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## **Measures of Success for Freedom of Information**

### **INTRODUCTION**

How do we measure the success of Freedom of Information (FOI)? The Constitution Unit is carrying out what we believe to be the first systematic study of the objectives, benefits and consequences of FOI ever undertaken. We are seeking to answer two questions: are the objectives of the UK FOI Act being achieved? And how has FOI affected the workings of central government? There is a preliminary question on which these questions depend, however. How do we measure the success of FOI? In this paper I would like to pick up the challenge laid down by Al Roberts earlier in this conference, who showed that the Right to Information (RTI) movement could be criticised for its lack of knowledge about even the most fundamental questions, by talking about our attempt to increase our understanding of the impact of FOI in the UK.

It is surprising that there is so little hard, systematic evidence about the impact of FOI, and that ours appears to be the first study of its kind. But this is not just the academic community keeping itself in work. FOI is now on the good governance agenda for all democracies. It is spreading rapidly across the world, but with surprisingly little testing or firm understanding of what FOI achieves in practice. Even without the global dimension, all policy requires an 'evidence base' which is currently lacking in FOI. So understanding how it works and what it does and does not do is highly important.

In this paper I will show the methods we are using to evaluate FOI and against which criteria. I will start, however, by setting the scene with a short background on the UK FOI Act.

## **THE UK FOI ACT: KEY CHARACTERISTICS AND UNIQUE POINTS**

The UK Freedom of Information Act was passed in 2000 and came into force on 1<sup>st</sup> January 2005. It grants a statutory right of access to government information held in any form and places public authorities under a duty to pro-actively release information through publication schemes. While it is comparable to other RTI laws, it has a number of salient characteristics.

Firstly, the Act has an extremely wide scope. It covers more than 100, 000 public bodies across central and local government and the wider public sector across the UK. It was implemented simultaneously across these levels government rather than gradually, sector by sector. And it was entirely retrospective from day one: it applies to information held or collected before it came into force. Anyone can make a request for information, from the UK or abroad.

Secondly, there is effectively no fees regime. Authorities do have the right to charge a fee, but only the National Archives do. Authorities can however refuse to process a request if doing so would cost more than a maximum limit set out in the Act (£600 for central government; £450 for local government).

Thirdly, at first sight the exemptions seem highly restrictive, with no less than 23 exemption provisions. But of these there are 15 exemptions which require application of the public interest test: even if information falls within the exemption it can only be withheld if it is in the public interest to do so. The starting point of the public interest test is that there is a general public interest in disclosing information, and the Information Commissioner and Tribunal have been rigorous in upholding this.

Fourthly, there are four tiers of appeal. A dissatisfied requester can ask first for an internal review, then appeal to the Information Commissioner, then to the Information Tribunal, and finally to the High Court on a point of law. This is unlike the USA, for

example, which relies upon the mainstream court system, or Ireland where the FOI regime is overseen by a Commissioner only. The Information Commissioner has the power to order disclosure, unlike the Information Commissioner in Canada or the Ombudsmen in Australia and New Zealand who can only make recommendations.

## **MEASURING THE IMPACT OF FOI**

One reason why this is the first study which attempts to ‘measure’ the impact of FOI may be because it is far from easy to do so. How is it possible to measure the success of FOI? We have five main research methods, which I will review briefly below. These are:

- Review of official and academic literature;
- Survey of FOI requesters;
- Interviews with government officials and others knowledgeable about the FOIA;
- Analysis of publication schemes and websites;
- Analysis of articles about FOI disclosures in national newspapers.

### **Literature Review To Identify The Objectives Of FOI**

The starting point of any evaluation is to measure the effects of the policy against its objectives. Unlike some FOI laws, the UK FOI Act has no purpose clause. We therefore conducted a literature review of official sources – such as the government’s Green and White Papers, ministerial speeches and parliamentary debates – to identify the stated objectives of FOI. Having identified these objectives, we used the remaining methods to analyse the extent to which FOI is achieving these objectives in practice.

### **Survey Of Requesters**

Our most innovative research method is the survey of requesters. As Al Roberts sets out in his conference paper, we still do not know the answer to three fundamental questions about RTI legislation: who are the requesters? What sort of information do they ask for? What do they do with the information when they get it? We hope to answer these questions by asking the people who make the requests. We have set up a survey online, to which requesters will be provided with a link when government departments respond to their requests. This obviously requires government cooperation, but departments have been hesitant for a number of reasons. As with all surveys, there is a risk of bias: because those who choose to respond may be those who want to express their

dissatisfaction. This is something we will never know for certain, because we are unlikely to get a 100% response rate.

