

# Open government, open data, and the FOIA right to information

by Judith Bannister

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## I INTRODUCTION

Freedom of information is back in the news again in the United Kingdom. There was much excitement over the release of correspondence between the Prince of Wales and Ministers in the Blair Labour Government that came to be known as the “black spider memos” (<https://www.gov.uk/government/collections/prince-of-wales-correspondence-with-government-departments>). The *Guardian* newspaper and journalist Rob Evans undertook a decade long battle to get access to the letters. The case provides an excellent case study in how rational minds can disagree about whether disclosure of government held information is, or is not, contrary to the public interest. The government departments and Information Commissioner originally agreed that the Prince’s letters ought not to be disclosed. On appeal the Upper Tribunal (*Evans v Information Commissioner* [2012] UKUT 313) allowed disclosure and the Attorney General then issued a certificate to override that decision. It was judicial review by the courts, appealed ultimately to the Supreme Court (*R (Evans) v Attorney General* [2015] 2 WLR 813), that ensured publication. The court invalidated the Attorney General’s veto certificate.

When the letters were released after the Supreme Court decision, the public learnt about a wide of range of views held by the Prince of Wales on topics such as herbal medicines, education, farming, and interestingly for this discussion, his awareness of the freedom of information regime that did not seem to have any chilling effect on his written communications (Letter to the Prime Minister dated February 24, 2005

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/427301/No10\\_Scanned\\_Letters.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427301/No10_Scanned_Letters.pdf)).

Before the case concerning the Prince’s letters had worked its way through the courts, the UK Parliament amended the Freedom of Information Act 2000 (UK) (FOIA) to change the exemption that protects the communications of the Monarch, heir and second in line to the throne from a qualified

to an absolute exemption (s 2(3)(ea); s 37(a)-(ab)). The strengthening of the exemption did not operate retrospectively and the *Evans* case continued. Removing the public interest analysis in any exemption is a step back from open access. However, it is the proposals for reform of the veto power, and more generally a call for strengthening of exemptions relating to the deliberative processes of government, that may have the greatest impact. In this piece I will argue that the differences of opinion about the veto concern the question: who gets the final say on whether disclosure is, or is not, in the public interest? Whereas, strengthening the exemptions may diminish the public interest analysis entirely, which is a major cause for concern.

## II A CALL FOR REFORM OF FOIA

Answering questions in the House of Commons the Secretary of State for Justice, Michael Gove, has called for return to the ‘founding principles’ of freedom of information:

*I think we do need to revisit the Freedom of Information Act. It is absolutely vital that we ensure that the advice that civil servants give to Ministers of whatever Government is protected so that civil servants can speak candidly and offer advice in order to ensure that Ministers do not make mistakes. There has been a worrying tendency in our courts and elsewhere to erode the protections for that safe space for policy advice, and I think it absolutely needs to be asserted. There is no contradiction between making sure that we give civil servants the protection they deserve and also ensuring that the data—for example, the amount we spend in any Government Department—are more transparent than ever...*

*We want to review the operation of the original Freedom of Information Act. Some of the judgments that have been made have actually run contrary to the spirit of the original Act, and some of those behind the original Act, including former Prime Minister Tony Blair and the Home Secretary who introduced the*

legislation, Jack Straw, have been very clear about the defects in the way in which the Act has operated. It is vital that we get back to the founding principles of freedom of information. Citizens should have access to data and they should know what is done in their name and about the money that is spent in their name, but it is also vital that the conversations between Ministers and civil servants are protected in the interests of good government (House of Commons, *Parliamentary Debates (Hansard)*, Vol 57 No 21, 23 June 2015, p 754).

This begs the question: what was the spirit of the original Act? Although an interesting place to start, a reference to founding principles does not necessarily advance the debate very far because the underlying objectives of freedom of information tend to be expressed in extremely broad terms. The UK FOIA does not include an objects or purpose clause, but drawing on extrinsic material the 2012 House of Commons post-legislative review of the Act identified the following four objectives: “openness and transparency; accountability; better decision making; and public involvement in decision making, including increased public trust in decision making by government.” (House of Commons Justice Committee, *Post-Legislative scrutiny of the Freedom of Information Act 2000* Vol 1 (2012), 8). When stating principles there is a strong temptation to rely upon grand, but vague, statements because it is difficult to challenge a “lofty goal”. (Ben Worthy, “More Open But Not More Trusted?” (2010) 23 *Governance* 561, 563). Invariably, the principles underlying freedom of information will start with an expectation of openness and transparency, and then refer to a balancing of competing public interests: government accountability versus national security; openness versus the protection of private interests and so forth. It is when the mechanisms for the assessment of those competing interests are worked out in detail that different opinions on the extent of openness emerge.

