "rules" (like Austria with 32 points) should surely not be deemed to pass the test. We have also discussed the idea of minimum threshold standards (i.e., things a law has to have to

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22. P.K. Balachandran, *Emperor Ashoka was the First to Grant Right to Information*, THE NEW INDIAN EXPRESS (May 17, 2016, 7:54 PM), <http://www.newindianexpress.com/world/Emperor-Ashoka-was-the-first-to-grant-right-to-information/2016/05/17/article3437749.ece>.

23. Lambie, *supra* note 11, at 2-8. This article gives vent to the claim about Chydenius criticized in this article. Further, the alleged Chinese connection has been roundly critiqued in Lena Rydholm, *China and the World's First Freedom of Information Act: The Swedish Freedom of the Press Act of 1766*, 20 JAVNOST 45-64 (2013), <http://www.diva-portal.org/smash/get/diva2:684198/FULLTEXT01.pdf>. The point about China is repeated by the Brechner Centre. See Brechner Ctr. for Freedom Info., *supra* note 21. The Centre also points to a precursor of the 1766 law, namely, a legal deposit law in 1707—but the first law was actually adopted in 1661. Pär Nilsson, *Collecting Bits and Pieces—The Development of Methods for Handling E-legal Deposit of Online News Material at The National Library of Sweden*, NATIONAL LIBRARY OF SWEDEN, [http://www.ifla.org/files/assets/newspapers/Geneva\\_2014/s6-nilsson-en-slides.pdf](http://www.ifla.org/files/assets/newspapers/Geneva_2014/s6-nilsson-en-slides.pdf) (last visited Mar. 18, 2017).

24. *Sustainable Development Goal 16*, UNITED NATIONS, <https://sustainabledevelopment.un.org/sdg16> (last visited Feb. 21, 2017).



qualify) although this is pretty contentious (because everyone has different candidates for what should be on that list).<sup>25</sup>

So, which polity should be awarded, as it were, the “silver medal”?

Very little noted or remarked upon, albeit it at the sub-national level, is the fact that the first Wisconsin statutes adopted after the organization of Wisconsin as a state provided for public access to the meetings and records of county government.<sup>26</sup>

Most noted as No. 2 is the measure adopted Colombia in 1913: Law No. 4, the *Code of Political and Municipal Organization* (in fact, it actually restates an earlier version of 1888). Article 320 states:

Todo individuo tiene derecho a que se le den copias de los documentos que existan en las secretarías y en los archivos de las oficinas del orden administrativo, siempre que no tengan carácter de reserva; que el que solicite la copia suministre el papel que debe emplearse y pague al amanuense, y que las copias puedan sacarse bajo la inspección de un empleado de la oficina y sin embarazar los trabajo de esta.<sup>27</sup>

Everyone has the right to receive copies of documents existing in the secretariats and archives of administrative offices, provided they do not have classified status; that whoever requests the copy provides the paper to be used and pays the clerk, and that copies can be made under the supervision of an employee of the office without compromising this material.<sup>28</sup> [author’s translation]

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25. Toby McIntosh, *FOI Laws: Counts Vary Depending on Definitions*, FREEDOMINFO (Oct. 28 2011), <http://www.freedominfo.org/2011/10/foi-laws-counts-vary-slightly-depending-on-definitions>.

26. See NAT’L ASS’N OF COUNTIES, OPEN RECORDS LAWS: A STATE BY STATE REPORT (2010), <http://www.naco.org/sites/default/files/documents/Open%20Records%20Laws%20A%20State%20by%20State%20Report.pdf>; see also Robert A. Christensen & David Lucey, *The Development of Public Access Law in Wisconsin*, <http://www.blonien.com/html/WI/2.HTM> (last visited Feb. 18, 2017); Robert Dreps, OPEN GOVERNMENT GUIDE OPEN RECORDS AND MEETINGS LAWS IN WISCONSIN (2011), <https://www.rcfp.org/rcfp/orders/docs/ogg/WI.pdf>.

27. See L. 4/13, Octubre 6, 1913, 15012 DIARIO OFICIAL [D.O.] (Colom.), <http://suin-juriscal.gov.co/viewDocument.asp?id=1820591>. In 2013, there was an event celebrating its 100 years, “Congreso y Sociedad Capítulo Especial: Centenario código de régimen político y municipal.” Congreso y Sociedad, *Congreso y Socioda Capitulo Especial: Centenario Codigo de Regimen Politico y Municipal*, YOUTUBE (Nov. 13, 2013), <https://www.youtube.com/watch?v=BIQUhOtxys>. Again, some discount a “single sentence” provision as counting as a full-scale RTI law.

28. This information is courtesy of Alberto Donadio, Colombian journalist, author, blogger and information activist. See generally Alberto Donadio, *Detrás de Interbolsa*, EL ESPECTADOR, <http://blogs.elespectador.com/interbolsa/autor> (last visited Feb. 21, 2017); ALBERTO DONADIO, LA LLAVE DE LA TRANSPARENCIA (2012). Thanks to David Banisar, who led me to Donadio. DAVID BANISAR, FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT RECORD LAWS AROUND THE WORLD 22 (2004) (citing Alberto Donadio, *Freedom of Information in Colombia*, ACCESS REPORTS (Feb. 1994)).

Finally, the foregoing has been focused on the right to information at the national level (and in the case of Wisconsin at the sub-national level). What about at the universal/global level? “Freedom of information” lies at the historical centre of the United Nations. It was the topic of the organization’s first-ever conference in 1948.<sup>29</sup> However, what was meant by that phrase was the free flow of information (i.e., press freedom) and not the right to information in the proper sense, i.e., entitling requesters to access information held by a public body (though, being entitled to request information is not the same as actually obtaining it). Further, the UN source for FOI in this second sense does not lie—as is so often claimed—in General Assembly Resolution 59(1), which called for the establishment of the Conference on Freedom of Information and is widely touted as the foundation for the global FOI movement. The present author would describe it as the foundational *myth* for that movement. Instead, it should be traced to General Assembly Resolution 13(1), “concerning the Organization of the UN Secretariat” which established the *information policy* for the Organization:<sup>30</sup>

## II. INFORMATION

The United Nations cannot achieve its purposes unless the peoples of the world are fully informed of its aims and activities. . . . The United Nations should establish as a general policy that the press and other existing agencies of information be given the fullest possible direct access to the activities and official documentation of the Organization. The rules of procedure of the various organs of the United Nations should be applied with this end in view.<sup>31</sup>

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29. See Zechariah Chaffee, Jr., *Legal Problems of Freedom of Information in the United Nations*, 14 LAW & CONTEMP. PROBS. 545 (1949), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2423&context=lcp>; see also OFFICE OF THE HISTORIAN, DEP'T OF STATE, THE UNITED STATES AND THE UNITED NATIONS CONFERENCE ON FREEDOM OF INFORMATION, HELD AT GENEVA, SWITZERLAND, MARCH 23–APRIL 21, 1948 (1948), <https://history.state.gov/historicaldocuments/frus1948v01p1/d189>.

30. See Resolutions Adopted by the General Assembly During Its First Session, <http://www.un.org/documents/ga/res/1/ares1.htm>; David Goldberg, *The United Nations and FOI: From freedom of Information to the Right to Access Information*, 2 GLOBAL MEDIA J. 76 (Slovak Ed. 2014), <http://www.paneurouni.com/files/sk/casopisy/gmj/gmj3naweb.pdf>; see also Int'l Covenant on Civil and Political Rights, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

31. Other agencies of the United Nations have a patchy or non-existent right to information policy; note though, it has recently been announced that UNESCO, the agency whose portfolio includes advocating for freedom of information laws internationally, is preparing its own FOI policy, according to a UNESCO official. UNESCO already has some internal rules on what should be confidential, but there is no disclosure policy resembling a national FOI law. According to a Department of Public Information official, “We . . . have nothing similar to a right of information law.” See Toby McIntosh, *UNESCO Drafting Standard for Disclosure of Information*, FREEDOMINFO (Aug. 10, 2016), <http://www.freedominfo.org/2016/08/unesco-drafting-standard-for-disclosure-of-information>. UNEP, on the other hand, has an Access to Information Policy. See

### III. RIGHT TO INFORMATION, THE COUNCIL OF EUROPE, AND EUROPEAN COURT OF HUMAN RIGHTS

Like Julius Caesar's Gaul,<sup>32</sup> institutional Europe is divided into three: the European Union, the Council of Europe, and the Organisation for Security and Cooperation in Europe. This article is concerned solely with the Council of Europe, and its judicial body, the European Court of Human Rights, with respect to securing the right to information for citizens—and others?—in member states.

#### A. *Treaty Law*

##### Convention on Access to Official Documents<sup>33</sup>

It is truly noteworthy that the Council of Europe has promulgated the first, and so far only, binding international legal instrument to recognize a *general* right of access to official documents held by public authorities.<sup>34</sup> The *Convention on Access to Official Documents* was opened for signature on June 18, 2009 in Tromsø, Norway, during the 29th Council of Europe Conference of Ministers of Justice. It emerged from the work of the Group of Specialists on Access to Official Information (DH-S-AC), initially set up in 1997, which was given its terms of reference from the Committee of Ministers upon the suggestion of the Steering Committee on Human Rights.<sup>35</sup>

Member states that signed that day comprised Belgium, Estonia, Finland, Georgia, Hungary, Lithuania, Macedonia, Montenegro, Norway, Serbia, Slovenia, and Sweden.<sup>36</sup> Notable by their absence were, e.g., the

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*UNEP Access-to-Information Policy (Revised)*, UNITED NATION ENVIRONMENT PROGRAMME (Jan. 28, 2016) <http://web.unep.org/environmental-governance/unep-access-information-policy-revised>.

32. *Ivli Caesaris Comment Ariorum De Bello Gallico Liber Primus*, LATIN LIBRARY, <http://www.thelatinlibrary.com/caesar/gall1.shtml> (last visited Feb. 4, 2017).

33. EXPLANATORY REPORT TO THE COUNCIL OF EUROPE CONVENTION ON ACCESS TO OFFICIAL DOCUMENTS (2009), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3836>.

34. There is the 1998 United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. *The Aarhus Convention*, EUROPEAN COMM'N (Dec. 19, 2016), <http://ec.europa.eu/environment/aarhus>.

35. Group of Specialists on Access to Official Information (DH-S-AC), [http://www.coe.int/t/dghl/standardsetting/cddh/DHSAC\\_en.asp](http://www.coe.int/t/dghl/standardsetting/cddh/DHSAC_en.asp); see also Terms of reference of the Group of Specialists on public service media in the information society (MC-S-PSM), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a07bf> (explaining terms of references).

36. *12 European Countries Sign First International Convention on Access to Official Documents*, FREEDOMINFO (June 19, 2009), <http://www.freedominfo.org/2009/06/12-european-countries-sign-first-international-convention-on-access-to-official-documents>. For a full list of countries, see *Chart of Signatures and Ratifications of Treaty 205*, [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures?p\\_auth=UZKwAIqR](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures?p_auth=UZKwAIqR).

United Kingdom, France, and Germany. However, not only member states may sign: the treaty is open for accession by non-member states and by any international organization. So far, none has done so.

At the time of writing, the Treaty has not yet entered into force, as it requires ten ratifications; currently, there are nine.<sup>37</sup> The name reprises the earlier Group established by the Steering Committee for Human Rights:

[It was] given specific terms of reference in 1997 to elaborate a legal instrument incorporating basic standards on the right for the public to have access to information in the hands of the public authorities. This work resulted notably in adoption by the Committee of Ministers of Recommendation Rec (2002)2 on Access to Official Documents [post] and the 2009 Council of Europe Convention on Access to Official Documents.<sup>38</sup>

The real prize of the Convention coming into force will be the establishment of the Article 11 “Group of Specialists on Access to Official Documents.” This will monitor the implementation of the Convention by the parties. The substance of the Treaty was criticized by NGOs<sup>39</sup>—and even by the Council of Europe’s own Parliamentary Assembly:<sup>40</sup>

The Assembly considers that the current draft has some shortcomings which need to be resolved in order not to miss the opportunity to enshrine modern standards for access to information in what will be the first binding international legal instrument in this field. The Assembly finds the issues raised sufficiently important to recommend to the Committee of Ministers that it send the draft back to the Steering Committee for Human Rights (CDDH) for further consideration with respect to:

9.1. broadening the definition of “public authorities” to include a wider range of activities of these authorities and hence widening the scope of the information made available;

9.2. including a time limit on the handling of requests;

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37. The most recent is Moldova (September 2016). See *Chart of Signatures and Ratifications of Treaty 205*, *supra* note 37. Armenia—and also Romania—are reported to be on the brink of becoming the “tenth man.”

38. See Group of Specialists on Access to Official Information (DH-S-AC), [http://www.coe.int/t/dghl/standardsetting/cddh/DHSAC\\_en.asp](http://www.coe.int/t/dghl/standardsetting/cddh/DHSAC_en.asp).

39. See *Council of Europe Convention on Access to Official Documents*, ACCESS INFO, <https://www.access-info.org/uncategorized/10709> (last visited Feb. 6, 2017); *12 States Sign World’s First Treaty on Access to Information*, ACCESS INFO (June 19, 2009), [https://www.access-info.org/wp-content/uploads/n-ost19.06.09\\_Council\\_of\\_Europe\\_-\\_12\\_States\\_Sign\\_Worlds\\_First\\_Treaty\\_on\\_Access\\_to\\_Information.pdf](https://www.access-info.org/wp-content/uploads/n-ost19.06.09_Council_of_Europe_-_12_States_Sign_Worlds_First_Treaty_on_Access_to_Information.pdf).

40. See 7 DOCUMENTS WORKING PAPERS: 2008 ORDINARY SESSION (FOURTH PART) 29 SEPTEMBER TO 3 OCTOBER 2008, at 179 (2009).

9.3. clarifying and strengthening the review process provided in Article 8.1.<sup>41</sup>

The Treaty's rationale is explained thus:

Transparency of public authorities is a key feature of good governance and an indicator of whether or not a society is genuinely democratic and pluralist. The right of access to official documents is also essential to the self-development of people *and to the exercise of fundamental human rights*. It also strengthens public authorities' legitimacy in the eyes of the public, and its confidence in them.<sup>42</sup>

So, the official Council of Europe position does not affirm or assert the status of this right as a fundamental human right, merely pointing out that it is an instrumental right for furthering the exercise of other, fundamental human rights. Not all agree. The "fundamental, human rights" language was promoted in 2004 in the Joint Declaration of the Special Rapporteurs on freedom of opinion and expression of the United Nations, the Organisation for Security and Cooperation in Europe, and the Organization of American States:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.<sup>43</sup>

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41. See Eur. Parl. Ass., *Draft Council of Europe Convention on Access to Official Documents*, Opinion 270 (2008), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17687&lang=en>.

42. See Details of Treaty No.205, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205> (emphasis added). The travaux préparatoires have now been declassified. See EUROPEAN COURT OF HUMAN RIGHTS, *Travaux Préparatoires to the Convention*, [http://www.echr.coe.int/Documents/Library\\_TravPrep\\_Table\\_ENG.pdf](http://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf).

43. Ambeyi Ligabo et al., *International Mechanisms for Promoting Freedom of Expression*, ORG. AM. STATES (2004), <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&IID=1> (emphasis added); *14 Key Principles*, CAMPAIGN FOR AN AFRICAN PLATFORM ON ACCESS TO INFO., <http://www.africanplatform.org/apai-declaration/14-key-principles/> (last visited Feb. 18, 2017). For the OAS, see also *Inter-American Program on Access to Public Information*, ORG. AM. STATES (2004), [http://www.oas.org/en/sla/dil/access\\_to\\_information.asp](http://www.oas.org/en/sla/dil/access_to_information.asp) (last visited Feb. 18, 2017).

Convention for the Protection of Human Rights and Fundamental Freedoms<sup>44</sup>

Sir Stephen Sedley view is that “[t]he European Convention contains no express right to information.”<sup>45</sup> That this is so is, no doubt, a reflection of the period when it was drafted (late 1940s). At that time, the enforceable, general right of the public to access information held by authorities under positive law was virtually unrecognized.

However, in Article 10, in relation to freedom of expression, there is the word “receive”: “This right shall include freedom . . . to receive . . . information . . . without interference by public authority . . .”<sup>46</sup>

Does this mean, or can it be interpreted to include, the right for the public to access information held by public authorities? A judicial interpretation was offered in *Guseva v. Bulgaria*, in the dissenting judgement of Judge Wojtyczek:

The verbs “receive” in English and “recevoir” in French imply that another person is willingly giving something. Moreover, the emphasis is placed on negative freedom, i.e. on freedom from interference, and there is no reference to any claim-right (positive right) to be provided with information held by public authorities. The provision under consideration therefore protects freedom to receive information that another person is disseminating or providing.<sup>47</sup>

Article 10 does not include the different word—“seek”—which is found, for example, in Article 19 of the Universal Declaration of Human Rights; in Article 19 of the International Covenant on Civil and Political Rights, and in Article 13 of the American Convention on Human Rights—which is promoted in some quarters as including/infering the right to information.<sup>48</sup> The Council of Europe’s 2002 Recommendation on access to official documents states:

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44. COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS (June 1, 2010), [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

45. See Sir Stephen Sedley, *Information as a Human Right*, Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams 243 (Jack Beatson & Yvonne Cripps eds., 2000). But see EXPLANATORY REPORT TO THE COUNCIL OF EUROPE CONVENTION ON ACCESS TO OFFICIAL DOCUMENTS (2009), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3836>.

46. COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 44.

47. *Guseva v. Bulgaria*, App. No. 6987/07 (Eur. Ct. H.R. Feb. 17, 2015) (Wojtyczek, J., dissenting), <http://hudoc.echr.coe.int/eng?i=001-152416>.

48. Universal Declaration of Human Rights, G.A. 217 A, art. 19, Dec. 10, 1948, <http://www.un.org/en/universal-declaration-human-rights>; see also International Covenant on Civil and Political Rights, G.A. 2200A, art. 19, Dec. 16, 1966, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

It should be noted that Article 19 of the Universal Declaration on Human Rights and Article 19 of the International Covenant on Civil and Political Rights *appear to grant a wider right of access to official information than the European Convention on Human Rights as these provisions also contain a right to seek information.*<sup>49</sup>

This seems tantamount to equating the right to “seek” with the claim-right (positive right) to be provided with information held by public authorities and that those authorities should establish mechanisms and procedures to implement this. In 1979, The Council’s Parliamentary Assembly adopted a Recommendation, “Access by the public to government records and freedom of information.”<sup>50</sup> In it, it called for the Committee of Ministers to implement its decision, taken in 1976, to insert a provision on the right to *seek* information in the European Convention on Human Rights.<sup>51</sup>

Nonetheless, equating “seek” with meaning requesting information that an authority has an obligation to disclose seems difficult to square with earlier stated positions. Thus, the 1975 Report of the Committee of Experts on Human Rights deals with the extension of the right to freedom of information.<sup>52</sup> It considered the matter from two separate aspects: (i) the feasibility of including the freedom to seek information in Article 10 of the Convention (as well as what would be the best mechanism to do that); and (ii) the duty of public authorities to make information available on matters of public interest, subject to appropriate limitations.<sup>53</sup> In a 1969 report looking at the co-existence of the ICCPR and the ECHR—and noting that the former did and the latter did not include a right to “seek” information—it was concluded, “This is an additional obligation which, however, does not, in the view of the experts, entail a legal obligation to supply information . . .”<sup>54</sup> i.e., with regard to the duty on public authorities to make information available on matters of public interest, subject to appropriate limitations, the Committee of Experts considered that *this duty represented an additional*

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49. See *Recommendation Rec (2002) 2 of the Committee of Ministers to Member States on Access to Official Documents* (2002), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c6fcc> (emphasis added).

50. Eur. Parl. Assemb., *Access by the Public to Government Records and Freedom of Information*, Recommendation 854 (1979), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14888&lang=en>.

51. *Id.*

52. Eur. Consult. Assemb., *The Protection of the Individual in Relation to Acts of Administrative Authorities* 1 (Dec. 22, 1975).

53. See Lucy Maxwell, *Access to Information in Order to Speak Freely: Is this a Right under the European Convention?*, OXFORD HUM. R. HUB (Jan. 19, 2017), <http://ohrh.law.ox.ac.uk/access-to-information-in-order-to-speak-freely-is-this-a-right-under-the-european-convention>.

54. Toby Mendel, *Freedom of Information as an Internationally Protected Human Right* 3-4 (unpublished manuscript), <https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>.

*obligation which was not a necessary corollary of the right to seek information.* It noted that the laws and practices of the various member countries varied considerably and that there were different approaches to the question of how information held by the State could be made more available to members of the public.<sup>55</sup> The Committee of Experts therefore suggested that the Committee of Ministers authorize it to organize, in co-operation with a scientific institute or university, a European Colloquy with a view to making a comparative study on the laws and practices of the Member States of the Council of Europe concerning access by members of the public to information entrusted to or held by public authorities.<sup>56</sup>

Finally, an interesting observation has been made by European Court of Human Rights Judge Wojtyczek with respect to the Tromsø Convention and its relationship to the Convention for the Protection of Human Rights and Fundamental Freedoms:

It appears that the drafters of this [Tromsø] treaty intended to fill a lacuna in the international protection of transparency . . . the Convention for the Protection of Human Rights and Fundamental Freedoms was devised as a first step for the collective enforcement of certain rights set out in the Universal Declaration of Human Rights. It does not encompass all the fundamental standards of the democratic rule of law. Furthermore, the Court has only a limited mandate, defined in Article 19 of the Convention, namely to ensure the observance of engagements by the High Contracting Parties in the Convention and the Protocols thereto. The adoption of the Council of Europe Convention on Access to Official Documents confirms that the “further realisation of human rights and fundamental freedoms” referred to in the Preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms is to be undertaken by way of new treaties.<sup>57</sup>

#### B. *Soft Law*

(i) As noted above, in 1979, the Council’s Parliamentary Assembly adopted a Recommendation on access by the public to government records and freedom of information, and called for its decision, taken in 1976, to insert a provision on the right to “seek” information in the European

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55. Maxwell, *supra* note 53.

56. See Eur. Consult. Assemb., *Proceedings of the Colloquy of the Council of Europe on Freedom of Information and the Duty for the Public Authorities to Make Available Information*, 15 (Sept. 21-23, 1976); Eur. Consult. Assemb., *Secrecy and Openness: individuals, enterprises and public administrations*, 17th Sess., 111 (Oct. 21-23, 1987).

57. *Guseva v. Bulgaria*, App. No. 6987/07 (Eur. Ct. H.R. Feb. 17, 2015), <http://hudoc.echr.coe.int/eng?i=001-152416>



Convention on Human Rights, to be implemented—albeit different opinions exist as to the significance of that word.<sup>58</sup>

(ii) Suggested by the Steering Committee for Human Rights, the Committee of Ministers adopted the 1981 Recommendation No. R (81)19 to member states on access to information held by public authorities:

Having regard to Assembly Recommendation 854 on access by the public to government records and freedom of information

Considering the importance for the public in a democratic society of adequate information on public issues;

Considering that access to information by the public is likely to strengthen confidence of the public in the administration . . .

In the implementation of these principles regard shall duly be had to the requirements of good and efficient administration. Where such requirements make it necessary to modify or exclude one or more of these principles, either in particular cases or in specific areas of public administration, every endeavour should nevertheless be made to achieve the highest possible degree of access to information.<sup>59</sup>

(iii) 1982, the Declaration of the Committee of Ministers on freedom of expression and information:

Ic. the pursuit of an open information policy in the public sector, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters.<sup>60</sup>

(iv) 2002, the Committee of Ministers adopted Recommendation Rec (2002)2 on access to public documents—the principal source of inspiration for the Tromso Convention:

Considering the importance in a pluralistic, democratic society of transparency of public administration and of the ready availability of information on issues of public interest;

Considering that wide access to official documents, on a basis of equality and in accordance with clear rules:

- allows the public to have an adequate view of, and to form a critical opinion on, the state of the society in which they live and on the authorities

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58. Eur. Parl. Assemb., *Access by the Public to Government Records and Freedom of Information, Recommendation 854* (1979), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14888&lang=en>.

59. Eur. Consult. Assemb., *Recommendation No. R(81)19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities* (1981), [http://www.right2info.org/resources/publications/instruments-and-standards/coe\\_rec\\_ati\\_1981](http://www.right2info.org/resources/publications/instruments-and-standards/coe_rec_ati_1981).

60. See *Recommendation Rec (2002)2*, *supra* note 49.

that govern them, whilst encouraging informed participation by the public in matters of common interest;

- fosters the efficiency and effectiveness of administrations and helps maintain their integrity by avoiding the risk of corruption;

- contributes to affirming the legitimacy of administrations as public services and to strengthening the public's confidence in public authorities;

Considering therefore that the utmost endeavour should be made by member states to ensure availability to the public of information contained in official documents, subject to the protection of other rights and legitimate interests;

Stressing that the principles set out hereafter constitute a minimum standard, and that they should be understood without prejudice to those domestic laws and regulations which already recognise a wider right of access to official documents;

Considering that, whereas this instrument concentrates on requests by individuals for access to official documents, public authorities should commit themselves to conducting an active communication policy, with the aim of making available to the public any information which is deemed useful in a transparent democratic society.<sup>61</sup>

(v) Most recently, the Parliamentary Assembly's Committee on Legal Affairs and Human Rights has adopted a Report by Ms. Nataša VUČKOVIĆ, Serbia, on "Transparency and openness in European institutions," focusing mainly on the transparency and regulation of lobbying activities.<sup>62</sup>

### C. *The European Court of Human Rights: Jurisprudence*<sup>63</sup>

Although the European Court of Human Rights has, at the time of writing, not recognized a *general* right of access to official documents or information arising from Article 10 of the Convention, the recent case law of the Court suggests that, under certain circumstances, Article 10 of the Convention may support a right of access to documents for so-called "public

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61. *Id.*

62. Eur. Parl. Assemb., *Transparency and Openness in European Institutions*, 3rd Sess., Doc. No. 14075 (2016), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22797&lang=en>.

63. See Dirk Voorhoof, *On the Road to more Transparency: Access to Information under Article 10 ECHR*, CTR. FOR MEDIA PLURALISM & MEDIA FREEDOM (Dec. 2, 2014), <http://journalism.cmpf.eui.eu/discussions/transparency-access-to-information-article-10-echr>; see generally *Monitoring Media Pluralism in Europe – Testing and Implementation of the Media Pluralism Monitor 2015*, CTR. FOR MEDIA PLURALISM & MEDIA FREEDOM (May 3, 2016), <http://journalism.cmpf.eui.eu/discussions/world-press-freedom-day-2016>.

watchdog” bodies.<sup>64</sup> In addition, the Court has recognized a positive obligation to provide, both proactively and upon request, information related to the enjoyment and protection of other Convention rights such as the right to respect for private and family life.<sup>65</sup>

Initially, the Court set its face against recognizing a right to get hold of recorded information under Article 10. There is a line of cases that decided that, although Article 10 guarantees the right to “receive” information, it does not require the State to provide access to information that is not already available:

[T]here is a line of jurisprudential authority which unambiguously rules out reading into freedom of expression as protected by Article 10 any right of access to information from an unwilling provider and any corresponding positive obligation on public authorities to gather and disclose information to the general or specialised public.<sup>66</sup>

This approach was confirmed in subsequent Grand Chamber judgments<sup>67</sup> and Chamber judgments.<sup>68</sup>

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64. *Sdružení Jihočeské Matky v. Czech Republic*, App. No. 19101/03 (Eur. Ct. H.R. July 10, 2006), <http://hudoc.echr.coe.int/eng?i=001-76707>.

65. *Gaskin v. United Kingdom*, App. No. 10454/83 (Eur. Ct. H.R. July 7, 1989), <http://hudoc.echr.coe.int/eng?i=001-57491>; *see Guerra and others v. Italy*, App. No. 14967/89 (Eur. Ct. H.R. Feb. 19, 1988) (arguing for the right to environmental hazard documents for the safety of family and private life), <http://hudoc.echr.coe.int/eng?i=001-58135>.

66. Judge Mahoney said, “My main concern in the present case is that the Chamber in its judgment should not be a party to a covert overturning of rather clearly stated established case-law, including Grand Chamber judgments. As Judge Wojtyczek points out in his dissenting opinion (paragraph 2), beginning with a chamber judgment in *Leander v. Sweden* (26 March 1987, Series A no. 116, § 74) as confirmed in succeeding plenary Court or Grand Chamber judgments (*Gaskin v. the United Kingdom* [plenary Court], 7 July 1989, Series A no. 160, § 52; *Guerra and Others v. Italy* [GC], 19 February 1998, Reports 1998-I, §§ 52-53; and *Roche v. the United Kingdom* [GC], no. 32555/96, ECHR 2005-X, § 172 there is a line of jurisprudential authority which unambiguously rules out reading into freedom of expression as protected by Article 10 any right of access to information from an unwilling provider and any corresponding positive obligation on public authorities to gather and disclose information to the general or specialised public.” *Guseva v. Bulgaria*, App. No. 6987/07 (Eur. Ct. H.R. Feb. 17, 2015), <http://hudoc.echr.coe.int/eng?i=001-152416>.

67. *See Gaskin v. United Kingdom*, App. No. 10454/83 (Eur. Ct. H.R. July 7, 1989), <http://hudoc.echr.coe.int/eng?i=001-57491>; *Guerra and others v. Italy*, App. No. 14967/89 (Eur. Ct. H.R. Feb. 19, 1988), <http://hudoc.echr.coe.int/eng?i=001-58135>; *Roche v. the United Kingdom*, 2005-X Eur. Ct. H.R. 87.

68. *See Case of Sirbu and Others v. Moldova*, App. No. 73562/01 (Eur. Ct. H.R. June 15, 2004), <http://hudoc.echr.coe.int/eng?i=001-61819>; *Guseva v. Bulgaria*, App. No. 6987/07 (Eur. Ct. H.R. Feb. 17, 2015), <http://hudoc.echr.coe.int/eng?i=001-152416>. *But see Jones v. United Kingdom*, App. No. 42639/04 (Eur. Ct. H.R. July 27, 2004), <http://hudoc.echr.coe.int/webservices/content/pdf/001-70437?TID=ihgdqbxnfi> (providing decision on the inadmissibility of permitting photographs at cemeteries).

But the Court has also thought about the provision of information by states as a “secondary right or obligation derived from the tabulated rights in the Convention.” Thus, the Court has recognized a positive obligation to provide, both proactively and upon request, information related to the enjoyment and protection of other Convention rights such as the right to respect for private and family life. The right to a fair trial as granted by Article 6 of the European Convention on Human Rights gives the parties to court proceedings a right to have access to documents held by the court and of relevance to their case.

#### Article 10 and Information Disclosure

As Dirk Voorhoof has stated, “The Court’s recognition of the applicability of the (effective) right to freedom of expression and information in matters of access to official documents is undoubtedly an important new development which further expands the scope of application of Article 10 of the Convention . . . .”<sup>69</sup>

The line of cases that Judge Wojtyczek has characterized as his “colleagues’ endeavors to protect and promote the democratic rule of law”—which he applauds, but cannot share their approach—includes:

#### *(a) Sdruzeni Jihoceske Matky v. Czech Republic (2006)*<sup>70</sup>

The Court stated: “In this instance, the applicant association asked to be able to consult administrative documents which were available to the authorities and to which access could be granted in the conditions provided for by section 133 of the Building Act, which was contested by the applicant association. In those circumstances, the Court accepts that the rejection of the said request amounted to interference in the applicant association’s right to receive information.”

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69. Voorhoof, *supra* note 63. *But see* Geraguyn Khorhurd Patgamavorakan Akumb v. Armenia, App. No. 11721/04 (Eur. Ct. H.R. Apr. 14, 2009), <http://hudoc.echr.coe.int/eng?i=001-92548>; Friedrich Weber v. Germany, App. No. 70287/11 (Eur. Ct. H.R. Jan. 6, 2015), [hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-150811](http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-150811).

70. App. No. 19101/03 (Eur. Ct. H.R. July 10, 2006), <http://hudoc.echr.coe.int/eng?i=001-76707>.

(b) & (c) *Társaság a Szabadságjogokért v. Hungary (2009)*<sup>71</sup> and *Kenedi v. Hungary (2009)*<sup>72</sup>

Without dealing with a particular medium of communication as such, the Court acknowledged in *Társaság a Szabadságjogokért v. Hungary* that non-governmental organisations had an essential “watchdog” role and that their activities should be protected by the Convention in the same way as those of the press.<sup>73</sup> It further held that it would be fatal for freedom of expression if political figures could censor the press and public debate by contending that their opinions on matters of public interest constituted personal data which could not be disclosed without their consent.<sup>74</sup> In *Kenedi v. Hungary*, the Court clarified the scope of the exercise of freedom of expression by finding in substance that access to original documentary sources for legitimate historical research, in this case documents concerning the Hungarian State Security Service during the communist era, was an essential element of the exercise of that right.<sup>75</sup>

(d) *Youth Initiative for Human Rights v. Serbia (2013)*<sup>76</sup>

The European Court reiterated that “the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom and the obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters.<sup>77</sup> As a result, they may no longer be able to play their vital role as ‘public watchdogs,’ and their ability to provide accurate and reliable information may be adversely affected.”

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71. App. No. 37374/05 (Eur. Ct. H.R. April 14, 2009), <http://hudoc.echr.coe.int/eng?i=001-92171>.

72. *Kenedi v. Hungary*, App. No. 31475/05 (Eur. Ct. H.R. May 26, 2009), <http://hudoc.echr.coe.int/eng?i=001-92663>.

73. *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05 (Eur. Ct. H.R. April 14, 2009), <http://hudoc.echr.coe.int/eng?i=001-92171>.

74. *Id.*

75. EUROPEAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2009 OF THE EUROPEAN COURT OF HUMAN RIGHTS 84 (2009), [http://www.echr.coe.int/Documents/Short\\_Survey\\_2009\\_ENG.pdf](http://www.echr.coe.int/Documents/Short_Survey_2009_ENG.pdf).

76. *Youth Initiative for Human Rights v. Serbia*, App. No. 48135/06 (Eur. Ct. H.R. June 25, 2013), <http://hudoc.echr.coe.int/eng?i=001-120955>.

77. *Id.*

(e) *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria (2013)*<sup>78</sup>

This case further clarified and expanded the scope of application of Article 10 of the Convention. The applicant in this case was an NGO, the Austrian Association for the Preservation, Strengthening and Creation of an Economically Sound Agricultural and Forestry Land Ownership (ÖVESSG). The Court considered that the refusal to give ÖVESSG access to the requested documents amounted to an interference with its rights under Article 10, as the association was involved in the legitimate gathering of information of public interest with the aim of contributing to public debate. The unconditional refusal by the Austrian regional authorities to give access to a series of documents thus made it impossible for ÖVESSG to carry out its research and to participate in a meaningful manner in the legislative process concerning amendments of real property transaction law in the region. Further, the Court also observed that in contrast with similar authorities in other regions in Austria, the Tyrol regional authority had chosen not to publish its decisions and thus, by its own choice, held an information monopoly.