### **Interviews With Officials**

The view from the survey of requesters needs to be supplemented by the view from the Civil Service. We aim to interview a sample of senior officials in a number of departments: those with FOI expertise and those with broader policy experience, such as permanent secretaries, senior information champions, legal advisers, heads of communications, heads of procurement, heads of parliamentary relations, and policy officials dealing with a lot of stakeholders. We will also interview retired officials, others knowledgeable about FOI, and those involved in the drafting of the legislation. This is the only way to uncover the impact of FOI on government working practices beyond a superficial, anecdotal analysis.

### **Analysis of Publications Schemes, Websites and Disclosure Logs**

The UK Act is innovative in placing public authorities under a duty to proactively publish information through publication schemes. (A publication scheme is a list of classes of information that authorities commit to publishing, and a guide to how the information can be accessed. The scheme has to be approved by the Information Commissioner.) By analysing publication schemes and websites in tandem we hope to be able to evaluate whether authorities are becoming increasingly transparent, and why. If there is increased transparency, how much of this is because of FOI, and how much because of other factors, for example developments in information technology?

Disclosure logs are an innovation by the public authorities themselves. They involve listing on their website all previous FOI releases. This saves departments the administrative effort of dealing with repeated requests for the same information. We can ask questions about the logs themselves, such as how popular a feature they are of departmental websites. And we can evaluate how media coverage of a disclosure corresponds with the information disclosed by the department.

## **Media Content Analysis**

99 per cent of the population do not make FOI requests. Few read disclosure logs on government websites. Most people hear of FOI or information obtained under it through a secondary source, the media. To understand the impact of FOI disclosures which are selected and edited by the media, we are carrying out a media content analysis of FOI stories in the UK national press. And to understand the media's selection and editing policies, we have interviewed journalists who make FOI requests and write FOI stories. We aim to find out what types of government information the media select to publicise through FOI stories, and the impact of those stories on people's understanding of government decision making, and on their trust in government. Understanding media use of FOI is critical to understanding how the vast majority of the population learn about FOI and government through the selective prism of the media. We will compare the results of the media analysis with results from our surveys of requesters and disclosure logs.

## **THE OBJECTIVES OF FOI**

If the UK FOI Act does not have a purpose clause, what is it for? A trawl through the literature reveals a range of primary and secondary objectives. Some of the latter include: better record keeping; more thorough and balanced advice to Ministers; increased efficiency in government procurement; improved service delivery; and increased administrative efficiency. We have restricted our analysis to six primary objectives, which are the ones most frequently mentioned by ministers and in the official literature:

1. Greater transparency;
2. Increased government accountability;
3. Better quality government decision-making;
4. More effective public participation in the political process;
5. Greater public understanding of government decision-making;
6. Increased trust and confidence in government.

I will attempt next to describe how we can measure whether each objective is being achieved, and provide one or two examples. The examples are limited at this stage because we have not yet started on our two main research methods, the survey of requesters and interviews with officials.

## 1. Greater Transparency

Transparency is the prime objective of Freedom of Information. We define transparency as the ability to observe what is going on inside an organisation - as an organisation being transparent about its policies, procedures or activities. The UK Act emphasises transparency through a duty of proactive publication.

How much does FOI contribute to increased transparency? We have divided this question into a number of sub-questions and indicators, of which the following are examples:

- Is more information placed in the public domain through proactive means (publication schemes, disclosure logs, other)?
- Is the breadth/quality/relevance of the information released greater under FOI?
- Do requesters and officials believe that authorities are more transparent as a result of FOI?

Each of our methods will help us answer these questions. Interviews will tell us what civil servants think; the survey of requesters will give their point of view; publication schemes will provide evidence of the quantity and quality of information being proactively disclosed; media content analysis will show how transparent government is portrayed as being by the press.

In the meantime, we have only hints at answers to these questions. There were 38,108 requests in 2005, the first year of the legislation, and 33,688 in 2006. According to official statistics, approximately 60% of 'resolvable' requests have been granted in full each quarter since the Act came into force.<sup>1</sup> It is difficult to say for certain whether these requests have led to more information being placed in the public domain than prior to FOI. According to research done by the UK's Information Commissioner, 68% of public authorities (who responded to their survey) felt their organisation released a lot or a little more information than they would have done without the Act.<sup>2</sup>

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<sup>1</sup> A request is 'resolvable' if the authority is not waiting for a fee to start processing, the information is held by the authority, and the authority does not need more information to start processing.

