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FREEDOM OF INFORMATION: HISTORY, EXPERIENCE AND RECORDS AND INFORMATION MANAGEMENT IMPLICATIONS IN THE USA, CANADA AND THE UNITED KINGDOM

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ABOUT US

The Constitution Unit (CU) is research body housed within the School of Public Policy/Department of Political Science at University College London in the UK. Researchers at the Constitution Unit specialize in constitutional reform and comparative constitutional studies. The Unit is independent and non-partisan, and the centre of a wide network of national and international experts. All of their work has a sharply practical focus, and aims to be timely and relevant to policy makers and practitioners. The Unit is chiefly funded by charitable trusts, research councils and government departments. It also operates a commercial consultancy to bring in additional income to fund its activities.

We were invited by the ARMA International Educational Foundation's (AIEF) Research Committee to prepare this report for a presentation at the 2006 ARMA International Conference in San Antonio. The aim of the paper is to shed light on freedom of information legislation and how it works by comparing freedom of information provisions in the USA, Canada and the UK.

LIST OF ABBREVIATIONS

ACPO	Association of Chief Police Officers
ATI	Access to Information
ATIA	Access to Information Act
ATIP	Access to Information and Privacy
BBC	British Broadcasting Corporation
CAIRS	Co-ordination of Access to Information Requests System
CBSA	Canadian Border Services Agency
CCIC	Canada Citizenship and Immigration Canada
CIA	Central Intelligence Agency
CNI	Critical national infrastructure
DCA	Department for Constitutional Affairs
DFAIT	Department of Foreign Affairs and International Trade
DHS	Department of Homeland Security
DOA	Department of Agriculture
DOC	Department of Commerce and the Department of State
DOD	Department of Defense
DOE	Department of Energy
DOJ	Department of Justice
DOS	Department of State
DVA	Department of Veteran Affairs
EDRMS	Electronic documents and records management systems
E-FOIA	Electronic Freedom of Information Act Amendments
EO	Executive Order
ERMS	Electronic Records Management Systems .
FBI	Federal Bureau Investigation
FCO	Foreign and Commonwealth Office
FOI	Freedom of information
FOIA	Freedom of Information Act
GAO	Government Accountability Office
GCHQ	Government Communications Headquarters
7HEW	Department of Health, Education and Welfare
HSE	Health & Safety Executive
ISOO	Information Security Oversight Office
MOD	Ministry of Defence
NA	National Archives
NARA	National Archives and Records Administration
OGC	Office of Government Commerce
OIP	Office of Information and Privacy
OPI	Office of primary interest
OPM	Office of Personnel Management
PCO	Privy Council Office
PRAD	Public Rights Administration Division
RDIMS	Records Document Information Management System
RM	Records Management
SEC	Securities and Exchange Commission
SSA	Social Security Administration
UK	United Kingdom
USA	United States of America

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EXECUTIVE SUMMARY

Freedom of information (FOI) laws are becoming more and more common worldwide. From nine such laws 20 years ago to 66 in 2006, the legislation is often touted by supporters and campaigners as a window into government, and by legislating administrations as proof of their commitment to transparency and accountability. How it works in practice, however, is often far from the ideal vision either group holds prior to implementation. This paper explores freedom of information in practice in Canada, the United Kingdom and the United States, three countries that legislated at three distinct periods of FOI's evolution.

The research undertaken to complete this paper consisted mainly of secondary source review and analysis. Government reports and other literature, newspaper and academic articles, web sites and the pieces of legislation themselves were consulted and examined. Every attempt to locate the most current information was made. One case study is based on the preliminary findings from original research that is currently being carried out by researchers at the Constitution Unit.

The paper consists of four distinct but related topics that, together, form a comprehensive view of the legislation in each country: governance and management of the legislation; elements reserved from coverage and protected by the legislation; usage and statistics; and practical issues for authorities. The topics follow one another in an order that allows the reader to build his/her knowledge of the laws in a logical fashion. In addition to factual information and analysis, each topic includes a case study to highlight a specific issue within the overall topic scope. Below are the main findings:

- In practice, freedom of information (FOI) works differently to the ideal vision of how it should work.
- The costs and benefits of FOI are unclear; further research is required to assess each.
- Monitoring FOI forms an important component in any successful implementation; however, monitoring requirements and standards vary considerably across the USA, Canada, and the UK.
- There is a core set of exemptions common to almost all FOI laws, which includes those relating to national defense, international relations, personal information, legal proceedings and policy advice.
- Some FOI regimes, most notably the UK's (which entails a 'government veto' that enables it to withhold information), illustrate a certain degree of reluctance to move to genuinely 'open government'.
- The proportion of a country's population that use FOI is very small. Citizens in the United States are more active users of FOI than citizens in the United Kingdom or Canada. Despite what one might think, most journalists do not use the Act; how a core group of reporters and editors do use the legislation; often to great effect.
- Private individuals (i.e. 'members of the public'), businesses and the media are the most frequent users of FOI.
- There are very few FOI 'horror stories'; the release of information has rarely impacted negatively on the public interest.
- The new security environment has had a marked impact on freedom of information, especially in the United States where several measures have been introduced to restrict access to information.
- In spite of drawbacks and problems encountered in each jurisdiction, more information is being released into the public domain and there are signs that FOI legislation helps create a greater culture of openness in government.
- Records management is at the heart of successful implementation of FOI legislation; essentially, if the information cannot be efficiently located it is unlikely to be released.

INTRODUCTION

If democracy cannot function without informed citizens, neither can it function without freedom of information or records management.[1] As more and more countries implement freedom of information laws in their quest to prove their 'transparency', 'accountability' and a 'culture of openness', the area of records management is where their attempts will stand or fall, and where it will become clear if FOI is a genuine attempt to improve democracy or to merely pay lip service to citizens' demands.

On the one hand, FOI laws are only as good as the systems that underpin them. Staff - information and records managers, IT specialists, legal advisors, communications officers, their senior managers and ministers - have to learn to deal with the demands of compliance and a new decision making process. Procedures - for the creation, management, disposal and archiving of documents and records - are key to their success. If a government employee cannot find information when asked for it, he/she cannot evaluate it, make the decision on whether to release it, make necessary redactions, and relay it to the requester within the legislation's statutory time limit. Without good records management FOI simply does not work.

On the other hand, FOI may also be a force for change. Freedom of information rights have been a major driving force in enabling the development of electronic documents and records management systems (EDRMS) and sustainable solutions for the long-term storage and preservation of digital records. EDRMS has the capacity to transform the accessibility of information at high speed and with increased accuracy, relative ease of operation and ability to enable online transmission of information.

Yet freedom of information, in particular its intersection with records management, is an under-researched field. The need for study is compounded by the accelerated internationalization of the legislation – over half the FOI laws currently in force were introduced in the last ten years.[2] This international trend can be understood in three 'waves' of legislation since the first act was passed by Sweden in 1766.[3] The first wave is said to have begun 200 years later when in 1966 the USA passed the *Freedom of Information Act* and continued throughout the 1970s, when several European countries (Denmark, Norway, France and the Netherlands) legislated. In the 1980s the second wave, which provided motivations and examples for many 'third wave' laws, hit. The second wave included Australia's *Freedom of Information Act*, New Zealand's *Official Information Act* and Canada's *Access to Information Act*, all implemented in 1982 or 1983. Between the late 1980s and 2006 the third wave hit as dozens of states' newly passed laws created a flood of 'open government'. Twenty-eight of the 30 OECD states now have some form of FOI legislation, most with exemptions protecting personal information. Around 20 other states are known to be considering the introduction of FOI legislation. This series of recent newcomers to FOI includes the UK, whose *Freedom of Information Act 2000* was

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[1] The term 'access to information' is often used interchangeably with 'freedom of information'. In Canada the term 'access to information' is usually used because the Canadian act is called the Access to Information Act; however, in this paper we use the term 'freedom of information' or FOI (the commonly used abbreviation) as a generic term for the concept of public access to government information.

[2] See for instance, Banisar, D. *Freedom of Information Around the World 2006: A Global Survey of Access to Government Records Laws*. 2006, p. 6 http://www.privacyinternational.org/foi/foisurvey2006.pdf.

[3] A Dutch legal consultant, Roger Vleugels, has produced a survey of current and proposed freedom of information regimes, published in February 2006, and it is from this list that these details have been taken. See: *Overview of FOIA countries worldwide.* http://www.foiadvocates.net/files/foia_list.pdf

fully implemented in January 2005. For the purposes of this study, we concentrate on one country from each FOI 'wave' – the United States of America, Canada, and the United Kingdom.

What do we need to ask about FOI and records management in these three countries? Four sets of questions emerge. First, has there been a development in FOI legislation and practice as lessons are learned, or do cunning bureaucrats learn more sophisticated avoidance techniques and reduce the scope of the act? An in-depth comparison of legislation sheds light on this question.

Second, to what extent is the power of the legislation limited? This question can be answered by a comparative analysis of the exemptions set out in the three pieces of legislation. Some secrecy is necessary for public security but how much? Practitioners also have to grapple with the public interest test. Is the public served by disclosing or withholding a certain piece of information? How does one judge? How volatile is the balance between secrecy and freedom of information? How much influence do wider social and political forces have?