(f) *Roșianu v Romania (2014)*<sup>79</sup>

Ioan Romeo Roșianu, a Romanian journalist, had been hosting a news show on a regional channel for six years when, in January 2005, he was fired and his show cancelled. Among other issues, the show had been discussing the use of public funds by the mayor of Baia Mare. The program was replaced with a show funded by a municipality of the town. Roșianu requested access to public documents concerning the use of public funds, as provided by Romanian law and Article 10 of the ECHR. The mayor of Baia Mare rejected such requests and, subsequently, failed to comply with tribunal sentences ordering him to hand over the documents. The Court of Appeal in Cluj, in reinstating the order, also required that Baia Mare's mayor pay compensation to Roșianu.<sup>80</sup>

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78. App. No. 39534/07 (Eur. Ct. H.R. Nov. 28, 2013), <http://hudoc.echr.coe.int/eng?i=001-139084>.

79. App. No. 27329/06 (Eur. Ct. H.R. June 24, 2014), <http://hudoc.echr.coe.int/eng?i=001-144999>.

80. Roșianu v. Romania, Global Freedom of Expression, COLUM. UNIV., <https://globalfreedomofexpression.columbia.edu/cases/rosianu-v-romania>.

*(g) Guseva v Bulgaria (2015)*<sup>81</sup>

“A Chamber of the Court of Human Rights . . . again recognized an Article 10 right to access to information and found a violation where a public authority had failed to provide public interest information despite court orders. . . . The majority of the Fourth Section noted that Article 10 did not guarantee a general right of access to information; however, it said that particularly strong reasons must be provided for any measure limiting access to information which the public has a right to receive.”<sup>82</sup>

The UK judge (now retired) Judge Mahoney dissented, stating:

[T]here is a line of jurisprudential authority which unambiguously rules out reading into freedom of expression as protected by Article 10 any right of access to information from an unwilling provider and any corresponding positive obligation on public authorities to gather and disclose information to the general or specialised public [and he preferred] not to be associated with reasoning that, in effect, reverses the clear direction of existing Grand Chamber case law.<sup>83</sup>

Polish Judge Wojtyczek also dissented, partly on the same ground as Judge Mahoney and partly on the ground that he could not accept two categories of applicants—journalists and NGOs on the one hand and all other citizens on the other:

All this leads to an implicit recognition of two circles of legal subjects: a privileged elite with special rights to access information, and the “commoners,” subjected to a general regime allowing more far-reaching restrictions . . . . In my view, it is irrelevant whether someone needs information for any selfish purpose or in order to participate in public debate with a view to promoting the common good.<sup>84</sup>

The privileged status of journalists as such also troubles the judge:

It is no exaggeration to say that today we, the citizens of European States, are all journalists. We (at least many of us) directly access different sources of information, collect or request information from public authorities, impart information to other persons and publicly comment on matters of public interest . . . . We are all social watchdogs who oversee the action of the public authorities. Democratic society is—inter alia—a community of

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81. *Guseva v. Bulgaria*, App. No. 6987/07 (Eur. Ct. H.R. Feb. 17, 2015), <http://hudoc.echr.coe.int/eng?i=001-152416>.

82. Hugh Tomlinson, *Case Law, Strasbourg: Guseva v Bulgaria, More Freedom of Information Under Article 10 (with dissents)*, Informm’s Blog (Feb. 28, 2015), <https://informm.wordpress.com/2015/02/28/case-law-strasbourg-guseva-v-bulgaria-freedom-of-information-under-article-10-with-dissents-hugh-tomlinson-qc>.

83. *Guseva v. Bulgaria*, App. No. 6987/07 (Eur. Ct. H.R. Feb. 17, 2015), <http://hudoc.echr.coe.int/eng?i=001-152416>.

84. *Id.*

social watchdogs. The old distinction between journalists and other citizens is now obsolete. In this context, the case-law hitherto on the functions of the press seems out of date in 2015 and should be adapted to the latest social developments.<sup>85</sup>

Finally, there is the piece de resistance, the November 2016 Grand Chamber Judgment: *Magyar Helsinki Bizottság v Hungary* (2016).<sup>86</sup>

The Grand Chamber of the Court, by a majority of 15-2,<sup>87</sup> found for the applicant and against Hungary. Joined by the UK—in a written and oral submission—the two Governments argued that Article 10 could not be interpreted to imply a right to access information, as a matter of both principle and practicality.

The applicant NGO was conducting a survey of the public defender system. It requested the names of the public defenders retained by investigating authorities, mainly police departments, and the number of their respective appointments. From a total of twenty-four police departments, two declined to supply the requested information. The applicant complained that the domestic courts' refusal to order the disclosure of the information amounted to a breach of its right to access to information under Article 10. The main issue confronting the Grand Chamber was “whether and to what extent a right of access to State-held information could be viewed as falling within the scope of Article 10, notwithstanding the fact that such a right was not immediately apparent from the text of that provision.” Whilst mindful of the need to be consistent with precedents and the values of equality, legal certainty and foreseeability, the Court also accepted that “since the Convention was first and foremost a system for the protection of human rights, regard had also to be had to the changing conditions within Contracting States and the Court had to respond to any evolving convergence as to the standards to be achieved.”<sup>88</sup> Evidence of such changing standards could be found as follows:

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85. *Id.*

86. *Magyar Helsinki Bizottság v. Hungary*, App. No. 18030/11 (Eur. Ct. H.R. Nov. 8, 2016), <http://hudoc.echr.coe.int/eng?i=001-167828>. For the third party intervention, see *Third Party Intervention Submitted in Accordance with Rule 44(3) of the Rules of Court* (Sept. 9, 2015), [https://www.article19.org/data/files/Magyar\\_Helsinki\\_v\\_Hungary\\_-\\_Intervention\\_19\\_Sep.pdf](https://www.article19.org/data/files/Magyar_Helsinki_v_Hungary_-_Intervention_19_Sep.pdf). For a recording of the hearings, see *Magyar Helsinki Bizottság v. Hungary (no. 18030/11)*, EUROPEAN CT. OF HUM. RTS. (Nov. 4, 2015) [http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=1803011\\_04112015&language=lang](http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=1803011_04112015&language=lang).

87. The very detailed and trenchant dissent is by Judge Spano (Iceland) joined by Judge Kjolbro (Denmark).

88. Prior decisions include *Leander v. Sweden*, 9248/81, 26 March 1987; *Gaskin v. the United Kingdom*, 10454/83, 7 July 1989; *Guerra and Others v. Italy*, 14967/89, 19 February 1998; *Roche v. the United Kingdom [GC]*, 32555/96, 19 October 2005, Information Note 79; *Sdružení Jihočeské Matky v. the Czech Republic (dec.)*, 19101/03, 10 July 2006; and *Youth Initiative for Human Rights v. Serbia*, 48135/06, 25 June 2013, Information Note 164.



- National legislation in the majority of Contracting States recognized a statutory right of access to information;
- Article 19 of the International Covenant on Civil and Political Rights 1966;
- the existence of a right of access to information had been confirmed by the United Nations Human Rights Committee;
- Article 42 of the European Union Charter of Fundamental Rights guaranteed citizens a right of access to certain documents; and
- the adoption of the Council of Europe Convention on Access to Official Documents, even though ratified by only seven [sic] member States, denoted a continuous evolution towards the recognition of the State's obligation to provide access to public information.

Notwithstanding the foregoing, the Court held that the phrasing of Article 10, namely the right to "receive" information, could not be interpreted as imposing positive obligations on a State to collect and disseminate information on its own motion and Article 10 did not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information to the individual. On the other hand, such a right or obligation could arise:

- where disclosure of the information had been imposed by a judicial order which had gained legal force (and had not been implemented); and
- in circumstances where access to the information was instrumental for the individual's exercise of his or her right to freedom of expression, in particular the freedom to receive and impart information and where its denial constituted an interference with that right.

Would not getting the requested information be a denial of access to information tantamount to an interference with an applicant's freedom of expression? The Court held that this was a matter to be assessed in each individual case, *in casu*; relevant factors would include:

- the purpose of the information request;
- the nature of the information sought;
- the role of the applicant; and
- whether the information was ready and available.

In the instant case, the Court was satisfied that the applicant in the present case wished to exercise the right to impart information on a matter of public interest, as the information on the appointment of public defenders was eminently public-interest in nature. The survey contained information which the applicant undertook to impart to the public and which the public had a right to receive. Lastly, the information was ready and available.

So, was the interference (i.e., that the applicants did not get the information they sought) justifiable? On the one hand, the data did consist of personal data. On the other hand, the information related to the conduct of professional activities in the context of public proceedings. Significantly, the Court held that public defenders' professional activities could not be considered to be a private matter. The information requested did concern personal data, but it did not involve information outside the public domain.<sup>89</sup> Furthermore, the data did not pertain to the public defenders' actions as legal representatives or to consultations with their clients. Finally, the Government had failed to demonstrate that the disclosure of the information requested could have affected the public defenders' enjoyment of their right to respect for private life. In any case, the names of public defenders and their appointments might become known to the public through other means.

The Court was satisfied that the applicant intended to contribute to a debate on a matter of public interest and that the refusal to grant the request had effectively impaired its contribution to a public debate on a matter of general interest. The Court concluded that, notwithstanding the State's margin of appreciation, there had not been a reasonable relationship of proportionality between the measure complained of and the legitimate aim pursued.

#### IV. ENDNOTE

One of the relatively few think pieces specifically on "FOI as a human right" is authored by Kay Mathiesen, in particular, her article *Access to Information as a Human Right*.<sup>90</sup> In it, she focuses on the rights related to free access to information, concluding that access to information is a "fundamental human right"—entailing, as a "welfare right" and not just a liberty right, duties being placed on governments to provide and give access to information.<sup>91</sup> Grounding her argument on James Nickel's view that

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89. Thus, "the Court declined to perform a 'balancing exercise' between the NGO's Article 10 rights and the Article 8 privacy rights of the criminal defence lawyers – 'the disclosure of public defenders' names and the number of their respective appointments would not have subjected them to exposure to a degree surpassing that which they could possibly have foreseen when registering as public defenders', so Article 8 was not even engaged. There was no justification; Hungary had breached the NGO's Article 10 rights." See *A Human Right to Freedom of Information*, <https://panopticonblog.com/2016/11/14/human-right-freedom-information>.

90. Kay Mathiesen, *Access to Information as a Human Right* (2008), [https://www.ideals.illinois.edu/bitstream/handle/2142/15236/1/Conf\\_Information\\_as\\_a\\_Human\\_Right.doc.pdf](https://www.ideals.illinois.edu/bitstream/handle/2142/15236/1/Conf_Information_as_a_Human_Right.doc.pdf).

91. *Id.* § 1. See S. Jagwanth, *The Right to Information as a Leverage Right*, in *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice* 3–16 (Richard Calland & Allison Tilley eds., 2002); Joshua Cohen, *Freedom of Expression*, 22 PHIL. PUB. AFF. 207, 223 (1993).

human rights are the rights to resources and circumstances to live a “minimally good life,” she identifies three aspects:

- human beings are creatures with a capacity and a desire for knowledge;
- knowledge is not only good in itself; it is pragmatically essential that persons have access to information if they are to have the capacity to exercise their other rights (Rawls’ “primary good”); and
- in order for persons to effectively exercise and protect their other rights, they need access to information.<sup>92</sup>

Peter Forsskal put the matter thusly in 1759:

Finally, it is also an important right in a free society to be freely allowed to contribute to society’s well-being. However, if that is to occur, *it must be possible for society’s state of affairs to become known to everyone*, and it must be possible for everyone to speak his mind freely about it. Where this is lacking, liberty is not worth its name.<sup>93</sup>

Interestingly, Mathiesen acknowledges that she may argue that our human rights extend beyond what has been explicitly encoded in human rights documents.<sup>94</sup>

This echoes the point made by Onora O’Neill, “[T]he Human Rights documents do not justify determinate speech or media freedoms [because] Declarations do not justify. . . they deliberately short-circuit justification.”<sup>95</sup>

Arguably, whilst Mathiesen focuses on the significance of access to information for the individual’s life, Forsskal’s formulation is more societal in orientation – the need to be able to access knowledge in order for anyone to contribute to society’s well-being.<sup>96</sup>

Basically, Mathiesen distinguishes between the intrinsic and the instrumental dimensions of the right to access information:

- A minimally good human life is not possible without access to a rich array of expressions and to knowledge for both practical ends and intrinsic benefits to the human spirit. Nevertheless, even if these interests were not sufficiently compelling, there would still be grounds for arguing that access to information is a fundamental

92. Mathiesen, *supra* note 90, § 1. See James W. Nickel, *Making Sense of Human Rights* 174 (2d ed. 2007).

93. PETER FORSSKÅL, *THOUGHTS ON CIVIL LIBERTY* ¶ 21, <http://www.peterforsskal.info/thetext.html> (last visited Feb. 17, 2017) (emphasis added).

94. Mathiesen, *supra* note 90, § 1.

95. Onora O’Neill, *Regulating for Communications*, FOUNDATION FOR LAW, JUSTICE AND SOCIETY (2012), <http://www.fljs.org/sites/www.fljs.org/files/publications/ONeill.pdf>.

96. See, e.g., *Consultation on Guidelines for Participation in Political Decision-Making*, COUNCIL OF EUROPE (July 11, 2016), [http://www.coe.int/t/dgap/localdemocracy/News/2016/consultation0716\\_en.asp](http://www.coe.int/t/dgap/localdemocracy/News/2016/consultation0716_en.asp).

human right. Access to information is a necessary precondition for us to exercise our other human rights.<sup>97</sup>

- If one is denied access to information about how to apply for jobs, for benefits, how to access and use healthcare, then, for all intents and purposes, one is being denied the rights to such things.
- If one does not have at least basic information about who is running in an election, their positions, their past experience and actions, then the rights listed in Article 21 of the UDHR [2], “everyone has the right to take part in the government of his country, directly or through freely chosen representatives” are meaningless. One cannot express one’s will in elections if one does not have the information necessary to make one’s choices a genuine expression of one’s values and preferences.

Finally, Mathiesen argues that whilst access to information can be viewed as a “liberty right” it should also be understood as a “welfare right”:

[T]he only way that our fundamental interests to access to information can be adequately protected is if they are understood as encompassing a welfare right that places duties on governments and others to supply people with the necessary information and knowledge. . . . the right to information should be understood as a welfare right that places on governments (and perhaps others) the duty to provide people with information.<sup>98</sup>

The philosophical analysis of the right to information being a fundamental human right is echoed legally in the decision of the Inter-American Court of Human Rights in *Reyes v. Chile* (2006):

This case addresses the State’s refusal to provide Marcelo Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero with certain information that they requested from the Foreign Investment Committee regarding forestry company Trillium and the Río Cónдор project, a deforestation project that was being carried out in Chile. In this ruling, the Inter-American Court recognized that the right to access to information is a human right protected under Article 13 of the American Convention.<sup>99</sup>

As the Court said in paragraph 77:

Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the

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97. Mathiesen, *supra* note 90, § 5.2.

98. *Id.* § 5.3, 7.

99. *Decisions and Judgments of the Inter-American Court*, OAS, [http://www.oas.org/en/iachr/expression/jurisprudence/si\\_decisions\\_court.asp#Claude](http://www.oas.org/en/iachr/expression/jurisprudence/si_decisions_court.asp#Claude) (last visited Mar. 18, 2017). Crucial to that decision—and in contradistinction to the situation under the European Convention—as has been pointed out *supra*, is the inclusion of the term “seek” in ACHR Article 13(1) and its absence in Article 10(1).

restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case.<sup>100</sup>

Crucially, both Mathiesen's analysis and the decision in *Reyes* make no distinction as to the category of requester as being a determinant of whether disclosure should be ordered or not. Indeed, how could that be relevant? If the right is a fundamental human right, then it must be a right of all. However, the Grand Chamber, whilst resisting the trenchant claims of the Hungarian and UK Governments that reading a right to access information into Article 10 is an overbroad act of judicial activism, nonetheless, as has been described above, is still resistant to extending the right to all in all circumstances. As has been remarked, rather delicately, "There is now a defined (if not unconfined) human right of access to information."<sup>101</sup> Further, to restate, the "right" is limited by the purpose for which the information is sought and its nature; but, the principle of the right to information is purpose and motivation blind. So, legally, the European Court still persists with a two-class approach to admitted beneficiaries of the right, even though it has now extended the list to include social media bloggers.<sup>102</sup>

It was said in another context, but the Strasbourg Court has "never missed an opportunity to miss an opportunity"—in this context, to find that the right of access to information is a right of all, in all circumstances, subject only to very precisely and narrowly drawn restrictions prescribed by law for a legitimate purpose and necessary in a democratic society. So, unless Article 10 is amended (highly unlikely) or a new Protocol to the Convention is adopted (highly unlikely), there is no reasonable prospect that there will be an interpretation from the European Court to match the decision of the Inter-American Court of Human Rights in *Reyes v. Chile* that the right to access information is a human right and, therefore, a right of all.

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100. *Claude-Reyes v. Chile*, Report No. 60/03, Inter-Am. Ct. H.R., ¶ 77 (Sept. 19, 2006).

101. *A Human Right to Freedom of Information*, PANOPTICON (Nov. 14, 2016) <https://panopticonblog.com/2016/11/14/human-right-freedom-information>; see also Nani Jansen Reventlow & Jonathan McCully, *The European Court of Human Rights and Access to Information: Clarifying the Status, with Room for Improvement*, HARVARD LAW SCHOOL: CYBERLAW CLINIC (Nov. 22, 2016), <http://clinic.cyber.harvard.edu/2016/11/22/the-european-court-of-human-rights-and-access-to-information-clarifying-the-status-with-room-for-improvement>.

102. See *Magyar Helsinki Bizottság v. Hungary*, Eur. Ct. H.R. (2016) at ¶ 168 ("The Court would also note that given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 133, ECHR 2015), the function of bloggers and popular users of the social media may be also assimilated to that of 'public watchdogs' in so far as the protection afforded by Article 10 is concerned.").



# Why the French FOIA “Failed”

Tom McClean\*

*This article presents a case study of the French freedom of information act. This is one of the oldest of the modern era, having been introduced in 1978. But it has also consistently been among the least used of any major democracy. It therefore presents something of a puzzle for many activists and scholars, who assume that the introduction of a law constitutes a decisive step towards transparency, and that over time they will probably exert a self-reinforcing effect on practice.*

*This article offers an explanation for the apparent “failure” through a study of how the French law came to be, and how it has been used since. It argues that the law itself is not significantly different from other more successful examples, nor are the circumstances of its introduction. Rather, its “failure” can be explained by the way certain aspects of the institutional, social and political context into which it was introduced mediated pressures which, in other countries, led to the introduction of freedom of information. These mediating factors combined to weaken key constituencies for legal rights of access to official files, and satisfied their demands in other ways.*

*A study of the French law is a useful corrective to the tendency among scholars of freedom of information to focus primarily on laws which are deemed to “work” and to understand their operation primarily in terms of a somewhat schematic view of electoral accountability. It helps to understand the variety of places they can occupy in the broader political economy of information, and of the factors which can influence their impact.*

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## INTRODUCTION

The French freedom of information act was passed on July 17, 1978, as part of the charmingly named *Loi N° 78-753 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal* ("law containing a range of measures for improving relations between the administration and the public, and a range of measures of an administrative, social and fiscal nature"). The law presents something of a puzzle, because it is one of the oldest in the world outside the United States and Scandinavia, but has also consistently been one of the least effective in any major democracy. This is difficult to reconcile with the consensus among scholars and practitioners, which holds that the introduction of a law constitutes a decisive step towards transparency, and assumes that over time these laws will usually exert a self-reinforcing effect on practice. The French case is also difficult to reconcile with the usual explanations for why some laws are stronger than others.

This article attempts to explain this "failure." It conducts a detailed historical case study of how the French law came to be, and of debates over rights of access more generally in that country. It compares this experience with a small number of other countries (principally the USA and the UK). It argues that the law itself is not significantly different from other more successful examples, and the circumstances of its introduction also resemble those elsewhere in many important respects. As such, these factors cannot explain the French experience. Rather, it will show that the failure is associated with certain aspects of the institutional, social and political context in France into which it was introduced. These mediated two pressures, which arose in almost every advanced industrial democracy over the second half of the twentieth century, usually led to the introduction of access rights: the growth of the welfare state and the increasing use of information and information technology as tools of governance. These mediating factors weakened demand for direct access to official files, through a combination of limiting opportunities to pursue this access, making it less appealing to potential beneficiaries, and satisfying demand in other ways. As a result, France has never developed a supportive coalition for rights of access as other countries have.

This article shows that study of the French law is a useful corrective to the tendency among scholars of freedom of information to focus primarily on laws which are deemed to "work," and to the tendency to bring assumptions grounded in Anglo-Saxon experience to the study of laws elsewhere. The French case helps to understand the variety of places they can occupy in the broader political economy of information, and of the factors which can influence their impact.



## HOW THE FRENCH FOIA HAS “FAILED”

According to the standards by which activists and academics usually judge these things, the French freedom of information act has not been particularly successful.

One way of doing so is to consider the number of access requests which are made each year to public authorities. The assumption is that numbers should be higher in countries with effective laws because citizens are more likely to use a law they know to be effective. This argument is open to question, not least because in every country where official statistics exist, they reveal that only a tiny fraction of the general population has ever formally requested access to a government document. The rate of requests per 100,000 people was 182 in the United States, 38 in the United Kingdom, and 2 in Germany in 2009 (one of the earlier years for which comparable data about routine operations of the laws in these three countries are available).<sup>1</sup> This suggests citizens generally get the information they need about their governments in other ways. The difficulties are greater in the case of France because the French government does not publish the relevant statistics. Indeed, the *Commission d'Accès aux Documents Administratifs* (“Commission for Access to Administrative Documents” or CADA), which is charged with oversight of the law, only gained the power to collect and publish any data at all in 2000, and only began putting in place the infrastructure to do so in 2005. Despite this, the general consensus has long been that rates there are probably quite low.<sup>2</sup> It is possible the French law is used more than the German, and highly likely it is used much less than the American or the British.<sup>3</sup>

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1. Figures calculated using UN population estimates and annual reports for the oversight body for each law. U.N. POPULATION DIVISION, WORLD POPULATION PROSPECTS (2008-2009); OFF. OF INFO. POLICY, U.S. DEP'T OF JUST., SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2 (2009); MINISTRY OF JUST., FREEDOM OF INFORMATION ACT 2000 ANNUAL STATISTICS ON IMPLEMENTATION IN CENTRAL GOVERNMENT 4 (2009) (UK); BUNDESMINISTERIUM DAS INNERN, STATISTIK DER IFG-ANTRÄGE 2009 ALLER RESSORTS EINSCHLIEßLICH GESCHÄFTSBEREICHE 2 [FOIA Requests] (Germany); COMMISSION D'ACCÈS AUX DOCUMENTS ADMINISTRATIFS, RAPPORT D'ACTIVITÉ 2 [Report of Activity] (2009) (France).

2. Andrew McDonald, *What Hope for Freedom of Information in the UK?*, in TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? 132 (Christopher Hood & David Heald eds., 2006); David Banisar, *Freedom of Information Around the World: A Global Survey of Access Records Laws*, THE ONLINE NETWORK OF FREEDOM OF INFORMATION ADVOCATES 73 (July 2006); OPEN SOCIETY JUSTICE INITIATIVE, TRANSPARENCY & SILENCE: A SURVEY OF ACCESS TO INFORMATION LAWS AND PRACTICES IN FOURTEEN COUNTRIES (2006); Donald Rowat, *The French Law on Access to Government Documents*, 10 GOV'T PUBLICATIONS REV. 35 (1983).

3. This view is not universal; Cain describes the use as heavy without citing sources. Bruce Cain, *Towards More Open Democracies: The Expansion of Freedom of Information Laws*, in DEMOCRACY TRANSFORMED? EXPANDING POLITICAL OPPORTUNITIES IN ADVANCED INDUSTRIAL DEMOCRACIES 124 (Bruce Cain et al. eds., 2003). The only quantitative estimate is from Patrick Vleugel, who gives a figure of 3 requests per 100,000 inhabitants in 2009. Patrick

A second approach is to compare rates of appeal and of the outcomes of those appeals. A law which favors access should give rise to more appeals, in that it provides an effective means to overcome the inherent tendency of public officials to refuse requests out of personal or institutional self-interest. This should be especially true for the period shortly after the law is introduced, when there is likely to be a significant amount of pent-up demand among requesters, and when traditions of administrative secrecy are likely to remain particularly strong among officials. A strong law should also be characterized by a high rate of successful appeals. It is possible to make some of these comparisons between France and other countries, because the CADA has recently begun to publish data on appeals. Their scope is limited because of the lack of historical data, which means we cannot compare between countries at similar points in the history of the law, and because the absence of request data means it is not possible to calculate the rate of appeals per request. Nevertheless, it appears that the French generally lodge around a third as many appeals as the British, for a population that is roughly similar. The available data also shows that the rate of successful appeals in France in 2009 was 47%, compared with 63% in the UK and 25% in Germany.<sup>4</sup> Comparable figures are not available for the United States. Despite these limitations, the data clearly suggest the French law is less effective than others in favoring public access to information that the government would prefer to withhold.

A third approach is to test how access laws work experimentally, by submitting requests and assessing the responses. Because of the costs involved, such studies are rare. By far the largest and most comprehensive was undertaken by the Open Society Justice Initiative in 2003-2005, and involved submitting similar requests to multiple agencies across fourteen countries.<sup>5</sup> This showed that France was usually the median performer, when measured against criteria such as compliance with timeframes and equity of access.<sup>6</sup> This is particularly noteworthy because the study was not conducted in other countries where freedom of information is assumed to work reasonably well (such as the USA or Sweden). Rather, it deliberately focused on countries that lacked France's "legal and administrative arrangements, [which] are often looked to as models by democratizing countries." In other words, France was included as a representative of a country where the

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Vleugel, *Overview of all FOI Laws: 88 National FOIAs, 175 Sub-National FOIAs, & 3 International FOIAs*, FRINGE SPECIAL (Oct. 9, 2011), <http://right2info.org/resources/publications/Fringe%20Special%20-%2090%20FOIAs%20-%20sep%207%202009.pdf>.

4. See sources cited *supra* note 1.

5. Open Society Justice Initiative, *supra* note 3, at 77-78.

6. *Id.* at 43, 63, 85.

institutional environment was assumed to be reasonably favorable, and even then its performance was merely average.

It is possible, finally, to infer something about the effectiveness of a law from the statements of relevant political actors such as politicians, administrators, activists and journalists. It is important to approach these sources with care, because this evidence usually exists as a byproduct of political struggles to establish the very thing we are interested in understanding, and is therefore inherently biased. In most countries, documents written by those seeking information typically claim that government is too secretive, while those written by administrators often emphasize the costs and side effects of too much transparency. Moreover, there are likely to be cultural differences which will influence whether, for example, journalists perceive the need to mention that they have used an access law when preparing a story. Despite these difficulties, the comparative evidence is consistent with the data discussed above, and with scholarly consensus: France is characterized by a relatively low level of awareness of the law both within government and among potential requester groups.<sup>7</sup> And as we shall see below, access rights are not a prominent matter of political debate as they are elsewhere.

#### WHY THIS “FAILURE” DESERVES EXPLANATION

The “failure” of the French access law has not received a great deal of scholarly scrutiny. This is a pity, because close examination suggests that it does not fit well within the existing literature about why these laws exist and how they function.

One common explanation, particularly among activists and legal scholars, is that the law itself is weak. The Open Society Justice Initiative, for example, notes that the CADA has no power to compel the bureaucracy to release a document—its decisions when hearing appeals are advisory only. It compares the French law unfavorably with other jurisdictions, like Mexico and South Africa, where the oversight body has determinative powers. The OSJI also notes that the CADA is not required to raise awareness of the law or to promote the concept of access generally. This contrasts with the Information Commissioner in the UK, who *is* required to promote the law, and given significant resources to do so. These claims are consistent with those made by French journalists who campaigned for reform in the mid-2000s (discussed later).

It is by no means clear that this explanation is sufficient when France is compared systematically with other countries. Access Info Europe, one of the main proponents of the “strong law” approach, launched a rating tool and

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7. *Id.* at 77-78.

conducted a particularly widespread and comprehensive study of access laws in 2010.<sup>8</sup> This showed that several countries which are generally understood to have quite strong records on transparency have weak laws on paper (e.g., the United States, Australia, Norway, and Iceland). It also showed that some countries that would probably never be held up as paragons of transparency have theoretically quite strong laws (e.g., Sudan, Ethiopia and Russia). Moreover, it is not even clear that the specific “weaknesses” which are usually identified in the French law are important. For example, both New Zealand and Sweden have oversight bodies which lack determinative powers—and both have strong reputations for administrative transparency.

Another second common explanation for the “failure” of the French law, particularly among public officials and scholars of public administration, is a persistence of a culture of secrecy among French bureaucrats. This is sometimes associated with a widespread acceptance of that secrecy among interested outsiders such as voters, civil society activists and journalists.<sup>9</sup> This explanation comes closer to the truth, as we shall see shortly, but it is not sufficient either. France was not alone in having a well-developed culture of administrative secrecy prior to the late 1970s. Every country which has an access law had a similar tradition, and it was this that these laws explicitly sought to overturn. Laws in other advanced democratic countries have generally been more successful in achieving this, and the question is why administrative secrecy should have endured in France *despite* the introduction of a law. On its own, the cultural “explanation” is merely a restatement of the question we are seeking to answer.

The French case is also worthy of consideration in light of the small number of empirical studies which seek to explain why these laws exist at all. These usually emphasize contingent political phenomena which are systematically correlated with the introduction of a law in different countries. For example, Berliner emphasizes the credibility of the electoral threat posed by opposition parties and a recent history of executive turnover;<sup>10</sup> Michener points to the electoral cycle, executive control of the legislature and concentration of press ownership;<sup>11</sup> Grigorescu highlights the spread of international norms and attempts by governments to signal their trustworthiness to the electorate.<sup>12</sup>

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8. *New RTI Legislation Rating Methodology Launched*, ACCESS INFO EUROPE (Sept. 29, 2010), <http://access-info.org/en/advancing-the-right-to-know/111-rti-rating-methodology>.

9. Open Society Justice Initiative, *supra* note 2, at 77-78.

10. Daniel Berliner, *The Political Origins of Transparency*, 76 J. POL. 479, 482 (2014).

11. GREGORY MICHENER, *THE SURRENDER OF SECRECY: MEDIA, POLITICS AND FREEDOM OF INFORMATION REFORM IN LATIN AMERICA* 6 (2010).

12. *See generally* Alexandru Grigorescu, *International Organizations and Government Transparency: Linking the International and Domestic Realms*, 47 INT'L STUDIES QUARTERLY 643 (2003).

The French case, as we shall see, confirms the relevance of many of these factors while also demonstrating the limits of what they can explain. The underlying assumption in these studies that countries introduce laws when political conditions are favorable. The French law was introduced relatively early, into a country with a reasonably free and fair electoral system, independent courts and other institutions that are usually associated with a functioning democracy. Furthermore, it has had over 35 years to develop a supportive constituency since its introduction—a constituency which might be expected to make increasing use of it and to campaign for improvements such as more rigorous accountability and oversight. This kind of campaigning has only begun to occur in the last decade, and while it is too early to tell whether this will prove significant in the long run, the signs are not favorable. As far as it is possible to tell, low rates of use and ineffectiveness have existed since the law was first introduced, despite the enormous changes to French politics, media and information technology that have occurred since. This cannot be waved away as “idiosyncrasy.”<sup>13</sup> A deeper explanation, which takes into account the fact that freedom of information might constitute a different kind of outcome in different countries, is required.

#### THE INTRODUCTION OF FREEDOM OF INFORMATION IN FRANCE

Just as the apparent failure of the French freedom of information act cannot readily be explained by the text of the law itself, nor can it be explained by the broad historical and political factors which led to its introduction. France experienced much the same pressures for administrative transparency as countries which have more “successful” access laws. The most important were the growth of the welfare and regulatory state in the immediate post-war decades, and the increasing importance of information technology in governance and politics throughout the whole period since. These led to government secrecy and control over information becoming topics of political debate in France in much the same way as they did in other countries.

#### *A Context of Pervasive Secrecy*

Like almost every country, France had an extensive tradition of government secrecy prior to the introduction of its access law. As elsewhere, this tradition rested on a complex, interlocking set of legal and sociocultural foundations. The complexity of the rules surrounding access, and the underlying presumption in favor of secrecy, meant that in effect the State

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13. Berliner, *supra* note 10, at 485.

could usually choose what information to release and when. Although these laws and their foundations have endured longer in France than in other countries, their existence and form was not particularly different from other countries.

From a formal legal perspective, the foundations of administrative secrecy in France were not so unusual as to obviously explain its persistence. They were perhaps more extensive than, say, in the USA (where the *Espionage Act* of 1917 criminalized only the unauthorized obtaining or communication of defense-related documents and information, and its communication to foreign governments). But they were less systematic or comprehensive than in the United Kingdom or other Westminster countries, where *Official Secrets Acts* theoretically criminalized the unauthorized disclosure of *any* information by *any* public servant. Instead, there were several laws and regulations that collectively had the same effect. The *Code Penal* criminalized the disclosure of any information concerning national defense secrets to any unauthorized person. "National defense" was interpreted quite broadly, and included information relating to population health and public order as well as military matters.<sup>14</sup> As late as 1979, the *Statut général des fonctionnaires* (civil service rules) imposed a general duty of secrecy on all civil servants, over and above the provisions of the penal code, in the absence of an explicit legal obligation to the contrary.<sup>15</sup> In addition, from 1959, an *Ordonnance* forbade civil servants from revealing to third parties any information they obtained in the exercise of their duty,<sup>16</sup> although it appears the courts were only willing to enforce this duty against civil servants who divulged information concerning third parties.<sup>17</sup> The duty of professional secrecy even applied to relations between different parts of the state—a decision by the *Conseil d'État* in 1953 confirmed that civil servants were to pass information to colleagues on a need-to-know basis only.<sup>18</sup>

Administrative secrecy was supported by jurisprudence, which held that the State could only be compelled to divulge information if there was a legal requirement to do so.<sup>19</sup> The range of circumstances involved reflected piecemeal historical development, and did not differ markedly from countries

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14. HOME OFFICE, DEPARTMENTAL COMMITTEE ON SECTION 2 OF THE OFFICIAL SECRETS ACT 1911, at 126 (Her Majesty's Stationery Office 1972).

15. J.C. Boulard, *France*, in ADMINISTRATIVE SECRECY IN DEVELOPED COUNTRIES 158 (Donald Rowat ed., 1977).

16. *Ordonnances*, J. OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, FEBRUARY 8, 1959, at 1747.