<sup>2</sup> *Freedom of Information: One Year On*, Information Commissioner's Office, 2006

Whether requesters believe that government is more transparent after their request is a question we will ask in our survey of requesters. Asking a related question of the general public in its Annual Track research, the ICO finds that the perception that the right to access information increases transparency and accountability increased from 53% in 2004 to 58% in 2005 and 74% in 2006. In our own study of UK journalists' use of the Act, we found grudging acceptance that things, though not perfect, had got better from their point of view.

## **2. Greater Accountability**

In 2000, the Justice Secretary stated that 'FOIA 2000 will deliver a more responsive, better informed and accountable public service'. Accountability has two aspects: giving account and being held to account. Giving account overlaps with transparency. Being held to account encompasses mainly:

- making public (read: publishing) mistakes and rectifications;
- explaining why decisions have been taken, by whom, and how outcomes came about;
- taking responsibility for and rectifying maladministration.

FOI provides people with the mechanism to access information, which they can then use to hold government to account. We are interested in finding out whether public authorities are held to account by the public, Parliament, judiciary, media or other relevant bodies, and whether ministerial accountability to Parliament has increased or decreased. Building on the above definition, we would ask questions such as the following:

- Do members of parliament hold ministers more closely to account by using information obtained under FOI?
- Does the government explain more often why and how decisions have been taken as a result of FOI?
- Do the media hold government more closely to account by using information obtained under FOI?
- Do members of the public hold government to account by writing to public officials or their MPs as a direct result of information they have received via an FOI request, or in response to something the media have published as a result of FOI?

Since holding to account depends mainly on the use to which information is put, it is a question which is best answered through analysis of the user: the requester and the media. I will discuss the specific issue of ministerial accountability below.

### **3. Better Quality Decision-making**

The 1997 White Paper proclaimed that '(u)nnecessary secrecy in government leads to arrogance in governance and defective decision making'. While the quality of a decision is arguably judged more by its outcome, we are primarily concerned with the decision-making process. It can be judged of high quality if based on thorough, balanced and impartial advice, and a frank exchange of differing views. The argument is that advice will be of higher quality if drafted with potential public scrutiny in mind. On the other hand, the threat of disclosure is sometimes thought to hinder the possibility of 'free and frank' discussion.

Does FOI contribute to better decision making on the part of government? It is difficult to evaluate, but in our interviews we can ask officials for their views and evidence to back up their views. Specifically we would be interested in asking the following:

- Do officials and ministers write briefings and memos with FOI in mind (i.e. they may be released)? Does this result in better or worse quality documents, which are then fed into the decision making process?
- Do official submissions sum up fairly the full range of representations received, and set out the full range of options, including ones ministers do not want to hear?
- Does FOI result in a better or worse audit trail, to record how a decision was made, by whom, and on the basis of what information?

[As we have not yet started our interviews with officials, I will just provide one example of the way in which FOI and the process of decision-making are interlinked. It involves the Department for Trade and Industry's consultation on the future of nuclear power and the environmental group Greenpeace. The government promised the 'fullest public consultation' on the matter before making its decisions. Greenpeace asked for a judicial review of the decision, alleging that the consultation had not been procedurally proper.

The outcome of an FOI request played an important role in the court case. Greenpeace had requested the economics papers on which part of the consultation document was based. The amount of information released in response to the request crystallised for the judge the difference in the amount of information available for those consulted to base their decisions on and the amount of information considered by the DTI. The difference was so great that the High Court Judge ruled that the promise to consult fully had not been kept, and the DTI was required to consult further.<sup>3]</sup>

#### **4. Better Public Understanding of Government Decision Making**

The Justice Secretary in 1997 linked Freedom of Information with public understanding of decision-making: ‘Freedom of Information...is about giving people the chance to understand how Government works and why it has reached particular decisions (Irvine, 1997). The assumption is that with more information available – information that people want, in addition to that which is volunteered or chosen by others (e.g. the media) – members of the public will better comprehend how and why their government makes its decisions. In short, in addition to being better informed through FOI, people should also become more knowledgeable about government.

