Why the French FOIA "Failed"

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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" though 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 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).[1] 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.[2] 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.[3]

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.[4] 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.[5] This showed that France was usually the median performer, when measured against criteria such as compliance with timeframes and equity of access.[6] 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

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.[7] 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

7. *Id*. at 77-78.

conducted a particularly widespread and comprehensive study of access laws in 2010.[8] 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.[9] 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;[10] Michener points to the electoral cycle, executive control of the legislature and concentration of press ownership;[11] Grigorescu highlights the spread of international norms and attempts by governments to signal their trustworthiness to the electorate.[12]

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."[13] 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

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.[14] 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.[15] In addition, from 1959, an *Ordonnance* forbade civil servants from revealing to third parties any information they obtained in the exercise of their duty,[16] although it appears the courts were only willing to enforce this duty against civil servants who divulged information concerning third parties.[17] 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.[18]

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.[19] The range of circumstances involved reflected piecemeal historical development, and did not differ markedly from countries

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.[20] This is sometimes cited as a forerunner of the contemporary right of access,[21] 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.[22] 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.[23] In addition, the *Code des Communes* (Local Council Code) had long provided access to minutes, accounts and regulations of local councils.[24] 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.[25] 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.[26] 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

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.[27] 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.[28] 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,[29] 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.[30] 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 préfectorale 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.

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.[31] 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.[32]

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.[33] 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.

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.[34] 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.[35] In 1975, the working party raised the possibility of a freedom of information act as a possible solution[36]

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 C*ommission chargée de favouriser 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.

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 VERITABLE DIALOGUE ENTRE L'ADMINISTRATION ET SES USAGERS 21-23 (Premier Ministre & Commission de Coordination de la Documentation Administrativez) (1981).

36. JONATHON 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.[37] 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.[38] 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.[39] 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.[40] Its seventh Report, issued in 1976, called for the introduction of a general right of access to government documents.[41]

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.[42] Early signs were already coming to the attention of the government in the 1960s.[43] During

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, SECRECY 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.[44] These debates explicitly identified the growing asymmetry of power between administrators and the administered,[45] 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.[46]

These concerns appear to have become politically salient due to the financial crisis of the mid-1970s.[47] 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.[48] 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,[49] 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

44. *See Les déliberations 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,[50] and so indirectly to government bodies more commonly giving reasons for their decisions[51]).

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,[52] and was primarily concerned with freedom of expression rather than access to government-held information.[53] 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.[54] In November 1977 the Communists tabled a second proposal, this time for a fully-fledged access regime.[55] 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.[56]

Although the government as a whole was not particularly enthusiastic about freedom of information, it did not oppose this amendment.[57] 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.[58] The election was particularly close, due to the combination of

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.[59] 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.[60] 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.[61]

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.[62] 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.

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.[63] 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.

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.[64] 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.[65] 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,[66] and even the ombudsman (although this rapidly came to be seen as more acceptable than the alternatives).[67] 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[68] 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.[69] 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

64. The United States is another exemplar, although it is more complex institutionally and there is not sufficient space 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.[70]

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.[71] 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.[72] 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,[73] 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.

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.[74] 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.[75] 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.[76] In the early 1990s, access to personal medical files became an issue following scandals involving infected blood transfusions.[77] 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

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[78] 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.[79] 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.[80] 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

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.[81]

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.[82] 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

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.[83] *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.[84] 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.[85] 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.[86] This level of dependency is a significant contributor to the willingness of civil society organizations to accept official secrecy.[87] 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.[88] 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.[89] 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,[90] and committed to improving access in 1960, 1972, 1976,

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.[91] 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.[92] 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.[93] 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.[94] Individual members of parliament have few formal

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

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

93. Sébastien Lazardeux, *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.[95] 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.[96] 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.[97] More secure governments, in the years since, have been better able to dismiss calls for reform fairly summarily.[98]

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

96. Errera, *supra* note 24, at 92; Lazardeux, *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.[99] 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 Sécurite* 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.[100] 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.

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.[101] 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.[102] 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.

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.[103] 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.[104] 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,[105] 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

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 chachées 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.[106] 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.[107] 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

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.[108] 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.[109]

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.[110] 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,[111] 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

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 Adminsitrative 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 Ad ministratifs 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.