17. Yohann Manor, *France*, in GOVERNMENT SECRECY IN DEMOCRACIES 240 (Itzhak Galnoor ed., 1977).

18. Boulard, *supra* note 15, at 165.

19. BRUNO LASSERRE ET AL., LA TRANSPARENCE ADMINISTRATIVE 18 (Presses Universitaires de France 1987).

like the UK or the other Westminster democracies. The *Déclaration des droits de l'homme et du citoyen* of 1789 provided that citizens could demand an account of public administrators for the spending of public money, for example.<sup>20</sup> This is sometimes cited as a forerunner of the contemporary right of access,<sup>21</sup> but this is not clear given the *Déclaration* as a whole was only incorporated into the constitutional jurisprudence of the Fifth Republic in 1970, when early moves towards greater transparency discussed below were already underway.<sup>22</sup> It is more noteworthy as an early indicator of the fact that a concern over how money is spent has tended to play a very prominent role in French thinking about transparency. The *Déclaration* also stated that private property was inviolable, a provision which gave rise to a tradition by which compulsory acquisition required public inquiries and reports.<sup>23</sup> In addition, the *Code des Communes* (Local Council Code) had long provided access to minutes, accounts and regulations of local councils.<sup>24</sup> Individual citizens also enjoyed relatively extensive rights of access based on principles of procedural fairness. From the 1930s onwards, *Conseil d'État* developed an increasingly elaborate line of jurisprudence which required the giving of reasons and to holding of *procédures contradictoires* (hearings) if a decision would affect private property rights, restrict liberty or was of the nature of a sanction.<sup>25</sup> Citizens also enjoyed fairly extensive rights of discovery if they brought a case against the State in the administrative courts. These rights were not without limits, however: the *Conseil d'État* held in 1959 that it did not have the power to order the disclosure of documents subject to a positive obligation of secrecy.<sup>26</sup> It did hold, however, that a refusal to disclose documents where the State had a discretionary power would lead to a presumption of irregular behavior and hence the administration losing the case.

This legal regime was supported by sociocultural features with deep historical roots. A central fact of French political life for much of the modern era has been a centralized and relatively powerful bureaucracy, which is often

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20. André Holleaux, *Les nouvelles lois françaises sur l'information du public*, 47 INT'L REVIEW OF ADMIN. SCI. 191 (1982).

21. Banisar, *supra* note 2, at 72.

22. Boulard, *supra* note 15, at 160; Alec Stone, *Abstract Constitutional Review and Policy Making in Western Europe*, in COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 41, 44 (Donald Jackson & C. Neal Tate eds., 1992).

23. Holleaux, *supra* note 20, at 191.

24. Roger Errera, *Access to Administrative Documents in France: Reflections on a Reform*, in PUBLIC ACCESS TO GOVERNMENT-HELD INFORMATION 115 (Norman Marsh ed., 1987).

25. *Dame veuve Trompier Gravier* 159 (Boulard, France 1944). It should be noted, however, that at least some of parliamentary support for freedom of information which arose in the mid-1970s appears to have been based on the belief that French administrative law lagged behind the American and German equivalents in these respects.

26. *Id.* at 171.

able to act independently not just of major interest groups but also its nominal political masters.<sup>27</sup> Some suggest this has contributed to secrecy via a culture of deference that has its roots in the State's origins as a tool of absolutist monarchy and military imperialism.<sup>28</sup> Others note the prominent distaste in French political thought for sectional interests—a distaste which can be found in Rousseau's discussion of the general will,<sup>29</sup> and in Jacobin thinking that the State plays an essential role in maintaining social order. This finds contemporary expression in the Gaullist view that the State should be majestic, aloof and authoritative.<sup>30</sup> Culture is insufficient as an explanation for ongoing secrecy, for reasons already discussed, but touches on a number of institutional features of French politics that will play an important role below.

These beliefs about the character and role of the state were reinforced by the social status traditionally attached to the civil service. This was distinctive for the extent of its formal institutionalization, rather than the fact of its existence: with the partial exception of the United States, bureaucrats in many countries enjoyed elevated social status until at least the early post-war era. Since the time of Napoleon, the upper echelons of the French state have been dominated by the so-called *grands corps*. These groups have received specialist training in a small number of élite schools (today, the two most important are the *École Nationale d'Administration* and the *École Polytechnique*, which also include a very large proportion of party officials among their alumni). The *grands corps* dominate the upper echelons of the most important institutions of central government in Paris. The most prestigious of all are the *corps* associated with three oldest and most prestigious State bodies (the *Conseil d'État*, which specializes in general public administration, the *Inspection des Finances*, which focuses on financial probity, and the *Corps des Ponts et Chaussées*, which specializes in engineering). Other important *corps* are the *préfecturale* and the *diplomatique*. All have a strong sense of common identity, and of superiority with respect to outsiders. These have retained a degree of social status that their equivalents have lost in many other countries, particularly in the Anglo-Saxon world, as we shall see later.

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27. B. GUY PETERS, *THE POLITICS OF BUREAUCRACY* 144-145 (Routledge, 2001); *see also* VIVIEN A. SCHMIDT, *THE CHANGING DYNAMICS OF STATE-SOCIETY RELATIONS IN THE FIFTH REPUBLIC* 141-143 (West European Politics 1999).

28. LASSERRE, *supra* note 19, at 3-12.

29. *See generally* JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Jonathan Bennet trans. 1968).

30. Manor, *supra* note 17, at 237-238; John Rohr, *French Public Administration*, in *COMPARATIVE BUREAUCRATIC SYSTEMS* 41-42 (Krishna Tummala ed., 2003).



*The Breakdown of Administrative Secrecy*

Administrative secrecy began to break down in France in the late 1960s, initially due to the growth of the welfare and regulatory state. Prior to the 1930s, welfare provision in France consisted of a patchwork system of social insurance schemes, most of which were linked to employment and which had developed in an ad hoc way with varying degrees of official support since the 1890s. Beyond this, the French state offered relatively little in the way of domestic welfare, and regulatory intervention was confined largely to the criminal and justice systems (although there was a long history of state-led economic development and investment in comparatively large infrastructure projects like roads and mines, which differed from the English-speaking world). Between the 1930s and 1960s, existing services were expanded and the state began to take on an increasing range of functions. Comprehensive social insurance was first introduced in the 1930s, and from the late 1940s the Fourth Republic instituted a number of welfare and economic development programs. These were consolidated into a comprehensive program of transfer payments and welfare services under the Fifth Republic from 1959. By the 1960s, France had one of the more generous regimes in the OECD.<sup>31</sup> Over the same period, the State also expanded the areas of economic and social life it sought to regulate, and the level of detail with which it did so.<sup>32</sup>

These changes led to the development of freedom of information in two main ways.

First, they gave rise to discussions among jurists and administrators who were close to, but not usually part of, elected governments in the early 1970s, about the use of information as a tool of governance.<sup>33</sup> Awareness of this possibility arose because one consequence of the growth of the State was that it began to collect a far greater volume and variety of information about French society. Something similar happened among officials and other politically-connected actors across the advanced industrial democracies at around the same time, although France was somewhat unusual for the extent to which this process was dominated by bureaucrats and for the fact that their discussions led to repeated and explicit calls for freedom of information.

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31. See generally John Ambler, *Ideas, Interests, and the French Welfare State*, in THE FRENCH WELFARE STATE, SURVIVING SOCIAL AND IDEOLOGICAL CHANGE 1-31 (John Ambler ed., 1991); Bruno Jobert, *Democracy and Social Policies: The Example of France*, in THE FRENCH WELFARE STATE, SURVIVING SOCIAL AND IDEOLOGICAL CHANGE 232-256 (John Ambler ed., 1991).

32. EDWARD HIGGS, THE INFORMATION STATE IN ENGLAND 168 (Palgrave MacMillan 2004); RENÉ LENOIR, L'INFORMATION ÉCONOMIQUE ET SOCIALE 35 (La Documentation Française 1979).

33. Errera, *supra* note 24, at 118-19.

One of the most significant forums for this debate in France was the *Commission de Coordination de la Documentation Administrative* (Committee for the Coordination of Administrative Documents). This was an internal working party, established by Prime Minister Chaban-Delmas in mid-1971 to ensure systematic archival procedures, to rationalize the publication of official documents, and if possible to establish them on a profit-making basis.<sup>34</sup> It was a direct successor to a working party founded by Mendès-France in 1956 to explore the uses of official publicity (i.e., peacetime propaganda) as tools of social regulation and legitimation. The 1971 decision grew out of increasing recognition that collecting, maintaining and publishing data was undertaken by various parts of the State, and hence was not subject to consistent rules concerning conservation or access. The working party was given a relatively narrow remit, but quickly went beyond it and raised a number of criticisms of administrative secrecy generally. These included the claim that it might contribute to the arbitrary treatment of citizens, because differential access to information could have significant effects on the extent to which different citizens were able to enjoy their rights in practice.<sup>35</sup> In 1975, the working party raised the possibility of a freedom of information act as a possible solution<sup>36</sup>

Prime Minister Barre inherited the working party from his predecessor, and was initially unwilling to follow its recommendation. He established a second working party in 1977, the *Commission chargée de favoriser la communication au public des documents administratifs* (Committee for Promoting the Public Release of Administrative Documents). It was asked to draw up a list of documents that could be made public as a matter of course. The cost and difficulty of compiling and maintaining this list, especially given the size and complexity of the State and the sheer number of documents it was producing, quickly led the officials involved to advocate the opposite approach: elaborating the kinds of documents which should be kept secret. They too recommended, in effect, something very like a freedom of information act.

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34. COMMISSION DE COORDINATION DE LA DOCUMENTATION ADMINISTRATIVE, *DOCUMENTATION ADMINISTRATIVE ET TECHNIQUES D'INFORMATION* 195 (1995) (France); Francis de Baecque, *Les origines de la Commission: Les bases d'une politique documentaire*, in *20 ANS D'ACTIVITÉ DE LA CCDA* 9 (Commission de Coordination de la Documentation Administrative ed., 1991).

35. Boulard, *supra* note 15, at 171; IVAN RENAUD, *POUR UN VÉRITABLE DIALOGUE ENTRE L'ADMINISTRATION ET SES USAGERS* 21-23 (Premier Ministre & Commission de Coordination de la Documentation Administrative) (1981).

36. JONATHAN GREEN & NICHOLAS J. KAROLIDES, *ENCYCLOPEDIA OF CENSORSHIP* 183 (2005).

Pressure for more systematic access also came from geographically and politically peripheral parts of the state. In particular, regional units began to demand information from the central administration that was more systematic, comprehensive and adapted to the needs of the administrative “end-users” at local level.<sup>37</sup> These demands were fostered by the development of technological infrastructure such as networks, which gave geographically and organizationally peripheral units direct access to central data stores. This kind of pressure was also given expression by the *Commissariat Général du Plan* (Planning Commission), which was founded in 1946 to manage economic development.<sup>38</sup> It began to discuss the possibility of greater transparency from the late 1960s onwards, primarily in response to the growing importance of information and technical expertise as tools of economic governance. This growing importance meant that increasingly technical topics became matters of public debate, and hence stimulated demand from interest groups for access to the information on which official decisions were being made.<sup>39</sup> The Commission appears to have become increasingly aware that deliberately sharing information—albeit in highly structured ways and not initially through a general right of access—could serve the government’s interests in achieving its economic aims.<sup>40</sup> Its seventh Report, issued in 1976, called for the introduction of a general right of access to government documents.<sup>41</sup>

On their own, these developments would probably not have led to the introduction of access rights, or at least not quickly. They only did so in combination with the second way in which growth of the State contributed to the introduction of freedom of information in France: through its direct effects on the public. This, too, was quite common across the developed industrial world, as was the manner in which the government responded.

From the 1960s, there arose increasingly widespread and intense dissatisfaction with the way the State was impacting on the everyday lives of French citizens, and particularly with its inflexibility and its tendency to require approval to do the most mundane activities.<sup>42</sup> Early signs were already coming to the attention of the government in the 1960s.<sup>43</sup> During

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37. *Id.*

38. *Id.* at 182.

39. THOMAS ANGELETTI, *LA PREVISION ECONOMIQUE ET SES ERREURS* 88 (2012).

40. *Serie Concurrence*, Jean-Marie Auby & Michel Fromont, *Les Recours contre les Actes Administratifs dans les pays de la Communauté Economique Européenne* 253-54 (Jurisprudence Générale Dalloz 1971).

41. SANDRA COLIVER, *SECURITY AND LIBERTY: NATIONAL SECURITY, FREEDOM OF EXPRESSION, AND ACCESS TO INFORMATION* 271 (1999).

42. ALAIN PEYREFITTE, *LE MAL FRANÇAIS* (Plon 1976).

43. *La Documentation Française*, *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE: DÉBATS PARLEMENTAIRES* 232-233 (Assemblée Nationale ed. 1978).

early 1970s, these widespread if somewhat inchoate concerns crystallized into a debate in newspapers such as *Le Monde* and among prominent political figures over the lack of bureaucratic responsiveness to individuals.<sup>44</sup> These debates explicitly identified the growing asymmetry of power between administrators and the administered,<sup>45</sup> and the inadequacy of existing accountability mechanisms such as administrative courts to provide redress in cases of error or insensitivity. These concerns took on an organized form in 1975 with the formation of the *Association pour l'amélioration des rapports entre l'administration et le public* (Association to Improve Relations between the Administration and the Public). Interestingly, its members were drawn overwhelmingly from the public service sector (principally the postal service, telecoms, social security and justice departments) rather than from the members of the public whose interests were ostensibly being harmed.<sup>46</sup>

These concerns appear to have become politically salient due to the financial crisis of the mid-1970s.<sup>47</sup> During this period, participants in these debates began to consider specific mechanisms for providing access to and control over certain kinds of official information like private data.<sup>48</sup> Prime Minister Barre responded in 1975 with his so-called "Blois Declaration." This promised to streamline the bureaucracy and make it more responsive to citizens' needs,<sup>49</sup> through things like strengthened rights of discovery, rights of participation in administrative decision-making, and new mechanisms of administrative accountability such as an ombudsman (*Médiateur de la République*) and privacy law. The Blois Declaration did not include a commitment specifically to introduce administrative transparency, nor was it explicitly intended to open the way to one. But it established very favorable conditions for parliamentary initiative. A similar pattern of dissatisfaction leading to the introduction of new mechanisms of accountability can also be seen in the USA (where it at least partly explains the introduction of the *Administrative Procedures Act 1946*), the UK (where it led to the establishment of an ombudsman in the late 1960s and the expansion of

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44. See *Les délibérations du Conseil des Ministres*, LE MONDE (Feb. 17, 1978); Pierre Drouin, *Entretien avec Michel Crozier I*, LE MONDE (Apr. 24, 1978); Patrick Frances, *A l'Assemblée Nationale, La mort du secret administrative*, LE MONDE (Apr. 28 1978); Alain Plantey, *Pour un bond en avant*, LE MONDE (June 29, 1978); *L'ARAP veut faire évoluer les mentalités*, LE MONDE (Sept. 21, 1978).

45. *La Documentation Française*, supra note 43.

46. *L'ARAP veut faire évoluer les mentalités*, supra note 44.

47. Compare synthesis of debate between so-called social partners in France in *S'informer et se documenter auprès de l'administration*, 37 et seq., 38-39.

48. Compare synthesis of debate between members of administrative commissions, *id.* at 47 et seq., 51.

49. *La Documentation Française*, supra note 43.

judicial review in the Supreme Court in the mid-70s,<sup>50</sup> and so indirectly to government bodies more commonly giving reasons for their decisions<sup>51</sup>).

*The Introduction and Passage of the Access Law Itself*

These circumstances provided the backdrop for the comparatively rapid adoption of an access law only two years after one was first proposed in the *Assemblée Nationale*. The first proposal was tabled in the *Assemblée Nationale* by the Communists in December 1975,<sup>52</sup> and was primarily concerned with freedom of expression rather than access to government-held information.<sup>53</sup> A second proposal was tabled in June 1976 by a broad left-wing coalition of Socialists and Radicals, this time containing a more comprehensive set of access rights. At the same time, the center-right UDR tabled propositions of its own, followed by the Gaullist RPR.<sup>54</sup> In November 1977 the Communists tabled a second proposal, this time for a fully-fledged access regime.<sup>55</sup> The law that was eventually passed was inserted into a general-purpose law on administrative procedure, which the government had introduced into parliament following its Blois Declaration. Some sense of the degree of independent parliamentary initiative involved can be gained by noting that this insertion was made by one of its committees a mere twenty minutes before the full *Assemblée* was due to consider it, and it was adopted without significant amendment.<sup>56</sup>

Although the government as a whole was not particularly enthusiastic about freedom of information, it did not oppose this amendment.<sup>57</sup> The circumstances of the mid-1970s discussed above contributed significantly to this. The law into which the committee inserted the access regime was initially introduced in November 1977 in fulfilment of the Blois Declaration. It lapsed with legislative elections before being taken up again in April 1978.<sup>58</sup> The election was particularly close, due to the combination of

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50. HEBERT M. KRITZER, *COURTS, LAW AND POLITICS IN COMPARATIVE PERSPECTIVE* 154 (1996).

51. *Id.*

52. *La Documentation Française*, *supra* note 43.

53. *France*, in *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE: DOCUMENTS PARLEMENTAIRES* (Assemblée Nationale ed., La Documentation Française 1976) [hereinafter *DOCUMENTS PARLEMENTAIRES*].

54. *La Documentation Française*, *supra* note 43.

55. *DOCUMENTS PARLEMENTAIRES*, *supra* note 53.

56. *France*, in *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE: DÉBATS PARLEMENTAIRES* [hereinafter *DÉBATS PARLEMENTAIRES*].

57. Michel Aurillac, *Table ronde: La genèse de l'élaboration du droit d'accès en France*, in *TRANSPARENCE ET SECRET. COLLOQUE POUR LE XXVE ANNIVERSAIRE DE LA LOI DU 17 JUILLET 1978 SUR L'ACCES AUX DOCUMENTS ADMINISTRATIFS* 56 (IFSA/CADA ed., 2003).

58. *DÉBATS PARLEMENTAIRES*, *supra* note 56, at 1324.

economic downturn and dissatisfaction with public administration mentioned above. President Giscard d'Estaing and Prime Minister Barre had already re-committed themselves to the Blois Declaration and to alleviating the "bureaucratic burden" as part of their election platform.<sup>59</sup> Indeed, there is some suggestion Barre himself was personally sympathetic to the idea of access rights, and the amendments were supported by the committee rapporteur, an associate of the Prime Minister.<sup>60</sup> The government could not easily reject its own law, and opposing the inconvenient amendment carried political risks which it appears to have been unwilling to run.<sup>61</sup>

### *Subsequent Amendments*

Two of the factors that contributed to the introduction of the access law have continued to shape it since the 1970s: the jurisprudence of the *Conseil d'État*, and a willingness by bureaucrats to consider pro-active release of data as a tool of governance. These have led to a very slow broadening of the kinds of documents to which the French have access, and the terms on which access is granted (although France continues to lag behind many other countries). The two most significant legislative changes occurred in 2000 and 2016 and were essentially responses to these factors. The *Loi relative aux droits des citoyens dans leurs relations avec les administrations* (Law relating to the rights of citizens in their relations with the administration) of 2000 was, as its title suggests, concerned with broader issues than administrative transparency. Its principal goal in respect of transparency was to codify jurisprudence developed by the *Commission d'Accès aux Documents Administratifs* and the *Conseil d'État*, which was in turn largely a result of attempts to overcome inconsistencies and ambiguities of the original law.<sup>62</sup> From 1 January 2016, the access regime was incorporated with only minor changes into the new *Code des relations entre le public et l'administration* to take account of new kinds of documents and administrative structures which had evolved in the interim. The willingness of French bureaucrats to consider disclosure as a tool of governance has exercised an independent effect, and demonstrates that the State is not entirely secretive even if classic freedom of information-style access rights have not flourished. The most important indicator of this is a decree issued in 2005 which explicitly sought to encourage re-use of public sector data sets.

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59. *Id.* at 1324-25; *id.* at 1379-80.

60. DÉBATS PARLEMENTAIRES, *supra* note 56, at 1378-83.

61. AURILLAC, TABLE RONDE: LA GENÈSE DE L'ÉLABORATION DU DROIT D'ACCÈS EN FRANCE.

62. DÉBATS PARLEMENTAIRES, *supra* note 56; LES RELATIONS ENTRE LES ADMINISTRATIONS ET LES CITOYENS. PROFIL DES PAYS. FRANCE 4 (OECD 2001).

France is not unique in embracing the opportunities offered by cheap computing and pervasive networking, but the contrast with other forms of transparency within that country is stark.

#### THE POLITICS OF ACCESS IN COMPARATIVE PERSPECTIVE

The reasons why France acquired its freedom of information act cannot in and of themselves explain why the law has proved so weak, because they are broadly similar to other countries where the laws have proved more effective. This last section of this article engages in a more thorough comparative approach. It draws on some elements identified above, and argues that the explanation lies in the way political institutions directly and indirectly mediated the impact of the factors which led to the law being introduced. Specifically, it identifies three contributors. First, freedom of information is weak in France because pre-existing accountability mechanisms helped frame discontent about bureaucratic interference in people’s lives as an individual and juridical problem. Second, political actors have had few incentives or opportunities to overcome this and mobilize in favor of collective and political ways of addressing these issues. And third, these tendencies have been reinforced by the State itself, which has played a leading role in these events, and which has not been substantially affected by the kinds of neoliberal reforms which have fostered transparency elsewhere.

The primary cases for comparison will be the United States and the United Kingdom, which dominate the English-language literature on this subject, and have proved influential as models for theorizing and activism worldwide. Like France, democratic institutions such as free and fair elections and effective parliaments were well-established before freedom of information was first discussed. This is an important factor, because since the late 1990s a large number of countries have introduced these acts soon after making the transition to democracy—or, indeed, as part of that transition.<sup>63</sup> They have been encouraged to do so because an international consensus has emerged that access to information is a hallmark of democracy and good governance, and because international bodies like the World Bank and the International Monetary Fund have strongly encouraged their adoption. These other countries are important in their own right, but they are less relevant to this study because the introduction of their laws tells us less about the domestic configurations of power and interest which we are seeking to examine here.

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63. Tom McClean, *Shackling Leviathan: A Comparative Historical Study of Institutions and the Adoption of Freedom of Information*, DEPT. SOCIOLOGY LONDON SCHOOL ECON. & POL. SCI. 45 (Dec. 2011).

*Addressing Discontent through Administrative Law*

The first factor which contributed to the weakness of freedom of information in France was the influence of pre-existing mechanisms for bureaucratic supervision and accountability. To understand how this has occurred, we must consider the way different accountability mechanisms might have different effects on the manner in which discontent with the bureaucracy finds political expression, and then examine the specific impact which the mechanisms in place in France have had compared with elsewhere.

There is good reason to expect greater demand for freedom of information to develop in countries where elected politicians play an important role in supervising and holding the bureaucratic state to account, and less so in countries where other mechanisms prevail. In ideal-typical terms, one might distinguish between four approaches to administrative dispute resolution: appeals to higher officials, appeals to politicians, adversarial hearings (i.e. courts and tribunals), and mediation (e.g. an ombudsman). In practice, most countries provide a mixture of all four, but differ in their emphases and the effectiveness of each. There are at least two reasons why countries that rely heavily on elected politicians are likely to be more favorable to the development of access rights. First, their systems of dispute resolution are more likely to break down when faced with an increase in the volume and complexity of individual complaints—which is precisely what occurred in almost every country where the welfare state expanded in the post-war era and began to intervene more frequently and intimately in people's everyday lives. Politicians have limited time, and many demands on it apart from responding to concerns from constituents. By contrast, competing priorities are fewer for more specialized officials, such as administrative tribunals and ombudsman. It is also usually more difficult to increase the number of politicians in the legislature than, say, to increase the number of tribunal members or expand the staff of an administrative office. All these things make it more likely that a system which relies on political supervision is more likely to break down under the pressure which state growth entails. Secondly, the breakdown of "political" dispute resolution is more easily framed by activists as a failure of the political system *per se*. As a result, the solutions to it can also be more easily framed in terms of collective, political decision-making processes, such as freedom of information, rather in terms of the need for stronger mechanisms to defend individual procedural rights and entitlements.

The United Kingdom exemplifies political control of the administrative behavior, thanks to the constitutional importance of parliament sovereignty and ministerial accountability to parliament. Its post-war history of



administrative accountability fits the expectations outlined above very well.<sup>64</sup> Concerns over the adequacy of ministerial accountability due to the growth of the State, and debate over how to respond, can be identified from the mid-1950s. One of the most important early instances was the 1957 Franks Report into tribunals and enquiries.<sup>65</sup> Although ostensibly concerned with the adequacy of courts and tribunals as mechanisms of administrative control, the question of ministerial control was central to its reasoning. The inquiry was called in response to a controversial decision by the Ministry of Defence to sell land that had been acquired compulsorily during the Second World War, and in response to widespread perception that the Parliamentary response had not been adequate. Franks discussed several possible responses, including greater openness, a requirement to give reasons for administrative decisions, and the possibility of an administrative division of the Supreme Court. Governments were initially unwilling to act, and invoked the principle of parliamentary accountability throughout the 1960s and 1970s to justify their refusal to adopt or strengthen mechanisms such as judicial review, access to files,<sup>66</sup> and even the ombudsman (although this rapidly came to be seen as more acceptable than the alternatives).<sup>67</sup> They were successful in these efforts in the short run, but in the long run their invocation of these principles proved self-defeating because the emphasis on the primacy of politics allowed parliamentary oppositions and extra-parliamentary groups to frame problems within the bureaucracy as failures of democracy. By the mid-1980s, groups such as the Campaign for Freedom of Information<sup>68</sup> and Public Concern at Work (PCAW) and were quite explicit in identifying a wide variety of “scandals” such as the corruption in local government housing and planning, the Piper Alpha explosion in the North Sea, the Clapham Rail Crash, and the Maxwell pensions scandal as instances of a pervasive “culture of complacency and cover-up” within government.<sup>69</sup> From as early as the late 1970s, government resistance to reform was weakening, and during the 1980s the Conservatives allowed the introduction of limited rights of access under specific circumstances. The

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64. The United States is another exemplar, although it is more complex institutionally and there is not sufficient space to explore it here. The original Freedom of Information Act 1966 grew out of congressional discontent with bureaucratic compliance with a much weaker set of access provisions in the Administrative Procedure Act 1946.

65. United Kingdom, *Report* (Home Office ed., Her Majesty’s Stationery Office 1957).

66. Great Britain, *Open Government* ¶¶ 56-58 (Lord Privy Seal ed., Her Majesty’s Stationery Office 1979).

67. *Id.* at 6.

68. Ron Bailey, *Secrecy in the Town Hall*, in *THE SECRETS FILE, THE CASE FOR FREEDOM OF INFORMATION IN BRITAIN TODAY* (Des Wilson ed., 1984).

69. See *Background*, PUBLIC CONCERN AT WORK, <http://www.pcaw.co.uk/about/background> (last visited Feb. 22, 2017).

most prominent example was the *Data Protection Act 1984*, but there were also several other specific public-interest access laws providing access to environmental and consumer information. Rather than satisfying demand, these only encouraged advocates further, both by providing mechanisms for identifying maladministration, and by providing a means for framing refusals to disclose as illegitimate secrecy.<sup>70</sup>

The contrast with France is stark. Well before the post-war growth of the welfare and regulatory State, it had a highly developed corpus of administrative law compared with the UK.<sup>71</sup> This was and is overseen by a hierarchy of specialized administrative courts; regular courts have no jurisdiction to rule on matters involving public or administrative law, and the legislature has comparatively weak powers of supervision over the President, ministers or the departments of state.<sup>72</sup> Constitutionally, the administrative courts sit within the executive branch, but they enjoy considerable *de facto* independence from presidential control, due in part to the fact that the hierarchy culminates in the *Conseil d'État*, a body which is protected from direct influence by its age, prestige,<sup>73</sup> and because until very recently French administrative law was based on jurisprudence which it developed itself (unlike the civil and criminal law, which have been primarily codified in legislation since the early 19th Century). This institutional ensemble has deep roots in French history, and its persistence is the result of a deliberate strategy by de Gaulle at the founding of the Fifth Republic. The immediate political imperative was to ensure the stability of the regime by protecting the State from political pressure or influence from “external” (i.e., sectional social) interests. A particular concern was to insulate the executive from the scrutiny of parliament, the institution where sectional interests are represented. Gaullism also included a commitment to ensure the equality of individual citizens before the law, and their protection from abuse of power by individual officials.

Consistent with expectations, the problems of bureaucratic accountability and responsiveness which arose in France in the 1960s were not framed as problems of political control as they were in the UK at the same time. French policymakers have consistently framed access rights as one mechanism—and by no means the most important—among many for ensuring that the State is responsive to the interests of individual citizens.

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70. *1993 Freedom of Information Awards*, CAMPAIGN FOR FREEDOM OF INFORMATION (Jan. 20, 1994), <https://www.cfoi.org.uk/1994/01/1993-freedom-of-information-awards>.

71. *United Kingdom, in DISCLOSURE OF OFFICIAL INFORMATION: A REPORT ON OVERSEAS PRACTICE 35* (Civil Service Department ed., Her Majesty's Stationery Office 1979).

72. PEYREFITTE, *LE MAL FRANÇAIS* 169 (1976).

73. *Serie Concurrence*, Jean-Marie Auby & Michel Fromont, *Les Recours contre les Actes Administratifs dans les pays de la Communauté Economique Européenne* 9 (1971).

We have already seen that the original access law was introduced as part of a broad package of reforms which was fundamentally juridical in nature. Indeed, with the *Blois Programme*, the French government adopted many of the reforms which were also being debated in the UK at the same time, but it did so far more quickly and with far less fuss: the giving of reasons for administrative decisions, judicial review, an ombudsman, and a privacy law. We have also seen that all subsequent amendments to the access law have been procedural in nature, and part of similar omnibus bills; French governments have consistently refused to consider more radical amendments on the grounds the law is fit for purpose as a tool for individual citizens in specific disputes with the State.

This view of freedom of information appears to be more than mere wishful thinking on the part of public officials. Unlike in the UK, where the introduction of limited rights of access stimulated demand for full freedom of information, the introduction of limited rights of access has not contributed in France to more widespread use of or debate over freedom of information. This is not because the French view specific-purpose rights, such as privacy law, as unimportant. The equivalent of the UK's *Data Protection Act* remains far more prominent in popular discourse than the equivalent of the *Freedom of Information Act*. There were very few debates on public access to general files in France in the 1980s, 1990s and 2000s. With a few rare exceptions discussed below, these all arose out of concerns with the collection and use of personal data and have all been resolved by strengthening privacy rather than freedom of information.<sup>74</sup> In the early 1970s, a series of articles in *Le Monde* crystallized fears about a government database known as SAFARI, which was designed to link social security data.<sup>75</sup> The subsequent outcry contributed directly to the introduction of France's privacy law—which, in a telling contrast with freedom of information, was sponsored from the outset by the government and benefited from considerable support from the political executive.<sup>76</sup> In the early 1990s, access to personal medical files became an issue following scandals involving infected blood transfusions.<sup>77</sup> The privacy law was significantly extended in 1983 and 1996 to cover police and judicial files. The contrast with the UK is even more significant given that the under-politicization of

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74. Franck Moderne, *Conception et élaboration de la loi du 17 juillet 1978*, in TRANSPARENCE ET SECRET. COLLOQUE POUR LE XXVE ANNIVERSAIRE DE LA LOI DU 17 JUILLET 1978 SUR L'ACCES AUX DOCUMENTS ADMINISTRATIFS (IFSA/CADA ed., 2003); David Flaherty, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES 166 (University of North Carolina Press 1989).

75. Flaherty, *supra* note 74.

76. Donald Rowat, *The French Law on Access to Government Documents*, 10 GOV'T PUBL'N REV. 35, 27 (1983).

77. France, *L'accès aux documents administratifs - Huitième rapport d'activité*, LA DOCUMENTATION FRANÇAISE 47 (Commission d'Accès aux Documents Administratifs ed., 1995).

access rights persists despite advocacy on both sides of the Channel from institutions charged with administering these laws (including, in France, the *Conseil d'État* and the *Médiateur de la République*, not just the *Commission d'Accès aux Documents Administratifs*).

*Few Opportunities or Incentives to Mobilize Around Access Rights*

The second contributor to the weakness of freedom of information in France has been the limited opportunities available to politically-engaged actors to mobilize around and campaign for such rights. This argument about political opportunity structures<sup>78</sup> rests on two observations. First, that the same kinds of people mobilized in favor of access rights in France and elsewhere, but that their mobilization was less widespread, long-lasting or effective than elsewhere. Second, this difference in intensity can be attributed to institutional structures rather than political culture or contingent circumstances.

In most countries, freedom of information typically enjoys strongest support among politically-engaged actors in peripheral positions in formal institutions. The most common are politicians and journalists, although lawyers, academics and civil society activists have also been prominent.<sup>79</sup> Even in countries where access rights have been more prominent and effective, such as the USA and the UK, explicit organized mobilization has been rare and usually not involved more than a small proportion of the members of any of these “natural constituencies.” Rather, activists have tended to form loosely-coordinated networks where individuals have used the advantages available to them through their institutional roles (such as the right to ask questions of ministers, to introduce private members’ bills, or to publish articles).

In the UK, individuals mobilized long before an access law became politically likely, and maintained a commitment to the issue over nearly two decades. Peter Hennessy at the *Times* was a prominent early supporter, publishing numerous articles from the late 1970s to the mid-1980s on the problems of government secrecy; official documents record discussions among senior officials and members of parliament on similar topics from the late 1960s.<sup>80</sup> Interest among civil society groups concerned with issues such as the environmental and consumer rights arose in the late 1970s, and all these various constituencies began to cooperate with each other through such

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78. Herbert Kitschelt, *Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies*, 16 BRITISH J. POL. SCI. 57 (1986).

79. Tom McClean, *Who Pays the Piper? The Political Economy of Freedom of Information*, 27 GOV'T INFO. Q. (2010); McClean, *Shackling Leviathan*, *supra* note 63.

80. Ronald Wraith, *United Kingdom*, in ADMINISTRATIVE SECRECY IN DEVELOPED COUNTRIES 183, 210-11 (Donald Rowat ed., 1979).

mechanisms as the Campaign for Freedom of Information from the early 1980s. This mobilization culminated in Tony Blair’s speech to the Campaign’s annual awards, only a few months before he was elected Prime Minister and begin the parliamentary process which led to legislation.<sup>81</sup>

In the USA, engagement among journalists arose even earlier and was more organized. Individual journalists and editors of newspapers across the country published on secrecy and transparency from the early 1960s, but this was not merely a matter of individual conviction: it formed part of a deliberate campaign by the American Society of Newspaper Editors to support the work of members of Congress who were making the case for a *Freedom of Information Act*. Environmental and consumer rights groups were instrumental in bringing about the 1976 amendments to the FOIA. In both countries and indeed in other parts of the Anglo-Saxon world such as Australia, freedom of information has remained prominent in political reportage and debate. It is regularly cited as the means by which information is obtained, and also often appears as a subject in its own right when governments refuse to disclose documents journalists have requested.