It is now part of FOIA legend that former Prime Minister Tony Blair expressed regret about passing FOIA and the way the competing views on the public interest were balanced in the legislation. In his autobiography he wrote:

*Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible nincompoop... The truth is that the FOI Act isn't used, for the most part, by 'the people'. It's used by journalists. For political leaders, it's like saying to someone who is hitting you over the head with a stick, 'Hey, try this instead', and handing them a mallet. The information is neither sought because the journalist is curious to know, nor given to bestow knowledge on 'the people'. It's used as a weapon.*

*But another and much more important reason why it is a dangerous Act is that governments, like any other organisations, need to be able to debate, discuss and decide issues with a*

*reasonable level of confidentiality. This is not mildly important. It is of the essence. Without the confidentiality, people are inhibited and the consideration of options is limited in a way that isn't conducive to good decision-making. In every system that goes down this path, what happens is that people watch what they put in writing and talk without committing to paper. It's a thoroughly bad way of analysing complex issues. (Tony Blair, *A Journey*, Random House, 2010) 516-17)*

Despite these expressions of regret, a system with a guarantee of confidentiality for government decision-makers was not the Act that was passed. It was a far more open statutory scheme that did not grant blanket absolute exemptions to government officials, and did not confine transparency to published facts and figures about money spent and government actions taken. The references in the quotes above to the publication of data and bestowing knowledge on the people suggests a reimagining of FOIA where accountability is satisfied by an “accounting” to the public by reporting of facts and figures. This is part of the FOIA story, but only one part.

### III THE FACTS AND FIGURES ABOUT GOVERNMENTS

Journalists have certainly used FOIA to draw out scandals. Far more commonly, they use the legislation as a tool to source stories about the activities of government, and a good deal of that information could be characterised as the ‘data’ of government being discussed by the Secretary of State for Justice. Some examples give a sense of the facts and figures focus: “Number of vulnerable children in UK rises for fifth successive year” (*The Guardian*, June 23, 2015); “Almost 500 bikes stolen in Flintshire” (*Daily Post*, June 23, 2015); “Cost of policing Sky Blues last season just £45k” (*Coventry Telegraph*, June 22, 2015, 2); “Speeding figures show a 30% drop” (*East Anglian Daily Times*, June 22, 2015).

When it comes to release of this kind of information there is no doubt that governments in the 21st century are far more open than ever before. That might seem a strange claim to make when UK readers recall the FOIA struggle to draw out details of MPs’ expenses (David Barrett, Andy Bloxham and Nick Collins, “MPs’ expenses timeline”, *The Telegraph*, April 8, 2011) but a little mid-20th century history puts current openness into perspective. The stories of official secrecy recounted by the freedom of information advocates of the 1970s and 1980s remind us how far open government has come. Before FOIA British researchers and journalists turned to United States sources to find out basic information about their own government on matters such as food hygiene and consumer product reports (James Michael, *The Politics of Secrecy*, Penguin, 1982, 9-11). There was a time when the staple of government accountability, the annual report, seemed optional. Writing about Australia in 1972 James Spigelman noted: “[s]

uch vital departments as Prime Minister's, Treasury, Trade, Primary Industry, Attorney-General's, Shipping and Transport do not present comprehensive reports. The Department of External Affairs presented a report in 1967, the first since 1940" (James Spigelman, *Secrecy*, Angus and Robertson, 1972, 10).

FOIA has been part of a much broader transparency movement that has transformed representative democracies. Governments in modern democracies now publish more information than could possibly have been imagined before the open government reforms. Advances in information technology have facilitated this access with government department and agency websites publishing policies, statistics, publications and consultation documents ([www.gov.uk](http://www.gov.uk)) and open data sets (<http://data.gov.uk>). Underlying government's adoption of this technology has been a major shift in attitude to information disclosure that has slowly evolved over decades, underpinned by the FOIA statutory obligations to publish.

However, access to datasets and publication of policies and reasons that inform us about what is done in our name, is only one element of open government. Some of this routine publication of information is done in compliance with statutory obligations, but much more is voluntary as governments embrace the open data movement. Voluntary disclosures are certainly important developments in transparency, but they are at the discretion of Ministers and the civil service and are not a substitute for FOIA. An enforceable right of access – the right to compel disclosure of official information – is a very different and far more powerful right.

#### IV COMPELLED DISCLOSURE

FOIA offers much more than published data, it offers the possibility of finding out how governments work, how and why decisions were made, to debate the competence of administrations and hold them to account. The central feature of freedom of information is that it is an enforceable statutory right of access to government information. It is the right to compel disclosure, subject to a range of exemptions. The routine, often voluntary, publication of data, although important, is no substitute.