Third, how and by whom is the legislation used? It is not possible to fully understand the act without knowing the extent to which the public are using it and how authorities are performing in terms of compliance. Statistics and other data from monitoring reports help clarify these issues.

Fourth and last, how sincere is the government's commitment to FOI? And to what extent do disclosure and records management procedures contribute to the success or failure of the legislation? An analysis of compliance procedures, practicalities, and processes, along with a discussion of the implications for records managers, completes the paper.

To address these questions and related issues, this paper is structured around the following four topics:

- *Governance and management of the legislation*
- *Elements reserved from coverage and protected by the legislation*
- *Usage and statistics*
- *Practical issues for public authorities*

Each section contains a comparison of the issues across the three countries and an isolated case study encapsulating the broader issues. A final section of the report will draw out the overarching issues and conclusions, with particular reference to the ways in which freedom of information affects the work of the records manager.

1. GOVERNANCE AND MANAGEMENT OF THE LEGISLATION

Introduction

Freedom of information legislation works by conferring to the general public the right to ask for and receive information that public bodies hold. The legislation qualifies that right by defining a series of issues for which the right is not valid. These are usually called 'exemptions'. Exemptions are the key section of any FOI legislation because their breadth and depth determine how much information is actually disclosed. There are additional provisions bearing on the use of the exemptions that can work either for or against disclosure. Thus, for example, the UK FOIA has a separate public interest test that bears on the majority of the exemptions and requires separate consideration. It is a subjective concept and cannot be said to favor either disclosure or withholding and it is largely a question of how it is used by those responsible for making the decision. Far less balanced are the provisions under some acts – including the UK and Canada – whereby government ministers are able to override normal workings and certify non-disclosure even after the Commissioner, or whoever is responsible for taking the decision, has declared being in favor of disclosure. These provisions are not widely used, however. The use of exemptions is addressed separately in section 2 starting on p.22.

There are other important issues about the way information access legislation is structured and how its workings are provided for in law and related guidance – as opposed to how they develop and operate in practice, which is usually a different story. This section explores these issues by addressing the following questions:

- How widely does the legislation apply? Does it cover the local as well as the central tiers of government? Does it extend to health and education bodies, law enforcement, mechanisms (such as Parliament) of the administration itself?
- Who can make requests – anyone in the world? Citizens of the state only?
- How is the law enforced? How strongly does the language of the legislation encourage disclosure?
- What guidance does government provide on how access is to be managed and by whom?
- Does the law specify quick time limits for dealing with access requests and does the government keep to the limits?
- Is the right of access free of charge or do requesters have to pay?
- Is there a right of appeal and is there someone with independent powers of action, such as an Information Commissioner, answerable directly to the parliamentary/legislative body?

The answers to these questions are set out in a comparative table (Table 1), which breaks down the details of the FOI regimes in the US, Canada and the UK.

Table 1 Key legislative issues by country

Issue	USA	Canada	UK	Comment
Legislation	*Freedom of Information Act 1966*, amended in 1974, 1986, 1996, 2002 and an Executive Order about logistical changes in 2005.[4]	Access to Information Act 1982, implemented in 1983.[5]	*Freedom of Information Act 2000*, fully implemented in 2005.[6]	The 2002 amendments of the USA act take into account the changed security climate after the events of September 11, 2001.
Right of access	Gives any person the right to request access to federal agency records or information. Agencies are required to disclose in response to any written request unless the information is protected by exemptions or exclusions. No public interest test as the exemptions are designed to take account of public interest.	Gives Canadian citizens and permanent residents an enforceable right of access to records on two principles – that government information should be available to the public and that exceptions should be limited and specific. Requests for information must be in writing and give reasonable detail to identify the record. Third party information can be subject to a public interest test.	Gives any person the right to request information of any public authority, to be told whether the authority holds the information and to obtain the information unless it is protected by an exemption. Most exemptions are subject to a public interest test.	Canadian guidance to the Act goes further than in the other two countries in stressing that it is government policy to release when there is no need to withhold and that 'there is a compelling public interest in openness, to ensure that the government is fully accountable for its goals and that its performance can be measured against these goals.' (from the *Introduction to Government Guidelines*)

[4] The US *Freedom of Information Act*, including amendments, it is available at: http://www.usdoj.gov/04foia/foiastat.htm
[5] The Canadian *Access to Information Act 1985* is available at: http://lois.justice.gc.ca/en/A-1/
[6] The United Kingdom *Freedom of Information Act 2000* is available at: http://www.opsi.gov.uk/acts/acts2000/20000036.htm

Issue	USA	Canada	UK	Comment
Breadth of coverage	Does not cover state or local government agencies, which are covered by legislation at the state level. Does not cover private sector organizations. No obligation to do research, to analyze data, answer written questions, or create records in response to a request.	Covers all government institutions – departments, bodies and agencies as listed in schedule 1 to the Act.	Covers all public authorities, i.e. government bodies and agencies plus local government and regional bodies as listed in schedule 1 to the Act and many smaller public bodies e.g. parish councils, schools, doctors' surgeries – about 100,000 bodies in all.	None of the three acts requires new information or records to be created in response to requests – they relate only to pre-existing information/ records.
Enforcement	Right of access is enforceable in court.	The Information Commissioner has certain powers to enforce, backed by court action if these fail.	The Information Commissioner has the power to serve decision, information and enforcement notices. These are backed by court action but may be overridden by the government in exceptional cases.	

Issue	USA	Canada	UK	Comment
Systems/ processes for handling requests	Individual agencies must publish regulations about how they handle requests. Requests must 'reasonably describe' the records requested and be in accordance with the agency's published regulations.	A 'Designated Minister' must take overall responsibility for operation of the act and related regulations, including: review of records management across government; prescribing forms and regulations for operating the Act; preparing and issuing directives and guidelines; and prescribing the format for the heads of Departments' annual reports to Parliament.	The act includes two statutory Codes of Practice giving guidance on authorities' functions and on records management. Compliance with the Codes is non-mandatory.[7] The Department for Constitutional Affairs is responsible for coordinating and giving guidance to central government departments, and more widely in producing the Codes of Practice. The information commissioner has a duty to promote good practice and the power to make recommendations on good practice to any authority.	

[7] The codes are specified under sections 45 and 46 of the Act

Related legislation, e.g. privacy	Privacy Act 1974[8]	Privacy Act 1985[9]	Data Protection Act 1992, revised 1998[10] Environmental Information Regulations 2004[11]	
Baseline information	All agencies required to make certain records generally available, including policy and administrative material and records released under *Freedom of Information Act* (FOIA), where these are of sufficient public interest. All agencies must publish their FOI procedures in the Federal Register. The agency's annual FOIA reports contain specific monitoring data.	'Designated Minister' to publish various information including details of records held by all institutions subject to the act, of named officials to contact for access, and a twice yearly bulletin on the operation of the Act.	Act requires all public authorities to have a 'publication scheme' setting out all information they provide without request, e.g. from a website or by requesting paper copies of documents. Authorities also required to give 'advice and assistance' to requesters to help formulate their requests. Non-mandatory guidance states that authorities should publish their FOI procedures.	
Response time	20 business days from reaching the appropriate section of the agency. Extendable by 10 days for specific reasons, e.g. large requests, or consultation with others. Provision for 'expedited requests' with a 10 day limit where 'compelling need' is shown by requester.	30 days (not 'business days') after request received, requester to get both the decision and, if disclosable, the record requested. Extendable by 15 days if request has to be transferred or by a 'reasonable time' if, e.g., consultation is required or for large or complex requests.	20 working days following receipt of request provided request is valid. Extendable in limited cases, e.g. where there is discussion on fees, or consultation with or transfer of request to another body or where the public interest test has to be applied.	Basic time limits are almost identical and the rights to extend are also broadly similar. Only USA has the shorter 'expedited request' time limit.

8 US *Privacy Act 1974*
http://www.usdoj.gov/foia/privstat.htm
9 Canada's *Privacy Act* 1985
http://lois.justice.gc.ca/en/P-21/index.html
10 UK *Data Protection Act 1998*
http://www.opsi.gov.uk/ACTS/acts1998/19980029.htm
11 UK *Environmental Information Regulations 2004*
www.opsi.gov.uk/si/si2004/20043391.htm

Fees and costs	No fee to file a request; three categories of charging for processing and photocopying - highest for commercial requesters; lowest for educational/ media; in between for the rest. Obligation on each agency to publish a schedule of fees, which must be 'reasonable standard charges'. Fees are not required in advance of disclosure, and may be waived. Court action has to be funded by requester, though costs may be awarded if successful.	An application fee of $25 plus any fee for reproduction or conversion plus an hourly rate if more than 5 hours work required. Some or all payable in advance. All fees waivable. Also provisions for seeing actual records, or copy; for translation; for access by persons with disability.	Making a request is free, a capped fee may be charged for search, reproduction or copying. If the estimated cost exceeds the cap requester must be informed and may agree to pay the full charge.	Canada alone has a fee for the initial request. All allow for search and copying fees in some form and all permit waiving of fees in principle.
Right of appeal or arbitration	1. Administrative appeal should be offered if requester is dissatisfied with initial response; decision reviewed internally. 20 business days to determine. 2. Judicial review: right to challenge in federal court. The court can order disclosure, with powers of enforcement against the responsible official. Costs can be awarded against the agency. Agency employees can be subject to disciplinary action for acting 'arbitrarily or capriciously'.	In principle decisions on disclosure of government information should be reviewable independently of government. Any refusal to disclose must include notification of the right of appeal to the Information Commissioner who is empowered to investigate refusal to disclose, fees issues, breaches of time limits and other issues. The IC may also initiate a complaint. Complaints to be made in writing and within a year of the request. If despite commissioner's investigation refusal persists then the requester must be told by the IC of the right to apply for judicial review by the Federal Court, with the burden on the government institution concerned to show that withholding records is justified.	The Code of Practice (non-mandatory) requires authorities to have an internal complaints procedure centered on fair review of decisions, and notification of this to requesters. There is then a right of appeal to the Information Commissioner covering both refusals and failure to deal properly with a request. Any refusal of a request must inform the requester of the right to appeal to the IC. An independent Information Tribunal hears appeals from requesters or authorities dissatisfied with an IC's decision notice. Tribunal decisions can be appealed on points of law only to the High Court.	USA administrative appeal is free of charge but is conducted by the agency concerned. The only independent appeal, to the federal court, incurs charges which are only recoverable if the judge awards costs. Appeals to the Information Commissioner in Canada and UK are free as are appeals to the UK Information Tribunal.