The weakness of access rights in France is not associated with any difference in the kinds of people who have campaigned, but it is associated with much weaker and less frequent engagement. We have already seen that the original law was introduced at the initiative of parties outside the ruling coalition, a fact which makes it highly unusual in the French context as parliament itself is usually a somewhat marginal institution.<sup>82</sup> Following this early and brief period of interest, there is evidence of only sporadic engagement until the early mid-2000s. Overall, such interest as existed among members of the press appears to have been a consequence of the introduction of the law, rather than a cause or the outcome of independent commitment. There were a very few articles in *Le Monde*, *Libération* and other outlets in the early 1980s, but these followed the legislation and reported on its existence. There were very few articles in any of the major newspapers or magazines over the next 20 years, and a search of French press archives reveals no instance of a journalist explicitly stating that an article draws on information obtained using the access law. The first significant organized mobilization occurred in 2004, when journalists, editors, politicians, lawyers and civil society activists formed a group called *Liberté d’Informer* (Freedom to Inform). This group circulated a petition in favor of a new access law, which they claimed drew support from 6,000 people

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81. Rt.Hon. Tony Blair MP, Speech at the Campaign for the Freedom of Information’s Annual Awards Ceremony (March 25, 1996), <http://www.cfoi.org.uk/blairawards.html>.

82. Cf. LASSERRE ET AL., *supra* note 19, at 72-74; Moderne, *Conception et élaboration de la loi du 17 juillet 1978*, at 40.

nationwide.<sup>83</sup> *Liberté d'Informer* appears to have been particularly active in 2004 and early 2005. It organized a colloquium hosted at the *Assemblée Nationale* in November 2004, which was primarily attended by members of the “natural constituencies,” and subsequently called for three reforms: that the CADA should be able to issue binding decisions, and that the scope of official secrecy and the exemptions from disclosure be significantly reduced. In the months before and after this event, its members published articles in prominent newspapers and periodicals (e.g. *Le Monde*, *L'Express* and *Libération*). This mobilization does not appear to have lasted. The organization's own website includes only one article dated later than January 2005, and the site itself has not been updated since 2012.

The fact that these groups mobilized at all suggests that we cannot take at face value the very common claim among French commentators, that French political culture is unfavorable to transparency. This is sometimes attributed to the predominance of “Jacobin” thought about the role of the state, discussed earlier.<sup>84</sup> In particular, commentators cite the long tradition of *étatist* or “heroic” policymaking, in which officials decide on policies and only negotiate with affected interests during implementation. This feature of French political culture is not just cultural. It persists for institutional reasons, including fragmentation and dependence on the State. Many important civil society organizations, such as the environmental movement, are both fragmented and highly institutionalized—in this case as a result of a more-or-less explicit policy of neo-corporatist co-optation undertaken by state authorities, particularly at the local and regional levels.<sup>85</sup> This is one instance of a broader pattern in which civil society organizations rely on the State to solve social problems by providing subsidies, creating new institutions and generally intervening in people's lives.<sup>86</sup> This level of dependency is a significant contributor to the willingness of civil society organizations to accept official secrecy.<sup>87</sup> The pattern is also visible in relations between media and government. Unlike the American and British press, the French media were both financially dependent on the State and tightly regulated by it until well after World War Two.

The role of closed political opportunity structures in contributing to the under-politicization of access rights in France is particularly clear when one examines elected politicians.

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83. *Pour un accès plus libre à l'information*, LIBERTÉ D'INFORMER (2012), <http://www.liberte-dinformer.org>.

84. Vivien A. Schmidt, *The Changing Dynamics of State-Society Relations in the Fifth Republic*, at 142-43 (Dec. 3, 2007), <http://dx.doi.org/10.1080/01402389908425337>.

85. Olivier Filleule, *France*, in ENVIRONMENTAL PROTEST IN WESTERN EUROPE 59, 68 (Christopher Rootes ed., 2003).

86. FLAHERTY, *supra* note 74, at 170.

87. Manor, *supra* note 17, at 238.

In the UK, the combination of the two-party system, a parliamentary executive, and highly disciplined parties creates very strong incentives for oppositions to problems with public administration in terms of secrecy, and hence as best solved through access rights. The same institutions encourage elected governments to resist, with the timing of changes to the law is largely explained by how well governments are able to balance the competing demands of institutional self-interest and political competition.<sup>88</sup> So, from the 1960s down to the present, we find evidence of opposition parties advocating for the introduction or strengthen access rights as a way of demonstrating to the electorate that they are more trustworthy than the incumbent government. The earliest supporters were members of the minority Liberal party, together with a small number of backbench Labour MPs while in opposition. These individuals lobbied for access when the two parties entered into a coalition government in 1977, but senior Labour figures including Prime Minister Callaghan were less than enthusiastic about the idea. Five private members’ bills were brought forward on the subject before the government fell to the Conservatives in 1979, but none were successful.<sup>89</sup> The Conservative Party hierarchy was equally hostile in the 1980s, and the little progress that was made before the mid-1990s came in the form of limited rights of access to specific sorts of information through private members’ bills which the government found it politically-expedient to allow. Freedom of information has appealed most strongly to opposition parties in the aftermath of major crises or scandals in which governments had—or were accused of having— withheld important information about what had happened to protect themselves. Labour, in particular, capitalized on a number of scandals in the early 1990s such as the Matrix-Churchill affair to differentiate itself from the Conservatives in the 1996 election campaign, and explicitly linked these with promise to legislate a freedom of information act.

In the USA, the two-party system provided similar incentives to the parties to campaign around the issue of access rights. Thus, we find that the Democrats first incorporated a freedom of information act into their electoral platform in 1956,<sup>90</sup> and committed to improving access in 1960, 1972, 1976,

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88. KENNETH ROBERTSON, *PUBLIC SECRETS: A STUDY IN THE DEVELOPMENT OF GOVERNMENT SECRECY* (1982); KENNETH ROBERTSON, *SECRECY AND OPEN GOVERNMENT: WHY GOVERNMENTS WANT YOU TO KNOW* (1999).

89. MARK EVANS, *CONSTITUTION-MAKING AND THE LABOUR PARTY 196* (Palgrave Macmillan UK 2003).

90. SUZANNE PIOTROWSKI, *GOVERNMENT TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM 22* (State University of New York Press 2007); HERBERT FOERSTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW. THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 27* (Greenwood Press 1999).

1984 and 2008.<sup>91</sup> The Republicans, by contrast, have promised only to *restrict* such rights, twice. Legislation was introduced far earlier than in the UK because the separation of powers between Congress and the Presidency combined with very weak party discipline meant parties and executives could not resist action by the natural constituencies so effectively.<sup>92</sup> The combination of all these factors can clearly be seen in the process which led up to the introduction of the act. This was very largely the work of a Democratic congressman from California called John Moss. Very shortly after first being elected in 1955, Moss managed to convince party bosses to set up a congressional subcommittee under his chairmanship to investigate government secrecy. This was an unusually senior position for a new member of the House, and he was able to attain it partly because he happened to be elected at a time when the Democrats had just regained control of the House under a Republican President, and when congressional dissatisfaction with the executive was unusually strong following Senator McCarthy's fall from grace. This gave Moss the institutional resources to build a comprehensive case for access rights, by working with journalists and editors from major newspapers to gather stories on official secrecy and the inadequacy of existing measures. The impact of the separation of powers can clearly be seen in the fact that the legislation was passed despite the open objections of President Johnson, who was both a Democrat and unusually influential within Congress. The 1976 amendments were passed over the veto of President Ford.

In France, by contrast, the electoral system and parliamentary powers provide fewer incentives to frame administrative problems as matters of secrecy for which the incumbent governments should be held electorally accountable, or for oppositions to advocate access rights to signal their trustworthiness to the electorate. France has not historically had a stable, competitive two-party system, but a complex arrangement of at least four parties grouped into somewhat less stable coalitions. This provides few electoral incentives for coalition partners to either propose or support alternative mechanisms of executive oversight.<sup>93</sup> In addition, the Constitution of the Fifth Republic was designed to protect the executive from parliamentary scrutiny and to give it an unprecedented degree of control over the legislature.<sup>94</sup> Individual members of parliament have few formal

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91. John Woolley & Gerhard Peters, *The American Presidency Project*, University of California Santa Barbara (2010), <http://www.presidency.ucsb.edu/index.php>.

92. ROBERTSON, PUBLIC SECRETS, *supra* note 88.

93. Sébastien Lazard, *The French National Assembly's Oversight of the Executive: Changing Role, Partisanship and Intra-Majority Conflict*, 32 W. EUROPEAN POL. (2009).

94. United Kingdom, *Open Government* 11 (Lord Privy Seal ed., Her Majesty's Stationery Office 1979).



mechanisms to take independent initiative, such as committee investigations or questions to ministers, and very weak powers to investigate the bureaucracy or call officials to account.<sup>95</sup> Since the mid-1970s, there has been no serious electoral promise by any major party in France to strengthen access rights, or to encourage a widespread perception that abuses of executive power might be solved by access to official files. There was also a near total absence of questions to the government or private members’ bills prior to the foundation of *Liberté d’Informer* in 2004, and very few since.

The relatively high degree of party discipline that has generally prevailed within France has allowed governments to ignore or resist whatever pressure has arisen despite all these systemic disincentives. Paradoxically, the best evidence for this is the mid-1970s, when the *Assemblée Nationale* demonstrated a very high degree of independent initiative on this issue. This is significant precisely because it is so unusual in the context of French politics. It occurred because of a breakdown in discipline within the ruling right-wing coalition led by President Giscard. Giscard’s party was not the dominant member of the majority coalition in the mid-1970s, and the more influential right-wing parties were uncomfortable some of his more liberal social policies. The relationship is perhaps best summed up by the fact that the leader of the largest party, Jacques Chirac, was simultaneously Giscard’s political rival and, until he resigned in 1976, his prime minister. After Chirac’s resignation, Giscard appointed Barre, who was an academic economist rather than a member of parliament and who lacked a political base from which to impose himself on the *Assemblée*. Consequently, the months leading up to the 1978 election were characterized by an unusual degree of disharmony and even rivalry within the government, at least by the standards of the preceding decades. The widespread politicization of access rights in the mid-1970s can partly be understood as a partisan tactic to discredit the President prior to the March 1978 elections in a manner which exploited a temporary and unusual lack of presidential control.<sup>96</sup> This tactic focused particularly on issues of administrative responsiveness to individuals because the government was struggling due to the economic downturn of the early 1970s, and because the election was expected to be close and to turn on the support of dissatisfied socially-liberal members of the growing middle classes.<sup>97</sup> More secure governments, in the years since, have been better able to dismiss calls for reform fairly summarily.<sup>98</sup>

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95. Flaherty, *supra* note 74, at 170.

96. Errera, *supra* note 24, at 92; Lazardoux, *supra* note 93.

97. Vincent Wright, *The French General Election of March 1978: La Divine Surprise*, 1 W. EUROPEAN POL. (1978).

98. E.g., *France*, CONSTITUTION UNIT, <https://www.ucl.ac.uk/constitution-unit/research/foi/countries/france> (last visited Feb. 10, 2017).

This persistent weakness in advocacy is not for want of opportunities around which Anglo-Saxon style mobilization might have crystallized. Advocates have, for example, been able to draw on numerous examples from outside France such as the American FOIA and the Swedish access law, both of which existed before access rights became a prominent matter of political debate. They have also been able to draw on norms and regulations which have emerged at European level, in part due to pressure from leaders in the field such as Sweden.<sup>99</sup> There is also indirect evidence of broad public demand for some kinds of information which contributed to transparency elsewhere: an active consumer rights movement has existed in France since the early 20th Century, and from the 1970s both it and the nascent environmental movement sought to empower citizens through public information campaigns (much as their counterparts did elsewhere). France has also experienced similar kinds of crises and scandals as those which formed the basis of mobilization elsewhere. Even at the time the original law was being debated, revelations of the State's use of the *Compagnie Républicaine de Sécurité* and wiretapping against its own citizens did not produce calls for greater access to government information, despite leading to the resignation of ministers and the termination of controversial surveillance programs.<sup>100</sup> Some of the more prominent examples from the following decades, discussed earlier, involved infected blood transfusions and concerns over databases. Indeed, the term "transparency" itself has gained a degree currency since the late 1990s in response to corruption in party and electoral financing, a tendency reinforced by further scandals in the 2000s, including one involving President Sarkozy and the billionaire Lilliane Bettancourt. This resulted in laws around financial transparency—which, tellingly, applied to political parties rather than the bureaucracy.

### *The Role of the State Itself*

Finally, the weakness of freedom of information in France must also be understood in terms of the unusual role played by the French state. It has not just been the main source of resistance to access, but also the most significant *supporter*. In addition, it has not experienced a significant period of New Public Management-style reform, which has contributed significantly to the opening of government in many countries.

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99. There is some evidence members of parliament drew on the Council of Europe's directive 77-31 on the protection of individuals against administrative acts in drafting the French FOIA. See Holleaux, *supra* note 20, at 192.

100. H.A. Brasz, *The Netherlands*, in *GOVERNMENT SECRECY IN DEMOCRACIES* (Itzhak Galnoor ed., 1977).

France is unusual for the fact that freedom of information has also enjoyed its most active support—both before and since its introduction—from serving civil servants including those at the highest levels of government. This attitude, among those who would be most inconvenienced by the law, is almost unprecedented. Cabinet ministers and influential bureaucrats have privately supported access rights in many countries, and some have even expressed this support publicly after leaving office. But the closest analogy outside France occurred in the UK in 1972, when the Association of First Division Civil Servants (the union representing the most senior bureaucrats) publicly called for reform to the *Official Secrets Act*. The uniqueness of the French situation is revealed in the fact the British merely identified a problem, and stopped short of calling for full freedom of information as the solution.<sup>101</sup> The most significant source of support within France was the *Conseil d'État*. It is difficult to overstate the influence this administrative body exercises on the French policy and legislative process. It was founded by Napoleon Bonaparte in 1799 to increase the power of the central government in Paris over regional bodies, and has outlived four republics, two empires and two monarchies, and continues to play a very important role in France today not just as final court of appeal in administrative matters, but as a source of policy advice to government.<sup>102</sup> In this first role, it has consistently, if cautiously, extended the range of information and bodies which are subject to the law throughout the Fifth Republic. Its influence has been more significant, and has occurred over a longer period of time, than other institutions such as the *Médiateur de la République* (the French equivalent of the Ombudsman, established in 1973) and the *Conseil Constitutionnel* (the ultimate court of appeal in constitutional matters). In its role as advisor within the executive branch, several of its members occupied influential positions within various working parties in the mid-1970s discussed earlier. Through them, it was instrumental in identifying freedom of information as a policy response to the challenges of governing France in the 1970s.

This support, combined with the absence of significant external pressure, meant that the French State has shaped access rights largely on its own terms. Even though members of the *Conseil d'État* and other bodies have supported these rights, active supporters were only ever a minority of senior officials. Moreover, even the most ardent supporters were all in the final analysis bureaucrats who fundamentally shared the institutional interests of the State.

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101. UK, *Association of First Division Civil Servants*, in *United Kingdom Rep.* 219 § 2 (Home Office ed., Her Majesty's Stationery Office, 1972).

102. Rohr, *supra* note 30, at 36-42; Hans Crossland, *Rights of the Individual to Challenge Administrative Action Before Administrative Courts in France and Germany*, 24 INT'L & COMP. L. Q. 711 (1975).

As a result, the manner in which rights of access to official documents have developed in France, and the nature of those rights themselves, have not seriously disrupted the operations or position of the administrative state in the French system of government. Rather, these rights have developed in a manner consistent with existing thinking and institutions for legitimizing public authority, making public policy, and holding public power to account. None of these bureaucratic supporters has been nearly as radical as external advocates in other countries.

The second unusual feature of the French State is that it has not been significantly affected by New Public Management-style reform (NPM).

The relationship between NPM and freedom of information is complex, and there is not space to discuss why in detail here. There is some evidence from the USA and other English-speaking countries that it actually *undermined* access rights in the 1990s and early 2000s.<sup>103</sup> I have argued elsewhere that this occurred because privatization placed formerly public-functions beyond the reach of public law, and the adoption of private-sector organizational forms and operating models sufficiently muddied the water to allow bureaucrats to plausibly invoke exemptions intended to protect private commercial interests.<sup>104</sup> This effect was real, but in retrospect appears to have been temporary and felt most keenly in those English-speaking countries where freedom of information law predated reform.

In the UK, NPM contributed directly to the development of freedom of information,<sup>105</sup> and the reasons also apply to other countries where reform preceded access. There was sometimes a direct causal link, as when John Major introduced a regulatory (i.e. non-legislative) right of access in the early 1990s, as an integral part of his Citizen's Charter reforms. But the relationship is not merely contingent—one reason legislation was eventually passed under Tony Blair is that the preceding era of conservative reform had fundamentally transformed the institutional incentives around freedom of information within the British State. This occurred because the Conservatives had attempted to institutionalize a separation of

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103. ALASDAIR ROBERTS, CLOSING THE WINDOW: PUBLIC SERVICE RESTRUCTURING AND THE WEAKENING OF FREEDOM OF INFORMATION LAW (1998); Alasdair Roberts, *Less Government, More Secrecy: Reinvention and the Weakening of Freedom of Information Law*, 60 PUB. ADMIN. REV. (2000); Alasdair Roberts, *Les faces cachées de la résistance gouvernementale à la transparence*, 6 ÉTHIQUE PUBLIQUE (2004); Alasdair Roberts, *La Lucha Por Gobiernos Abiertos*, in CORRUPCIÓN Y TRANSPARENCIA 180-200 (Irma Sandoval, ed., 2006); Alasdair Roberts, *Dashed Expectations: Governmental Adaptation to Transparency Rules*, in TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? (Christopher Hood & David Heald eds., 2006); PIOTROWSKI, GOVERNMENT TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM.

104. McClean, *Shackling Leviathan*, *supra* note 63; Tom McClean & Chris Walker, *Third-Tier Complaint Handlers for Human Services and Justice*, AIAL FORUM (2016).

105. BEN WORTHY, POLICY MAKING IN BRITISH CENTRAL GOVERNMENT: THE FREEDOM OF INFORMATION ACT 2000: A CASE STUDY (2007).

responsibilities between policy setting and service delivery, through a variety of mechanisms including outsourcing, marketisation, and the use of arms-length agencies and of purchaser/provider arrangements within the public sector. Both the Conservatives, and New Labour after them, also sought to make public sector service providers more directly accountable to their clients and the public, by requiring the publication of information relevant to performance and quality such as performance data and the outcomes of audits, inspections and ratings/rankings. For both parties, in different ways, freedom of information was appealing as part of a system in which the political executive were not necessarily responsible, even in theory, for everything that happened in the bureaucracy.

France contrasts with the UK, in ways that confirm the claim that NPM fosters FOI. There have been several waves of public sector reform since the start of the 1980s. Those which have been most distinctively French have been most successful, and have not affected access rights. Proposals for greater administrative transparency have arisen during periods most influenced by NPM, but these periods have resulted in the least substantive change of any kind, including to public sector accountability.

Under Mitterrand in the early 1980s, reform emphasized managerial professionalism and geographic decentralization rather than economism and transparency. This left intact the *grands corps* intact and did not seriously challenge the Jacobin tradition of public administration.<sup>106</sup> Decentralization was primarily accomplished by restricting the supervisory authority of the representatives of the central state—the *préfets*—over elected bodies at local and regional level.<sup>107</sup> It involved, in other words, a removal of centralized control over peripheral parts of the administrative apparatus, rather than an attempt to reconstruct political responsibility for operational decisions by institutionalizing a split between (centralized) policy development and (decentralized) service delivery.

Under Chirac in the mid-1990s, reform was both the most explicitly neoliberal and the least successful. Although nowhere near as hostile as Mrs. Thatcher, Prime Minister Juppé explicitly identified the civil service as exercising an unjustifiable monopoly over the policy process, and attempted to separate centralized policy development from decentralized service delivery within the ministries, through the use of contracts and performance

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106. Alain Guyomarch, “Public Service”, “Public Management” and the “Modernisation” of French Public Administration, 77 PUB. ADMIN. INT’L Q. 172-75 (1999); Jean-Claude Thoenig, *Territorial Administration and Political Control: Decentralisation in France*, 83 PUB. ADMIN. INT’L Q. 685 (2005).

107. OECD/PUMA, *Managing Across Levels of Government* 199 (OECD 1997); Rohr, *supra* note 30, at 49-50.

management among other things.<sup>108</sup> Had these reforms been successful, access might have become much more important as a principle of administrative control in France. As it happens, they were abandoned entirely in the face of a series of general strikes.<sup>109</sup>

Under Chirac's *cohabitation* with Prime Minister Jospin in the late 1990s and early 2000s, reformers borrowed some of the rhetoric of NPM, including an emphasis on transparency and accountability. Jospin also introduced some of the less controversial aspects of performance management, at around the same time as passing the first major legislative update to the access law. As has already been noted, this did not significantly affect the substance of access rights, just as the broader reform program essentially left the structure of the State intact. Indeed, the substance of Jospin's transparency reforms were strikingly similar to those of Giscard d'Estaing and Barre two and a half decades earlier: the term "transparency" referred here primarily to the textual clarity and public availability of the laws and rules governing the state, rather than to access to files. The amendments once again formed part of a broader effort to lighten the burden which bureaucracy imposed on individual citizens, not to alter the terms of accountability or democratic participation in France.<sup>110</sup> The *Commission d'Accès aux Documents Administratifs* identified a low level of awareness of—and sympathy for—access among civil servants as the major barrier to their implementation,<sup>111</sup> suggesting that traditional structural interests remained very much in place.

President Sarkozy introduced a wide range of reforms in a very short period after taking over from Jacques Chirac in the mid-2000s. Sarkozy explicitly compared himself to Margaret Thatcher in 2008, and although he shared her conviction of the need to liberalize the economy and reduce the burden of the (welfare) state on society more generally, he does not appear to have had anything like the systematic theory of reform which the British Conservatives developed. There was no change to freedom of information during this period; it was mainly significant for the so-called Woerth-Bettencourt corruption scandal, discussed earlier. This, followed by a string of further scandals under the Hollande government in the early 2010s, led to the creation of the *Haute Autorité pour la Transparence de la Vie Publique* (High Authority for Transparency of Public Life). This office is responsible

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108. David Clark, *The Modernisation of the French Civil Service: Crisis, Change and Continuity*, 76 PUB. ADMIN. INT'L Q. 106-07 (1998).

109. Philippe Bezes, *Bureaucrats and Politicians in the Politics of Administrative Reforms in France (1988-1997)*, in POLITICIANS, BUREAUCRATS AND ADMINISTRATIVE REFORM 51 (B. Guy Peters & Jon Pierre eds., 2001).

110. Clark, *supra* note 108, at 111.

111. France, *Rapport d'activité*, LA DOCUMENTATION FRANÇAISE 44-47 (Commission d'Accès aux Documents Administratifs ed., 2000).

both for corruption prevention (primarily through public registers of conflicts of interest and financial declarations by public officials), and promoting the release and re-use of public sector datasets. This is transparency as a tool for disciplining individuals, not whole organizations. Its very existence shows that the French political system is not immune to pressure for transparency, and also that the forces which have shaped the politics of information there throughout the post-war era continue to apply.

#### CONCLUSION

We are now in a position to offer a tentative explanation for the “weakness” of the French freedom of information act. We must reject the argument that the weakness lies solely in the text of the law itself—even if this were true, there have been several occasions when it could have been strengthened and was not. Clearly, there are more fundamental forces at work. A comparison with the UK and the USA suggests three factors have contributed to this. First, the French approach to administrative oversight was able to cope with the pressures which arose from the post-war growth of the welfare and regulatory state. The primary contrast is with the UK, which relied more heavily on elected politicians. This favored the framing of discontent with state growth as a problem of unjustified and undemocratic secrecy, which was therefore best solved through access to official files. Second, France’s constitutional structure provides few incentives or opportunities to the politically-engaged groups which usually support freedom of information to campaign for access rights. This differs significantly from both the UK and the USA, where the electoral system and the relationship between parliament and executive provide significant incentives to politicize access rights. In the USA, the separation of powers and weak party discipline also provide ample opportunity to act on these incentives, and contributed to early legislation. Finally, France has not experienced the kind of transformation in the structure of the State which the UK did under Thatcher and Major, and which was preserved under Blair. This significantly weakened the institutional incentives for senior public officials to oppose access rights in the UK, whereas in France the old structures remain largely in place.

The French experience also suggests that we should be wary of using terms like “weakness” and “strength” without caution. The French freedom of information act, considered in isolation, is certainly little-known and little used. But the French state is not entirely opaque—it provides strong rights of access under defined circumstances, such as to personal data, in court proceedings and during administrative decision-making processes. These are the circumstances in which many people use freedom of information acts in other countries. Furthermore, it has a long history of pro-active publication

of information of legal, economic or political relevance, which has manifested itself most recently in a commitment to open data. To persist with the view that France is opaque is to ignore the importance of these things, and to judge one country on the basis of assumptions developed in another (in this case, Anglo-Saxon pluralism and neoliberalism). We simply cannot assume that these laws will have the same effect in all countries, because pre-existing political institutions influence the perceived value of administrative transparency and the opportunities to pursue it.



# Sunlight Where It's Needed: The Case for Freedom of Media Information

Roy Peled\*

## 1. INTRODUCTION

On September 5, 2016, *Aftenposten*, Norway's most widely circulated newspaper,<sup>1</sup> ran a front-page story reporting how Facebook has suspended an account on the social network, after its owner uploaded to his feed a status that included the iconic "napalm girl" picture taken during the Vietnam War. The paper naturally linked to the report from its Facebook account that morning. Facebook consequently deleted that post from the newspaper's page, citing the girl's nudity as the reason. *Aftenposten* editor-in-chief replied with a front-page open letter to Facebook CEO Mark Zuckerberg, crowning him "the world's most powerful editor" but expressing fear of what he is "about to do to a mainstay of our democratic society."<sup>2</sup> At the time of writing, this letter remains unanswered. Facebook may or may not have had good reasons for banning the picture from its platform. We will never know what they were, which is key for my discussion here.

Twenty years earlier, in 1996, CBS's chief correspondent Roberta Baskin reported a story exposing how employees in the factories producing Nike shoes in Vietnam were systematically abused.<sup>3</sup> The story caused much outrage despite denials from Nike management. As Baskin was working on

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1. According to data compiled at the Media Studies department of the University of Bergen. See *Circulation of Norwegian Newspapers*, MEDIANORWAY, <http://medienorge.uib.no/english/?cat=statistikk&medium=avis&queryID=190> (last visited Mar. 12, 2017).

2. Espen Egil Hansen, *Dear Mark. I am Writing this to Inform You that I Shall Not Comply with Your Requirement to Remove this Picture.*, AFTENPOSTEN: KOMMENTAR (Sept. 8, 2016), <http://www.aftenposten.no/meninger/kommentar/Dear-Mark-I-am-writing-this-to-inform-you-that-I-shall-not-comply-with-your-requirement-to-remove-this-picture-604156b.html>.

3. The information here is based on Baskin's description of the events, as presented in the movie *Shadows of Liberty* (Docfactory 2012). The film in full length is available for online viewing at <http://shadows.kcetlink.org>.

a follow-up report, she received notice it has been taken off schedule because “there was some sort of deal being made between Nike and CBS news regarding the upcoming Winter Olympics.”<sup>4</sup> The deal, allegedly, included a commitment on behalf of CBS not to air Baskin’s follow-up story. Baskin wrote a memo criticizing this agreement. CBS subsequently demoted Baskin from her position and buried the story.<sup>5</sup>

In these two cases, as in numerous others, powerful media corporations, one a news outlet and the other a social network, made decisions with implications on issues undoubtedly at the heart of public discourse (war atrocities and the social responsibility of international corporations). Such decisions are part of their job. What is interesting for the sake of this article is that the public has no means to receive any information useful for evaluating these decisions. In this sense, they are dramatically different from decisions made by any public agency, even one with much less impact on matters of public interest, and also from those made by many commercial entities with even a remote touching on public matters.

This article argues that there exist a dramatic “accountability gap” between the constitutional dimension of the media’s role in democratic societies and its scrutiny-free operation. It calls for creating transparency requirements from news organizations, and technology firms who control news distribution, as a tool to hold them accountable. This is required to deter unduly censorship, misinformation, and disinformation, and mitigate what British philosopher Onora O’Neill, describes as “the poisoning of the public discourse and public life.”<sup>6</sup>

My battle here is an uphill one. There exists a widespread notion that any form of regulation is a violation of “freedom of the press.” Any attempt to regulate in any way what the press can do or refrain from doing is seen as an *ipso facto* violation of freedom of the press. This view has deep roots in US constitutionalism. Its flaw is that it focuses on the dangers of regulation, but overlooks the serious dangers to the public of non-regulation. My argument in this article is that transparency requirements are a form of *soft regulation*, which strikes the proper balance between the two fears.

It was said, “If there is ever to be an amelioration of the condition of mankind, philosophers, theologians, legislators, politicians and moralists will find that the regulation of the press is the most difficult, dangerous and important problem they have to resolve.”<sup>7</sup> I attempt here to contribute a

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4. *Id.*

5. *Id.*

6. Onora O’Neill, *Shoot the Messenger*, GUARDIAN (May 1, 2002), <https://www.theguardian.com/comment/story/0,3604,707820,00.html>.

7. Letter from John Adams to James Lloyd (Feb. 11, 1815), in THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 117 (1856).

modest suggestion towards the resolution of this problem. The discussion is theoretical and can be applied to any democracy, though my discussion is situated mostly in American constitutional law with a look at U.K. law.

Part II begins with an account of the power of the press. It is followed by a lengthier discussion of how the press has evaded accountability requirements often applied to private institutions of such power. Part III presents the justifications for Freedom of Information (FOI) legislation and will examine their applicability to the news media. Part IV details a few of the fields I believe transparency should be specifically applied to, but will also discuss the effect of a general disclosure regime which obliges the news media to release any information in its possession, in the absence of considerations that outweigh the public's right to know. It will also refer to information held by the major information agents of the day—online search engines and social networks, without which no discussion of the news media is nowadays complete. Part V will present the U.K. case of the BBC and the “Balen report” as a test case for the current, and in my view mistaken, balance prevailing in courts between freedom of the press and its accountability. Part VI concludes.

## 2. POWER WITHOUT ACCOUNTABILITY

### 2.1. Power

This Part need not be too lengthy. The crucial function of the press in any democratic society seems to be a settled matter. It has been expressed so eloquently by so many, that there is little for me to add. It is still worthwhile to remind ourselves of some of the basic maxims on the press and the power it.

It is a commonplace to say that the press holds enormous powers. This is intuitive, but also backed by numerous researches. It can end the careers of leading politicians,<sup>8</sup> bring down multi-billion dollar corporations,<sup>9</sup> push

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8. For the coverage of the MPs' expenses scandal that brought about the resignation of the speaker of the U.K. parliament and six cabinet ministers, see, e.g., *MPs' Expenses*, GUARDIAN (Mar. 30, 2009), <https://www.theguardian.com/politics/mps-expenses/2009/mar/30/all>.

9. In the Enron scandal, see, e.g., George J. Benston & Al L. Hartgraves, *Enron: What Happened and What We Can Learn From It*, 21 J. ACCOUNTING & PUB. POL'Y 105 (2002); Paul M. Healy & Krishna G. Palepu, *The Fall of Enron*, 17 J. ECON. PERSPECTIVES 3 (2003); BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (2003).

governments to take action,<sup>10</sup> mobilize voters<sup>11</sup> and public opinion, and generate objection to war<sup>12</sup> or support for it.<sup>13</sup>

Any organization amassing such public powers is of political significance. Robert Dahl suggests that any large corporation should be seen as a political force, due *among other things* to its ability to “exercise influence, power, control and even coercion.”<sup>14</sup> News organizations easily meet these criterion. They may not be the largest corporations, but they are definitely amongst the most capable of exercising influence, power, and control. Their foundational role and enormous power in a democratic society cannot be overstated.

What is of importance is not merely the scope of power the media possess, but its public nature. The press performs functions for the public “in which its own existence as a free society may be at stake.”<sup>15</sup> To a large extent, it controls the public sphere, where public discourse takes place. So much so, that media scholar Ben Bagdikian described it as “a new Private Ministry of Information and Culture.”<sup>16</sup> Take the press away from a democratic society, and you have taken away one of the strongest bonds creating a polity out of a mass of individuals. Inflict harm on the service provided by the press, compromise its standards, taint its content, and you have harmed social unity, compromised it and tainted its foundation. When it comes to public discourse, it is the media—not the legislature, nor the executive or judiciary—that is, in the words of Jürgen Habermas, “[P]ublic sphere’s preeminent institution.”<sup>17</sup>

When Habermas wrote these words in 1989, he could not have had in mind new institutions which will practice even more power over the exchange of news information in society—technology companies such as

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10. For an interesting account on the impact of media on policy makers, see David Strömberg and James M. Snyder, *The Media's Influence on Public Policy Decisions*, in INFORMATION AND PUBLIC CHOICE 17 (Roumeen Islam ed., 2008) (showing, among other things, how the U.S. government is more likely to offer aid to countries handling a natural disaster situation if it was widely covered by the media).

11. Stefano DellaVigna & Ethan Kaplan, *The Political Impact of Media Bias*, in INFORMATION AND PUBLIC CHOICE, *supra* note 10, at 79.

12. The Pentagon Papers affair was documented in the movie *The Most Dangerous Man in America* (Kovno Communications, 2009).

13. Such criticism was voiced against the Israeli media's functioning during the second Palestinian uprising in 2000. See DANNY DOR, INTIFADA HITS THE HEADLINES HOW THE ISRAELI PRESS MISREPORTED THE OUTBREAK OF THE SECOND PALESTINIAN UPRISING (2004).

14. R.A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 11 (1967).

15. ROBERT M. HUTCHINS ET AL., THE COMMISSION ON FREEDOM OF THE PRESS (1947).

16. EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT 4 (Pantheon Books 2002).

17. JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 181 (MIT Press 1989).

Google, Facebook, and the like. Such corporations have today a bigger role in determining what news items will receive public attention than do editors in the leading news organizations. They are the most powerful information agents, in general, and regarding news information in particular. A 2014 research report found Google responsible for forty percent of the traffic to pages in news websites, and Facebook responsible for an additional twenty-six percent.<sup>18</sup> Leading American newspapers have agreed to share revenue with Facebook generated by news items that will be opened directly from the social networks without people visiting the news site. One news editor criticized this move, saying, “We are de-emphasizing our role as editors who influence what you should be spending your time on.” Indeed, technology companies nowadays determine what public affairs the public spends its time and attention on.

