

FOIA — why bother?

Ben Worthy, Lecturer in Politics at Birkbeck College, UCL, blogger and author of the forthcoming book, ‘The Politics of Freedom of Information: How and Why Governments Pass Laws That Threaten Their Power’, considers why governments pass FOI legislation despite their apparent distaste for it

“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. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it.” - Tony Blair.

Why do governments bother to pass Freedom of information laws? The question is not as odd as it sounds.

On the face of things, even though legislation may provide some temporary kudos, in the long-term many politicians come to believe FOI law brings nothing but trouble. Indeed, those in power often come to regret passing FOI legislation on the basis that they disrupt neat media grids and let enemies in the media delve deep into what a government is doing.

It is no surprise that former Prime Minister Tony Blair quaked at his own imbecility for championing FOI. In 2015, David Cameron felt FOI was a ‘buggeration factor’ and in 1966 US President, Lyndon Johnson, after some swearing, beseeched the Congressman supporting an FOI law: ‘I thought you were on my side?’

For any budding politician, FOI appears to be the ultimate political boomerang. To make FOI laws even less popular, they lack voting appeal among the public. Merlyn Rees, a Home Secretary who fought hard against an FOI law in the 1970s, once exclaimed that ‘the Guardian can go on for as long as it likes about open government... but I can tell you that in my own constituency of 75,000 electors I would be hard pressed to find many who would be interested’.

Only in India, where the call for an RTI law was part of a broader anti-corruption campaign, did the Right to Information Act really match up with wide public enthusiasm. Elsewhere, electorates virtually ignore FOI laws. Politicians may gain some credibility (if the public notices) but no votes.

So how and why do governments pass FOI legislation? Here’s a few explanations.

Under pressure

Although very few voters are interested in FOI, legislatures and civil society certainly are and often fill the gap.

As Associate Professor in law at the University of Tasmania, Rick Snell, points out, it is often a combination of organised groups and enthusiastic individuals, often ‘outsiders’, pushing for the law, from Congressman John Moss in the US, to Sonia Ghandi in India. As the exception, India’s huge exercise in pushing for an RTI law — half agitprop, half theatre, and all people power — is now legendary.

In Britain, Parliament was crucial in applying pressure. Between 1979 and 1992 there were no less than six FOI Private Members’ Bills in the House of Commons concerning transparency. All of the main parties supported greater openness, while backbenches continually banged on about it.

Outside of Parliament, Campaign group the Campaign for Freedom of Information (‘CFOI’) waged a lengthy battle to open up public bodies, starting with small changes in the 1980s. As the Campaign’s Chairman Maurice Frankel points out, by the 1990s, lobbying for FOI had the support of groups such as Charter 88 and Liberty as well as various churches, animal rights groups and trade unions. The group also carried out fascinating experiments during pre-elections: one neat CFOI trick was to persuade opposition MP leaders to publically promise an FOI law, making it harder for them to back out of them later.

Technology

Information Technology is one of the forgotten forces that has helped bring about FOI.

During the 1990s, IT changes transformed the type of information that could be accessed and, even before search engines arrived, altered public perceptions of what information they could and should be entitled to access. Tony Blair’s promise in 1998 to make 25% of government interactions ‘electronic’ now looks positively quaint.

Two decades or so into the information revolution, dealing with information and data is also a wholly different experience. In the late 1960s, Daniel Ellsberg had to actually photocopy the thousands of Pentagon papers he leaked, whilst the Panama Papers in 2016 just needed a good size USB stick.

It's contagious

FOI, it seems, is contagious.

In fact, it's gone from being a bit contagious to very contagious indeed.

Since Sweden's brief Freedom of the Printing Press Act of 1766, FOI infected the US in 1966 and handful of Westminster democracies. In the 1990s, it exploded and has carried on 'infecting' all sorts of countries ever since, with notable laws in India (2005) and Nigeria (2011).

We are now at around 100 laws around the world, from Russia to China and Jamaica to Jersey. This means it's very tricky to argue against a law if you don't have one, because a campaigner can just say 'well X has one, so does X and X-where's yours?'

Scandal

Many FOI laws (and openness reforms generally) are born out of scandal. Laws have sprung up from all sorts of problems, from rigged entrance exams in Thailand to infected beef in Ireland. Politicians always need to take action after something has gone wrong. FOI is a ready-made answer to a scandal, and the subsequent cry that 'something must be done'.

More politically, scandal provides the opportunity for the opposition to call for change and rail against the incumbent government as secretive rascals.

In Britain, John Major's government wrapped itself in knots over arms to Iraq, sleaze and mad cows. This gave the Labour opposition an open goal to make themselves appear better than the government. Blair himself spoke of how 'it was

a media game, and as Opposition we played it' and, despite his later regrets, it was 'just too easy to score'.

They don't know what they are doing and don't notice

FOI laws are, it is argued, frequently passed out of naivety. Inexperienced governments and politicians who want to do something differently often plump for openness.

Think Tony Blair in 1997, David Cameron in 2010 or Barack Obama in 2009. Tony Blair later lambasted himself for his naivety, claiming that the law had been passed 'with care but without foresight', and telling the Justice Committee that FOI was a 'commitment given in opposition before the experience of government'.

In some cases, politicians were simply not paying attention whilst the laws were passed. Jack Straw claimed that the 'few words' of the manifesto commitment in Labour's 1997 manifesto were 'about all the serious intellectual consideration that [Labour] or the Shadow Cabinet had given to this inherently complex issue', and that there was a 'collective naivety' at senior levels about the law and its implications. Very few of Labour's big politicians turned up to the meetings on FOI. It was said Gordon Brown had to be told about the Act's existence in 2007, seven years after its assent and two years into its operation. FOI can arrive when no one's looking.

Some do think, though...

Some academics have pointed out that politicians can and do think, quite craftily, about FOI. It is said various openness laws in China are designed to keep an eye on what local and regional government are doing, as a sort of FOI fire alarm.

Sometimes laws emerge out of coalition deals, as seen in India and Ireland. Other politicians pass laws to guarantee access to information for themselves once they are out of power. Clever.

Sending out signals

Although it doesn't get votes, promising FOI law does bring what one might call 'moral capital'. A commitment to an FOI law sends out all sorts of strong messages of radicalism, change and empowerment that new governments find difficult to resist. It tells voters 'we are different' and also offers to give 'the people' a new right. FOI also carries a pleasing moral angle for politicians: 'you can look inside as we've got nothing to hide'.

The problem for politicians is that they can overdo it. In 1996, Tony Blair gave a speech to CFI in 1996 where he referred to FOI as 'not just important in itself, but part of 'bringing our politics up to date', of letting politics catch up with the aspirations of people', as well as involving more people in politics and increase trust in government. Blair's words came back to haunt him, and stop him, when he wanted to water down the law.

So what happens?

For all of the reasons mentioned, Freedom of Information laws are difficult to resist during pre-election periods. They make their way easily into speeches, manifestos and policy proposals.

However, the problem for politicians is that the symbolism, radicalism and 'moral' angle of FOI, and even its resonant name, mean that the law is difficult to get rid of quietly. The accusation of betrayal from the media, political opponents and from factions within the party makes backpedalling impossible. Instead of obviously dropping FOI proposals, they are stalled, blocked and fought over behind closed doors.

After many lengthy internal battles FOI laws often emerge, if they emerge at all, as a messy compromise.

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