Ombudsman/ Commissioner[12]	None as such. Senior official – non-political – is the Director of the Office of Information and Privacy in the Dept of Justice with government-wide responsibility for coordinating and implementing policy development and compliance for FOIA, but has no overarching regulatory or appeal function. Otherwise regulation rests with the agency concerned, subject to appeal only to the courts.	An independent Information Commissioner who reports directly to Parliament. Appointed by the Governor in Council for seven years, renewable once. With powers of decision supported by powers to summon, to enter premises, to require government records, etc.	An independent Information Commissioner who reports directly to Parliament. Appointed for five years, renewable twice. With powers to issue a range of notices (see above), though government ministers can override in certain cases. Also powers to see records, enter premises, etc.	
Reporting	Agencies required to publish annual reports made to the Attorney General, including: number of refusals of requests with reasons; number of appeals submitted, with results and reasons if access denied; specified information on any court decisions to withhold information; number of requests for records pending; number of requests received and processed; average time taken to process requests; fees collected; number of staff and amount expended on processing requests. Attorney General to produce a report each year with specified content on operation of the FOIA regime at federal level.	The head of every government institution to report annually to Parliament. The Commissioner under an obligation to report to Parliament annually and on special occasions. Parliament to designate a committee to review the administration of the Act.	Commissioner to report to Parliament annually and on other occasions as he/she thinks fit. No statutory requirement for collection or publication by public authorities of data relating to implementation or compliance. Code of Practice requirement (non-mandatory) to keep a record of any partial or complete refusal, for monitoring purposes.	No reports are required from the individual agencies or authorities under the UK Act and the mentoring requirement is non-mandatory and only covers refusals. This makes the UK Act substantially less demanding in reporting requirements than the other two. Both commissioners are subject to tight reporting requirements.

[12] See the UK's Information Commissioner's Office http://www.informationcommissioner.gov.uk/ and Canada's Information Commissioner's Office http://www.infocom.gc.ca/

Offences	None (violating the Privacy Act willfully, by contrast, is a criminal offence).	It is an offence punishable by fine or imprisonment to destroy, mutilate, falsify or conceal records in any attempt to deny the right of access.	It is an offence punishable by fine to alter, hide or destroy any record with the intention of preventing disclosure where a request has been made and the requester would have been entitled to see the information.	
Powers to override access requirements	The 2002 amendments and other post-2001 legislation – e.g. the Intelligence Authorization Act 2003 and the Critical Infrastructure Information Act 2002 – introduced significant new exceptions to the USA FOIA.[13]	A certificate under the *Canada Evidence Act* prohibiting the disclosure of information for the purpose of protecting national defence or national security means that the *Access to Information Act* does not apply to that information.[14]	Provision for a government department and specified other bodies to issue a certificate which overrides compliance with a decision notice form the IC.	

[13] US *Intelligence Authorization Act for Fiscal Year 2004 for Fiscal Year 2004*
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s1025rs.txt.pdf
US *Critical Infrastructure Information Act 2002*
http://www.dhs.gov/interweb/assetlibrary/CII_Act.pdf2
[14] See s.38.13 of the *Canada Evidence Act 1985*
http://laws.justice.gc.ca/en/C-5/index.html
and s.69.1 of the *Access to Information Act.*

Miscellaneous issues			FOI Act overrides the previous provisions for access to historical records, housed at the National Archives, bringing them instead within the FOI access regime.	

Key issues

The USA legislation is an innovative act and has given the rest of the world 40 years of experience on which to draw. Canada can also take credit for a carefully considered law that has incorporated most of the key points for good FOI legislation. It is not by chance that the UK Act, almost twenty years later, has taken many lessons from the Canadian act and others like it.

It can be argued, however, that the later two acts are not as strong as they could be, exemplified by two facts. First, the UK Act includes few reporting requirements. The reason given is that requirements are unduly burdensome, a claim that is hard to sustain because any effective FOI system needs to include recording and monitoring for its own purposes. It is little extra effort to collate and produce that information in a publishable report. Although citizens can make an FOI request to see the monitoring information an authority makes and keeps, it is a burdensome task. Another explanation, a more cynical one, for not requiring regular reports is that such reports reveal too much of the actual workings of government, which in turn could reveal whether the inherent 'culture of secrecy' prevalent in many government servants is actually changing.

The second example of what might be considered retrogressive is that the Canada and UK Acts both have a ministerial opt out, which the US Act does not. It was intended to be used in cases of dire need, and has not yet been used in either country. Yet it is there. Though the USA Act did not originally include such a provision it has recently introduced other provisions which do effectively reduce and limit the scope of the FOIA. Examples are the *Critical Infrastructure Information Act 2002* and the *Intelligence Authorization Act for Fiscal Year 2004*.

Case study – the origins of the UK FOI Act

This section tracks the development of the UK's *Freedom of Information Act*. It includes the policy and strategic issues the government faced when they decided to enact the legislation. We look briefly at the way attitudes and approaches within government changed as the UK legislation was drafted, how this was managed, and the effects it had. We chose the UK Act because the process of its development is relatively recent, documentation is readily accessible, and there is an interesting and revealing tale to tell.

The Labour government, led by Tony Blair, was elected to office in May 1997 with a firm commitment to pass freedom of information legislation. Before Labours' win, there had been a succession of Conservative administrations since the late 1970s under Margaret Thatcher and John Major. Since the early 1990s the Conservatives, reluctant to commit to a full-fledged FOI regime, had operated a non-statutory Code on Open Government. There were two versions of this Code, the original made effective in 1994 and a revised version in 1997.[15] The code was non-mandatory and low-key but in hindsight proved surprisingly effective. Cabinet Office monitoring data showed a substantial increase in information released as a result of the Code.

In the early months of the new Labour government freedom of information developed quickly. By December 1997 the government had published a White Paper, '*Your Right to Know – the Government's Proposals for a Freedom of Information Act'*, setting out its position on access to government information.[16]. This was widely welcomed as a forward looking document and a public consultation on it was promised. In his foreword to the White Paper the responsible Cabinet Minister, Dr David Clark, wrote:

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[15] The *Code of Practice on Access to Government Information Second Edition 1997*, can be viewed at http://www.foi.gov.uk/ogcode981.htm.

[16] The full text of the White Paper can be viewed at http://www.archive.official-documents.co.uk/document/caboff/foi/foi.htm

> 'There are matters, such as national security or personal privacy, where information has to be protected. Government itself needs some protection for its internal deliberations. This White Paper strikes a proper balance between extending people's access to official information and preserving confidentiality where disclosure would be against the public interest. It is a new balance with the scales now weighted decisively in favor of openness.'

Yet when the consultation on draft legislation was published in May 1999, that balance seemed to have shifted.[17] When the Chairman of the Campaign for the Freedom of Information James Cornford, gave evidence to the Select Committee on Public Administration in June 1999, he said:

> 'We are pleased that there is going to be a Freedom of Information Act…We have to say that we are deeply disappointed in the substance of the Bill. It represents a very substantial retreat from the Government's White Paper which was published only 17 months ago with the backing of the whole Cabinet and a preface from the Prime Minister. As you know, the White Paper was very warmly received, both domestically and internationally. The Information Commissioner who supervises Canada's FOI Act…said that this proposal in the White Paper "left Canada trailing in the dust". While the White Paper has been seen as a yardstick for best practice, the draft Bill is already being cited in the opposite context.'[18]

Two specific examples of the change are noteworthy. First, the White Paper proposed a regime with only seven classes of exempt information. The draft bill lengthened this list and the final act has not seven but 24 exemptions. Second, the White Paper included a 'substantial harm test' for withholding information but the draft bill (and current act) had only a simple harm test – a significantly lower level at which the power to withhold could be invoked. The then Home Secretary, Jack Straw, the Minister responsible for the draft Bill, acknowledged in his own evidence to the same 1999 Select Committee that there had been strong adverse comment, '….that this Bill represents (I am being quite specific) a betrayal of what the Prime Minister said in Opposition about freedom of information'. He was resolute in denying this and defending the position the government had reached. But a careful reading of his evidence and the document overall shows he was on the back foot.