Thomas Jefferson famously wrote: “were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.”<sup>19</sup> It was Jefferson’s belief that public opinion can play a greater role than the law in regulating people’s behavior and preventing government officials from becoming “wolves” looking at fellow citizens as “sheep.”<sup>20</sup> In addition to serving as a check on political and other powers in society, the media is also the main forum for members of any political community to exchange ideas and make their voice heard as participation in the democratic processes.

These public benefits ascribed to a free press are what historically drove the struggle to achieve the right to free press.<sup>21</sup> It is too often taken for granted that this is a right of news organizations, rather than of the public at large. Since it is in the name of the public and its interests that the press received various constitutional entitlements, it flows naturally that the same public, in the name of which the press demands and receives various privileges, has a right to see to it that the press indeed serves these public goals.

## 2.2. Without Accountability

The press is mostly comprised of private commercial entities (with some notable exceptions such as PBS, BBC, and *The Guardian* and from more

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18. *How Efficient is the News?*, AUTHORITY REPORT (Oct. 2013 - Jan. 2014), <https://www.parsely.com/resources/authority-report-4>.

19. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *Founders Online*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-11-02-0047> (last visited Mar. 12, 2017).

20. *Id.*

21. BRIAN HENRY LEVESON, AN INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS, at B § 2.17 (2012) [hereinafter *Leveson Report*]. In 1947, the Hutchins committee in the U.S. similarly analyzed the different foundations of freedom of speech and freedom of the press. See HUTCHINS, *supra* note 15.

recent times *ProPublica*, *Mother Jones*, and *The Intercept*). As we have seen, if there is any private commercial entity that has been trusted with carrying out a public function, it is no other than the press. Nevertheless, two factors—its private commercial nature and “freedom of the press” based claims come together to free it from any notion of public duty, or, in the words of British Prime Minister Stanley Baldwin, to grant it “power without responsibility.”<sup>22</sup>

When private commercial entities provide public services, they are often required to subject themselves to various regulatory requirements, including at least some level of transparency. The utilities and health sectors provide good examples.<sup>23</sup> Many U.S. states have laws requiring hospitals, private as public, to be transparent about medical errors.<sup>24</sup> Some states require hospitals to report statistical data on the outcomes of certain high-risk medical procedures.<sup>25</sup> A recent and growing legislative trend among states imposes price and cost disclosure on health services providers.<sup>26</sup> The coverage of the U.K. Freedom of Information Act extends to “any person” providing medical services as a contractor or under another arrangement according to the National Health Service Act 2006, in respect of information relating to the provision of the service.<sup>27</sup> Many other private and commercial organizations are brought under mandatory disclosure requirements, even when providing what is considered purely private products<sup>28</sup>—first and foremost financial

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22. Which, as the quote goes, is “the prerogative of the harlot throughout the ages.” The phrase was borrowed from Rudyard Kipling. See The Rt. Hon. The Earl Baldwin of Bewdley, *The Unfading Genius of Rudyard Kipling*, in THE KIPLING JOURNAL 4 (1971), <http://www.kiplingjournal.com/textfiles/KJ180.txt>.

23. For a conceptual overview of the challenges of regulating the health sector through disclosure, see William M. Sage, *Regulating through Information: Disclosure Laws and American Health Care*, 99 COLUMBIA L. REV. 1701 (1999).

24. JILL ROSENTHAL & MAUREEN BOOTH, MAXIMIZING THE USE OF STATE ADVERSE EVENT DATA TO IMPROVE PATIENT SAFETY 3 (2005), [http://www.nashp.org/sites/default/files/use\\_of\\_adverse\\_data.pdf](http://www.nashp.org/sites/default/files/use_of_adverse_data.pdf); Aharon D. Twerski & Neil B. Cohen, *Second Revolution in Informed Consent: Comparing Physicians to Each Other*, 94 NW. U. L. REV. 1, 2 (1999).

25. David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS MGMT. 155, 173 (2006) (discussing the effectiveness of patient safety disclosure acts in Pennsylvania and New York).

26. For a list of such laws in thirty-one states, see *Transparency and Disclosure of Health Costs and Provider Payments: State Actions*, NAT'L CONFERENCE OF STATE LEGISLATURES (March 2017), <http://www.ncsl.org/research/health/transparency-and-disclosure-health-costs.aspx>.

27. Freedom of Information Act, 2000 c. 36, Schedule I, Part III, §§ 43A, 44, 45, 45A.

28. For an in-depth discussion of existing disclosure requirements on private corporations, see ARCHON FUNG, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* (2007); Roy Peled, *Occupy Information: The Case for Freedom of Corporate Information* 9 HASTINGS BUS. L. J. 261 (2013).

products.<sup>29</sup> Disclosed information is used by the public at large, and very often by the press as it holds power to account. However, the press itself suffers no such duties.

The lack of public oversight over press conduct is no accident of history. When it was suggested to extend the U.K.'s FOI law to cover the (now defunct) Press Complaints Commission (PCC, a council of private commercial media),<sup>30</sup> the Commission based its opposition among other reasons, on "the inherent undesirability of direct regulation of the press".<sup>31</sup> Interestingly, ITV-PLC and Channel 5 Ltd., two privately owned commercial broadcasting services, wrote to the Justice Ministry together that bringing commercial public service broadcasters under the scope of the act "could not be reasonably justified."<sup>32</sup>

One could argue that in a free society the plethora of news organizations increases accountability in the press sector itself, as they hold each other to account. As a descriptive matter, this seems not to be the case. When media scandals in the U.K. were revealed in 2010, a public inquiry commission that was subsequently appointed to look into press ethics noted that "the press did nothing to investigate itself or to expose conduct which, if it had involved the Government, Parliament, any other national institution or indeed any other organization of significance, would have been subject to the most intense spotlight that journalists could bring to bear upon it."<sup>33</sup>

Least accountable are the technological information agents. Not only are they private corporations, as are most news organizations, but they are also free from any journalistic ethos or commitment to the public discourse. In 2008, Google CEO Erich Schmidt described as "disturbing" the fact that people prefer reading about popstar Britney Spear than about more public

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29. As imposed in several federal acts, most notably the Securities Act of 1933 (15 U.S.C. § 77), Securities Exchange Act of 1934 (15 U.S.C. § 78a), and The Sarbanes-Oxley Act of 2002 (Public Law 107-204, 116 Stat. 745-810). For a description of the legislations and their full text, see *Fast Answers, Laws that Govern the Securities Industry*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/about/laws.shtml>.

30. By the National Union of Journalists in a letter to the Ministry of Justice (Jan. 2008), The Campaign for Press and Broadcasting Freedom in a letter to the Ministry of Justice (Jan. 24, 2008), and the Campaign for Freedom of Information: Maurice Frankel and Katherine Gundersen, Response to the Ministry of Justice Consultation (Mar. 3, 2008) (on file with author).

31. Letter from PCC director to the Ministry of Justice Information Rights Division (Jan. 24, 2008) (on file with author).

32. Letter from Director of Regulatory Affairs, ITV and Director of Corporate Affairs, Five to the Ministry of Justice (Feb. 1, 2008) (on file with author).

33. Leveson Report, *supra* note 21, executive summary ¶¶ 21, 23. Joseph Stiglitz holds a more optimistic, and I would argue less valid, view of competition in the media, writing: "Multiple media can provide an important set of checks and balances. In other words, each reporter or newspaper has an incentive to uncover the mistakes or distortions of others." Joseph Stiglitz, *Fostering an Independent Media with a Diversity of Views*, in INFORMATION AND PUBLIC CHOICE 139, 145 (Roumeen Islam ed., 2008).

matters.<sup>34</sup> Yet he didn't as much as entertain the thought that perhaps Google has a role in shaping such preferences, saying "We love our consumers, even if I don't like what they're doing."<sup>35</sup> When it comes to the handling of specific cases, technology firms are much less candid. When in 2015 Facebook shut down the account of an Israeli social activist attacking the country's leading bankers, company spokespeople consistently refused to comment on the decision, referring only to "Facebook terms" and "community standards."<sup>36</sup> In 2016, when posts linking to stories critical of the company's Israel PR firm were taken off the air, the company would only say that it is "investigating the matter."<sup>37</sup>

News organizations, joined nowadays by technological information agents, are of the most powerful and of the least accountable organizations in society. They enjoy this accountability gap largely because of the fear of violation of freedom of the press or the freedom of expression they and technology companies allegedly enjoy.<sup>38</sup> I will argue below that there is nothing in press freedom to justify preventing public scrutiny of the use, misuse, and abuse of the power the press holds.

### 3. FOIA AND THE PRESS

I have shown thus far that the media hold considerable power, that this is power exercised in the public sphere, but that they are unique among organizations of similar power in that they are free of any disclosure requirements.

Jurgen Habermas argued against this state of affairs, writing that:

[P]ublicity is also to be extended to institutions that until now have lived off the publicity of the other institutions rather than being themselves subject to the public's supervision . . . also to politically influential mass

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34. Erich Schmidt, *Interview with Gary Hamal*, MANAGEMENT LAB SUMMIT (May 2, 2008), <https://goo.gl/TUpSWI>.

35. *Transcript of Google CEO Erich Schmidt O&A at NAA*, POYNTER (Apr. 7, 2009), <http://www.poynter.org/news/mediawire/95079/transcript-of-google-ceo-eric-schmidts-qa-at-na>.

36. Dori Ben-Israel, *Facebook Removed the Page "Coming to the Bankers" Referring to Bullying on Behalf of Barak Cohen and Eran Vered*, MIZBALA (Sept. 3, 2015), <http://mizbala.com/digital/social-media/103659> [in Hebrew]. In spite of the headline, Facebook did not actually cite a specific reason. Reference to bullying was made in the automatic message sent to page owners announcing the "unpublication" of the page and inviting owner to the company's "Bullying Prevention Hub."

37. Oded Yaron, *Is Facebook Censoring Posts Critical of the Social Media Giant?*, HAARETZ (Aug. 23, 2016), <http://www.haaretz.com/israel-news/.premium-1.738010>.

38. Such a claim a technology company was upheld by a New York federal court in *Zhang v. Baidu*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014).



media . . . [t]hese are all institutions of societal power centers . . . that exercise public functions within the political order.<sup>39</sup>

I will now proceed to justify applying disclosure requirements to the media. I will argue that the underlying principles of Freedom of Information (FOI)<sup>40</sup> laws are comfortably applied to such organizations. This is not to say that there are no distinctions between news organizations and public agencies in the level and nature of transparency justified. I will in later parts of the article detail the topics which I argue require most transparency in news organizations (issues such as finance and ownership but also sources, decision-making processes and more), and the form of general disclosure I see justified.

FOI laws are now in action in more than 100 countries worldwide,<sup>41</sup> including almost all liberal democracies. This is a rather modern development. More than ninety of these laws have been enacted in the past twenty-five years.<sup>42</sup> In many countries, the right to receive information from public authorities is a constitutional right.<sup>43</sup> FOI laws have gained popularity, as they are believed to promote the fight against corruption<sup>44</sup> (although this nexus has been debated<sup>45</sup>) and for good governance. They share another important function—limiting the power of government and empowering the press and the public as a whole. They reach this effect through the power gained by access to information.

In the following sections, I outline the major justifications for recognition of a right to obtain information from public authorities. For each, I will examine whether it can be applied to news organizations.

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39. HABERMAS, *supra* note 17, at 209.

40. “Freedom of information” is the term accepted internationally to describe the right of the public to receive information from public authorities. It is a vague term, and some writers prefer to use “the right to know” or “right of access to information.” These express the same idea, and are used in different places in this article with the same meaning.

41. The most comprehensive and up to date tally appears on the freedominfo.org website, a FOI portal managed by the National Security Archives at George Washington University. It counts 113 countries as of October 2016. See *Chronological and Alphabetical List of Countries with FOI Regimes*, FREEDOMINFO (June 30, 2016), <http://www.freedominfo.org/2016/06/chronological-and-alphabetical-lists-of-countries-with-foi-regimes>.

42. *Id.*

43. Roy Peled & Yoram Rabin, *The Constitutional Right to Know*, 42 COLUM. HUM. RTS. L. REV. 357 (2010).

44. This is a widespread notion, and, in the author’s view, a valid one as well. However, it is not undisputed. For supporting evidence, see Catherina Lindstedt & Daniel Naurin, *Transparency and Corruption: The Conditional Significance of a Free Press*, 2 QOG WORKING PAPER SERIES (2005), [http://www.pol.gu.se/digitalAssets/1350/1350633\\_2005\\_5-lindstedt\\_aurin.pdf](http://www.pol.gu.se/digitalAssets/1350/1350633_2005_5-lindstedt_aurin.pdf).

45. For a few challenging the utility of FOI laws in fighting corruption, see Samia Tavares, *Do Freedom of Information Laws Decrease Corruption?*, MPRA Paper (2007), <http://mpra.ub.uni-muenchen.de/3560>.

### 3.1. Justifications

Four major justifications are often cited for recognizing the public's right to receive information from public authorities.<sup>46</sup> They are: (1) the proprietary justification (information is public property); (2) the instrumental justification (information is necessary to protect other rights); (3) the oversight justification (information is required for practicing public oversight), and (4) the civic-democratic justification (information is required for meaningful civic participation in the political process).

#### 3.1.1. Proprietary

The proprietary justification states that information held by public authorities is, in fact, the property of the country's citizens. As such, citizens are meant to enjoy free access to it. The rationale behind this is either the status of citizens as the sovereign, or the fact that taxpayers' money was used to create and collect the information, or the status of civil servants controlling the information as trustees of the public.<sup>47</sup>

Private news organizations are considered the property of their owners, not the public at large. If property is a person's "sole and despotic dominion,"<sup>48</sup> then the owners of news organizations have the right to exclude others from the information they hold. Modern theories of property offer a more varied approach to property and the rights it entails.<sup>49</sup> The "stakeholder theory" holds that owners have duties towards others, including consumers.<sup>50</sup> Stakeholders include neighbors of a polluting factors, employees whose livelihood is dependent on their workplace, as well as consumers and other individuals who have a "stake" in the operation of the business. The theory suggests that firms should consider the preferences of *all* interested parties and not just those of stockholders. Others, like Dahl, have argued that

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46. For a more detailed discussion of this justifications and their theoretical background, see Peled & Rabin, *supra* note 43.

47. In the words of the Australian Parliament's Reform Commission:

The information holdings of the government are a national resource. Neither the particular Government of the day nor public officials collect or create information for their own benefit. They do so purely for public purposes. Government and officials are, in a sense, "trustees" of that information for the Australian people.

Australian Law Reform Commission, OPEN GOVERNMENT: A REVIEW OF THE FEDERAL FREEDOM OF INFORMATION ACT 1982, at 22 § 4.9, [http://www.arc.ag.gov.au/Documents/Report+40+-+word+version+\(ARC++ALRC\).doc](http://www.arc.ag.gov.au/Documents/Report+40+-+word+version+(ARC++ALRC).doc).

48. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1847).

49. See, e.g., M. A. Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961); STEPHEN MUNZER, A THEORY OF PROPERTY (1990).

50. The theory was first presented in EDWARD R. FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984). However, the idea that managers owe fiduciary duties to constituencies other than stockholders is not new. This argument was made as early as 1932. See Merrick E. Dodd, *For Whom Are Corporate Managers Trustees*, 45 HARV. L. REV. 1145 (1931).

powerful corporations should be viewed as *political* institutions and treated as such.<sup>51</sup> If such a notion were accepted, it would surely apply to major news organizations. There are also scholars who have attached social responsibility to the status of ownership, instilling into it commitments toward society, including an obligation to allow other individuals access to the owned property under certain circumstances.<sup>52</sup>

In a way that would justify giving the public rights to access “their” information, one may admit that the proprietary justification is not easily applied to commercial media. However, such a claim is not entirely without merit. The news is one of those few products which are consumed by almost everyone. The public has at least those rights it is entitled to as consumers. Furthermore, the stakes for news consumers are much higher than many other types of consumers. If neighbors are stakeholders in polluting factories, and community residents are stakeholders in dominant companies that control the community’s economy, then members of the public at large are at the least a significant “stakeholder” in the news industry. Malfunctioning news organizations can pollute the public discourse and cause irreversible damage to any democratic community. The public may not enjoy property rights in these organizations, but a stakeholders approach to their management may serve to confer fiduciary duties on their managers, reporters, and editors, including opening a discussion on transparency duties.

### 3.1.2. Instrumental

Some interests should be elevated to the level of a legal right because they are prerequisites for the fulfillment of other recognized rights, a *sine qua non*. For example, the right of education is a precondition for substantially fulfilling one’s right to vote and other liberties. In the words of Isaiah Berlin, “If a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him.”<sup>53</sup>

The right to information is similarly a prerequisite to the fulfillment of many other rights. “It is perhaps an underpinning of democracy that freedom of information is most important . . . [u]nless there are good reasons for withholding such information, everyone should have access . . . [freedom of information] is a key component of a transparent and accountable

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51. Robert A. Dahl, *Governing the Giant Corporation*, in *CORPORATE POWER IN AMERICA* 10, 18 (Ralph Nader & Mark J. Green eds., 1973).

52. See Hanoch Dagan, *Exclusion and Inclusion in Property* (Tel Aviv Univ. Law Sch., Working Paper No. 109, 2009); Hanoch Dagan, *The Social Responsibility of Ownership*, 92 *CORNELL L. REV.* 1255 (2007).

53. Isaiah Berlin, *Introduction*, in *FOUR ESSAYS ON LIBERTY* iiiii (1969).

government.”<sup>54</sup> For instance, the ability to advocate for social rights hinges on the ability to access information.<sup>55</sup> If one wishes to protect his health, he is in need for information on the nutritional value of the food he is consuming. If town residents want to campaign for air quality, they first need to know the levels of pollutants released from the nearby factory. The right to personal autonomy entails a right for full disclosure of information regarding medical procedures one undergoes. The list goes on and on.

As far as the press is capable of violating rights of individuals and groups, the information it possesses might prove crucial to defending other human rights or remedying their violations. The most immediate examples relate to the harm to reputation and breach of privacy. Where those suffering harms from the press seek remedy in a court of law, they have discovery rules in place to assist them. These have been described as a “focused version of FOIA.”<sup>56</sup> But not all controversies are sorted out in a courtroom. If a person wishes to correct a story published in her regard, she might need to know what sources the reporter relied on. These may be confidential sources in need of protection, but may also be public record or spokespersons of organizations with competing interests. When a group which has been smeared in the press wants to protect its reputation, it may need access to information collected by a journalist to be able to reply. Alternatively, it may want access to correspondence leading to the story, minutes of editorial meetings, or information revealing a financial or other interest of the news organization in their story. Perhaps more importantly, the knowledge that under some circumstances such information might be disclosed could serve as a deterrent (some would say an overwhelmingly powerful one) to unnecessary violations of rights.

### 3.1.3. Oversight

We now reach the first of two primary justifications in our discussion. First is the oversight function of transparency. Indeed, Freedom of the Press itself is guaranteed in democracies because of the important role of the press as a monitoring mechanism, a watchdog to those in power. In the words of

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54. Toby Mendel, *Freedom of Information as an Internationally Protected Human Right*, ARTICLE 19, <https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf> (last visited Feb. 9, 2017).

55. The growing effectiveness of social pressure groups is often attributed to their improved access to (and use of) information. See JEFFREY M. BERRY, *THE RISING POWER OF CITIZEN GROUPS* (1999); BROOKINGS INST., *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* (Theda Skocpol & Morris P. Fiorina eds., 1999).

56. Jack M. Beermann, *Administrative-Law-like Obligations on Private[ized] Entities*, 49 *UCLA L. REV.* 1717, 1723 (2002) (“liberal discovery rules can function like a more focused version of FOIA, opening a great deal of private information to access by opponents in civil actions, which in turn may lead to public discourse of that information”).

Louis Brandeis, “the best of disinfectants.”<sup>57</sup> One of the major justifications to Freedom of Information laws, perhaps the most intuitive and widely accepted, is their role in the battle against corruption.<sup>58</sup> It is not just corruption that the public has the right to know about and receive information on. Civil servants are trustees of the public. The public thus has the right reserved to any beneficiary to monitor her trustee. Beneficiaries have no need to uncover or even suspect corruption to justify their oversight. In the public sphere, such a review may indicate that officials have invested innocently but unwisely, even while bearing the public good in mind.<sup>59</sup> As long as the trustees operated free of any conflicts of interest, or extraneous considerations—their conduct is not a matter for law enforcement. The same does not apply to the public trial. The public is entitled to demand an account of its trustees’ actions and the exercise of their judgment. It may demand that they act not only reasonably, but optimally. Such oversight requires the public’s access to information.

Taking this justification to the press finds that the public has a vested interest in the proper and professional functioning of the press. It has an interest in being able to assess the credibility of the news the media provides it with. “Reporting that we cannot assess is a disaster. . . How can we tell whether and when we are on the receiving end of hype and spin, of misinformation and disinformation? . . . What we need is reporting that we can assess and check.”<sup>60</sup>

The importance of information to be able to evaluate the trustworthiness of news items can be exemplified with the following two stories.

The “Pentagon Military Analysts Program,” launched by the United States Department of Defense, consisted of a select group of retired generals who were frequent military analysts in the media. Many had business interests in the Pentagon. They were given access to confidential documents and then asked to reiterate DoD talking points in their “objective” analysis in the electronic media. Some information was not disclosed to analysts unwilling to subject themselves to such manipulation.<sup>61</sup> Participants were expected to serve as “message force multipliers.” When the program was

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57. LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1913).

58. See *supra* note 19.

59. A similar point is made in Joseph Stiglitz, *Fostering an Independent Media with a Diversity of Views*, in *INFORMATION AND PUBLIC CHOICE: FROM MEDIA MARKETS TO POLICY MAKING* 139, 141 (Roumeen Islam ed. 2008) (“Even without corruption, all individuals are fallible, and the consequence of human fallibility is that there has to be shared decision making.”).

60. O’Neill, *supra* note 6.

61. The program became known to the public through a Pulitzer Prize winning New York Times coverage that began with David Barstow, *Behind TV Analysts, Pentagon’s Hidden Hand*, N.Y. TIMES (Apr. 20, 2008), <http://www.nytimes.com/2008/04/20/us/20generals.html>.

revealed by the *New York Times*,<sup>62</sup> a series of internal investigations by the Department of Defense followed.<sup>63</sup>

The story warrants questions regarding the conduct not only of government officials, but of the media as well. Were the networks aware of this manipulation? Did they consider the conflicts of interest of their analysts? Such questions were indeed asked, but no legal tools were available to make the networks answer. The coverage story itself, was met by the networks with what *Politico* described as “deafening silence.”<sup>64</sup> Questions sent out by a Congresswoman to the five major networks (ABC, CBS, NBC, FOX, and CNN) regarding their conflict-of-interests policies and their implementation in this case, were never replied to by three networks, and two others (CNN and ABC) offered very partial answers.<sup>65</sup> The DoD was held accountable, but questions to the media remain unanswered.

Another example comes from Israel. In July 2016, an administrative court rejected an appeal of a journalist to receive information from the office of Prime Minister Benjamin Netanyahu about his phone conversations with American casino mogul Sheldon Adelson and with the editor-in-chief of Israel’s most widely circulated newspaper owned by Adelson. The newspaper is considered by many to be strongly biased in favor of the Prime Minister. The court accepted that the Prime Minister could not argue for breach of his privacy, but also accepted that the editor and publisher have a right to privacy that justifies withholding the information.<sup>66</sup>

In both cases, the lack of any accountability measures that would force more transparency on the media compromises the public’s ability to assess the information provided to it by the media. If one may paraphrase James Madison’s famous quote, a citizenry without information *on the information it is given*, “or the means of acquiring it, is but a prolog to a farce or a tragedy; or perhaps both.”<sup>67</sup>

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62. Clark Hoyt, *Information that Doesn't Come Freely*, N.Y. TIMES (May 11, 2008), <http://www.nytimes.com/2008/05/11/opinion/11pubed.html>.

63. A first report was prepared by the Department of Defense Inspector General, and later withdrawn to public criticism of its methodology. See also David Barstow, *Inspector at Pentagon Says Report Was Flawed*, N.Y. TIMES (May 5, 2009), <http://www.nytimes.com/2009/05/06/us/06generals.html>.

64. Avi Zenilman & Michael Calderone, “Deafening” Silence on Analyst Story, POLITICO (May 8, 2008), <http://www.politico.com/story/2008/05/deafening-silence-on-analyst-story-010204>.

65. Glenn Greenwald, *CNN, the Pentagon's "Military Analyst Program" and Gitmo*, SALON (May 9, 2008), [http://www.salon.com/2008/05/09/cnn\\_abc](http://www.salon.com/2008/05/09/cnn_abc).

66. AdminC (Jer) 28606-09-15 Drucker v. Comm’r for Freedom of Info. in the Prime Minister, (2015) (Isr.).

67. James Madison, *James Madison to W.T. Barry*, FOUNDERS’ CONSTITUTION (Aug. 4, 1822), <http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html>.

#### 3.1.4. Civic-Democratic

“The democratic system of government is nourished by—and is dependent on—the open and free flow of information which focuses on the core issues that influence community and individual life . . . the free flow of information is the ‘key’ to the operation of the entire democratic system.”<sup>68</sup> Information is required to understand the political processes, and no less important, to voice a view on any current affairs. This notion is one foundation for inclusion of the right to request as well as obtain information in article 19 of the Universal Declaration of Human Rights of 1948,<sup>69</sup> which guarantees the right to “freedom of thought and expression.” The 1966 U.N. International Covenant on Civil and Political Rights also includes seeking information in the right to freedom of expression in its own article 19:

Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds.<sup>70</sup>

Information provided by the media shapes people’s opinion on public affairs. The publication of the “Pentagon Papers” in 1971 caused public outrage because they showed how the American public had been misinformed about the war.<sup>71</sup> The government fought the disclosure of the leaked documents up to the Supreme Court and failed. During the war in Iraq, several media campaigns played a role in turning many in the U.S. against the war. When the Bush Administration banned the publication of pictures of coffins of fallen soldiers arriving at Dover air base, citing privacy concerns, they were taken to court by a retired journalist, Ralph Begleiter, who successfully argued that the true reason was a desire to conceal from the public graphic evidence of the human cost of the war.<sup>72</sup>

Numerous examples can be added to show how information disclosed to the public supported its ability to participate in public debate and voice its opinions on matters on the public agenda. It is not just government that controls such information. In today’s political world, private corporations

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68. HCJ 1/81 Shiran v. Pub. Broad. Auth. PD 35(3) PD 365, 378 (1981) (Isr.).

69. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at 19 (Dec. 10, 1948).

70. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 19-2 (Dec. 16, 1966).

71. Support of the war has been declining for years and it is hard to assess the contribution made to this process by the publication of the papers. Yet there seems to be no question they contributed significantly to disillusionment among the American public about the war.

72. *Return on the Fallen: Pentagon Releases Hundreds More War Casualty Homecoming Images*, NAT’L SEC. ARCHIVE (Apr. 28, 2005), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB152>.

are amassing more and more power and influence on public affairs.<sup>73</sup> It comes without saying that of these, the private companies with impact on public opinion are news organizations. FOI legislation offers a tool to look behind government curtains and its use of information in shaping public opinion. No such tool exists when it comes to the press, although much of the information in its hands may be of utmost public interest. That is, if we believe the public should be aware of the way the forces that shape public opinion operate.

Consider the story of Roberta Baskin presented at the opening of this article. It is alleged that CBS removed from the public sphere information on the conduct of an American corporation overseas. There are two different types of information in this story, which are of much public importance. The first relates to the conduct of CBS itself. If CBS indeed agreed to hide such information from the public in return for Nike's business, this could be a grave violation of media ethics. The contract between the parties, as well as internal correspondence regarding its implementation, is necessary for being able to assess whether indeed CBS is guilty of such unethical journalism.

The second type of information is the hidden story itself. Somewhere in the CBS archives lies filmed information, which a mega-corporation was allegedly willing to spend a significant amount of money to keep hidden from the public. This information was removed from the public sphere not because it was of no interest, but precisely the opposite—because of the interest in it. Corporate misconduct was in the 1990s, and remains in the 2010s an issue of huge public interest. There are efforts on various levels, civic, legislative and others, to hold corporations accountable for human rights violations they engage in. CBS holds this information because it is its duty, for which it received a license from the Federal Communications Commission, to bring such information to the public sphere. It chose to withhold it from entering the public discourse. Questions of copyright law notwithstanding, the public should have a right to access such information. It is information useful for any citizen that wants to partake in the open debate on corporate vices.

However, pure business information of a news organization itself, not related to coverage of any news item, can also be of utmost importance for the public to voice their opinions. This is the case with *Yisrael HaYom* (Israel Today) Adelson's newspaper in Israel, mentioned above. It is a giveaway paper, distributed for free in numerous distribution stations but also delivered for free to the homes of subscribers. The newspaper, like other commercial media organizations, does not disclose any information on its internal affairs. But it has been alleged in court proceedings that the editor of the newspaper

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73. I further developed this idea in respect to corporations in general in Roy Peled, *Occupy Information: The Case for Freedom of Corporate Information*, 9 HASTINGS BUS. L.J. 261 (2013) (discussing how corporations are amassing more power and influence).



was hired as a request of Bibi (Benjamin Netanyahu) and Mr. Adelson and that Adelson pours millions of U.S. dollars each month to cover the newspaper's operational losses.<sup>74</sup> This is a story that raised huge interest in Israel. At stake was whether a foreign billionaire was using his enormous wealth to influence local politics. The answer lies to a large extent in the audit reports of *Yisrael HaYom*.<sup>75</sup> This is information highly relevant to an ongoing public debate on a political affair of the first magnitude. The effective public discussion, one that extends beyond vague allegations, is in practice prevented by the concealment of the information required for the discussion. The public lacks information on the actual corporate structure of the newspaper and its political as well as personal bias.

The traditional media together with the more recent online platforms, in theory as in practice, holds the key to public discourse. It controls much, if not most, of the information required for such discourse.<sup>76</sup> With politicians, we are suspicious that they are insincere and care for their own political interests and thus cannot be trusted.<sup>77</sup> We then turn to the media for information we can rely on. The quality of public discourse, its meaningfulness, and effectiveness, hinge largely on the quality of information supplied by the press. In the words of Hannah Arendt, "Freedom of opinion is a farce unless factual information is guaranteed and the facts themselves are not in dispute."<sup>78</sup> In this sense, the media is one of the most important political institutions. The public has a right, perhaps a duty, to access information that will allow it to be involved in the discourse about the media itself, not just about its reportage. As of now this information is entirely out of citizen's reach.

### 3.2. *Objections*

I have explained above why I believe there is deep public interest in access to media information, and why this interest justifies the opening of

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74. Oren Persico, *Smoking Gun*, 7 EYE (Aug. 26, 2011), <http://www.the7eye.org.il/12925>.

75. Needless to say, loss alone does not prove this point. Many print newspapers suffer ongoing losses in the past years. However, the size and stability of the losses with no reasonable business plan to alter this course would serve as strong indicators to the validity of the allegations against the newspaper and Adelson.

76. This statement has been debated by one of the commentators on this article, arguing that this has changed or at least is changing in the Internet era. This might be true as a matter of process, but for the current being, there are several indicators showing that while indeed the blogosphere and social media are playing a major and growing role in the dissemination of news, they still largely rely on the traditional media in bringing the information to the public sphere for them to spread.

77. For a discussion of the tension between politics and truth, see HANNAH ARENDT, *THE PORTABLE HANNAH ARENDT* 546 (Peter Baehr ed., 2000) (discussing the tension between politics and truth).

78. *Id.* at 554.

media information to the public in a way similar to how the opening of government agencies is warranted. Such a move is not problem-free. I will now address a few of the problems it raises.

### 3.2.1. Press's Freedom of Speech

One argument against bestowing transparency duties on the press is that such an act would violate the press' right to freedom of speech. This argument builds on two assumptions. First, that press corporations have a right to freedom of speech; and second, that forcing them to disclose information would violate it.

Discussing the first assumption draws us into the debate regarding corporate personhood and corporate rights. This is a major debate going on for decades, and this article cannot encompass even a portion of it. For the purpose of our discussion, it suffices to say that there are serious arguments, and in the author's view, convincing ones, made against the notion of corporate rights and corporate personhood.<sup>79</sup> The notion itself is based on shaky grounds in the legal history of the United States, from where it spread to the rest of the common law world.<sup>80</sup> It is, to say the least, not a given that corporations are entitled to constitutional rights.

However, even if car manufacturers, software companies, and cereal producers do not enjoy first amendment protection, perhaps media organizations are unique, and should enjoy such protection because of their special role in society? Opposing opinions on this question have enjoyed support among U.S. Supreme Court justices.<sup>81</sup> The answer, I argue, lies in the dominant motive of the news organization. If it is one of profit, where the news serves a wider effort to make a profit and editorial decision are subject to profit-making considerations, then granting first amendment protections to the organizations will primarily serve profit making and not

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79. The most elaborate, detailed and convincing account of such arguments I am aware of appears in Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2008). For a history of the commercial speech doctrine in the United States and a very different approach to commercial free speech, see Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929 (1998). I offered my own rebuttal to some of the arguments in favor of recognition of constitutional corporate rights in Peled, *supra* note 73, at 278.

80. For a critical historical account of the development of "corporate personhood" see Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985). For traces of the theory of corporations as persons in continental Europe, in somewhat different forms, see Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 566-69 (1987).

81. David S. Allen, *The First Amendment and the Doctrine of Corporate Personhood*, 2 JOURNALISM 255, 263 (2001), <http://journals.sagepub.com/doi/pdf/10.1177/146488490100200303>.

public discourse.<sup>82</sup> This is a difficult line to draw, but given my following point, regarding the second assumption, it is not necessary that we conclude the exact position of the line at this point.

Do disclosure obligations violate freedom of speech? The argument here is that this is a form of “compelled speech” and a violation of the right not to speak or “negative speech.”<sup>83</sup> But one of the main justifications of free speech, to begin with, is the vitality of free flow of information to any open society and the individual’s search for truth. This is particularly the case with *factual* information.<sup>84</sup> Raising the free speech flag to protect an alleged right to prevent factual information from entering the public sphere is an abuse of the idea of free speech. This is not to say that transparency requirements from the media do not raise other concerns, as discussed below.

### 3.2.2. Compromising Freedom of the Press

The third objection, and the one that carries the most weight is that applying disclosure requirements to the press may compromise its freedom. Hannah Arendt contended that “if the press should ever really become ‘the fourth branch of government,’ it would have to be protected against government power and social pressure even more carefully than the judiciary is. For this crucial political function of supplying information is exercised from outside the political realm.”<sup>85</sup> In her view, any social pressure from basically anyone with an opinion or ideology to serve is antithetical to the press’s commitment to truth telling. Requests for information, and more so operation in conditions of transparency, may indeed inflict such pressures as Arendt feared, on the press. This can be the case, for instance, when information is sought by competitors, business or ideological, to expose faults in the newspapers conduct and perhaps misrepresent them, take them out of context or proportion. This can be the case where internal information is used to turn the public against a media organization because of the way it

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82. For different views on the role of profit-making in the determination of First Amendment protection, see *Fed. Election Com. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

83. For the development of Supreme Court jurisprudence on the matter, see Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL’Y & L. 205 (2011).

84. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.”); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence.”), *overruled by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

85. ARENDT, *supra* note 77, at 572.

reached one or other decisions. In short, as in every information battle, information can be turned against its original owner when out in the light.<sup>86</sup>

Were the press comprised of a group of distantly secluded journalists, dedicated to meticulously searching for nothing but facts and publishing them in the most neutral gazette-like fashion, Arendt would have had it right. Any intrusion into their bubble might have been harmful. But the press never operated this way and it is not likely it ever will. In reality, journalists, editors, and publishers inevitably have to take numerous decisions based on several subjective factors: their professional judgment on matters such as what is of public interest; their opinions regarding questions like what is important and what is not, what is reasonable framing of a fact; and their business and other organizational interests. This being the case, the press is indeed another political actor, with opinions and interests.

The press being a political actor does not negate the notion that it should be free of external pressure—governmental or social. But it does present this concept with some serious problems. On the one hand, the sought freedom is justified by the need to be able to tell any truth free of any pressure or fear of any consequences. On the other hand, the press is inherently susceptible to the pressures described above of judgment, opinions, business, and organizational interests. Transparency requirements which open the media to social pressure might serve *to balance* these other pressures. Politicians, business partners, advertisers, sponsors, lobbyists, PR professionals—all apply pressure on the press in many various ways. The added pressure that may result out of transparency requirements will come from groups that are otherwise the least empowered, least capable of reaching the information that serves their own interests. It is not clear that democracy is better served when these are the only groups prevented from applying pressure to this highly valuable machine laying the grounds to the public discourse (while business interests and organizational interests are free to do so).

In this dilemma, I believe the proposition promoted here strikes a delicate balance. Requiring news organizations to be more transparent is a soft form of pressure. Disclosure requirements are the least intrusive of pressures.<sup>87</sup> In themselves, they do not present any demand that interferes

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86. Lawrence Lessig, *Against Transparency*, NEW REPUBLIC (Oct. 8, 2009), <https://newrepublic.com/article/70097/against-transparency>.

87. In a rating of twelve levels of interventions of “interest holders” in the life of a corporation, informing was rated as third least intrusive. ANDREW L. FRIEDMAN & SAMANTHA MILES, *STAKEHOLDERS: THEORY AND PRACTICE*, 167-68 (2006). See also Cass R. Sunstein, *Private Broadcasters and the Public Interest: Notes Toward a “Third Way”* 4 (Chi. Law & Econ., Working Paper No. 65, 1999) (presenting “[m]andatory public disclosure of information about public interest broadcasting, unaccompanied by content regulation” as one of three “less intrusive and more flexible instruments” to promote public interest goals in the broadcast media). For the regulatory

with the media's professional work. They may help substantiate certain public demands from news organizations, but do not give the government or the public any direct control power.<sup>88</sup> If such requirements compromise any freedom of the press, it is the freedom conceal, which to begin with seems antithetical to the goals of the press (except, of course, where concealment serves other disclosure, as is sometimes the case with confidential sources).

One question is: Can freedom of the press be defined to include the right to conceal information, other than when concealment is necessary for the carrying out of journalistic work? If freedom of the press includes a right to conceal information from the public, it works against the same public it aims to serve. The balance is intrinsic. It is not between competing forces. Where concealment serves the public interest, it should prevail; where it diserves it, it should not. It is the interest of the public in disclosure or concealment, not that of the journalist, editor or publisher, that is paramount.

### 3.2.3. Press's Property Rights (NOYB)

Another possible argument that against media disclosure duties is that enforcing such obligations on privately held news organizations would breach their property rights, their right to run their business as they see fit without external intervention. This accepts the concept of property as a "sole and despotic dominion." However, as illustrated above, there are nowadays alternative approaches to the narrow traditional approach to property rights. Hanoch Dagan maintains that under certain conditions and in certain contexts the right to property *itself* obligates its possessor to allow others to gain access to his possession.<sup>89</sup> This component of the right to property is derived from the fact that ownership is a status constituting a relationship between the owner and other individuals in the community for promoting social values. As the right to property bases a demand from society to make its resources available to defend the ownership of the individual, it is only reasonable to recognize society's obligations to the interests of its other members, who are not the owners of the property.<sup>90</sup> Where the use of information by others does not harm the owners reasonable enjoyment of it (as is often the case with information), Dagan argues that allowing access to

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force of transparency, see Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339 (2011).

88. Amitai Etzioni in his discussion of the limits of privacy suggests this distinction between "accountability (matters the government is or is not entitled to "watch") and control (the "decisional" realm, choices the government is or is not entitled to make). This is a helpful thought method here if we replace the government with the public that may watch, but not control, the news media. See AMITAI ETZIONI, *THE LIMITS OF PRIVACY* (2000).

89. For a comprehensive description of this concept and its supporters, and criticisms, see Dagan, *Exclusion and Inclusion in Property*, *supra* note 52.

90. See also Dagan, *The Social Responsibility of Ownership*, *supra* note 52.

the general public to it is not merely an *appropriate* practice, *despite* its harming of a right to property, but is actually an *obligation originating* in the owner's right to property, and the social responsibility that is an integral component of this right.

This is much more so when the relevant property is a news organization. Such organizations ask for recognition of their rights to collect information and publish it to allow for public scrutiny of affairs of public interest, whether involving public or private bodies. It would seem awkward to them, of all, to argue that one and only piece of property, happening to be their own, should be left out of the information-harvesting realm. Indeed, they do not have a legally recognized right to access information in much of the non-public bodies they cover, but they nevertheless make efforts to extract information from such institutions. Assumably, they believe the public interest in the information they shed light on justifies allowing them access to it, however, such access is gained.<sup>91</sup>

#### 4. TRANSPARENCY OF WHAT?

I have tried to show that there is justification for increased transparency of the press, and that the required transparency may be well advanced by applying the concept of FOI to the press, and furthermore that the advantages of such a move outweigh the problems it raises. I now turn to discuss what such transparency might look like.

This is a complicated, sensitive and arduous task. Here, I can only offer a rough outline of categories of information that may contribute to the public's understanding of the way the media, this major political force, operates. I first identify four categories of information which can and should be proactively disclosed to the public. I then go on to consider the adapted FOI regime that forces organizations to reply to queries from the public.

Different people may identify different goals for transparency in the media. Such different goals may all be valid, as transparency, truth has many virtues. I suggest thinking of one major goal of transparency in the media as the dismantling of what Edward Herman and Noam Chomsky describe as a "propaganda model" that the media is.<sup>92</sup> This in order to allow people to be aware and critically think of the power they are subjected to when on the receiving side of the news. In presenting the different fields of suggested transparency, I will also mention how they relate to some of the news "filters" which together comprise Chomsky's "system of propaganda."

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91. For insights on the relationship between the right to property and freedom of the press, see SLAVKO SPLICHAL, *PRINCIPLES OF PUBLICITY AND PRESS FREEDOM* 171-76 (2002).

92. HERMAN & CHOMSKY, *supra* note 16, at 1.

#### 4.1. Ownership

Media is big business. Huge business. No news here. Even though revenue fell, the newspaper industry is still a \$34 billion-a-year industry.<sup>93</sup> These owners own the media. It is not surprising that Herman and Chomsky identify ownership as “the first powerful filter that will affect news choices.”<sup>94</sup> They identify the profit-making purposes of these businesses as the major motive behind such filters. As they rightly point out, were it profits alone, populace demand for program content might have outweighed owners’ preferences. However, if power and influence are dominant factors alongside profit-making, owners might be willing in some instances to sacrifice popular demand for the benefit of other interests, ideological, political, personal or those of their other businesses.

One way or the other, it is undeniable that ownership has a stark influence on what news consumers receive. Therefore, news consumers have keen interest in understanding the complex web of ownership standing behind each news organization. For publicly traded companies this is often publicly available information. General corporate regulation laws determine disclosure requirements from these companies, including disclosure of ownership and identification of chief officers.<sup>95</sup> This however may not be enough, neither in scope of businesses included or the depth of information provided. The Council of Europe recognized this in a recommendation it published in 1994, regarding means to promote transparency in the media. Most of the measures suggested there focused on making available to the public information regarding persons and bodies that are part of media organizations’ structure and their interest in other economic sectors and specifically other media enterprises.<sup>96</sup>

#### 4.2. Finance / Advertising / Special Interests

Until a new model for financing the media is found, advertising is the lifeline of commercial news organizations. One needs no “inside information” to realize that advertisers have great impact on what news organizations choose to communicate, how they choose to present news touching on their advertisers, and what they choose not to communicate at

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93. Pew Research Center, *The State of the News Media 2012*, PEW RESEARCH CTR’S PROJECT FOR EXCELLENCE IN JOURNALISM 1 (2012).

94. HERMAN & CHOMSKY, *supra* note 16, at 14.

95. JENS CAVALLIN, EUROPEAN POLICIES AND REGULATIONS ON MEDIA CONCENTRATION (1998), <http://essaydocs.org/european-policies-and-regulations-on-media-concentration-by-pr.html>.

96. EUR. CONSULT. ASS., *Recommendation No. R (94)13* (Nov. 22, 1994), <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=534799&SecMode=1&DocId=515710&Usage=2>.

all. The story of Nike and CBS (part 0 above) is just one of many examples. A 2000 Pew Center poll found that more than a third of 300 editors polled practice self-censorship avoiding stories that might damage their organization or its parent company, and a little less than a third go as far as restraining themselves in publications that might damage advertisers.<sup>97</sup> Advertisers and their advertisements determine the fate of news organizations, which in turn determine what voices will be heard in society<sup>98</sup> and who will be addressed by the press.<sup>99</sup> Advertisers are the subsidizers and patrons of the newspaper pages and the broadcast programs. For Chomsky, appealing to them is the second filter through which potential news items are screened.<sup>100</sup>

Transparency in the advertising and funding of news organizations is crucial to the understanding of their operations. How much income was generated from each advertiser? When? Such information will allow those interested to trace correlations between changes in advertising and coverage of particular stories. Were there promises made in return for advertising?<sup>101</sup> One may doubt whether a news organization will admit to such agreements, but one may also assume it will be harder to reach such agreements if the parties know their contract might become public.

#### 4.3. Sources

Sources for news reports come in all sorts and shapes and sizes. Sometimes, but not very often, they are the “deep throat” type, whistleblowing behind a veil of secrecy. Much more often they are in the form of a text message sent by a spokesperson for a group of journalists. Sometimes it is an interview or a tip from a politician in a corridor discussion. Other times the source may be a poll or a report issued by a research group or a think tank. The important thing about sources is that they are rarely passive bystanders. More often they are participants in the unfolding of events with an agenda of their own. Thus, receiving the maximum information possible on the sources to a news story is key to understanding

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97. *Self Censorship: How Often and Why*, PEW RESEARCH CTR. PEOPLE PRESS 2 (2000), <http://www.people-press.org/2000/04/30/self-censorship-how-often-and-why>.

98. The process in which advertising changes the target audience of a newspaper and draws certain publications out of business is well described in JAMES CURRAN, *POWER WITHOUT RESPONSIBILITY* 28-33 (2003).

99. Offering advertisers more upscale viewers “with money to buy.” See HERMAN & CHOMSKY, *supra* note 16, at 16.

100. *Id.* at 18.

101. In one case that surfaced during legal procedures in Israel, it was revealed that a daily newspaper that was distributed in railway stations and onboard trains had committed itself to arbitration where news items might damage interests of the railway company, “including its public image.” See Barstow, *supra* note 61.



what forces are at play through it. “Deep throat” sources are, as mentioned, the rarity and deserve protection. They are not in the focus of this part.

According to Herman and Chomsky, sources are the third filter of news.<sup>102</sup> They explain why government officials and official government information are preferred as sources by the press, and how they enjoy credibility that often prevents journalists from investigating themselves.<sup>103</sup> Corporate public relations department are the next primary sources of news items, issuing press releases that are often copied verbatim by journalists and presented as their own writings. Media researchers Robert McChesney and John Nichols reveal, “The dirty secret of journalism is that a significant percentage of our news stories, in the 40-50 percent range, even at the most prestigious newspapers in the glory days of the 1970s, were based upon press releases . . . only loosely investigated and edited before publication.”<sup>104</sup> A 2008 study in the United Kingdom looked at 2,207 news items printed in the country’s most prestigious newspapers and found that “[n]early one in five newspaper stories . . . were verifiably derived *mainly or wholly* from PR material or activity.”<sup>105</sup> A 2010 study conducted in Israel found that “PR practitioners contributed varying amounts of material for 73 percent of news items, but succeeded in supplying 100 percent of the information for only 22 percent.”<sup>106</sup>

There is a shared interest for journalists and PR professionals to keep such information away from the public.<sup>107</sup> “PR practitioners want their messages to gain the aura of ordinary journalistic content serving the public interest.”<sup>108</sup> “Journalists, in turn, try to avoid being perceived as lazy people who outsource their public duties to a third, biased party.”<sup>109</sup> At the same time, it is clear that there is public interest in knowing the source for a news item. Hiding such information from the public, while being an industry standard, is akin to intentionally misleading news consumers. The information is not kept from the public to prevent any harm to the source (i.e., the PR practitioner). Indeed, these often enjoy telling tales of their

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102. HERMAN & CHOMSKY, *supra* note 16, at 18.

103. *Id.* at 19.

104. ROBERT WATERMAN MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM* 47 (2010).

105. Justin Lewis et al., *A Compromised Fourth Estate?*, 9 *JOURNAL. STUD.* 1, 7 (2008).

106. Zvi Reich, *Measuring the Impact of PR on Published News in Increasingly Fragmented News Environments*, 11 *JOURNALISM STUDIES* 799, 806 (2010).

107. Although at least in one country, Germany, the journalistic code of ethics specifically addresses this issue stating in article 1.3, “Press releases must be identified as such if they are published by the editorial team without any further editing.” See German Press Code, ETHNICNET, [http://ethicnet.uta.fi/germany/german\\_press\\_code](http://ethicnet.uta.fi/germany/german_press_code) (last visited Mar. 12, 2017).

108. Reich, *supra* note 106.

109. *Id.* at 804.

impact on the news. It is kept from the public so it thinks it received balanced, weighed, edited information that passed the critical scrutiny of a journalist, while the truth is often that it receives a sophisticated form of disguised advertisement.<sup>110</sup>

The U.K. Leveson report deals with this issue, suggesting that a regulatory body “should consider encouraging the press to be as transparent as possible about sources and source material for its stories . . . to be as clear as is consistent with the protection of sources about where a story comes from.”<sup>111</sup> The report goes on to encourage politicians to publish their contacts and relationships with the press and details of communications with press representative “which might be thought to be relevant to their responsibilities.”<sup>112</sup> This is a suggested mode of oversight over politicians’ conduct. However, if we accept that proprietors of news organizations and their editors are political figures as well, similar disclosure might be warranted for their meetings not only with politicians but with representatives of the corporate world and other pressure groups.

A more modern non-transparent phenomenon is simply scraping of information by one news organization to the website of another. There is no quantitative data to describe how widespread a phenomenon this is, but qualitative research documents this trend and the motivations behind it.<sup>113</sup> When this happens, the news consumer is led to believe that the authority behind a news item is the journalist named in the by-line, while he/she cannot sincerely offer any such authority. New technologies create some of these problems, but they can also provide some of the solutions. In print, it is hard to attribute every item to many different sources, and one assumes the journalist is responsible for the news item in its entirety (though this is often no more than fiction<sup>114</sup>). However, online, there can be metadata added to news items, which can easily include a list of sources, links to press releases used, and other material sources.<sup>115</sup>

Forcing the fullest possible disclosure of sources and source materials is tantamount to stripping a news item naked. It denies the journalist some of

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110. For more on the problematic relationship between journalists and PR professionals, see John Sullivan, *True Enough*, COLUMBIA JOURNALISM REV. (2011), [http://archives.cjr.org/feature/true\\_enough.php](http://archives.cjr.org/feature/true_enough.php).

111. Leveson Report, *supra* note 21, ¶ 63.

112. *Id.* ¶ 86.

113. Angela Phillips, *Transparency and the New Ethics of Journalism*, 4 JOURNALISM PR. 373, 375 (2010).

114. Angela Phillips et al., *An Ethical Deficit? Accountability, Norms and Material Conditions of Contemporary Journalism*, in NEW MEDIA OLD NEWS 51, 61-62 (Sage 2010).

115. A project to offer such metadata structures was launched in 2008 by the Media Standards Trust and is applied by several news websites. See Transparency Initiative, MEDIA STANDARDS TRUST, <http://mediastandardstrust.org/projects/transparency-initiative/background>.

the power he/she enjoys while putting together a news item. It opens to public scrutiny the diversity of sources used, their reliability, and the impact of sources on the final product. In short, it helps the citizen who are consuming the news to better assess the weight to be attached to the information he/she receives, and thus sets apart good journalism from lesser journalism.

#### 4.4. *Decision-Making and Algorithms*

Decisions made in newsrooms on an hourly basis shape our public discourse. They determine what items will appear on the top of the homepage, open tonight's broadcast, and appear in tomorrow's paper or be aggressively pushed the social networks. They decide whether to pursue or drop a lead for an investigation, and how to frame the latest story. The decisions are taken in editorial boards' meetings, through correspondence between publishers, editors, journalists and others. To a growing extent they are also made by algorithms, or more accurately by the people who design them and seniors in technology companies.

Research has shown that the public and news people share similar views on what is news-worthy. We also know that what the actual preferences practiced by editors and publishers through their policies and by the public through its media consumption habits, have little to do with those shared views. All agree that "hard news" about political affairs and the economy deserve prominence in the news media, yet editors will often put celebrity gossip and other lifestyle affairs ahead of these, and the public will reward them with higher ratings.<sup>116</sup>

We have no tools to look into how this becomes to be the situation. We have no tools to decide whether a report that turned to be misleading or inaccurate, was the result negligent decision making during the investigation. We have no tools to assess whether reporting is designed by a calculated position the news organization decided to take or on the merits of the covered item alone. Looking into such decisions, either through publications of minutes of meetings, leaked correspondences or simply interviewing decision makers in the media about their work (a surprising rarity) is of immense public value.

Many such decisions are today taken by technology. Facebook, Google and similar companies decide which news item will receive what prominence online, which is where most people consume their news.<sup>117</sup> These major technology companies can make a news item disappear altogether, for all

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116. Pamela Shoemaker & Akiba A. Cohen, *News Around the World: Content, Practitioners and the Public* (2006).

117. *See How Efficient is the News?*, *supra* note 18.

practical matters, as was attempted with the *Aftenposten* photo mentioned in the opening of this article. Computers make some of these decisions by extremely sophisticated algorithms developed by humans.<sup>118</sup> Most technology companies like Google and Facebook treat their algorithms as a trade secret and will not allow any inspection of them. What values do they represent? What categories of professionals were involved in their development? Lawyers, psychiatrists, sociologists, business administrators? One can trust that Google works to bring users “the most helpful and useful information” and that that alone fulfills ethical expectations, as is argued by Eugene Volokh and Donald M. Falk in a Google-commissioned paper.<sup>119</sup> However, others may doubt whether this suffices to protect the public interest in the free flow of information in society.

Volokh and Falk argue that “Google, Microsoft’s Bing, Yahoo! Search and other search engine companies are rightly seen as media enterprises, much as the New York Times Company or CNN are media enterprises”.<sup>120</sup> This is not how Google wants to be perceived in all circumstances. For instance, when a public inquiry commission in Israel looked into regulation in the new media environment, Google’s submission to the committee that a search platform is not like a newspaper and a hosting platform like Google’s YouTube is not an editor who selects between news items.<sup>121</sup> Google seems to be holding the stick at both ends of the legal discussion on press freedom protections and their implications on search engines. Whether Google, Facebook, Twitter, Reddit, and other information agents are media enterprises or “merely” technology providers is immaterial. What is important is that their decisions have an enormous bearing on the public sphere. The public has thus legitimate interest in looking behind their veil of secrecy to understand their decision-making processes.

#### 4.5. Replies, Mistakes, Criticism

News items most often cover controversies. One part of the controversy is often happy with the report, and the other much less so. Those feeling they

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118. Some researchers believe the Facebook algorithm that determines what members will see in their “news feeds” contains as many as 100,000 variants. See generally Motahhare Eslami et al., *I Always Assumed That I Wasn’t Really That Close To [Her]: Reasoning About Invisible Algorithms In News Feeds* (2015), [http://www-personal.umich.edu/~csandvig/research/Eslami\\_Algorithms\\_CHI15.pdf](http://www-personal.umich.edu/~csandvig/research/Eslami_Algorithms_CHI15.pdf).

119. Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J. L. ECON. POL’Y 883, 884 (2011).

120. *Id.* at 888.

121. “Google’s position on the possibility of regulation of audio-visual content on the internet in Israel.” White paper submitted by Google to the Inquiry Commission to Address the Regulation of Commercial Broadcasting in Israel (Shechter committee) (Apr. 24, 2014), [http://www.moc.gov.il/sip\\_storage/FILES/0/4140.pdf](http://www.moc.gov.il/sip_storage/FILES/0/4140.pdf).

were wronged by a report expectedly want to correct the record to project their views. They might offer a different narrative to the same chain of events presented to the public. Sometimes they will make factual claims, which may be false and may be true. Sometimes they will go after the motive of the reporter or his sources.

In 1974, the U.S. Supreme Court in a controversial ruling decided that a state law granting subject of press coverage a legal right of reply is an unconstitutional violation of freedom of the press.<sup>122</sup> Nevertheless, it is considered good practice to publish replies for news items and guidelines in this respect appear in several journalistic codes of ethics.<sup>123</sup> Yet replies are often edited. In print media, where inches are counted, and in broadcast media where seconds are expensive, this is unavoidable. Editing constraints may at time be abused to present a reply in an unfashionable manner and protect the journalist and his story. But since lengthy replies have to be edited, it's hard to enforce more transparency in delivering them. However, this is not the case with digital media. There is no reason why replies by subjects of news coverage cannot appear in the digital media in their entirety and be clearly linked to from the news item they address.

Many codes of ethics<sup>124</sup> require editors to publish corrections they receive or report mistakes they otherwise find included in their publications. Victims of the U.K. phone-hacking scandal have argued against an industry habit of “burying apologies in the back of a newspaper, having defamed an innocent person on the front page.”<sup>125</sup> The manner in which apologies and corrections are posted is also an issue of transparency. There is no reason for why nowadays reasonably worded requests for correction or criticism of published news items, will not appear in their entirety online. They might there not be more noticeable there than in a newspaper's back page, but their aggregate can be telling. It can document a trajectory of reporting in need of corrections and offer an insight into. It will also force the journalist to reply to the more serious allegations or better-made arguments brought against a certain news item.

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122. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

123. See, e.g., National Code of Conduct § 4 (Denmark); Guideline for Journalists § 21 (Finland); Charter of Duties of Journalists (Italy); Guidelines from the Netherlands Press Council § 6.1 (Netherlands); Code of Ethics of the Norwegian Press § 4.15 (Norway); Deontological Code for the Journalistic Profession § 13(C) (Spain); Code of Ethics for the Press, Radio and Television § 5 (Sweden); Editor's Code of Practice § 2 (United Kingdom). English versions of all codes are available at Collection of Codes of Journalism Ethics in Europe, EthnicNet, [http://ethicnet.uta.fi/codes\\_by\\_country](http://ethicnet.uta.fi/codes_by_country).

124. Including literally all those mentioned *supra* note 123.

125. Patrick Wintour, *Phone-hacking Victims Reject Newspapers' Charter Proposal*, GUARDIAN (May 23, 2013, 7:01 PM), <http://www.guardian.co.uk/media/2013/may/24/phone-hacking-reject-charter-proposal>.

Transparency of criticism and responses may also have a blessed effect on the critics themselves. It may serve as an “anti-flak” measure. Herman and Chomsky describe “flak” as the “negative responses to a media statement or program . . . [that] can be both uncomfortable and costly to the media.”<sup>126</sup> They argue that the ability to produce effective flak lies with the powerful and that if “certain kinds of fact, position or program are thought likely to elicit flak, this prospect can be a deterrent.”<sup>127</sup> But if pressures applied to news organizations would become public knowledge, this would have at least three different effects on three different constituencies. The “flak appliers” would have to take into account that they might be called to justify their pressure publicly. A cut in advertising contracts with a corporation will not be seen as pure business if it becomes public knowledge that it followed angered letters to an editor. For the news organizations themselves, this may provide a shield. They will be able to explain to those pressuring them that any yielding to such pressure is likely to become public knowledge and harm both parties. Both those applying flak and those on the receiving end will have to be more careful when striking deals with each other on what information will be supplied to the public if they know such deals might be brought under sunlight. The public at large can benefit in at least two ways. In addition to the deterrence of “flakers” and “flakees,” its own flak efforts may be given greater weight. If a news organization is obliged to reveal the volume and nature of appeals from the public regarding a certain controversy, numbers might be in a better position to outweigh money and power.

#### *4.6. General Disclosure in Response to Other Information Requests*

While there is much to be gained from proactive disclosure in the fields described above and others, it would be naïve to expect the agencies we are out to critique, to themselves provide all information of public interest on their most troubling conducts when they occur. The conflict of interests is inherent and clear. This applies to most corporate disclosure, and I have argued elsewhere for general disclosure requirements from corporate entities.<sup>128</sup> If we are to rid the news media of its illnesses, we cannot rely on it alone to do so.

My goal here is to show that a statutory general disclosure requirement from news organizations, similar (though not identical) to that imposed by FOIA on public authorities, is in place. The model calls for a presumption of openness in the operation of the news media. This does not mean absolute transparency or transparency in all fields of the organization’s operation. The

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126. HERMAN & CHOMSKY, *supra* note 16, at 26.

127. *Id.*

128. Peled, *supra* note 28, at 261.

basic idea is that when a member of the public requests information from a news organization, it is entitled to receive that information, given certain circumstances and subject to certain limitations described below. Additional substantial or procedural exceptions may need to be carved in order to protect legitimate corporate interests. Yet blanket secrecy should no longer be taken for granted as the default *modus operandi* of the media.

The South African Promotion of Access to Information Act (2000) (PAIA)<sup>129</sup> is one of the very few freedom of information acts to recognize the right to receive information from private entities, regardless of any relationship with a public authority or public function.<sup>130</sup> Regarding private entities, the right to access information is recognized as long as the information is needed “for the exercising or defending of a right.”<sup>131</sup> The advantages and disadvantages of applying FOI legislation to private entities, in general, is beyond the scope of this article.<sup>132</sup> For our purposes, it is worth noting that at least *de jure* a right to access information held by the media exists in South Africa (beyond of course the publicly-owned media which is covered in many countries). It is also important to note the limitations on such access.

These limitations can be divided into positive and negative ones. Positive limitations relate to the reason for access. Unlike with FOIA in general, a requestor needs to present his interest in the information he wishes to obtain from a private body. This can be understood by looking back to the justifications to FOI. Since in this category the information is not the property of citizens as sovereigns or as taxpayers, they do not enjoy free access to just any piece of information. The valid justifications are the instrumental, oversight and civic-democratic justifications, and they need to be substantiated for the right to be invoked. In the case of the South African law, the requisite is a need to defend a right. That is a reasonable basis for requesting information from the media as well but does not cover much of the information related to the public function of the press. In the case of the

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129. The Promotion of Access to Information Act 2000 (act 2 of 2000) [hereinafter PAIA]. For a description of the legislative process and the struggle against failed attempts to reduce its applicability to private entities, see Gideon Pimstone, *Going Quietly About Their Business: Access to Corporate Information and the Open Democracy Bill*, 15 S. AFR. J. HUMAN RIGHTS 2 (1999). See also Doug Tilton & Richard Calland, *In Pursuit of Open Democracy and Freedom of Information – A South African Campaign Study* 8.2. CHRI NEWS (2001), [http://www.humanrightsinitiative.org/publications/nl/articles/south\\_africa/in\\_pursuit\\_of\\_open\\_democracy\\_foi.pdf](http://www.humanrightsinitiative.org/publications/nl/articles/south_africa/in_pursuit_of_open_democracy_foi.pdf).

130. Similar provision appear in the Liberian Freedom of Information Act of 2010 § 1.6(b), <http://freedominfo.org/documents/liberian%20law%202010%20text.doc>, and in the Model Law on Access to Information for Africa § 2(b), prepared by the African Commission on Human and Peoples' Rights, [http://www.achpr.org/files/news/2013/04/d84/model\\_law.pdf](http://www.achpr.org/files/news/2013/04/d84/model_law.pdf)

131. PAIA, *supra* note 129, article 50(1)(a).

132. See Peled, *supra* note 73, at 9.

press, it seems more adequate to grant the right to access information in those cases where the information requested is of public interest. Indeed, such a definition leaves much space for interpretation. However, guidance for interpretation can be found in referring again to the justifications. Where information may shed light on the way the media operates it serves the oversight justification, where it is needed to protect a right, it serves the instrumental justification, and most importantly, where it serves to assess information in the public sphere, which is ground for public discourse, it serves the civic-democratic justification.

The negative limitations to access are those exemptions which outweigh a request for access, even when it serves one of the justifications mentioned above. Naturally, wherever an FOI law would be expanded to include the media, those exemptions listed in the law will apply as well. One exemption that appears in many FOI legislation and is relevant here is that of “commercial secrets.” The United Kingdom’s FOIA allows the withholding of information which “would, or would be likely to, prejudice the commercial interests of any person.”<sup>133</sup> The United States FOIA does not apply to matters that are “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”<sup>134</sup>

Clearly, the proposal does not come without a price. Part of the price is monetary. The handling of requests for information, even if not according to the statutory FOIA procedures, is burdensome and requires human resources. More importantly, learning to operate under conditions of transparency requires a profound cultural change that in turn requires both time and efforts. I do not think the press is entitled to a “right to conceal” and is therefore not surrendering such a right if subjected to transparency. But one cannot overlook hardships that come inherent in operating under transparency, as well as possible dangers from abuse of transparency by competitors and others with ill intentions. This requires further discussion to focus on the safeguards that can be added to a FOIA regime applied to the press, in the same manner, that safeguards were added to FOIA legislation to protect interests of police units and national security agencies.

## 5. THE CASE OF THE BBC

The case of *Sugar v. British Broadcasting Corporation*<sup>135</sup> offers a glimpse into the U.K.’s Supreme Court’s view on transparency in the media. This opportunity is quite rare because FOIA, of course, does not normally

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133. Freedom of Information Act, (2000) ¶ 36, 43 (Eng.), [http://www.legislation.gov.uk/ukpga/2000/36/pdfs/ukpga\\_20000036\\_en.pdf](http://www.legislation.gov.uk/ukpga/2000/36/pdfs/ukpga_20000036_en.pdf).

134. 5 U.S.C. § 552(b)(4) (1996).

135. *Sugar v. British Broad. Corp.* [2012] UKSC 4.



apply to media outlets. The BBC is different, being a public authority funded with public money. However, the law is applied to the BBC only “in respect of information held for purposes *other* than those of journalism, art or literature.”<sup>136</sup>

Steven Sugar, a British citizen and supporter of the State of Israel, approached the BBC in 2005 with a FOIA request, asking for a copy of the “Balen Report.” This was a report prepared by an external consultant upon request of the BBC’s Director of News, Mr. Richard Sambrook to “analyze the BBC’s domestic Middle-Eastern coverage . . . and to suggest whether, and if so how, it might be improved.”<sup>137</sup> The BBC denied his request on the basis that the report was not covered by law, as it was not prepared “for purposes other than those of journalism.”<sup>138</sup> Mr. Sugar appealed the BBC’s decision, and the case’s trajectory brought it all the way up to the Supreme Court.<sup>139</sup>

The Supreme Court unanimously dismissed the appeal. To reach its decision it struggled with different interpretive approaches to the designation in the law (i.e., the term “other than those of journalism, art or literature”).<sup>140</sup>

For the purpose of our discussion a few observations on the Court’s ruling are in place.

The Court was concerned with the possible “chilling effect” of the disclosure of the report. It feared that if disclosed “the necessary frankness of such internal analysis would be damaged.”<sup>141</sup> The argument that disclosure has a “chilling effect” deterring people from speaking freely where they have reason to believe that their words will become public, is not a new one, nor limited to disclosure of information in general or media

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136. *Id.* (emphasis added).

137. *Id.* at [6].

138. *Id.*

139. This trajectory included an appeal to the information commission which upheld the BBC’s refusal (*id.* at [14]); a subsequent appeal by Mr. Sugar to the Information Tribunal which reversed the commissioner’s decision (*id.* at [16]); an appeal by the BBC to the High Court, which again reversed and held the Information Commissioners initial decision lawful; an appeal by Mr. Sugar to the Court of Appeal, which was dismissed (*id.* at [19]); an appeal by Mr. Sugar to the House of Lords which was granted and where the case was remanded to the High Court. (*id.* at [20]); a second allowing of the BBC appeal by the High Court (*id.* at [22]); another appeal by Mr. Sugar to the Court of Appeal which was dismissed (*id.* at [23]); and finally the appeal to the Supreme Court discussed here.

140. This was the main issue in dispute between the justices. While all agreed that the report in discussion should be seen as not covered by the law, they disagreed whether it is so because it was held *predominantly* for purposes of journalism, or it suffices that it was held for purposes substantially related to journalism, regardless of their dominance. *See, e.g.,* Sugar v. British Broad. Corp. [2012] UKSC 4 at [57], [65], [75], [83], [110].

141. *Id.* at [40], [102].

information.<sup>142</sup> Freedom of Information acts worldwide pay notice to this phenomenon and provide for tests balancing between the public interest in disclosure and that in avoiding the implications of the chilling effect.<sup>143</sup> To conclude that the chilling effect in the case of the BBC is so alarming that it avoids a balancing test altogether, the court must have assumed that there is something more worrisome about chilling BBC personnel than any other bureaucrat in any other public authority.

Evidence of this effect is found in the court's reference to the rationale behind the designation in the law: "A measure of protection might have been available under some of the qualified exemptions in Part II of FOIA . . . But Parliament evidently decided that the BBC's important right to freedom of expression warranted a more general and unqualified protection . . ." <sup>144</sup> The designation, the court concluded,

is necessary in a democratic society for the protection of the freedom to impart information enjoyed by the BBC . . . [with] particular regard to the importance of freedom of expression and, in particular, to the extent to which it would be in the public interest for "journalistic, literary or artistic material . . . to be published."<sup>145</sup>

There is more than a grain of irony in this comment. The court allowed the BBC to conceal information to protect its right to impart information. There is, of course, a reasonable logic behind such a view, that fears the BBC will not feel free to impart information in the future in the way it sees (professionally) fit, in light of public criticism based on the disclosed report (or the fear of future criticism that will follow disclosure of future reports). But what is striking about the opinions of the five justices, is that none of them thought there was reason to discuss whether concealment in this case indeed serves the BBC's right to freedom of expression, and what the public interest in disclosure may be.