Public understanding has been an important factor in the Information Commissioner’s public interest test. The Commissioner’s annual tracking research indicates that the percentage of people agreeing that being able to access information held by public authorities ‘increases knowledge of what public authorities do’ has increased from 54% in 2004 to 76% in 2006. This is in the abstract, however, not related to a specific request. We will explore this issue at the level of individual requests through the survey of requesters and on a higher level through media content analysis. We will explore questions such as the following:

- Do responses to FOI requests include clear explanations of the processes through which government went to reach the decision?
- Could members of the public learn about government decision making by reading a newspaper article that is based on information obtained through FOI, and includes background information about how government works?

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<sup>3</sup> *Greenpeace Limited v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), 15 February 2007

## **5. More Effective Public Participation in the Political Process**

If people better understand government decision-making, the theory is they will be able to participate more, and more effectively, in the political process. Minister of State Lord Filkin, stated in 2003 that ‘Freedom of Information is part of the culture of giving information so you can then have a more informed dialogue with the citizens we serve’.

Public participation in the political process is any method by which people attempt to influence policy or decision-making. Examples of this include communicating with government officials and elected leaders, responding to consultations, protesting, contributing to campaigns, etc. Participation is effective if people seeking to participate are better informed about the political process they are seeking to influence, and/or succeed in having an impact on the outcome.

- Does FOI, or information obtained through FOI, engage people and government officials in dialogue?
- Through information obtained via FOI are NGOs better informed about government policy on issues for which they campaign?
- Has information obtained through FOI spurred people to respond to a government consultation, lobby their MP, sign a petition, etc?

The key to answering these questions lies in our survey of requesters, and asking them what they do with the information they receive.

## **6. Increased Trust and Confidence in Government**

The objective that is perhaps most difficult to achieve and hardest to isolate as a direct outcome of freedom of information is increased trust and confidence in government.

Trust and confidence in government, for the purposes of this study, shall be understood as an expectation that: government will listen to the public’s concerns and weigh them carefully before coming to a decision; and that the government or its representatives will follow procedure (e.g. the law, or any ethical rules or codes of conduct) impartially and thoroughly.

Not only is the link between trust and any action on the part of government tenuous, but FOI might actually have the opposite effect. For example, after reading media articles on

the ‘negative’ things government has done, which are based on information obtained through FOI, citizens might trust government less.

There are two aspects to measuring this: firstly the public as FOI requester; secondly the non-FOI requesting majority. Through the survey of requesters we hope to be able to ask requesters to assess their levels of trust in government following receipt of the response to a request. We are not able to poll the opinions of the public at large (although the Information Commissioner’s research shows again that, in the abstract, the percentage of people who believe that access to information held by public authorities increases trust and confidence in government increased from 51% in 2004 to 69% in 2006). But the way the media report on FOI stories may have the opposite effect. In an initial analysis of the 700 FOI stories in the UK national press in 2005, our researchers estimated that 55 per cent had no effect either way on trust. But of the remaining 45 per cent, they estimated that 44 per cent served to decrease trust, and only 1 per cent served to increase trust in government. This media effect may help to explain why FOI might lead to reduced trust in government.

## **THE IMPACT OF FOI ON CENTRAL GOVERNMENT**

What if some of the objectives of FOI are achieved at a cost? What if, for example, increased government transparency reduces government effectiveness? Or increased accountability in general reduces ministerial accountability to parliament? To fully evaluate the success of FOI, we need to evaluate its impact on the workings of government. We have chosen five central characteristics of the Westminster and Whitehall model to monitor:

1. ‘Culture of secrecy’;
2. Civil service neutrality;
3. Ministerial accountability;
4. The Cabinet system;
5. Effective government.

### **1. ‘Culture of Secrecy’**

The UK has long been famous for its ‘culture of secrecy’, even if this is a universal characteristic of bureaucracies. While this has changed significantly in recent years, it

still persists to an extent – indeed one of the objectives of FOI was specifically to ‘end the culture of secrecy’. Measuring it is a challenge which we will address mainly through interviews: of officials, stakeholders, the media and requesters.

## **2. Civil Service Neutrality**

The UK Civil Service is permanent, that is, its top officials do not change as the elected government changes. This necessitates a neutral Civil Service – so that they are equally able to serve governments of any political colour.

Neutrality is thought to depend to in part on the anonymity of Civil Servants. If Civil Servants are not named, they cannot be identified with a specific policy or minister, which could potentially hinder their ability to serve a different government. Freedom of Information was thought to threaten this longstanding principle.