What happened in the interim? Two practical things had changed. First, David Clark, the Minister responsible for the White Paper, had been removed from his position. He was sympathetic to the FOI process and a staunch supporter of strong legislation, which is clearly reflected in the White Paper he wrote. Second, his responsibilities for the FOI bill had been passed to the Home Office under Jack Straw, a Minister known to have little sympathy for FOI. It will only be when various Cabinet papers are disclosed in due course (not yet, as they are subject to an exemption under the new FOI regime) that we will have the details of the Cabinet discussions that took place during this time. But the general view is that after a year or so of government the potential pitfalls of a truly open access regime had instilled deep nervousness at the top levels of the government, which persuaded the leaders to retrench.

Since then FOI has been on a slight knife edge. The act was passed in 2000 but full implementation was delayed until January 2005. There have been one or two other alarms as well; for example, a fear about the introduction of fees regime. In the run-up to implementation there were delays on agreeing and announcing what fees should be charged. Some people suggested that this delay reflected a wish to load charges in such a way as to make a cost barrier that would impede access for the average citizen (this did not take place, however).

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[17] A summary can be viewed at http://www.lga.gov.uk/lga/modernising/foi.htm

[18] *Minutes of Evidence for Tuesday 22 June 1999 Freedom of Information Draft Bill: Rt Hon Jack Straw MP, Mr Timothy Middleton; Mr James Cornford and Mr Maurice Frankel*. HC 570-i. (1998-1999) http://www.publications.parliament.uk/pa/cm199899/cmselect/cmpubadm/cmpubadm.htm

Since implementation there has been a further review of the fees structure with fears that it will be revised in such a way as to introduce off-putting additional costs. This has just recently prompted the Campaign for the Freedom of Information – the leading FOI campaigning body in the UK – to issue a press release, at the end of July 2006[19], which states:

> According to reports of a leaked cabinet document, authorities would be allowed to take into account the time officials spend considering whether to release information as well as the time they spend looking for it. This means that the cost limit would be reached more quickly and more requests would be refused on cost grounds - even if the information itself was not exempt.
>
> The Campaign's director, Maurice Frankel, has said:
>
> *"These proposals would make it harder for requesters to ask penetrating questions and easier for authorities to avoid scrutiny. As the Act begins to bite we have finally begun to see some weakening of the traditional obstacles to openness. The last thing we need is to reverse this process by giving authorities better armor to defend themselves against requests. Instead of making it easier to refuse requests, government should be encouraging authorities to become more open by publishing more information without being asked, handling requests more expertly and organizing their records more efficiently."*

A document leaked to the *Sunday Times* suggests that at least 17 percent of requests that are now being processed would be refused on cost grounds in the future.[20] Official statistics show that some 800 requests to government departments were refused on cost grounds during 2005. The Campaign said that if the new proposals had been in force, more than three times that number – over 2,600 requests – would have been refused.

This is not to say that the FOI Act that was passed in the UK is 'bad' nor that it has prevented the release of much information. However, this short case study illustrates that governments and their officials can be placed under great pressure when faced with extra scrutiny. As a result they may seek ways to minimize that scrutiny even when their wish for openness prompted them to legislate in the first place.

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[19] The text of the press release is available at http://www.cfoi.org.uk/foi310706pr.html
[20] Cracknell, D. "Government U-turn on free information". *The Sunday Times*. July 30, 2006. http://www.timesonline.co.uk/article/0,,2087-2291779,00.html

2. ELEMENTS RESERVED FROM COVERAGE & PROTECTED BY THE LEGISLATION

Introduction

As stated in section 1, although freedom of information legislation establishes the statutory right to access information, all FOI laws have exemptions, exclusions or other provisions for protecting sensitive information from disclosure. Exemptions delineate the limits of the right of access to information under the legislation. A requester's right to information ends where exemptions begin; exemptions form the backbone of any FOI legislation.

Key questions

- What are exemptions?
- What are the different types of exemptions?
- How do exemptions relate to the "public interest"?
- What are the strongest and most common exemptions?
- What are the most commonly cited exemptions?
- Can the government veto the release of information?
- How has the increasing focus on national security affected each jurisdiction's freedom of information legislation or compliance with the law?

Exclusions & exemptions

Exemptions operate in different ways and tend to cover such issues as:

- the content of the information;
- the effect that disclosure would have (for example, on national security or international relations);
- the source of the information, and;
- the purpose for which the information was recorded.

Exemptions can be of different types and scope. In general there are two main types of exemptions – absolute and qualified. If an absolute exemption applies there is no further obligation on the part of the public authority to consider the request for information. Qualified exemptions involve further deliberation in which the public interest or potential harm in disclosure is considered. Some exemptions are 'class' based, in which case certain classes of information, such as information relating to the formulation of government policy or information obtained in confidence, for example, are exempt. Exclusions are a more fundamental type of 'exemption'. As the term suggests, certain public bodies or information generated by those bodies are excluded from the scope of the legislation, i.e. the law does not confer a right to access such information or information held by those organizations.

Who can make requests, and for what?

An obvious yet important potential 'exemption' is the requester – does the law give the right of access to anyone or only to citizens? The laws in the United States and in the United Kingdom allow anyone to make a request, whilst the Canadian *Access to Information Act* only applies to Canadian citizens or permanent residents of Canada. A recent change in the US via the *Intelligence*

Authorization Act for Fiscal Year 2004 prohibits intelligence agencies from complying with requests from foreign governments, their representatives or an intergovernmental organization.[21]

Although obvious, it is also important to consider what citizens are entitled to request. Does the Act allow citizens to request records, documents or is it does it confer the right to *information*? The British, American and Canadian legislation all interpret "records" broadly. In the Canadian ATIA, a record is described as one that "includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof."[22] "Records" in the United States are either created or obtained by an agency, and under agency control at the time of the FOIA request; the Electronic Freedom of Information Act Amendments of 1996 redefines records as simply "including any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format".[23] The UK FOI Act gives a person the right to ask for any information that is held by a public authority.

Exemption structure, common exemptions

The number, extent and process of applying exemptions vary. There are, however , exemptions that are common to most FOI regimes. The most common of these are illustrated in Table 2.

The US FOI Act's exemptions are discretionary and the act does not prohibit the disclosure of any information (i.e. the exemptions are not mandatory and agencies can, at their discretion, disclose information). In practice, however, there are other mechanisms that prohibit the disclosure of information even if an agency wishes to disclose. For example, classified information protected by the *Privacy Act* is not ordinarily disclosed. The nine discretionary e xemptions are: national security, internal agency rules, information protected by other statutes (142 different statutes that allow for nondisclosure), business information, inter and intra agency memos, personal privacy, law enforcement records, financial institutions and oil wells data. Recent changes since September 11th 2001 have also extended the range of exemptions to include 'critical national infrastructure'.[24]

The UK has both 'absolute' and 'qualified' exemptions. There are eight absolute exemptions; if the information requested falls within the scope of the exemption the information can be withheld. Seventeen exemptions are 'qualified' and therefore subject to a public interest test (the public interest test is addressed below in greater detail)[25].

The Canadian Act includes mandatory aand discretionary exemptions. Mandatory exemptions (similar to the UK's absolute exemptions) allow the public authority no option but to deny access if the requested information meets the criteria outlined in the exemption. However, two of the mandatory exemptions are subject a public interest test (explained in further detail below). The discretionary exemptions (similar to the UK's qualified exemptions) provide an opportunity for the release of information but subject to a 'harm test' (addressed below in more detail).

Table 2 Common exemptions

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[21] *Intelligence Authorization Act for Fiscal Year 2004*. See also *FOIA Post* "FOIA Amended by Intelligence Authorization Act for Fiscal Year 2004", http://www.usdoj.gov/oip/foiapost/2002foiapost38.htm

[22] Canada's *Access to Information Act. s.3.*

[23] *United States Department of Justice Guide to the Freedom of Information Act.* United States Department of Justice. 2004. http://www.usdoj.gov/04foia/foi-act.htm

[24] US *Homeland Security Act 2002.* http://www.dhs.gov/interweb/assetlibrary/hr_5005_enr.pdf

[25] Carter, M. & Bouris, A. *Freedom of Information: Balancing the Public Interest.* Constitution Unit: London, 2006.

Exemption	USA	CANADA	UK
National defense	Exemption 1, Classified Documents (information classified by Presidential Executive Order)	Section 15, International affairs and defence	Section 24, National security
International relations	Exemption 1, Classified Documents	S. 15, International affairs and defence	S.27. International relations
Ongoing investigations	Exemption 7	S.16 Law enforcement and investigations	S.30 Investigations and proceedings conducted by public authorities
Information provided in confidence	Exemption 1 (information classified by Presidential Executive Order) and Exemption 4 "privileged or confidential" information	S. 13 Information obtained in confidence	S. 41 Information provided in confidence
Law enforcement	Exemption 7	S.16 Law enforcement and investigations	S. 31 Law enforcement
Personal information	Exemption 6	S. 19 Personal information	S. 40 Personal information
Policy advice	Exemption 5	S. 21 Advice, etc. (Operations of government)	35.Formulation of government policy, etc.