A discussion of the BBC's right to freedom of expression might have raised the question "who is to be served by it?" Is it a freedom granted to the BBC like to any individual to speak as she wishes? Or is it rather a legal right and obligation granted to it in order to bring information to the public.

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142. For history and a discussion of the chilling effect in the U.S. context, see Frederick Schauer, *Fear, Risk and the First Amendment*, 58 BOSTON UNIV. L. REV. 685 (1978). For evidence on the role of press regulation in the creation of a chilling effect, see T.W. Hazlett & D.W. Sosa, *Was The Fairness Doctrine a "Chilling Effect"?* *Evidence from the Postderegulation Radio Market*, 26 J. LEG. STUD. 279 (1997); T. MCCORMACK, *STUDIES IN COMMUNICATIONS: CENSORSHIP AND LIBEL: THE CHILLING EFFECT* (Jai Pr 1990). For a short discussion of the chilling effect and freedom of information in the U.K. context, see the Information Commissioner's website at <http://www.ico.org.uk/foikb/FOIPolicyChillingeffectarguments.htm>.

143. Freedom of Information Act, *supra* note 133, at c. 36, 2(2)(b).

144. *Sugar v. British Broad. Corp.* [2012] UKSC 4, at [78].

145. *Id.* at [59].

If the latter is the case, could it not be argued that where there are findings of a disservice to the public, freedom of expression cannot be the basis for hiding that very information from the public it is to serve?

The court notes that the words of the designation are derived from the U.K. Data Protection Act of 1998.<sup>146</sup> That act states that journalism and artistic and literary purposes are “special purposes.”<sup>147</sup> It exempts publications of private data made for such purposes from the limitations in the law where “having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest . . . .”<sup>148</sup> The court fails to notice the contrast between this stipulation and its findings in the Balen report case. The DPA empowers journalists where it may have otherwise limited them from bringing information of public interests to the light of day. This serves the fundamental justifications of the right to freedom of expressions, to promote the pursuit of truth and democratic discourse. The court’s interpretation of FOIA does exactly the reverse. It empowers journalists where they make an effort to conceal information from the public. Indeed, this might be to protect future endeavors. However, in this sense, the BBC journalists are no different from any other person preferring to conceal findings of his professional misconduct.

More alarmingly, the court failed to discuss even very shortly, the public interest in disclosure of the specific piece of information here in discussion. The BBC is a powerful actor to a large extent shaping public discourse in the U.K. It is, at least in this sense, a political actor. It is interested in protecting and maintaining its power. It has its organizational interests, and it has much power to promote them. There may or may not be some truth in the allegations that the way in which it impacted public opinion on Middle-East affairs was tainted. If the former is the case, this was in breach of its duty to impartiality. If so, there is immense public interest not only in accessing the Balen report but indeed in the corporation knowing that future review of its coverage in other fields of interest will also be subject to public scrutiny.

## 6. CONCLUSION – THE EFFECTS OF TRANSPARENCY

Transparency is much about trust and distrust. Where we have blind faith in someone, we have little interest in looking into her specific actions. Where we trust ourselves to reach our own conclusion in the judgement of others, we require information on their actions. Skepticism and critical thought are a hallmark of democracy. It is not reasonable nor morally

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146. *Id.* at [34].

147. *Id.*

148. *Id.* at [35].

acceptable to expect the public of a free society to award any institution of such immense political impact as the news media with blind trust.

This understanding is meaningless unless some effective measures are taken to promote media transparency. Subjecting the media to an FOI-like regime has its cost. People do not enjoy working with other lurking over their shoulders. Nevertheless, the global wave of transparency laws has taken much more than the governmental bureaucracies and purely public authorities. In most countries, if you sell a car, you must provide information on its safety and pollution level. Food manufacturers are obliged to provide information on nutrients in their produce. In many countries, schools have to publish their performance levels. In the United States as in the United Kingdom, hospitals are required to publish information on various performance indicators. Publicly traded companies have to publish every information item that bears impact on their financial situation. It is hard to think of another private sector remotely as powerful as the media which has totally evaded this wave of transparency and remains as free to conceal information regarding its product.

Transparency will let news consumers make wiser decisions as to which news providers they choose to trust and how they should react to specific news items. It will let NGOs, corporations, and individuals more effectively fight against alleged unfairness in reporting. But most importantly, it will impact how journalists carry out their job. Knowing they and their work is open to public scrutiny will force journalists to think twice before signing on to news reports that suffer any of the numerous illnesses plaguing the media. This is not a move aimed at inflicting more hardship on the press. Sunlight as a powerful disinfectant is too important a tool to forgo if we are to cure the press of its infections. In the words of Theodore Roosevelt, "We are not attacking the corporations, but endeavoring to do away with any evil in them. We are not hostile to them; we are merely determined that they shall be so handled as to subserve the public good."<sup>149</sup>

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149. Theodore Roosevelt, *Second Annual Message*, (Dec. 2, 1902), <http://www.presidency.ucsb.edu/ws/index.php?pid=29543>.

# Legislating Usability: Freedom of Information Laws That Help Users Identify What They Want

Mark Weiler\*

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## I. INTRODUCTION

With the rapid diffusion of freedom of information (FOI) legislation in recent decades,<sup>1</sup> questions about their usability take on global significance. These questions include: How to teach people to use their access rights? For whom are current FOI laws usable? How to make them easier to use? This article examines one important issue in usability: what are the statutory mechanisms within FOI laws that help users identify the information they want to access?

This examination is important and timely. As part of their legislative lifecycle, both established and more recently adopted FOI laws will become subject to public commentary, review, and revision.<sup>2</sup> Similar public discussions will also likely occur around the globe in years to come as policy makers formulate opinions about the efficacy of FOI laws and their implementation. Raising discussions about how to make these laws more usable, however, may encounter regressive pressures reacting against access rights.<sup>3</sup> Three years after having left the Prime Minister's office, Tony Blair publically scolded himself for having led his government to pass the United Kingdom's first freedom of information act.<sup>4</sup> Pushback of this sort may be because FOI legislation limits the power of the state to restrict freedom of expression.<sup>5</sup> Without robust FOI laws, governments are free to censor the

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1. See Greg Michener, *FOI Laws Around the World*, 22 J. DEMOCRACY 145, 145-46 (2011) (describing rapid diffusion of FOI laws since 1990); John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 85-86 (2006); Jeannie E. Rely, *Freedom of Information Law and Global Diffusion: Testing Roger's Model*, 89 JOURNALISM & MASS COMM. Q. 431, 447-448 (2012); see generally DAVID BANISAR, *FREEDOM OF INFORMATION AROUND THE WORLD 2006: A GLOBAL SURVEY OF ACCESS TO GOVERNMENT LAWS* (2006) (summarizing the FOI laws of approximately seventy countries).

2. E.g., Blaine Calkins, *Review of the Access to Information Act: Report of the Standing Committee on Access to Information, Privacy and Ethics*, H. C., i, at 1-4 (2016); Independent Commission on Freedom of Information Report (2016); FOIA Improvement Act of 2016, Pub. L. No. 114-185 (2016); ROBERT HAZELL, BEN WORTHY, & MARK GLOVER, *THE IMPACT OF THE FREEDOM OF INFORMATION ACT ON CENTRAL GOVERNMENT IN THE UK: DOES FOI WORK?* (2010). See also Jeremy Hayes, *FOI: Whitehall strikes back*, 20 British Journalism Rev. 57 (2009).

3. See Ackerman & Sandoval-Ballesteros, *supra* note 1, at 128 (describing the challenge of government backlash against FOI laws shortly after they are adopted).

4. E.g., TONY BLAIR, *A JOURNEY: MY POLITICAL LIFE* 511-12 (2010) (describing himself as "naive, foolish, irresponsible nincompoop" for supporting the passage of the U.K.'s first freedom of information law).

5. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (articulating a right to freedom of expression); Juha Manninen, *Anders Chydenius and the Origins of the World's First Freedom of Information Act*, in *THE WORLD'S FIRST FREEDOM OF INFORMATION ACT: ANDERS CHYDENIUS' LEGACY TODAY* 18 (Juha Mustonen ed., 2006).

media and suppress public thought by withholding information from examination and commentary.<sup>6</sup>

While instruments designed to evaluate FOI laws may focus on the presence of specific clauses,<sup>7</sup> the passage of a national access law, while certainly no minor accomplishment, is by no means a guarantee that they are actually implemented effectively. Other factors such as whether or not they achieve their desired outcome will also likely be considered.<sup>8</sup> Since the defining characteristic of FOI laws is that they articulate a right for individuals to access unpublished information held by government authorities, a crucial factor in assessing their effectiveness is whether or not they are designed from the outset so they can be used effectively.<sup>9</sup>

To locate itself in the general topic of the usability of FOI laws, Part II of this article turns to the origins of FOI legislation. Situated historically, using FOI laws is viewed as an act that allows individuals to reduce the censorship capacity of governments. Part III examines a few issues that affect its usage and legislative mechanisms that aim to make FOI laws more useable. A core issue is for potential users to be able to identify the unpublished material they want to access. Within librarianship and information sciences the terms “description” and “metadata” refer to information that is about other information. An important function of description and metadata is to help users identify the items they want to retrieve from an information source. Many FOI laws require governments to publish description and metadata, which can help identify information they wanted to order. Part IV reports the results of a content analysis of legislated requirements placed on national governments to publish description or metadata that helps users identify the unpublished materials they want to access.

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6. See EDWARD HERMANN & ROBERT MCCHESENEY, 4 GLOBAL MEDIA: THE NEW MISSIONARIES OF GLOBAL CAPITALISM (Continuum 2004) (describing how an instrument of censorship employed by Great Britain was withholding information under the Official Secrets Act); Christine Anthonissen *Censoring and Self-Censorship*, in HANDBOOK OF COMMUNICATION IN THE PUBLIC SPHERE 401 (Ruth Wodak & Veronika Koller eds., 2008) (explaining how an individual or group can self-censorship by withholding information); ENCYCLOPAEDIA OF UNITED STATES NATIONAL SECURITY 397 (Richard J. Samuels, ed.) (2006) (noting how the U.S. government can effectively censor journalists by withholding information).

7. See *Methodology*, GLOBAL RIGHT TO INFORMATION RATING, <http://www.rti-rating.org/methodology> (last visited Mar. 12, 2017).

8. Taewoo Nam, *Freedom of Information Legislation and Its Impact on Press Freedom: A Cross-National Study*, 29 GOV'T INFO. Q. 521, 527 (2012) (explaining that the passage of FOI laws is necessary but not sufficient in reaching its desired outcomes). See Alasdair Roberts, *A Great and Revolutionary Law? The First Four Years of India's Right to Information Act*, PUB. ADMIN. REV. 925 (2010).

9. See STANLEY L. TROMP, *FALLEN BEHIND: CANADA'S ACCESS TO INFORMATION ACT IN THE WORLD CONTEXT* 42 (2008) (emphasizing the necessity of users to exercise their rights by ordering information through FOI laws).

## II. FOI LEGISLATION: AN ENLIGHTENMENT MECHANISM FOR LIMITING GOVERNMENT CENSORSHIP

From a historical perspective, a source for addressing the general question about usability is the 18th century Kingdom of Sweden during which time the Riksdag passed the world's first FOI law.<sup>10</sup> Until the United States passed its Freedom of Information Act in 1966, the question of usability of access legislation could only be a parochial concern limited to northern Europe.<sup>11</sup> But with the accelerated rate of diffusion of FOI laws globally, most countries of the world now face questions about usability. Examining the history of FOI legislation is important because the distance in time may offer the present moment a novel perspective. For example, in contemporary discussions, the purpose of freedom of information legislation is often framed as making governments transparent or more accountability to the public.<sup>12</sup> However, as will be explained in this section, the political debates giving rise to the world's first freedom of information law in eighteenth century Sweden were more clearly focused on the issue of the minimizing state censorship.<sup>13</sup>

In the English FOI scholarship that examines Sweden's history, attempts have been made to acknowledge a range of contributors to the idea of access to government information.<sup>14</sup> The benefit of recognizing a widening range

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10. See Manninen, *supra* note 5, at 18.

11. *Chronological and Alphabetical Lists of Countries with FOI Regimes*, FREEDOMINFO (Jun. 30, 2016), <http://www.freedominfo.org/?p=18223>. But see Banisar, *supra* note 1, at 58 (Colombia appears to have had a legal code for access to public documents in 1888. Information about it is difficult to find in available English literature).

12. E.g., Mark Boven, *Information Rights: Citizenship in the Information Society*, 10 J. POL. PHIL. 317, 327 (2002); Seth F. Kreimer, *Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1012 (2008); Lindita Camaj, *Governments' Uses and Misuses of Freedom of Information Laws in Emerging European Democracies: FOI Laws' Impact on News Agenda-Building in Albania, Kosovo, and Montenegro*, JOURNALISM & MASS. COMM. Q. 1, 12 (2015).

13. See Christoffer von Kocken et al., *Additional Report on the Third Committee of the Grand Joint Committee of the Honourable Estates of the Realm on Freedom of Printing, submitted at the Diet in Stockholm on 21 April 1766*, in *ANTICIPATING THE WEALTH OF NATIONS: THE SELECTED WORKS OF ANDERS CHYDENIUS (1729-1803)*, at 237-248 (Maren Jonasson & Pertti Hyttinen ed., Peter C. Hogg, trans., 2011); Ackerman & Sandoval-Ballesteros, *supra* note 1, at 88 (referring to the intimate tie between access to government information and freedom of expression).

14. E.g., Manninen, *supra* note 5 (touching on the influence of people such as Anders Chydenius, Anders Schönberg, Gustaf Cederström, Peter Forsskal, Anders Nordencrantz, Johan Arckenholtz, and the Tang Dynasty); David Goldberg, *Peter Forsskal: Goettingen Prodigy and Author of One of the Least Known Jewels of Enlightenment Literature*, [http://www.peterforsskal.com/pdf/Goettingen\\_paper4.pdf](http://www.peterforsskal.com/pdf/Goettingen_paper4.pdf) (last visited May 3, 2017) (describing the contribution of Peter Forsskal); Rolf Nygren, *The Citizen's Access to Official Records – A Significant Principle in Swedish Constitutional Life Since 1766*, in *DIE ZUNÄNGLICHKEIT VON PARLAMENTS AKTEN UND DIE AUDIOVISUELLEN MATERIALIEN IN PARLAMENTS-UND PARTEIARCHIVEN* 14, 20-21 (Günter Buchstab ed., 1999) (describing the contribution of Baron



of contributors and influences is that it helps broaden our understanding of what the world's first FOI law was addressing in its historical moment. This broader understanding makes it easier to frame answers to questions about using FOI laws in our contemporary moment.

In 18th century Sweden, books or pamphlets could only be printed if approved by a censoring body. Likewise, Sweden's Chancellery and Royal Court exercised absolute power to withhold documents held in state archives.<sup>15</sup> Numerous individuals reacted against this control. In 1759, Swedish naturalist Peter Forsskål (1732-1763) wrote a pamphlet titled *Thoughts on Civil Liberty*. After parts were censored, five hundred copies were printed and distributed, although the state quickly tried to reclaim them.<sup>16</sup> The pamphlet articulated a foundational idea of freedom of information: "it is also an important right in a free society to be freely allowed to contribute to society's well-being. However, if that is to occur, it must be possible for society's state of affairs to become known to everyone."<sup>17</sup> Although several years before the principle of access to official records would be reflected in the law of 1766, this passage suggests that access legislation is needed so individuals can participate in the care of their society. This perspective, which places a responsibility for societal wellbeing on individuals, is quite different than contemporary discourses that emphasize knowledge of government activities is needed so individuals can hold government accountable for its responsibilities to act in the public interest.

Anders Nordencrantz (1697-1772), a member of the Riksdag's burgher estate, argued strongly that printers should be free to publish accounts of government activity and criticism of it.<sup>18</sup> For Nordencrantz, the freedom from censorship would provide a means to discover truth through criticism, prevent despotism, and combat public ignorance.<sup>19</sup> As an example of a free press, Nordencrantz described China's Peking Gazette, an official journal of the Imperial Grand secretariat, in which government edicts, appointments, and punishments of government bureaucrats, amongst other things, were announced on a regular basis.<sup>20</sup> His account of the gazette was heavily

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Gustav Cederström); Lena Rydholm, *China and the World's First Freedom of Information Act: The Swedish Freedom of the Press Act of 1766*, 20 JAVNOST – THE PUBLIC 45, 60-61 (2013) (explaining how Anders Nordencrantz and Anders Chydenius drew on examples from China to support their proposals for freedom of the press).

15. Nygren, *supra* note 14, at 18-19 (explaining that access to state archives was strictly controlled, even by authors commissioned to write official histories or biographies).

16. Thomas von Vegesack, *Commentary on Thoughts on Civil Liberty*, Peter Forsskål, <http://www.peterforsskal.com/thetext.html> (last visited Mar. 12, 2107).

17. Peter Forsskål, *Thoughts on Civil Liberty* (trans. 2009), <http://www.peterforsskal.com/thetext.html> (last visited Mar. 12, 2107).

18. See Rydholm, *supra* note 14, at 48-52.

19. *Id.* at 49.

20. See *id.* at 50-51.

skewed, however as he did not describe how the publication was under absolute control by the Emperor and used to strengthen, not question, imperial power.<sup>21</sup> Although a champion of a free press, Nordencrantz did not propose an outright ban on censorship. Instead, he wanted the censor's power transferred from the government to parliament.<sup>22</sup>

Anders Chydenius (1729-1803) was influenced by Nordencrantz.<sup>23</sup> However, Chydenius did not think that the Riksdag should have absolute power as he thought the people should regulate it.<sup>24</sup> To ensure the best ideas for governing could be found, Chydenius argued that records of government activity and critical commentary should not be constrained by giving the king, government, or Riksdag the power to approve what could be printed.<sup>25</sup>

Baron Gustaf Cederström also submitted a proposal to the 1765-66 session of the Riksdag on the question of censorship.<sup>26</sup> Although Cederström is given only passing reference in a popular account of the first FOI law,<sup>27</sup> his influence may be more significant. According to legal historian Rolf Nygren:

Cederström argued that the freedom of the press must necessarily be not only lawful but also legally protected. Technically, this meant that the law must define what kind of documents could *not* be published. This approach made the whole question turn one hundred and eighty degrees by making public access the chief rule and secrecy the exception.<sup>28</sup>

The law that ultimately passed on December 2, 1766 had numerous provisions that protected printers to produce critical commentary on almost any topic without attaining government approval. The assumption that writers and the printers were free to publish records of government activity required an assurance of accessing documents held by the state, otherwise government officials could effectively censor authors or printing presses by simply withholding documents from them.<sup>29</sup> Article six of the act begins, "the freedom of the press will further include,"<sup>30</sup> and continues to state that

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21. *Id.* at 51.

22. *See* Manninen, *supra* note 5, at 39 (Nordencrantz "would have moved political censorship from the Censor and Chancellery to the Estates.").

23. Rydholm, *supra* note 14, at 47.

24. *See* Manninen, *supra* note 5, at 49.

25. *Id.* at 46.

26. Nygren, *supra* note 14, at 20.

27. Manninen *supra* note 5, at 45.

28. Nygren, *supra* note 14, at 20.

29. *His Majesty's Gracious Ordinance Relating to Freedom of Writing and the Press (1766)*, in *The World's First Freedom of Information Act* 8, 13 (Gustav Björkstrand & Juha Mustonen, eds., trans. Peter Hogg, 2010) (section 6 explains that freedom of the press includes the requirement for the government to give documents immediately "to anyone who applies for them").

30. *Id.* at 13.

documents “shall immediately be issued to anyone who applies to them.”<sup>31</sup> In 1766, the freedom of the press from state censorship and the ability to access documents held by the state were unified.

Drawing from this historical perspective, the functional similarity between freedom of the press and freedom of information is more obvious. Freedom of the press protects printing presses from censors who would otherwise restrain them from publishing materials, while freedom of information protects printing presses from censors who would inhibit publishing government information by simply withholding it. In both cases, the protections enable presses to publish material, whether critical commentary on government authority or records of that authority’s activity, without having to first attain state approval. FOI laws limits censorship by transferring the authority to make information available from government to individuals. As explained by the Information Commissioner of Canada, government officials can find it difficult to recognize this:

The clear lesson of my almost eight years of service as Canada’s Information Commissioner, is that—by-and-large—public officials just don’t get it! They don’t get the basic notion that, in passing the Access to Information Act in 1983, Parliament wanted a shift of power away from ministers and bureaucrats to citizens. Parliament wanted members of the public to have the positive legal right to get the facts, not the “spin”; to get the source records, not the managed message; to get whatever records they wanted, not just what public officials felt they should know.<sup>32</sup>

Recognizing that FOI legislation has its historical origins in limiting government censorship clarifies that using access laws is an act of limiting the power of governments.

### III. ASSESSING THE USABILITY OF FREEDOM OF INFORMATION LAWS

Many factors can facilitate or impede the usage of FOI laws. Due to deficiencies in their capacities, governments may not be able to implement them.<sup>33</sup> Even if implemented adequately, civic society may not have the

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31. *Id.*

32. John Reid, *The Future of Accountability – The Federal Government’s Accountability Act and Discussion Paper and the Open Government Act*, OFFICE OF THE INFORMATION COMMISSIONER OF CANADA (June 2006), [http://www.oic-ci.gc.ca/eng/media\\_room-speeches-2006-junexx.aspx](http://www.oic-ci.gc.ca/eng/media_room-speeches-2006-junexx.aspx).

33. Nam, *supra* note 8, at 527 (stating “the recent policy innovation has occurred before national capacities for FOIL have matured”); Monica Escaleras, Shu Lin, & Charles Register, *Freedom of Information Acts and Public Sector Corruption*, 145 *Pub. Choice* 435, 437 (2008) (explaining that “its effectiveness is clearly limited by the ability of interested parties to act on the information provided”).

capacity to use them.<sup>34</sup> As a result, FOI laws may be prone to merely existing on paper.<sup>35</sup> Although usability is an important litmus test for their success, studies that examine issues of use cannot keep up with actual levels of usage.<sup>36</sup> Beyond the pragmatics of conducting studies, another reason for the difficulty in studying FOI usability is because access laws often follow a principle of applicant blindness.<sup>37</sup> Under this principle, users are not required to provide details about themselves or their reasons for seeking information.<sup>38</sup> The variety of reasons for which people use FOI may also be clouded by its highly politicized portrayal in the media and treated within government.<sup>39</sup> A recent study suggests that much of FOI usage may be far less political than portrayed.<sup>40</sup> When evaluating the usability of FOI laws, it is important to avoid being swept up by these politicized discourses, which may hide important and revealing nuance.

#### A. *Approaches to Evaluating Usability*

##### 1. Technological metaphors of information retrieval

Questions about the usability of FOI laws can be approached by framing government institutions as information retrieval systems. When subject to FOI laws, government authorities take on properties like mechanistic information retrieval systems: (1) they contain various stores of information, such as filing systems or databases; (2) a user provides a FOI officer with a query that specifies the properties of items they want retrieved; which (3) initiates a process of identifying and returning items in the sources that meet the criteria in the query. A characteristic of information retrieval under FOI

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34. See ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* 116-120 (2006) (describing the capacity of civil society to use FOI laws).

35. Nam, *supra* note 8, at 528 (stating “[i]n the former Soviet Republics in Central Asia, access to public information remains largely illusory even though laws have been adopted in Uzbekistan and Tajikistan”).

36. Gregory Michener & Ben Worthy, *The Information-Gathering Matrix: A Framework for Conceptualizing the Use of Freedom of Information Laws*, *ADMIN. & SOC’Y* 1, 2 (2015) (describing how the diversity of uses of FOI laws is understudied).

37. ROBERT HAZELL, BEN WORTHY, & MARK GLOVER, *THE IMPACT OF THE FREEDOM OF INFORMATION ACT ON CENTRAL GOVERNMENT IN THE UK: DOES FOI WORK?* 64-66 (2010).

38. Maeve McDonagh & Moira Paterson, *Freedom of Information: Taking Account of the Circumstances of Individual Applicants*, 3 *PUBLIC L.* 505, 506 (2010) (describing the principle of disclosure).

39. Michener & Worthy, *supra* note 36, at 2 (explaining how most FOI uses occur within the non-political/private quadrant of their model).

40. Michener & Worthy, *supra* note 36, at 2.

law, however, is that retrieved items are subjected to a review process to protect sensitive information before copies are provided to the user.<sup>41</sup>

Mechanical information retrieval systems are often evaluated using formally defined metrics, such as “recall” and “precision.” Recall is the ratio between the relevant items retrieved in response to a query and all relevant items in the information source.<sup>42</sup> A search with high recall will return most of the relevant items but may include many irrelevant ones too. A characteristic of high recall strategies is the lack of consideration for the number of items returned. Some evidence suggests that both experienced and inexperienced FOI users may use search strategies aiming for high recall.<sup>43</sup> This strategy, sometimes called a “fishing expedition,” is characterized by being “[broad] in scope and us[ing] open-ended language. They tend to request records about a particular subject using phrases such as: ‘including, but not limited to, memos, reports, studies and briefing notes regarding . . .’”<sup>44</sup> A high-recall search is illustrated by a case where the City of Sioux City used the federal Freedom of Information Act to acquire copies of documents from the United States Postal Service. The wording of their query was very broad:

Any and all correspondence, recordings, notes or records of communication whether in person, via letter, facsimile, telephone, e-mail, text, recorded video conference, voicemail or any other written, digital or electronic means relating to any and all changes in mail drop box collections times in the City of Sioux City, Iowa or within the geographic area currently served by Sioux City, IA P&DF from December 1, 2009 through to the date of this request [June 24, 2011].<sup>45</sup>

This was only one of 10 similarly broad and open-ended search clauses the city sent to the US Postal Service in a single fax. While high recall search strategies may have few downsides in information retrieval systems implemented in electronic environments where processing power is fast and cheap, the situation is entirely different in retrieval systems that require a significant amount of human mediation. In the case of FOI laws, all identified items, both relevant and irrelevant items, must be carefully

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41. See Charis E. Wilson, *In the Beginning Was the Request: A Street-Level Perspective on the FOIA Process* at 70 (Jun. 15, 2015) (unpublished Ph.D. dissertation, Emporia State University), <https://esirc.emporia.edu/handle/123456789/3320> (documenting the work procedures of a FOI officer).

42. *Recall*, ONLINE DICTIONARY FOR LIBRARY AND INFORMATION SCIENCE, [http://www.abc-clio.com/ODLIS/odlis\\_r.aspx#recall](http://www.abc-clio.com/ODLIS/odlis_r.aspx#recall) (last visited Mar. 12, 2017).

43. See Wilson, *supra* note 41, at 75; Robert Cribb, Dean Jobb, David McKie, & Fred Vallance-Jones, *Digging deeper: A Canadian Reporter’s Research Guide* 160 (2006).

44. Cribb, et al., *supra* note 43, at 160; see also Wilson, *supra* note 41, at 94.

45. Fax from Paul Eckert, City manager, City of Sioux City, Iowa to manager, Records Office, U.S. Postal Service (Jun. 24, 2011) (acquired by author through the Freedom of Information Act).

reviewed for sensitive information. High human mediation can increase fee estimates, which can frustrate users. For example, Sioux City was reported to be outraged to receive an estimated fee of \$831,000 for the U.S. Postal Service to complete the search.<sup>46</sup> It is common for FOI officers to work with FOI users to help narrow down what they are seeking to avoid these types of situations.<sup>47</sup>

Another measurement of information retrieval is “precision.” This refers to the proportion of relevant items returned to all items returned.<sup>48</sup> It is a measurement of information retrieval that accounts for the volume of documents returned. A high precision search strategy will reduce the volume of items returned by avoiding irrelevant items. Having precisely worded queries is strongly encouraged by experienced users and FOI officers.<sup>49</sup> With a highly precise search strategy that yields a low volume of documents, fewer sources have to be manually searched, fewer items have to be assessed to see if they meet the search criteria, and fewer items have to be reviewed for information requiring legal protection. An example of a highly precise, low volume search is when the City of Coquitlam in British Columbia ordered from the Metro Vancouver government “a copy of the video and/or audio recording of the Special meeting of the Greater Vancouver Regional District Board that took place on April 8, 2011 in the second-floor boardroom at 4330 Kingsway Street.”<sup>50</sup> In this case, the records office was able to provide the audio in one day.

The effectiveness of precise-based searches strategies may seem to suggest they are better than recall-based strategies. Overly broad queries have been disparaged, as the name “fishing expedition” implies, and characterized as a misuse of access rights.<sup>51</sup> Such conclusions may be too harsh, however. High-recall searches strategies may be unavoidable if the information needed to be more precise is simply not available.<sup>52</sup> In such

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46. Lynn Zerschling, *City Outraged at Postal Service's \$831K Estimate for Document Search*, Sioux City Journal (July 27, 2011), [http://siouxcityjournal.com/news/local/govt-and-politics/city-outraged-at-postal-service-s-k-estimate-for-document/article\\_0f2a6feb-3e9d-594c-bcfd-3b1703bc295d.html](http://siouxcityjournal.com/news/local/govt-and-politics/city-outraged-at-postal-service-s-k-estimate-for-document/article_0f2a6feb-3e9d-594c-bcfd-3b1703bc295d.html).

47. Wilson, *supra* note 41, at 126-27.

48. *Precision*, ONLINE DICTIONARY FOR LIBRARY AND INFORMATION SCIENCE, [http://www.abc-clio.com/ODLIS/odlis\\_r.aspx#precision](http://www.abc-clio.com/ODLIS/odlis_r.aspx#precision) (last visited Mar. 12, 2017).

49. Kreimer, *supra* note 12, at 1025; Wilson, *supra* note 41, at 125; MIKE LARSEN, ACCESS IN THE ACADEMY: BRINGING ATI AND FOI TO ACADEMIC RESEARCH 18 (2013).

50. E-MAIL FROM LAUREN HEWSON, MANAGER LEGISLATIVE Administrative Services, City of Coquitlam, to Chris Plagnol, Information and Privacy Coordinator, Metro Vancouver (May 3, 2011) (on file with author).

51. See Jeremy Hayes, *FOI: Whitehall Strikes Back*, 20 BRIT. JOURNALISM REV. 57, 59; Wilson, *supra* note 41, at 125 (reporting how a FOI officer explained that FOI users who submit overly broad FOIs are “expecting FOIA staff to do their research work for them”).

52. See Kreimer, *supra* note 12, at 1025-27.

cases, a high-volume disclosure may give evidence of otherwise concealed government activities, which can then be the basis for subsequent and more specific searches.<sup>53</sup> Another advantage of high recall searches is that high volume disclosures may discourage misconduct within organizations. Since a large number of documents are made public, the actions of more government employees are likely to be implicated in the release and so they may feel the pressure from public scrutiny to conduct their actions appropriately.<sup>54</sup> Precise, low-volume searches, on the other hand, may do less to change organizational cultures because less evidence of government activity is made public.

## 2. Challenges of evaluating government information retrieval

Although a technological approach may provide important insights into issues with FOI usage, drawing too heavily on mechanistic metaphors of information retrieval may be inappropriate, as it hides important insights. In studying electronic information retrieval, the Cranfield approach is commonly used by researchers and developers. This approach relies on “test collections,” which are standardized collection of documents, query topics, and relevance assessments of each document for each query.<sup>55</sup> Test collections are shared amongst researchers and developers who run them through their information retrieval systems repeatedly to assess their performance.<sup>56</sup> While this methodology is well suited for electronic information retrieval systems controlled by their designer, it has limited use for evaluating FOI laws. Evaluators cannot give governments a collection of documents and then repeatedly run queries through FOI to access them.

A method for evaluating the implementation of access laws that researchers have used is to order information from governments through FOI laws and then compare characteristics of responses, either between

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53. See Kevin Walby & Mike Larsen, *Getting at the Live Archive: On Access to Information Research in Canada*, 26 CAN. J. LAW & SOC'Y 623, 625 (encouraging social and legal researchers to conceiving of FOI as a means to access the living archives of government organizations).

54. See Chetan Agrawal, *Right to Information: A Tool for Combating Corruption in India*, 3 J. MGMT & PUB POL'Y 26, 33 (2012) (although government officials feel an anxiety that “the ghosts of the past might haunt them,” they are delighted by public engagement and the opportunity to build trust with them).

55. Paul Clough & Mark Sanderson, *Evaluating the Performance of Information Retrieval Systems Using Test Collections*, 18 INFO. RES. (2013), <http://www.informationr.net/ir/18-2/paper582.html> (the Cranfield approach was developed at the Cranfield Library in the United Kingdom in the 1960s).

56. *Id.*

jurisdictions<sup>57</sup> or within a jurisdiction over a period of time.<sup>58</sup> For example, to compare the FOI retrieval systems under the Clinton and Bush administration, Kim analyzed eight years of annual FOI reports from twenty-five federal agencies subject to the US Freedom of Information Act.<sup>59</sup> Amongst other findings, Kim found decreases in response efficiency,<sup>60</sup> increases in backlogs<sup>61</sup>, fewer full disclosures,<sup>62</sup> and more exemptions cited for redactions from the Clinton to Bush administration.<sup>63</sup> A threat to the validity of this study is that the research could not control for any systematic variation in either the queries or the relevant documents. Over time or between jurisdictions, FOI users may initiate more or less complicated queries or seek differing levels of sensitive information that required legitimate protection.

Another method of evaluating how governments implement FOI laws is to conduct a FOI audit.<sup>64</sup> Newspapers Canada, for example, conducts annual FOI audits of federal, provincial, territorial, and municipal governments in Canada. Their method involves identifying a set of documents likely to be held by all government authorities being audited and then running a series of queries through FOI laws for that information. The responses are assessed according to performance criteria. An advantage of this approach is that it allows for a comparison between retrieval systems.<sup>65</sup> A limitation of this approach is it assumes that different FOI laws are completely comparable. Legislative bodies may have different exemptions that determine what information must be withheld. FOI audits are also prone the Hawthorne effect, whereby individuals or organizations change their behavior when they know they are being observed by researchers. If governments determine they

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57. E.g., Robert Hazell & Ben Worthy, *Assessing the Performance of Freedom of Information*, 27 GOV'T INFO Q. 352 (comparing the performance of FOI in the United Kingdom, Australia, New Zealand, Canada, and Ireland).

58. E.g., Minjeon Kim, *Numbers Tell Part of the Story: A Comparison of FOIA Implemented under the Clinton and Bush Administrations*, 12 COM. L. & POL'Y 313 (comparing FOI performance in the United States of America between 1998 and 2005).

59. *Id.*

60. *Id.* at 324.