What is being proposed in the calls for reform is a re-negotiation of some key features of the UK FOIA, namely: the scope of the exemptions concerned with the formulation of government policy; and who has the final say on the public interest assessment. The exemptions and the external review processes of the UK FOIA were analysed and fought over in great detail before the legislation was enacted. Individual applicants, Ministers and government authorities will inevitably disagree with the outcomes in particular cases, but the application of the exemptions in the court, tribunal and Information Commissioner's decisions have not eroded

guaranteed protections for a "safe space" for policy advice, the public interest balancing that has been undertaken by the Information Commissioner and tribunals over the last 10 years is exactly what was envisaged by the legislation.

#### V THE BALANCE STRUCK BY FOIA

As the House of Commons Public Administration Committee noted before the Bill was finally passed, it was a "long road to Freedom of Information" in the United Kingdom. (House of Commons, *Public Administration – Third Report; Freedom of Information Draft Bill* (Cmnd 4355, 1999) xvi. (1998/99 HC 570-i)). There were very gradual developments toward discretionary publication of government of information, which were noted by the Fulton Committee back in 1968. Well before the openness that came with FOIA was adopted, governments were slowly moving into a new age of publication of official information, if only certain limited kinds of information. In 1968 The Civil Service Report (Cmnd 3638) Select Committee commented:

*We welcome the trend in recent years towards wider and more open consultation before decisions are taken; and we welcome, too, the increasing provision of the detailed information on which decisions are made. (Select Committee, The Civil Service Report, Chairman Lord Fulton (Cmnd 3638) 91 – 92 [278])*

The 1977 confidential internal memo sent to Permanent Secretaries – known as the "Croham Directive" – came to public attention when it was leaked (James Michael, *The Politics of Secrecy; Confidential government and the public right to know*, Penguin, 1982, p 205). The memo instructed the civil service to separate out factual material from the advice based upon it so that the facts could be published. It was a very slow process, and certainly not a statutory right of access, but civil servants were gradually coming to terms with the idea that government's had an obligation to publish information that explained to the public the reasons for certain decisions and the facts and figures that supported those decisions.

The early proposals for freedom of information in the United Kingdom were based upon a code of conduct rather than a statutory scheme, and a Code was introduced in 1994 (*Open Government; Code of Practice on Access to Government Information*, Revised 2nd ed, 1997). The Code of Practice continued with the focus upon facts, analyses and reasons, and the stated aims included:

- *to improve policy-making and the democratic process by extending access to the facts and analyses which provide the basis for the consideration of proposed policy;*
- *to protect the interests of individuals and companies by ensuring that reasons are given for administrative decisions, except where there is statutory authority or established*

convention to the contrary; (*Open Government; Code of Practice on Access to Government Information*, Revised 2nd ed, 1997, 1).

What the Code did not provide was a statutory right of access, and it was that the Labour Government promised in the 1997 white paper (Cabinet Office, *Your Right to Know; Freedom of Information 1997* (Cmnd 3818)) described by the House of Commons Select Committee on Public Administration as a “radical advance in open and accountable government” (House of Commons. Select Committee on Public Administration, *Third Report, Your Right to Know: Your Government’s Proposals for a Freedom of Information Act* (HC 1997-98), 398-1, para 1).

The draft Bill published in 1999 offered a right of access, but there were a number of areas where the Bill did not fulfil the earlier promises. Notably, for the purposes of this discussion, the exemption in the original Bill concerned with decision-making and policy formulation was wide-ranging, and the assessment of the public interest in disclosure was at the discretion of the public authority holding the information. In the draft Bill that assessment could not be overridden by the Information Commissioner. What was proposed was a discretionary system and the Government was clear in its position that:

*the right person to make the final decision on [disclosure in the public interest], having taken into account anything that the Commissioner, for example, might propose, would be the public authority itself* (House of Commons Select Committee on Public Administration, *Third Report, Freedom of Information Draft Bill* (HC 1998-99), 570-1, xxvi.)

When reading current arguments that refer to the original “spirit” of the legislation it is important to emphasise that while this approach is probably the one that many politicians and civil servants favoured at the time, and wished had been passed, the draft Bill underwent major revisions.

The discretionary disclosures approach was opposed by critics of the Bill. The House of Commons Select Committee on Public Administration emphasised the need to make proposed legislation “more of a Freedom of Information Bill and less of a statement of commitment to Open Government... An effective Bill needs to be based more firmly on clear rights and less on discretionary duties” (House of Commons. Select Committee on Public Administration, *Third Report, Freedom of Information Draft Bill* (HC 1998-99), 570-1, xxxv.)