Exemptions are often structured in terms of the "class" of the information being protected. Class-based exemptions are "blanket exemptions" in that records or information that falls within that particular "class of information" is exempt.[26]

Table 3 Class based exemptions

Class based exemptions		
USA	**CANADA**	**UK**
• Classified documents • Information exempt under other laws • Confidential information	• Information intended for future publication. • S. 13 information obtained in confidence from other • S. 16 information obtained or prepared by the Royal Canadian Mounted Police while acting as a municipal or provincial police force • S. 19 personal information • S 20 which protect the trade secrets and the confidential financial, commercial, scientific or technical information of third parties. • S. 23, solicitor and client	• Information accessible by other means • Information intended for future publication • Information supplied by/relating to security bodies • Court records • Investigations • Formulation of government policy • Information provided in confidence • Legal advice

[26] The University of Edinburgh Records Management Section provides some clear outlines of the nature of exemptions and can be viewed at http://www.recordsmanagement.ed.ac.uk/InfoStaff/FOIstaff/FOIIndex.htm

	privilege • S. 24 need for confidentiality identified in some other statutory provision. • S. 18 government trade secrets or financial, commercial, scientific or technical information that has, or is likely to have, substantial value. • S. 21 advice or recommendations to the government	

Public interest and harm tests

In many FOI regimes some exemptions are qualified and subject to a public interest or harm test. This mechanism requires the decision maker to consider the wider public interest or potential harm when applying an exemption. If the decision maker assesses the public interest would be enhanced or that no harm would be done by disclosing the information then the exemption can be overridden. However, "public interest" is not a clear or easily defined term; indeed, there is no universal definition. In most countries it is not defined in the legislation and it is up to the FOI practitioner to judge whether the public interest is better served by disclosing or withholding the information.

Table 4 Public interest override

	USA	CANADA	UK
Definitions	Act does not define	Act does not define	Act does not define
Does the Act contain a 'public interest override'?	No Exemptions are designed to incorporate the public interest already. The Act is said to have a "built in public interest". [27]	There is no general public interest override. Only two exemptions are subject to a public interest test (S. 19 Personal & S. 20 Third party information)	Yes 17 exemptions are subject to the public interest test.

The public interest is incorporated (or not) in varying ways across the jurisdictions. The United States FOIA does not have a specific public interest test *per se*, but instead "incorporates" the public interest into the exemptions themselves. Similarly, the act has no significant harm test except in its interaction with the *Privacy Act*. FOI officers in the United States do not have to consider the public interest or (except in relation to privacy matters) any potential harm when applying exemptions.

In Canada there is no general overriding public interest mechanism. Only two sections of the act are subject to a public interest test: section 20(6) in which commercial information from a third party as it relates to health, safety or the environment can be disclosed, and section 19, which states that personal information may be disclosed if it is in accordance with s. 8 of the *Privacy Act*.

[27] Metcalfe. D. J. (Director. Office of Information and Privacy. Department of Justice). "Privacy vs Freedom of Information: Competing or Complementary Rights?" FOI Live 2006: annual information rights conference for the public sector. London, 25 May 2006.

The public interest must clearly outweigh the injury or invasion of privacy that would result after disclosure. The public interest test 'bar' in Canada is set very high in that the public interest must *clearly* outweigh the reasons for non-disclosure, whereas in the UK and other commonwealth jurisdictions it is a matter of *balancing*; i.e. if the balance is even slightly skewed in one direction, the information should be disclosed.[28]

Far from moving toward a system that fully incorporates a public interest test, the Canadian Conservative government put forward proposals in April 2006 that would increase the number and scope of exemptions and exclusions of the act. The proposals prompted the Information Commissioner to remark that, "No previous government, since the *Access to Information Act* came into force in 1983, has put forward a more retrograde and dangerous set of proposals to change the *Access to Information Act*."[29] However, the situation may change if the Canadian Information Commissioner has his way. In a recent special report to Parliament he recommended amending the Act to include a general public interest mechanism.[30]

Of the three acts, the public interest test is used most prominently in the UK legislation and applies to 17 of the Act's exemptions. The starting point or assumption when considering the balance of the public interest is that there is a general public interest in disclosure, not withholding, of information.[31] The absolute exemptions to which the test does not apply are: S21 information accessible by other means; S23 information supplied by or relating to security bodies; S32 court, inquiry and arbitration records; S34 parliamentary privilege; S36 in relation to conduct of public affairs in the House of Lords or House of Commons; S40 personal information[32]; S41 disclosure of information amounts to an actionable breech of confidence, and; S44 prohibited by another enactment, Community obligation, contempt of court.

Notable differences in exemptions and exclusions

The Canadian *Access to Information Act* covers the Security Intelligence Service, although the way the act works in practice is slightly different. In contrast, the security services in the UK are well protected. As well as being shielded by several exemptions (for example, defense, national security, international relations) they are excluded entirely from the act's coverage. Indeed, they are protected to the extent that other authorities may not disclose that they *do not* hold information received from the security services. The security and intelligence services are well protected in the USA, too, especially in light of the changes since September 11th (see following case study for further details). The Federal Bureau Investigation (FBI) and the Central Intelligence Agency (CIA) are subject to the act, although their "operational files" are excluded. Perhaps unsurprisingly the CIA has one of the highest withholding rates and a large back log[33].

The status of each country's legislature under their respective FOI regimes also differs. In the United States, Congress is excluded from the Act, so individuals do not have the right under the FOI Act to access information held by Congress. The same is true of the Canadian Act, which excludes the Canadian Parliament. In the UK the both Houses of Parliament are included, although some special exemptions (parliamentary privilege[34]) and considerations apply when

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[28] Carter & Bouris. p. 292.
[29] Canada's Office of the Information Commissioner. *Response to the Government's Action Plan for Reform of the Access to Information Act: A Special Report to Parliament*. 2006 http://www.infocom.gc.ca/specialreports/2006special-e.asp
[30] Canada's Office of the Information Commissioner. 2006
[31] Department of Constitutional Affairs. *Guidance on Exemptions*. http://www.dca.gov.uk/foi/guidance/index.htm
[32] With three exceptions, see Carter, M. & Bouris. p. 19.
[33] *Agency FOIA Workloads & Backlogs, Fiscal Year 2004*. Public Citizen. http://www.citizen.org/litigation/free_info/foic_rep/statistics/index.cfm
[34] For further details on the notion of "Parliamentary privilege" please see http://www.parliament.uk/works/standards.cfm#sppriv

considering requests submitted to them. Although the administration of Parliament is subject to FOI, information held by individual Members of Parliament is not.

In contrast to the US and Canadian legislation, the UK Act has an exemption that allows FOI officers to deal with potential misuse of the Act. Section 14 of the act on "Vexatious or repeated requests" states:

> "Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request." [35]

Given the potential misuse of the exemption the Information Commissioner has warned that there must be "sound grounds" for such a decision. The Commissioner describes a vexatious request as one that: clearly does not have any serious purpose or value; is designed to cause disruption or annoyance; has the effect of harassing the public authority, or; can otherwise fairly be characterized as obsessive or manifestly unreasonable.[36] Further details of vexatious requests can be found in section 4.

Enforcement

What are the most commonly cited exemptions? [37]

The exemption cited most often in the USA, Canada and the UK is that covering personal information. In both the UK and Canada this is followed by the exemption for information or advice related to the formulation of government policy. Exemption 7 covering law enforcement is the second most frequently cited exemption in the United States. Similar exemptions protecting law enforcement in the UK and Canada are also often used. Requests for information relating to international affairs and defense are frequently rejected across the jurisdictions. Similarly, exemptions for legal professional privilege and information provided in confidence are used often. There are distinct parallels in the exemptions used most frequently and few notable differences.

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[35] UK *Freedom of Information Act 2000*
[36] *Freedom of Information Act Awareness Guidance No 22: Vexatious and Repeated Requests.* Information Commissioner's Office. http://www.informationcommissioner.gov.uk/cms/DocumentUploads/AG%2022%20Vexatious%20Paper%20-%20Final.pdf
[37] These figures refer to 2005 for the UK and Canada, and 2003 for the United States.