61. *Id.* at 324.

62. *Id.* at 326.

63. *Id.* at 332.

64. E.g., MEDIA INSTITUTE OF SOUTH AFRICA, MISA TRANSPARENCY ASSESSMENT: 2016 REPORT ON OPEN & SECRETIVE PUBLIC INSTITUTIONS IN SOUTHERN AFRICA (2016), [http://misa.org/wp-content/uploads/2016/09/survey-2016\\_final\\_online.pdf](http://misa.org/wp-content/uploads/2016/09/survey-2016_final_online.pdf); *Examples of FOI Audits between 2005 and 2015 Conducted by Newspapers Canada*, NEWSPAPERS CANADA, <http://newspaperscanada.ca/public-affairs/freedom-of-information> (last visited Mar. 12, 2017).

65. See NEWSPAPERS CANADA, NATIONAL FREEDOM OF INFORMATION AUDIT 2015, at 7 (2015), <http://newspaperscanada.ca/sites/default/files/FOI-2015-FINAL.pdf>.



are being audited, they may change their behavior to look more favorable.<sup>66</sup> For example, Newspapers Canada reported that in 2011 many public bodies had determined they were being audited and “officials in every province, in several federal departments as well as the City of Windsor, Ontario, communicated about the requests they received in common.”<sup>67</sup> They also reported that the BC government responding by

[launching] a concerted effort to process the requests—which they correctly identified as belonging to the 2011 audit—as quickly as they could. The effort was overseen from the highest levels of the Ministry of Citizens’ Services and Open Government, the department in charge of FOI processing in BC and featured regular updates to top officials and a formal briefing note to the deputy minister.<sup>68</sup>

Field experiments, which systematically vary characteristics of some part of the FOI application process, may face similar problems if government officials detect that they are being evaluated.<sup>69</sup>

A limitation of studies that only evaluate the information retrieval system created under FOI laws is they do not allow for comparison with non-FOI methods of retrieval. This comparison is important because access laws should be expected to be as good, if not better, at accessing unpublished information than informal methods. For example, Worthy, John, and Vannoni conducted a comparison study involving 4,300 English parish councils.<sup>70</sup> They ordered organizational charts either through FOI legislation or requested it through a regular letter.<sup>71</sup> The results indicated that using FOI law, while not a perfect method, was twice as effective as non-FOIs. An important limitation of this study is that organizational charts, which are non-contentious in nature, do not represent a broad sample of unpublished information held by governments. If the documents were more contentious or complicated, one might reasonably expect even more pronounced differences between FOI and non-FOI methods.

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66. See Gregory Michener & Karina Rodrigues, “Who Wants to Know?” *Assessing Discrimination in Transparency in Freedom of Information Regimes* 6 (Jun. 2015) (unpublished paper presented at the 4th Global Conference on Transparency Studies, Università della Svizzera italiana, Lugano, Switzerland, June 4-5, 2015).

67. *National FOI Audit: Notes on British Columbia and Interprovincial Communication*, NEWSPAPERS CANADA (2011), <http://www.newspaperscanada.ca/sites/default/files/FOI%20Audit%202011%20British%20Columbia%20notes.pdf>.

68. *Id.* at 1.

69. See Michener & Rodrigues, *supra* note 66, at 6.

70. Ben Worthy, Peter John, & Matia Vannoni, *Transparency at the Parish Pump: A Field Experiment to Measure the Effectiveness of Freedom of Information Requests* (Dec. 4, 2015) (unpublished manuscript), <http://ssrn.com/abstract=2699198>.

71. *Id.* at 24.

The comparison with non-FOI methods of accessing information is also important because it draws critical attention to the condition of established methods of accessing unpublished information. For example, a user of India's Right to Information (RTI) Act is quoted as saying:

Before the RTI Act was passed, it was impossible to locate one's query in the government's workflow. This resulted in applicants feeling powerless and helpless. My refusal to pay bribe to a police official led to a 3 year delay for my passport application to be processed. In the absence of RTI I was unable to locate the actual status of my application. But with the RTI coming into force, it took exactly 2 weeks from the date I filed an RTI application to know the reasons why my application is being delayed for my passport to arrive. The RTI Act forced the police official to be responsive and act according to prescribed rules and procedures.<sup>72</sup>

In this example, not only does India's RTI Act provide a dramatic improvement for the user, it simultaneously draws critical attention to the degraded conditions of the established methods of accessing unpublished information. Likewise, in the United States, a researcher indicated that FOI legislation has made data on racial and ethnic preferences in government procurement far more available compared to other means.<sup>73</sup> Since FOI laws tend to be highly politicized,<sup>74</sup> public and scholarly discourses often direct criticisms to barriers or imperfections in access laws.<sup>75</sup> While there is surely merit to such criticism, the failure to publicly praise FOI laws warrants criticism itself. Praising FOI laws when they are successful makes it possible to draw critical attention to established, culturally inherited methods of accessing unpublished government material that are in worse condition.

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72. Agrawal, *supra* note 54, at 32-33.

73. George R. La Noue, Two Cheers for the Freedom of Information Act, 29 Acad. Quest. 10, 12 (stating that "short of litigation, without the FOIA tool, this kind of information about important public policy issues can almost never be brought to light").

74. See Michener & Worthy, *supra* note 36, at 3-4 (explaining that the "[t]he fields of scholarship outlined above are to varying extents "politicized" and have consequently tended to focus on "barriers to accessing public information").

75. See generally MIKE LARSEN & KEVIN WALBY, BROKERING ACCESS: POWER, POLITICS, AND FREEDOM OF INFORMATION PROCESS IN CANADA (2012).

### 3. User-centered evaluation

A third way to evaluate information retrieval systems is based on user evaluations, such as indicators of satisfaction.<sup>76</sup> User expectations are a key factor in their satisfaction with an information system.<sup>77</sup> User expectations of FOI-based retrieval can be shaped by experiences with other information retrieval systems, such as search engines or databases.<sup>78</sup> The information retrieval systems created by online databases, however, are significantly different than the information retrieval systems implemented under FOI laws. Online databases contain well-structured information, which can be searched rapidly at low cost. In contrast, government institutions contain a massive number information sources, which may be unstructured, unclassified, not indexed, and may require extensive human intervention to search. FOI officers tasked with responding to users may not know where to find the information.<sup>79</sup> Institutions may also be insufficiently resourced to perform at the level expected by users.<sup>80</sup> FOI users have been reported to underestimate the vast amount of information contained with bureaucracies and oversimplify the ease with which it can be found.<sup>81</sup>

These observations do not imply that FOI procedures or the conditions in which they are implemented are immutable and cannot be improved based on experiences of users; rather, it recognizes that users may have unrealistic expectations of usability because they are unfamiliar with nature of the information retrieval system they are querying. Users should not be faulted for this because the lack of knowledge of government is precisely the problem FOI laws attempt to address.

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76. Ellen M. Voorhees, *The Philosophy of Information Retrieval Evaluation*, in EVALUATION OF CROSS-LANGUAGE INFORMATION RETRIEVAL SYSTEMS, 355-370, 355 (Carol Peters, Martin Braschler, Julio Gonzalo, & Michael Kluck eds., 2001) (describing two broad classes of evaluation, system evaluation and user-based evaluation).

77. See generally D. Sandy Staples, Ian Wong, & Peter B. Seddon, *Having Expectations of Information System Benefits that Match Received Benefits: Does it Really Matter?*, 40 INFO. & MGMT. 115 (2002); Barbara Lynn Marcolin, *The Impact of Users' Expectations on the Success of Information Technology Implementation* (2014), <http://ir.lib.uwo.ca/digitizedtheses/2325>.

78. See Wilson, *supra* note 41, at 79.

79. See generally Gemma John, *Relations that Unite and Divide: A Study of Freedom of Information Legislation and Transparency in Scotland* (Dec. 2008) (unpublished dissertation, University of St. Andrews).

80. Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387 (stating that agencies may not have sufficient resources to process orders for information from users).

81. See Wilson, *supra* note 41, at 94.

## B. Factors Affecting Usability

### 1. Knowledge of bureaucracies

To use FOI laws effectively requires have some knowledge in certain areas, such as the nature of one's access rights and the procedures to exercise them.<sup>82</sup> Knowledge of government bureaucracy and structure are also important for using access laws.<sup>83</sup> This bureaucratic knowledge gives FOI users realistic expectations needed to conduct successful searches. Novice users, for example, can incorrectly assume governments have a single, central database that can be searched for anything.<sup>84</sup> It should not be surprising that novice users have misconceptions about governments as the need for an access law acknowledges government secrecy is a problem. Unless one is employed in a government department or routinely engages with one, it may take time to develop knowledge of bureaucracy and to develop expertise in using access laws. In the United States, a cottage industry of expert FOI users has emerged.<sup>85</sup> The challenges of learning how to use FOI proficiently also means it may take time before users in field such as journalism<sup>86</sup> or academic research are in a position to share their knowledge.<sup>87</sup>

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82. See Madhupa Bakshi, *Miles to Go: Effectiveness of RTI for Women*, GLOBAL MEDIA J. 1, 6-7.

83. See Martin Webb, *Disciplining the Everyday State and Society? Anti-Corruption and Right to Information Activism in Delhi*, 47 CONTRIBUTIONS TO INDIAN SOC. 363, 375-76 (2013) (explaining that Hindi word 'jaankaari' is used amongst FOI users in India to refer to the difficult to attain knowledge of government bureaucratic structures that is helpful for using FOI).

84. Wilson, *supra* note 41, at 65.

85. *Id.* at 48.

86. DAVID CUILLIER & CHARLES DAVIS, *THE ART OF ACCESS: STRATEGIES FOR ACQUIRING PUBLIC RECORDS* (2010); HEATHER BROOKE, *YOUR RIGHT TO KNOW: A CITIZEN'S GUIDE TO THE FREEDOM OF INFORMATION ACT* (2007); Cribb, et al., *supra* note 43; JIM BRONSKILL & DAVID MCKIE, *YOUR RIGHT TO KNOW: HOW TO USE THE LAW TO GET GOVERNMENT SECRETS* (2014).

87. E.g., K. J. Brown, *Counterblast: Freedom of Information as a Research Tool: Realising Its Potential*, 48 HOWARD J. 88 (2009); R. Lee, *Research Uses of the U.S. Freedom of Information Act*, 13 FIELD METHODS 370 (2001); Ashley Savage & Richard Hyde, *Using Freedom of Information Requests to Facilitate Research*, 17 INT'L J. OF SOC. RESEARCH METHODOLOGY 303 (2014); K. Walby & Mike Larsen, *Access to Information and Freedom of Information Requests: Neglected Means of Data Production in the Social Sciences*, 18 QUALITATIVE INQUIRY 31 (2011); Shannon M. Oltmann et al., *Using Open Records Laws for Research Purposes*, 37 LIBRARY & INFO. SCI. RES. 323 (2015); Dominique Clément, *"Freedom" of Information in Canada: Implications for Historical Research*, 75 LABOUR / LE TRAVAIL 101 (2015); Cathy Murray, *Sport in Care: Using Freedom of Information Requests to Elicit Data about Looked after Childrens Involvement, in Physical Activity*, 43 BRITISH J. SOC. WORK, 1347 (2013); Alexander J. Fowler, et al., *The UK Freedom of Information Act (2000), in Healthcare Research: A Systematic Review*, 3 BMJ OPEN 1 (2013); LARSEN, *supra* note 49.

## 2. Non-government capacity

Another factor affecting the usability of FOI laws is the how engaged civil society organizations are with access rights. In many countries, public interest groups, media associations, and other civil society organizations are not only important users of FOI laws but also promoters of it.<sup>88</sup> Use of FOI legislation by community organizations has also had secondary benefits, such as making FOI laws easier to use by journalists.<sup>89</sup> Additionally, when community-based organizations routinely use access laws, it has been found to have a positive effect on the empowerment of citizens.<sup>90</sup> FOI usage levels could be an indicator of the capacity of civil society to use access rights or whether conditions for a robust civil society are present.<sup>91</sup>

## 3. Governments burdening the FOI system

Another factor that can affect usability of FOI laws is government procedures for responding to users. Depending on the sensitivity of the records being accessed, the procedures for reviewing and providing them can change in complexity. The use of FOI laws can draw criticism because of the alleged costs it places on government authorities.<sup>92</sup> FOI laws are often characterized as a method of last resort and to be used after all other informal and presumably less costly methods have been exhausted.<sup>93</sup> But this characterization is specious. The procedures for responding to informal access methods also involve costs for locating, retrieving, and protecting sensitive information and therefore have the same costs as formal access methods. If any of these informal procedures are more cost effective, then government administrations should integrate them into their FOI handling procedures. This implies that using FOI laws should actually be the most cost-effective method of accessing unpublished information.

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88. See ROBERTS, *supra* note 34, at 116-20.

89. See Camaj, *supra* note 12, at 12 (“[J]ournalists attributed this to the role of the civil society organization MANS that has filed more than 30,000 FOI requests, often serving as intermediaries for citizens and journalists. Such high demand for FOI has led to increased awareness of the right to information among governmental officials and increased efforts and commitment to comply.”).

90. Emmanuel Skoufas, Renanta Narita, & Ambar Narayan, *Does Access to Information Empower the Poor? Evidence from the Dominican Republic* 23-25 (May 2014), <http://ssrn.com/abstract=2445212>.

91. See ROBERTS, *supra* note 34, at 118 (explaining how the capacity of civil society organizations are affected by tax laws and presence of donors who can help sustain them).

92. See Mark Boven, *Information Rights: Citizenship in the Information Society*, 10 J. POL. PHIL. 317, 324 (2002); Wilson, *supra* note 41, at 50; Judith Ross & Phillip Whittaker, *Freedom of Information: Is Openness Too Expensive, Too Difficult or Too Dangerous?*, 7 J. FIN. & MGMT PUB. SECTOR 55, 59 (2009).

93. E.g., Mark Mulqueen, *FOI and Public Trust in Parliament, in IRELAND AND FREEDOM OF INFORMATION ACT: FOI @ 15*, at 85-102 (Maura Adshead & Tom Felle, eds., 2015).

Governments can, however, create extraneous burdens that affect the usability of FOI laws. In an investigation of secret rules for responding to the media, the Information Commissioner of Canada found

institutions that label access requests as “sensitive,” “of interest” or “amber light,” or with some other marker indicating special handling, tend to delay requests for unacceptably long periods. We also found that the media are not the only ones to encounter such delays. Requests from parliamentarians, organizations, academics and lawyers are also delayed<sup>94</sup>

Cultures of administrative secrecy within government organizations create unnecessary resistance that frustrates FOI access procedures.<sup>95</sup> Governments can also burden FOI systems by withholding funding from it.<sup>96</sup> And when governments tightly control messages to the public, it becomes more difficult for FOI users to know what their governments are doing or what records they have in the first place.<sup>97</sup>

### C. Legislative Mechanisms for Enhancing Usability

Legislative mechanisms can enhance the usability of FOI laws. One mechanism is the principle of identity neutrality, which prevents governments from requiring a person to provide information about their identity or explaining why they are accessing the information.<sup>98</sup> Eighty-four out of 111 national FOI laws have some level of restriction on governments asking users the reasons they want information,<sup>99</sup> while eighty-three

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94. Information Commissioner of Canada, *Maximizing Compliance for Greater Transparency* 29 (Jun. 2009) (finding delays when media, academic, etc. users labelled) <http://www.oic-ci.gc.ca/telechargements-downloads/userfiles/files/OIC08-09E.pdf>.

95. See Vincent Kazmierski, *Accessing Democracy: The Critical Relationship*, CAN. J. L. & SOCIETY 613, 615-17 (describing reports of administrative secrecy in the government of Canada); Daxton R. “Chip” Stewart, *Let the Sunshine in, or Else: An Examination of the “Teeth” of State and Federal Open Meeting and Records Law*, COMM. L. & POL’Y 256, 300-03; Herbert W. Synder, *The Study of the Effects of Electronic Storage of Government Information on the Freedom of Information Act* 45 (Dec. 1998) (unpublished dissertation, Syracuse University) (describing how some FOI officials in the United States of America narrowly construe a user’s search parameters); Alasdair Roberts, *Administrative Discretion and the Access to Information Act: An Internal Law on Open Government?*, 45 CAN. PUB. ADMIN. 175, 176 (2002) (summarizing an investigation into Canada’s human resource development agency that determined users that had ordered information identified as “sensitive” had longer response times).

96. See Wilson, *supra* note 41, at 110 (describing United States federal government underfunding FOI programs); Jane Lee, *Abbott Government Has Not Appointed FOI Commissioner*, SYDNEY MORNING HERALD (Aug. 26, 2015), <http://www.smh.com.au/federal-politics/political-news/abbott-government-has-not-appointed-foi-commissioner-20150825-gj7ks2.html>

97. See Kreimer, *supra* note 12, at 1025.

98. See McDonagh & Paterson, *supra* note 38, at 507.

99. Based on a review of scores of indicator 13 of Global Right to Information Rating. Indicator 13 is “Requesters are not required to provide reasons for their requests.” The rating system

minimize the amount of information the user is to provide about themselves.<sup>100</sup>

Another statutory mechanism to enhance usability is to assign government officials a duty to assist users. In a comparative study of Canada, the United States, New Zealand, Australia, and the United Kingdom, the Information Commissioner of Canada found this clause involves three principal features: helping the user identify the information they want, conducting a fair and reasonable search, and responding to the user as accurately and quickly as possible.<sup>101</sup> According to the Global Right to Information Rating, of 111 national FOI laws, 78 assign officials some duty to assist users.<sup>102</sup> A duty to assist requirement would also be expected to include assisting people with special needs arising from circumstances such as disabilities, illiteracy, or other circumstances. The Global Right to Information found that sixty national FOI laws have some requirement to assist people with special needs.<sup>103</sup> As people with disabilities may be underemployed, fees associated with using access laws affect their usability. Seventy-eight of 111 national FOI laws do not include clauses that waive fees for people with low or no income.<sup>104</sup>

A third statutory mechanism to make FOI laws more usable is to require government bodies to publish information that helps users find information.<sup>105</sup> Canada's Access to Information Act, for example, requires the federal government to publish "a description of all classes of records under the control of each government institution in sufficient detail to

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gives a score of 2, 1, or 0. Data was accessed in October 2016 from <http://www.rti-rating.org/by-indicator/?indicator=13>.

100. Based on a review of scores of indicator 14 of Global Right to Information Rating. Indicator 14 is "Requesters are only required to provide the details necessary for identifying and delivering the information (i.e. some form of address for delivery)." The rating system gives a score of 2, 1, or 0. Data was accessed in October 2016 from <http://www.rti-rating.org/by-indicator/?indicator=14>.

101. Information Commissioner of Canada, *The Duty to Assist: A Comparative Study*, Office of the Information Commissioner of Canada (May 2008).

102. Global Right to Information Rating, indicator 16 ("Public officials are required provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification"). The rating system gives a score of 2, 1, or 0. Data was accessed in April 2016 from <http://www.rti-rating.org/by-indicator/?indicator=16>.

103. Global Right to Information Rating, indicator 17 ("Public officials are required to provide assistance to requesters who require it because of special needs, for example because they are illiterate or disabled"). The rating system gives a score of 2, 1, or 0. Data was collected in October 2016 from <http://www.rti-rating.org/by-indicator/?indicator=17>.

104. Global Right to Information Rating, indicator 26 ("There are fee waivers for impecunious requesters"). The rating system gives a score of 2, 1, or 0. Data accessed in October 2016 from <http://www.rti-rating.org/by-indicator/?indicator=26>.

105. Global Right to Information Rating, *Indicator 58*, <http://www.rti-rating.org/by-indicator/?indicator=58> (last visited Mar. 12, 2017).

facilitate the exercise of the right of access under this Act.”<sup>106</sup> In library and other information professions, this requirement can be understood as a requirement to publish “description” or “metadata.” Often used interchangeably, description and metadata refer to a process of describing resources in a standardized way. A briefing memo, for example, could be described in terms of which organization it was produced within, the date it was produced, who authored it, and who it was sent to. When this sort of description or metadata is created, it makes it easier for an organization to organize, manage, retrieve, and dispose of information. Requiring governments to publish metadata and description is important because it can help FOI users know what records they can order.

#### IV. REQUIREMENTS TO PUBLISH DESCRIPTION AND METADATA

##### A. *Prerequisite Knowledge for Using FOI*

Amongst India’s users of the Right to Information Act, “jaankaari” refers to the practical knowledge required to exercise access rights effectively.<sup>107</sup> This knowledge can be difficult to acquire. Using FOI legislation requires having pre-requisite knowledge in certain areas, such as what governments departments are doing.<sup>108</sup> It is easier to order information from a government authority if details of its activities are already publicly available. For this reason, FOI laws are more likely to be usable where institutions, such as the media, the courts, and whistleblowers are capable of making government activities known to potential FOI users.<sup>109</sup> In absence of these sources, users may also learn about government activities by using FOI, finding insider sources, or carefully reading statements made in the public.<sup>110</sup>

Another prerequisite knowledge needed to use FOI legislation is the procedural knowledge to actually invoke one’s access rights.<sup>111</sup> Related to this, is knowledge of the internal procedures government officials follow when providing access to information.<sup>112</sup> Internal handling terminology such as “office of primary interest,” which in the Canadian context refers to office

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106. Access to Information Act, RSC 1985, c A-1, <http://laws-lois.justice.gc.ca/eng/acts/A-1/page-1.html>.

107. Webb, *supra* note 83, at 374-76.

108. See Kreimer, *supra* note 12, at 1029-32.

109. *Id.* (explaining how using freedom of information legislation to learn about the global war on terror can be difficult because its activities are highly secretive to begin with).

110. See generally CUILLIER & DAVIS, *supra* note 86, at 64-82.

111. Cox, *supra* note 80, at 402.

112. ROBERTS, *supra* note 34, at 117.



that is deemed to be in custody of the documents the FOI user wants,<sup>113</sup> is helpful because it allows users to set expectations when exercising their access rights.

Knowing government activity or the procedures for invoking one's access rights is not sufficient for using access laws effectively. What is also required is knowledge of the specific records wanted. This requires users to develop knowledge of the records keeping practices of a government authority,<sup>114</sup> document vocabularies,<sup>115</sup> and how information sources, such as internal databases, can be searched.<sup>116</sup> Given the importance of this type of knowledge for using FOI laws effectively, it is important to monitor when governments fail to live up to their obligations to publish information about the documents they have.<sup>117</sup>

### B. *Publishing Description and Metadata*

What is the nature of the requirements that national FOI laws place on government authorities to publish description and metadata? The following results were based on a content analysis of national FOI laws. From the international Global Right to Information Rating, sixty-eight FOI laws were identified as having a requirement to publish a list or registers of documents in their possession.<sup>118</sup> From these laws, sixty-two were selected because they were available in English. On inspection, eleven laws were determined not to have substantial requirements to publish registers of documents and so were excluded, which left a total of fifty-one FOI laws reviewed.

The content analysis was conducted in two phases. In the first phase, the sections containing the requirements to publish description of records were examined and open codes created in response to conceptual features of the requirements. This close reading revealed these requirements were usually part of more complex sections that had additional requirements to publish information. These complementary requirements were also open

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113. Walby & Larsen, *supra* note 87, at 629.

114. Cox, *supra* note 80, at 389-90; ROBERTS, *supra* note 34, at 117.

115. Walby & Larsen, *supra* note 87, at 629.

116. Cox, *supra* note 80, at 402 (stating that while the United States Department of Justice publishes a helpful list of major information systems, it could be more useful if the list also described "how they are searched or the kinds of records they produce").

117. *See id.* at 403 (noting "many agencies have done nothing to comply with this statutory mandate"); National Security Archive, *File Not Found: 10 Years after E-FOIA, Most Federal Agencies are Delinquent* 13 (Mar. 12, 2007) (reporting findings that "only 36% of agency sites include an identifiable list of major information systems" and "[m]any agencies have not attempted to describe their record holdings in a systematic and comprehensive way"), [http://nsarchive.gwu.edu/NSAEBB/NSAEBB216/e-foia\\_audit\\_report.pdf](http://nsarchive.gwu.edu/NSAEBB/NSAEBB216/e-foia_audit_report.pdf).

118. *Indicator 58*, *supra* note 105 ("Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public").

coded for their conceptual features. At the end of the first phase, the concepts were organized into a classification scheme. Five major classes of published information emerged, described below. In the second phase, the fifty-one FOI laws were reviewed again using closed coding based on the classification scheme. This resulted in a frequency count of conceptual features within each larger category.

#### 1. Publishing information about the access system

It is common for FOI laws to require government agencies to publish information about the access system itself. Fifty-one percent of the surveyed laws required governments to publish contact details of FOI officials. For example, China requires state organs to

prepare and publicize guides for government information. . . Guides on government information release should include types of government information, their system for arrangement, methods for obtaining information, the names of government information release organizations, their office addresses, office hours, contact telephones, fax numbers, and electronic mailing addresses etc.<sup>119</sup>

More than half (fifty-five percent) of the reviewed laws required governments to publish information about the procedures for using the legislation. For example, Croatia's law requires public authorities to publish annual reports, which contain, amongst other things, "notifications on the manner of exercising the right of access to information and re-use of information with contact data of the information officer."<sup>120</sup> Likewise, Ethiopia requires public bodies to publish a "detailed explanation of the procedures to be followed by persons who wish to access this information."<sup>121</sup>

A smaller percentage (twenty-four percent) of surveyed laws required governments to publish information about available complaint procedures. South Africa, for example, requires the Human Rights Commission to publish an easily comprehensible guide in each official language for people who want to use their access rights. Amongst many other things, the guide is required to include:

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119. People's Republic of China Ordinance on Openness of Government Information, article 19, <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan041352.pdf>.

120. Right to Information Act, article 10(1)(1), <http://www.rti-rating.org/wp-content/uploads/Croatia.pdf>.

121. A Proclamation to Provide for Freedom of the Mass Media and Access to Information, No.590/2008, <http://www.rti-rating.org/wp-content/uploads/Ethiopia.pdf>.

all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging—

(i) an internal appeal; and

(ii) an application with a court against a decision by the information officer of a public body, a decision on internal appeal or a decision of the head of a private body.<sup>122</sup>

While high frequency codes in a content analysis can reveal dominant themes, examining infrequently occurring codes can draw attention to innovations. For example, the Czech Republic was unique in requiring public authorities to publish “the procedure that the obligated body shall follow when processing all requests, suggestions and other motions filed by citizens.”<sup>123</sup> This internal handling procedure is important knowledge that assists FOI users.<sup>124</sup>

## 2. Publishing description of government organizations

Another major category of published description that emerged was information about the organization itself. Ninety-two percent of the laws reviewed required publishing a description of the structure, powers, or responsibilities of each organization. In countries without such clauses, it should not be assumed that citizens have the ability to know what government organizations exist and are established to do.

## 3. Publishing description about employees

Forty-five percent of the reviewed laws required governments to publish some information about employees. Twenty-five percent required governments to publish employee contact information and twenty-four percent required some publication of description of employee roles, responsibilities, or activities. Sixteen percent required governments to publish information about employee remuneration. This information was not necessarily exhaustive to all employees. In many cases, the information only pertained to senior employees.

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122. Promotion of Access to Information Act, section 10(2)(g), <http://www.justice.gov.za/legislation/acts/2000-002.pdf>.

123. The Freedom of Information Act, 106/1999, Section 5.1.d, <https://www.access-info.org/wp-content/uploads/Czech-Republic.pdf>.

124. See ROBERTS, *supra* note 34, at 117.

#### 4. Publishing description of government records

Based on the selection criteria, all the laws reviewed required governments to publish description of some sort about the records held by government. Of these, it was most common (eighty percent) for governments to proactively publish description of classes of records held in their custody. Significantly fewer (twenty-nine percent) required publishing item level descriptions, such as lists of documents. Even fewer (six percent) required departments to publish lists of subjects.

An innovative clause found in South Sudan, Maldives, Antigua, Finland, and Guinea was to publish description of the overall records keeping system. While many countries require publishing description of classes of records, a more comprehensive description of records keeping system within the government might help users understand how information is organized within government.

#### 5. Publishing description of government activity

A major class of information that governments published can be referred to as description of government activity. This broad class included decisions of each public authority, documents, such as draft legal acts, annual reports, inspectors, minutes of official meetings, to name only a few. A common type of document that governments are required to publish are manuals given to their employees to carry out their responsibilities. In the United States, the requirement to publish manuals, which contain instructions on how to interpret law, is aimed to diminish secret lawmaking.<sup>125</sup> Some countries required publishing employment opportunities and description of hiring procedures. Financial information, such as budgets was also a common class of information to be published.

Publishing information of this sort has a different purpose from publishing information about an organization, employee, or class of records. It has the potential to furnish the public with knowledge of what their government departments are doing, which is prerequisite knowledge for using access rights. However, the broad scope of this category and apparent lack of focus makes it doubtful that the purpose of these publishing requirements is to help people user their access rights. On review, it seems that FOI laws are simply being used to implement publishing policies aimed at a broad range of other outcomes.

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125. See Charles H. Koch, *The Freedom of Information Act: Suggestion for Making Information Available to the Public*, 32 MD. L. REV. 189, 198-99 (explaining four classes of information that assist in diminishing secret law making: opinions in cases, adopted policy interpretations, staff manuals and instructions that affect the public, and an index of promulgated policy).

## V. DISCUSSION

From a historical perspective, freedom of information legislation has its origins in minimizing government censorship. Within contemporary FOI laws, this legacy is reflected in the transference of authority to make information available from government to individuals. Using FOI laws is an act of reducing government control over thought and expression. The statutory requirement for government authorities to publish information is a mechanism to make FOI laws more usable. It allows users to identify the specific documents that they want.

The results of this content analysis show that across fifty-one national FOI laws, there is a general pattern to publish metadata or description to facilitate the use of their access rights. Although not uniformed, governments tend to publish five categories of information: (1) information about how to use the access system, (2) description of the government organization itself, (3) information about employees, (4) description of classes of information held by the organization, and (5) information about government activity. The Global Right to Information Rating,<sup>126</sup> a major international standard for evaluating FOI laws, however, only recognizes a requirement for government authorities to publish lists of records. This standard may be overlooking important classes of information that make using FOI laws more user-friendly.

Of the five categories, the generic category of information about government activities is the most peculiar. Across the fifty-one FOI laws reviewed, it was difficult to find a unifying purpose for what was being proactively published. It appeared to cover a range of topics: service descriptions, relationships with other governments, budgetary information, opportunities for participating in policy making, inventories, and so forth. In some cases, the items appeared as a list of documents, reports, or information of public interest. For example, Nigeria's FOI law requires government authorities to publish 16 classes of information, including financial planning reports, application for contracts, grant information, and substantive rules of the authority.

Some take the requirement for governments to proactively publish information as a new direction for the future of FOI laws.<sup>127</sup> From this perspective, FOI laws are taken as the legislation home for integrating publishing policies.<sup>128</sup> Yet adding classes of information to publish in FOI

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126. Specifically, indicator 58 ("Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public"), *supra* note 105.

127. Ackerman & Sandoval-Ballesteros, *supra* note 1, at 108 (stating that the "section of FOI laws that refer to the obligation to publish is absolutely crucial").

128. *Id.* at 125 ("Since publication on the Internet brings information out into the public domain much more than the printing of a report, these sections should get special attention in new FOI laws

laws should be viewed with caution. Proactive disclosure requirements can conflict with FOI laws in an important way. When governments decide which materials to publish, political interests will inevitably influence their decisions. Proactive disclosure policies may end up serving the political interests of the governing party.<sup>129</sup> By transferring the authority about what is made available from government officials to individuals, FOI laws are designed to avoid this problem. While some scholars propose that governments publish all information automatically,<sup>130</sup> it is difficult to imagine how this could be implemented without requiring an army of FOI officers to review every document for information needing protection. This would also risk accidentally disclosing information that legally requires protection.<sup>131</sup>

Proactively disclosing documents may also diminish FOI laws as a system for accessing information. In the United Kingdom, government authorities are required to publish information according to a publication scheme, which must be approved by the Information Commissioner.<sup>132</sup> However, governments have not implemented them effectively and the Information Commissioner has lacked resources to monitor them properly.<sup>133</sup> It is worth quoting findings from interviews with FOI users in the United Kingdom:

the utility of the original publication schemes has been seen to be limited, with those produced being described as “hopeless” (interview 11), “a waste of time” and “meaningless” (interview 14), “not useful” (interview 15) and “a dead loss” (interview 17) . . . The requestors that we spoke to confirmed that they had consulted publication schemes in the past and were often directed to do so in response to a request, but none had found them useful. Requestors described these as “absolutely useless” (focus group), “hasn’t

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and should be reformed in older laws.”); Information Commissioner of Canada, *Striking the Right Balance: Recommendations to Modernize the Access to Information Act* 80-81 (Mar. 2015) (specifically recommendation 6.1, 6.2, and 6.3), <http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report.aspx>.

129. See Harlan Yu & David Robinson, *The New Ambiguity of “Open Government,”* 59 UCLA L. REV. 178, 198 (2012) (summarizing criticisms of the implementation of the Obama government’s Open Government Directive).

130. CUILLIER & DAVIS, *supra* note 86, at 528-29 (proposing that government records should be open from the moment of creation).

131. See HAZELL, WORTHY, & GLOVER, *supra* note 2, at 93 (quoting an interview with a FOI official who said, “there were big mistakes, there were files or parts of files that should not have gone on the public shelf”).

132. Freedom of Information Act 2000, <http://www.legislation.gov.uk/ukpga/2000/36/contents> (section 19 and 20 pertain to publication schemes).

133. See HAZELL, WORTHY, & GLOVER, *supra* note 2, at 94-96.

been relevant” (requestor 4), does not “make any difference” (requestor 8) and “isn’t good enough” (requestor 6).<sup>134</sup>

While improvements to proactive disclosure could be made, it should not be assumed that integrating publishing requirements into FOI laws are inherently an effective method of making FOI laws more user-friendly. When governments do not publish information that people want, proactive disclosure fails entirely as a system for accessing information.<sup>135</sup>

Yet requirements for governments to publish a description about what they are doing, along with their access procedures, organizational structure, employee information, or records keeping information, can clearly be helpful to FOI users. Having knowledge of government activity is a precondition for knowing what to access in the first place.<sup>136</sup> As FOI laws are evaluated in the years to come, legislative research would stand to benefit by clarifying what forms of descriptions of government activity best helps citizens know what their government is doing. Description or information about government activity that does not help the broadest range of potential FOI users exercise their access rights is bettered suited for separate legislation.

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134. Elizabeth Shepard, Alice Stevenson, & Andrew Flinn, Freedom of Information and Records Management in Local Government: Help or Hindrance?, 16 INFO. POL’Y 111, 118 (2011).

135. See SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 179 (1983) (specifically stating “if officials make public only what they want citizens to know, then publicity becomes a sham and accountability meaningless”).

136. See Kreimer, *supra* note 12, at 1025-27.

# JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

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