So far we have noticed two things. Firstly, that the names of Civil Servants are being released under FOI. Secondly, we have not noticed any Civil Servant’s neutrality being brought into question by such a disclosure. When the press seek to pin blame following an FOI disclosure, it is invariably the minister they focus on rather than the official who tendered the advice.

## **3. Ministerial Accountability**

In a representative system like the UK, civil servants are accountable to ministers, who are accountable to their electors through parliament. Civil Servants, therefore, are not directly accountable to parliament. Margaret Thatcher, among others, feared FOI would undermine this principle: ‘Under our constitution ministers are accountable to Parliament for the work of their departments, and that includes the provision of information...Ministers’ accountability to Parliament would be reduced, and Parliament itself diminished’. To understand the impact of FOI on this convention, the key questions are:

- Have FOI disclosures caused officials to account directly for their actions or decisions?
- Have FOI disclosures strengthened or weakened ministerial accountability to parliament?

- Have FOI disclosures increased official or ministerial accountability outside of parliament?

Once again analysis is only provisional. As stated above, the political pressure is on the minister rather than the official. And if the issue is high-profile, the minister in question often ends up accounting for his or her decision in parliament. (I am referring here specifically to a request from The Times to request to see the advice given to Gordon Brown when he was chancellor about the impact upon UK pension funds of the decision to change the regime for tax credits on UK dividends in 1997.) Equally, however, it is clear that the media are frequent users of the Act, and that accountability to the media and to parliament are not necessarily mutually exclusive.

#### **4. The Cabinet System**

The crux of the Cabinet system is the convention of collective cabinet responsibility. According to this convention, cabinet speaks and votes as one; disagreements are therefore not expressed in public. FOI disclosures were thought to be a threat to this convention, which is why it is given explicit protection in section 36 of the Act, which protects ‘the convention of the collective responsibility of Ministers of the Crown’. The main question to ask, therefore, is whether FOI disclosures have resulted in the Cabinet losing its appearance of unanimity. This has been an argument put to the Information Commissioner and Tribunal against disclosure. When disclosure has ensued, however, there have been few articles claiming Cabinet ‘rifts’ or ‘splits’. The Information Commissioner and Tribunal have both expressed themselves on this specific point, and it is worth quoting the Information Commissioner at length:

‘This is an unwritten convention which undoubtedly survives the enactment of the Act. Equally, however, the new requirements – which Parliament has made legally binding – call for some adjustment of thinking in government and elsewhere about the interpretation and application of the underlying principle. For example, the strength of the convention lies primarily in the political commitment of all Ministers to a government decision once it has been made. It is less powerful in relation to any personal or departmental differences of view or emphasis which arise during the decision-making process. The convention should

not be used to create or reinforce any fiction that Ministers have always been of a single collective opinion. The public do not expect such an approach and would probably be dismayed by the absence of rigorous debate before complex decisions are taken.’ (*Information Commissioner, 4 April 2007, FS50076355*)

## **5. Effective Government**

Effective government – the ability of government to achieve its objectives – is a traditional part of the Westminster and Whitehall model. It allows us to pose some crucial questions with regard to FOI: has it made government less effective? If so, in what ways? And was it worth it? On the one hand, the fear was that it would be yet another accountability ‘overhead’, and that innovative or robust policy could not be made in a ‘goldfish bowl’. On the other hand as we have seen, proponents thought transparency would improve decision-making and, by extension, effectiveness. From an FOI point of view, the most interesting aspects of effective government are:

- The nature of advice given to ministers;
- Efficient records and records management;
- Whether FOI is a diversion of resources from ‘frontline’ activities.

The impact of FOI on each of these we hope to ascertain through our interviews with officials and with retired ministers.

## **CONCLUSION**

This is not proving an easy study to undertake. But I hope that if we can crack some of the methodological difficulties others might be encouraged to follow our example. Only through systematic studies of this kind can we gradually build up an evidence base and a more realistic sense of the costs and benefits of FOI. In theory FOI delivers multiple benefits. Practitioners know the picture is more nuanced than that. Through systematic studies of this kind I hope that academics can show more precisely which benefits FOI delivers and which it does not, so that we can develop a more balanced overall verdict on the impact of FOI. I am proud to be leading this pioneering study, but I sincerely hope that it is not the last, and that comparative studies will soon follow.