Figure 1 Exemptions used, Canada 2005

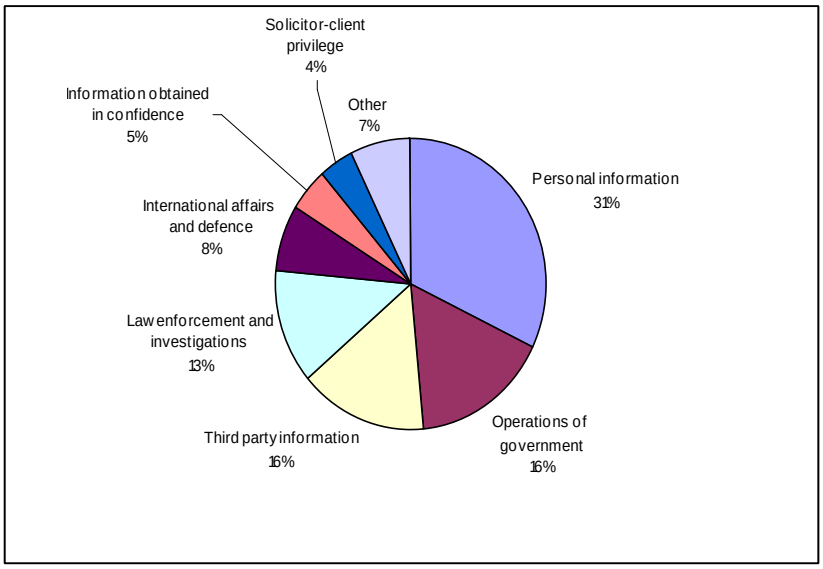
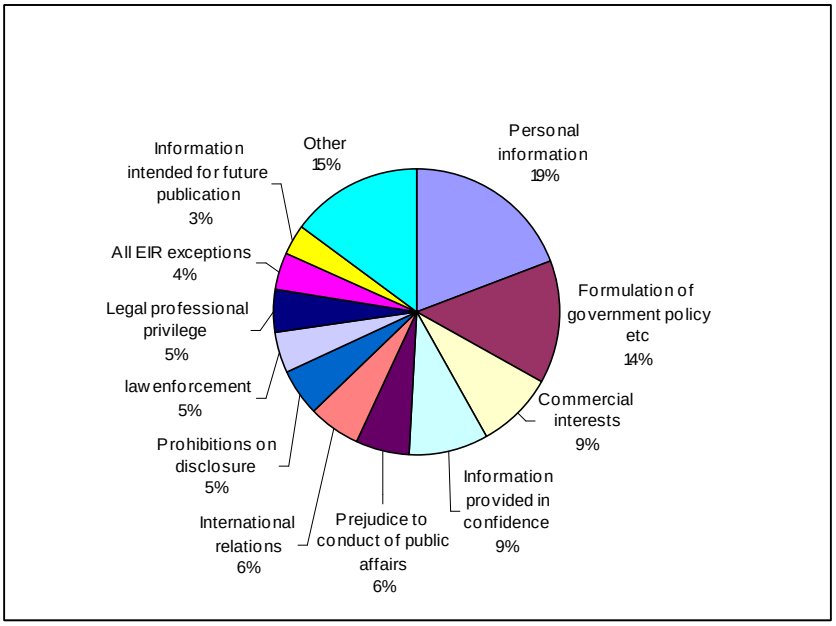


Figure 2 Exemptions used, United Kingdom 2005



Government 'veto'

Table 5 Government 'veto'

Government 'veto'	US	CANADA	UK
	No	No	Yes

Some FOI legislation incorporates a 'veto' that allows a public authority (ordinarily only central or federal government) to prohibit the release of information. In almost all jurisdictions such vetoes are rarely used; it is regarded as the 'nuclear' option.

Of the three acts only the UK's provides for a formal government 'veto'. In the UK only a Cabinet Minister may use the 'ministerial veto' that overrides a decision of the Information Commissioner or Information Tribunal that requires disclosure. The power was intended to be used only in exceptional circumstances. Shortly before the Act was implemented the Information Commissioner announced that he would be reporting all veto decisions made by government ministers to parliament for detailed consideration and public scrutiny. The Commissioner made his position on the veto clear,

> "Public interest must prevail. Ministers may believe that they have valid reasons for disagreeing with one of our decisions, but the Act makes clear they must have 'reasonable grounds' before exercising the veto. I hope the veto will be used very rarely, if at all, but I cannot let a culture develop that makes use of the veto common practice."[38]

Canada has a similar provision in which Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information for the purpose of protecting national defence or national security. There are no provisions for such a veto in the US Act as the Act is enforced in the courts, which members of the executive are unable to overrule.

[38] UK Information Commissioner's Office. *Ministerial decisions to be made more transparent*. http://www.informationcommissioner.gov.uk/cms/DocumentUploads/Ministerial%20decision%20to%20be%20made%20more%20transparent.pdf

Case study – the 'national security' exemption in the US FOIA and changes since 9/11

Although freedom of information legislation establishes the statutory right to access information, all FOI legislation has exemptions, exclusions or other provisions for protecting sensitive information from disclosure. The most common elements reserved and exempted from FOI laws around the world are those involving national security and defense interests; indeed, it is safe to say that national security interests are either excluded or exempt in some form from every FOI law in the world.

It was the rise of standing armies and the ability to provide security through organized violence that gave rise to the modern state, and this remains the state's most defining characteristic even today[39]. National security exemptions and exclusions represent perhaps the most solid of all exemptions or exclusions in FOI regimes; it is widely recognized that it is not in the public interest to allow untrammeled access to information about national security and defense. However, the extent to which national security is protected by FOI regimes and the manner in which it is done can be telling. Given that national security represents the central and strongest of all exemptions and exclusions, any shift in the balance between security and freedom of information is likely to have a significant affect upon the operation of the entire access regime; if exemptions relating to national security are considered 'too weak', it is likely that interpretation of 'lesser' exemptions will be viewed in a similar light. This section of the paper will provide an overview of the shift in the balance between national security and freedom of information in the United States (particularly since the attacks of September 11th 2001) and highlight some of the significant changes that have occurred in the past several years.

Soon after the attacks on New York and Washington the US Government began a broad series of measures intended to make the country safer. Legislation such as the *USA PATRIOT Act 2001*, the *Homeland Security Act 2002*, the *Intelligence Authorization Act for Fiscal Year 2004* and other non-legislative measures extended secrecy, increased the state's powers of surveillance and sought to limit access to sensitive or potentially sensitive information. The assumption underlying many of the measures that addressed information security was that open government and freedom of information could provide opportunities to access information that may aid preparations for any further attack[40] - in essence, there was too much freely available information about the United States' critical national infrastructure (CNI) that could be put to ill use.

This fear has led to a substantial shift in balance between national security interests and open government in the United States. The shift is perhaps most starkly illustrated by comparing memos issued by Attorney General Janet Reno in 1993 and by Attorney General John Ashcroft in October of 2001[41].

> "President Clinton has asked each Federal department and agency to take steps to ensure it is in compliance with both the letter and the spirit of the *Freedom of Information Act* (FOIA)…First and foremost, we must ensure that the principle of openness in government is applied in each and every disclosure and nondisclosure decision that is required under the Act. Therefore, I hereby rescind the Department of Justice's 1981 guidelines for the defense of agency action in *Freedom of Information Act* litigation. The

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[39] See Max Weber's seminal speech *Politics as a vocation* in which he characterizes the state as, "a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory". It can be accessed at http://www2.pfeiffer.edu/~lridener/DSS/Weber/polvoc.html

[40] Roberts, A. "National Security and Open Government". *The Georgetown Public Policy Review. 9:2 (Spring 2004).*

[41] Lamble, S. "FOI as United States' foreign policy tool: a carrot and stick approach". *FOI Review*. Number 105 (June 2003).

> Department will no longer defend an agency's withholding of information merely because there is a "substantial legal basis" for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure… In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be."
>
> *Memorandum (abridged) for heads of departments and agencies from Attorney General Janet Reno, October 4, 1993.*[42]

The memo illustrates that there was leadership from the top of government to apply not only the letter but also the spirit of the law. It made clear that the starting position for FOI officers was to assume disclosure and that the Department of Justice would only defend agencies who adopted this approach. Shortly after September 11th, Attorney General John Ashcroft issued another memo.

> "As you know, the Department of Justice and this Administration are committed to full compliance with the *Freedom of Information Act* (FOIA), 5 U.S.C. § 552 (2000)…The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy…I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information…When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."
>
> *Memorandum (abridged) for heads of departments and agencies from Attorney General John Ashcroft, October 12, 2001*

The Ashcroft memo demonstrates a marked shift in the balance between openness and national security. Prior to September 11th 2001 the Federal Government urged a presumption of disclosure and would only defend those agencies that shared that presumption. After September 11th 2001 the emphasis shifted to careful compliance and agencies were assured of Department of Justice support if there was sound legal basis for withholding information; it is the letter of the law that dominates the Ashcroft memo, the 'spirit' is absent.

There have also been legislative measures to amend citizens' rights to access information. The *Homeland Security Act 2002* provides further protection for critical infrastructure information. The protection comes in establishing a new category of information ("critical infrastructure information" or CII) to be considered under exemption 3 of the FOIA. It allows information about critical infrastructure that is voluntarily submitted to the Department of Homeland Security (DHS) by private sector bodies to be withheld. Critical infrastructure is systems essential to the

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[42] United States Department of Justice. *FOIA Update Vol. XIV, No. 3 1993*. http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm

minimum operations of the economy and government such as telecommunications, energy, banking and finance, transportation, water systems and emergency services, both governmental and private. A further example is the *Public Health Security and Bio-terrorism Preparedness and Response Act 2002* which amends the *Safe Drinking Water Act* to require every community water system serving a population of greater than 3,300 to undergo an assessment of its vulnerability to a terrorist attack[43]. Citizens have no right to access the assessments because they are excluded from the FOIA. Furthermore, only individuals designated by the 'Administrator' may gain access to the document; information is being compartmentalized.