What was passed in the UK was legislation that had very few absolute exemptions when compared with other comparable jurisdictions that had introduced freedom of information in earlier years. Unlike Australian freedom of information, for example, the UK has no absolute exemption for cabinet documents (see *Freedom of information Act 1982* (Cth) s 34). For the many qualified exemptions, including the exemption

concerning formulation of government policy (FOIA, s 35), whether disclosure will be required involves a public interest assessment focusing upon “all the circumstances of the case”. The information will be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure (s 2 (1)(b); s 2(2)(b)). This is an assessment made at first instance by the public authority that holds the information, but is a decision that can be reviewed by the Information Commissioner (Part IV) and appealed on to the Tribunal (Part V). The task of the Commissioner (and in turn the Tribunal) is to consider whether the public authority has failed to release information when the Act required disclosure, including an assessment of the public interest element of the qualified exemptions.

This system of external review is very different to the strong discretion that was to be retained by public authorities in the first draft of the Bill, but it is this system that was passed into law. When Ministers and public authorities disagree with disclosure of information, often in relation to material that discloses the deliberative process of government, the disagreement is with the public interest analysis in particular cases. Governments inevitably place greater emphasis on protecting the “thinking spaces” of decision-makers, but many of these claims amount to a demand for blanket protection regardless of the material under consideration. The Information Commissioner and Tribunals look at the specific information involved in particular cases and can come to a different decision on the public interest. While complaints may often be expressed in terms of the scope of the exemption for deliberative processes, so long as that exemption is qualified by a public interest test, and so long as rational minds differ on how to assess the public interest, the real dispute is over who has the final say on what the public interest requires.

This was the last part of the balance struck when the UK FOIA was passed into law. With discretionary disclosure removed from the public authorities, and independent external review strengthened, the balance that was struck was to grant a veto power to the government. The veto shifts power back to centre of Executive government. It effectively grants a ‘trump card’ (Philip Coppel, *Information Rights; Law and Practice* (4th ed, Hart Publishing, 2014) [28.014]).

The Supreme Court’s decision in the *Evans* case (*R (Evans) v Attorney General* [2015] 2 WLR 813), affirming the Court of Appeal (*R (Evans) v Attorney General* [2014] QB 855), has left government with a veto power that is far less powerful than had been assumed. The veto empowers senior members of the government (including Cabinet Ministers and the Attorney General) to issue a certificate that overrides decisions or enforcement notices issued by the UK Information Commissioner or Information Tribunal (FOIA, s 53(2)). Any decision by the Information Commissioner or Tribunal that

the public interest requires disclosure of documents ceases to have effect.

In the *Evans* case the court invalidated the Attorney General's veto certificate because it could not be justified on reasonable grounds. The legislation requires the person signing the certificate to form the opinion that the authority's assessment of whether disclosure is required, including the assessment of the public interest, is the correct one on "reasonable grounds" (FOIA, s 53(2)).

The veto is exercised only after a comprehensive review of the issues by the Information Commissioner or the Tribunal, who publish their decisions. For the Supreme Court this was problematic because it left the executive government attempting to overrule judicial decisions. The Supreme Court set a high standard for "reasonable grounds": simply coming to a different conclusion on the public interest was not sufficient.

What is left is very limited circumstances in which a veto certificate might be issued in relation a tribunal decision, and some uncertainty over whether there is any greater scope for veto of decisions of the Information Commissioner, given the availability of an appeal process (*R (Evans) v Attorney General* [2015] 2 WLR 813 [86]).

## VI CONCLUSION

A freedom of information system with few absolute exemptions that favours external review of information access decisions through an appeal process over executive vetoes is admirable. It is understandable that the government is

perturbed by the outcome in *Evans*, but there are very real concerns that calls for FOIA reform may blur the veto debate and seek a far greater winding back of the right to information. The first response, well before the *Evans* case reached the Supreme Court, was to introduce an absolute exemption to protect the communications of the Monarch, heir and second in line to the throne (*Constitutional Reform and Governance Act 2010* (c 25) (UK), sch 7). There may be similar attempts to introduce other absolute exemptions, for example for Cabinet documents. The call for protections of "safe thinking spaces" if similarly expressed in terms of an absolute exemption allowing only the release of factual information such as spending "data", is of particular concern. It would not be a return to the spirit of the legislation, but a step back to a time before FOIA.

On July 17, 2015 the Parliamentary Secretary for the Cabinet Office, Lord Bridges, announced a new Freedom of Information Commission to review FOIA ([www.gov.uk/government/speeches/freedom-of-information-new-commission](http://www.gov.uk/government/speeches/freedom-of-information-new-commission)). The Terms of Reference make particular reference to "whether the operation of the Act adequately recognises the need for a 'safe space' for policy development". The Commission is due to report by the end of November 2015.

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