The present administration has also led an expansion of classification and a growth in "sensitive but unclassified information". According to a report by the Information Security Oversight Office classification increased by 64 percent in the two years that followed the September 11th attacks.[44] But there has also been an increasing emphasis on what is termed "sensitive but unclassified information". This more cautious approach to freedom of information at the federal level has been mirrored at the state level. Since September 11th 2001 more than 40 states have implemented policies that restrict citizens' access to certain types of information.[45]

There has also been an unprecedented process of reclassification. Thousands of declassified documents residing at the National A rchives and Records Administration (NARA) have been reclassified since 2001. Executive Order 12958 signed by President Clinton in 1995 started a process of bulk declassification of federal records that were aged 25 years or older, within certain specified exemptions (relating intelligence sources and methods still in use). The deadline for declassification was April 2000. However, the Department of Energy (DoE) later expressed concern that declassification had led to inadvertent release of "unmarked" restricted and formerly restricted data on nuclear weapons. In 1998 Congress authorized the DoE to remove these files.[46] By fall of 1999 other agencies such as the CIA had become increasingly intransigent in their willingness to declassify documents, especially for the State Department's *Foreign Relations of the United States* series. Delaying tactics were evident; indeed, the deadline for compliance was already extended by 18 months to October 2001 at the request of Department of Defense. The issue came to a head in the fall of 1999, when six US Government agencies (including the CIA, DoD, the three military services and the Department of Justice) wrote to NARA suggesting that the initial declassification review did not take account of their 'equity' (ownership). NARA, as a custodian of the documents (details were apparently outlined in a classified Memorandum of Understanding[47]), was therefore was obliged to remove many documents. Fifty-five boxes were reviewed again between 1999 and 2000, resulting in 14 boxes (9,750 pages) being reclassified. The review was not discovered until files were requested by researchers unaware of their reclassification. During the Bush Administration, the agencies have demanded access to review all declassified NARA files. Since 2001, agencies have briefly surveyed 43.4 million pages, and audited 6.1 million pages on a 'page by page' basis. The result was the reclassification of 9,500 documents (55,000 pages)[48]. According to Matthew M. Aid, writing for the National Security Archive at George Washington University, the reclassification process was carried out without authorization or budgets from Congress.

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[43] Atkins, C. "State Open Records Laws: Legislative Activities in 2003". *Terrorism Preparedness A Series of Reports About State Responses To Public Health Threats.* Vol. 1 No. 4. *(*July/August 2003)
[44] Weitzel, P. "A zeal for secrecy". *The American Editor*. (May-June-July 2004).
[45] Senator John Cornyn, "St. Mary's study to ensure laws don't hinder flow of info". *San Antonio Express News*. July 23, 2006.
http://www.mysanantonio.com/opinion/stories/MYSA072306.4H.Ncornyncomment.5075817.html
[46] US *National Defense Authorization Act 1999*. S. 3161
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ261.105.pdf
[47] Aid, M. *Declassification in Reverse: The US Intelligence Community's Secret Historical Document Reclassification Program*. National Security Archive, George Washington University.
http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB179/
[48] Aid.

As this brief survey has shown, there have been significant changes in the balance between the public's right to know and national security, particularly under the Bush Administration since September 11th 2001. The Ashcroft memo, especially when contrasted with that of his predecessor Janet Reno, illustrates the different approach; state governments have largely followed the lead of the federal government.

3. USAGE AND STATISTICS

Introduction

A key to understanding freedom of information in the US, Canada and the UK is embedded in the statistics: how many requests are made and by whom, how closely public authorities comply with timescales, and which departments receive the most requests, to name a few of the pertinent issues best illustrated by numbers. This section of the paper will look at a range of FOI monitoring data in each country.

The monitoring requirements in each country vary widely, which makes straight comparisons difficult, if not impossible. In the UK, the Department for Constitutional Affairs (DCA) produces quarterly and annual statistical reports covering all central departments and agencies with the number of requests received, response times, use of exemptions, number of internal reviews, percentage of information released in full or in part vs. percentage of information withheld, and number of appeals to the information commissioner. The Canadian government publishes an annual bulletin called *Info Source*, which includes statistics on requests made under the *Access to Information Act*. In the United States, the Department of Justice (DOJ) publishes an annual report like those of its counterparts in Canada and the UK. The most recent DOJ document summarizing individual departments' statistics was published online in 2003; however, the Government Accountability Office (GAO) published an overall assessment of FOI statistics and performance on 26 July 2006 and it is from this report that we draw the numbers for this section[49].

For the purposes of this section, UK statistics refer to FOI requests received by 42 central government departments and agencies and Canadian statistics to 148 federal government departments or agencies, while US statistics refer to requests received by 24 federal departments and agencies. The focus of this section will be primarily on 2005; however, we will also draw upon historic trends in the levels of use of FOI in Canada and the USA.

Key questions

- How many FOI requests are made to government and by whom are they submitted?
- Can we draw conclusions about requesters and their reasons for seeking information?
- Can we say which types of information are most commonly sought by requesters?
- Which authorities receive the most requests and are there discernable similarities across the three countries?
- What can the monitoring statistics tell us about compliance performance in each regime?

Usage of freedom of information laws

Levels of usage

Many argue that the "right to know" is an integral part of modern democracy and a means of bringing the government closer to the people. Informed citizens are better placed to partake in public affairs, and to do so effectively. Information is now commonly regarded as the currency of democratic life. Whether FOI laws actually enhance democracy is open for debate, however, especially if one looks only at the statistics - not many people use FOI to obtain government-held information. In the USA, Canada and the UK less than 1 percent of the population in each

[49] United States Department of Justice. *FOIA Post* "Summary of Annual FOIA Reports for Fiscal Year 2003".http://www.usdoj.gov/oip/foiapost/2004foiapost22.htm ; Government Accountability Office. *Freedom of Information Act: Preliminary Analysis of Processing Trends Shows Importance of Improvement Plans.* 2006. http://www.gao.gov/new.items/d061022t.pdf.

country have ever made an FOI request. However, people do not often use the right to information for the explicit purpose of engaging the political or democratic process; rather, most individuals and organizations are interested in their hospitals' performance indicators, the cleanliness of local restaurants, and contractual agreements between public authorities and private entities, i.e. information that can help further a personal or 'private' goal.

Table 6 Number of information requests by country[50]

Jurisdiction	Requests received in 2005	Population (thousands)	Requests per 1,000 people
United States of America	2,629,190	281,000	9.4
Canada	25,207	31,630	0.8
United Kingdom	38,108	60,000	0.64

Trends over time

Although the public's use of FOI overall is low, the number of FOI requests made is on the increase in Canada and, to a lesser extent, in the US. In fact, in Canada the number of requests has increased threefold in the last decade. Prior to 1998 the number of FOI requests received by Canadian federal departments or agencies rose steadily, while between 1999 and 2000 there was a steep rise in the number of requests. Since then the number of requests has continued to rise, particularly rapidly since 2002.

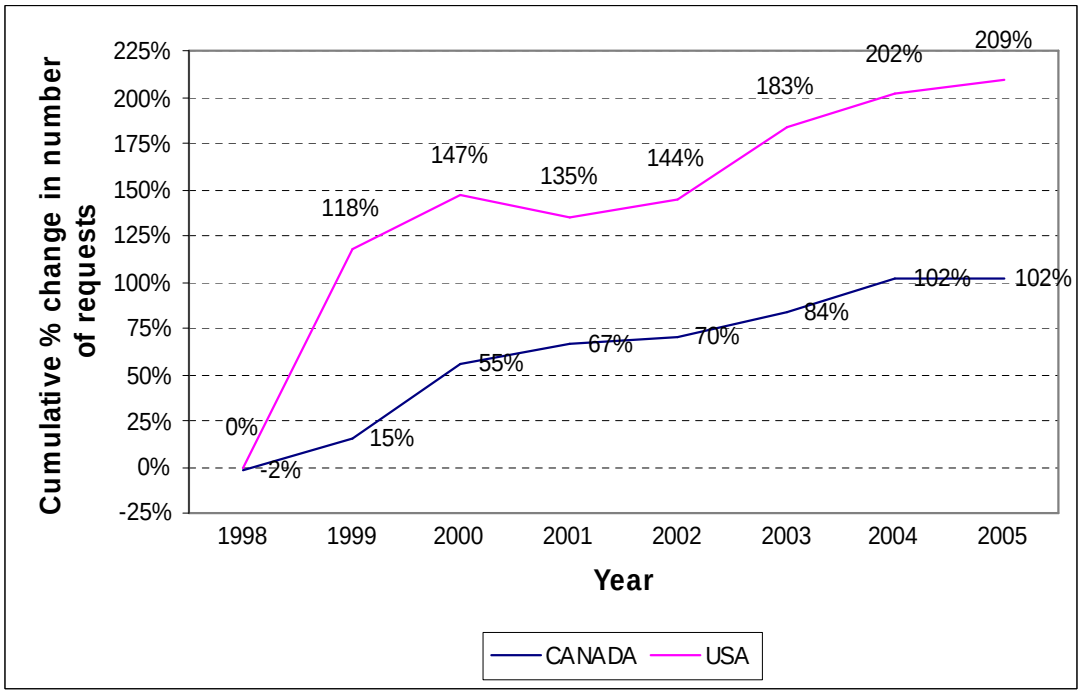
The use of FOI has also risen in the United States, but the overall increase in recent years has been slight. From 1998 to 1999, request numbers increased dramatically due to a jump in requests to the Social Security Administration (SSA) for genealogical and research purposes, and then increased slightly until 2000, after which they declined slightly[51]. Over the period 2002 to 2005 the number of requests received increased by about 27 percent, but only by 2.5 percent from 2004 to 2005[52].

[50] Statistics from: Government of Canada. *Privacy Act and Access to Information Act: Bulletin Number 28*. 2005. http://www.infosource.gc.ca/bulletin/2005/bulletin01_e.asp ; Department for Constitutional Affairs. *Freedom of Information Annual Report 2005: Operation of the FOI Act in Central Government*. 2006. http://www.dca.gov.uk/foi/imprep/annrep05.pdf ; GAO. 2006.

[51] Government Accountability Office. *Information Management: Update on Implementation of the 1996 Electronic Freedom of Information Amendments*. 2002. http://www.gao.gov/new.items/d02493.pdf, p. 27.

[52] GAO. 2006. p. 15. Note that the numbers of requests for this period exclude the Social Security Administration, which began tracking FOI requests in a different way in FY 2005. DOJ officials have suggested that SSA exclude the majority of requests for personal records in FOI tracking statistics in the future.

Figure 3 Percentage change in number of requests since 1997



It is too early to discern any trends in the UK but after receiving 13,000 requests in the first quarter of 2005, central government departments and agencies received an average 7,000 to 8,000 requests in each of the next three quarters. In the first two quarters of this year they received 9,400 and 8,000 requests, respectively.

Requests by individual departments

As Table 7 illustrates, large numbers of requests are concentrated in a few departments in each country. This trend is most marked in the United States where the Department of Veteran Affairs received almost two-thirds of all requests in 2005, while Citizenship and Immigration Canada got one-third of all requests and the UK's Health & Safety Executive (HSE) received around one-fifth of all requests to central government. The five agencies in the United States that receive the most requests account for just under 93 percent of all FOI requests, while the 'top five' in the UK and Canada account for just under 60 percent. In Canada and the UK departments and agencies not appearing in the 'top ten' account for more than a quarter of all requests; in the United States only 1.5 percent of all FOI requests are received by authorities outside the 'top ten' list (see Table 7).

The agencies receiving the most requests are by and large 'service' oriented or 'front facing' departments that have day-to-day interactions with the general public. The two departments in the US and Canada that receive the most requests deal with social benefits, taxes or immigration matters, whilst in the UK the HSE, responsible for health and safety regulations, receives many requests from individuals seeking information that will assist them in making a case for compensation.

Table 7 Ten departments receiving the most information requests, per country (2005)

	USA		CANADA		UK	
1	Department of Veteran Affairs	72.8%	Citizenship and Immigration Canada	35.8%	Health and Safety Executive	18.
2	Department of Health and Human Services	8.5%	Canada Revenue Agency	7.4%	National Archives	16.
3	Department of Homeland Security	6.2%	Health Canada	5.4%	Ministry of Defense	12.
4	Department of Defense	3.1%	National Defence	5.1%	Home Office	5.2
5	Department of the Treasury	2.0%	Royal Canadian Mounted Police	4.3%	Department for Transport	4.1
6	Department of Justice	2.0%	Public Works and Government Services Canada	3.5%	Department for Work and Pensions	3.9
7	Department of Agriculture	2.0%	Transport Canada	3.1%	Cabinet Office	3.8
8	Department of Labor	0.9%	Environment Canada	2.6%	Foreign and Commonwealth Office	3.5
9	Environmental Protection Agency	0.5%	Library and Archives Canada	2.5%	HM Revenue and Customs	3.3
10	Office of Personnel Management	0.5%	Correctional Services Canada	2.4%	HM Treasury	3.2
	Other Departments	1.5%	Other Departments	27.9%	Other Departments	26.

Requesters

Identifying the people who make FOI requests and finding out why they do so is not a simple task. In the US and UK the capacity in which a requester makes a request is not documented by the receiving department and guesses as to who is requesting are only as good as the FOI practitioners' estimates. Monitoring statistics in those countries tell us nothing about who requesters are, why they make FOI requests, or what they do with the information received. Canada's *Info Source* bulletin, however, which includes information logged through the Co-ordination of Access to Information Requests System (CAIRS)[53], does provide some information about the categories of ATIA requesters, as can be seen in Table 8.

Table 8 Sources of requests, Canada, 2005[54]

Businesses	47.20%	11,910
Public/private individuals	32.60%	8,213
Organizations	8.40%	2,107
Media	10.60%	2,680
Academics	1.20%	297
Total Requests Received		25,207

Although neither the UK nor the United State's reporting requirements include recording the sources of FOI requests, there has been some research on requests to local authorities in the UK. When asked to rank the categories of requester, most FOI practitioners listed private individuals as the most frequent requesters, businesses/companies second and journalists third, followed by lawyers, campaign groups and academics, among others.[55]

Types of information requested

Identifying the types of information people request is also challenging; such information is seldom recorded (or published) by public authorities in any of the countries. We can infer some conclusions from other sources, however. For example, we know that most requests in Canada come from businesses and that the third parties exemption and commercial confidentiality exemption are frequently cited by departments withholding information, which suggests that businesses seek information on present or past government contracts. The most frequently cited exemption in all three countries is personal information. In the UK there is evidence that many people mistakenly apply for personal information through FOI legislation when such requests should be made through the *Data Protection Act*. These are logged by public authorities as FOI requests, however.

The most obvious example of types of information requested can be found in articles printed by newspapers. Journalists and editors often include the fact that the writer has obtained certain information through the legislation. Breaking down the types of information into categories, it appears that government running costs and expenses as well as government procedures and policy were most frequently requested in the UK in 2005. A detailed look at the UK national media's use of FOI can be found in the case study for this section.

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[53] For more information about CAIRS, see p. 45

[54] Roberts, A., DeWolfe, J. and Stack, C. *An Evidence-Based Approach to Access Reform*. 2001. Queens University, School of Public Policy. http://www.queensu.ca/sps/working_papers/files/sps_wp_22.pdf .The numbers reported by departments through CAIRS do not necessarily match the actual number of requests received. However, these are the official numbers put forth by the Treasury Board.

[55] *Freedom of Information Act 2000: The First Year: The Experience Of Local Authorities In England*. Constitution Unit. Forthcoming 2006.

Performance issues

Information released and withheld

One of the statistics that helps tell the story of an FOI act's 'success' is the proportion of requests that result in disclosure. In the US, four of the 'top ten' receiving departments had among the top five highest full disclosure rates in 2005: Veterans' Affairs, Health and Human Services, US Department of Agriculture, and Office of Personnel Management[56]. This can be attributed to the fact that requests to these departments are mainly for personal records or information that departments regularly release to requesters. In contrast, in the same year requests to the DOJ resulted in barely more than 50 percent full disclosure. It is unclear why the full disclosure of information in Canada is so much lower than in the US or UK (for which a low 66 percent is partially explained by the fact that the act was newly implemented in 2005).

Table 9 Proportion of information disclosed and withheld 2005

	Canada	USA	UK
Full disclosure	27.1%	87.2%	66%
Partial disclosure	43.2%	4.0%	13%
Full denial	3.1%	0.8%	18%

Backlogs and delays

A universal – and much criticized – problem plaguing FOI regimes across the world is delays and backlogs in the request process. Performance levels do vary, with some departments and agencies boasting much smaller backlogs than others; most blame the problem on lack of resources. Although monitoring requirements do not allow for a consistent comparison across the three jurisdictions, information in Table 10 gives an indication of processing delays in each country.

Table 10 Backlogs

Country	Pending from previous year	Received	Processed	Carried forward	Backlog
Canada[57]	4,927	25,207	24,709	5,425	18.0%
USA[58]	160,000	2,629,190	2,589,190	200,000	7.1%
UK[59]	n/a	35,097	34,181	916	2.6%

Note: Figures for Canada apply to the period 1 April 2004 to 31 March 2005. UK figures apply to calendar year 2005. Figures for the United States refer to data from FY 2004-2005; requests pending and carried forward are approximate.

According to official statistics, FOI requests in the UK are processed faster than in the US and Canada[60]. The majority of requests in the UK in 2005 – 87.5 percent – were answered within the statutory limit of 20 working days[61]. This number is slightly misleading, however, as it does not account for requests that are subject to the public interest test, which allows for permitted extensions. In Canada more than half (61 per cent) of all requests in 2005 were processed within

[56] GAO, 2006. p 19.
[57] *Privacy Act and Access to Information Act: Bulletin Number 28.* Government of Canada. 2005. http://www.infosource.gc.ca/bulletin/2005/bulletin01_e.asp
[58] Department for Constitutional Affairs 2006.
[59] *FOIA Post* "Summary of Annual FOIA Reports for Fiscal Year 2003". United States Department of Justice. 19 September 2006. http://www.usdoj.gov/oip/foiapost/2004foiapost22.htm
[60] However, there was notable variation across departments and agencies. For further details please see Department for Constitutional Affairs, 2006.
[61] Department for Constitutional Affairs. 2006

31 days and 16 per cent between 30 and 60 days. However, one-fifth (21 percent) of requests took longer than 61 days to process.

Reporting of processing times in the United States is less transparent than in the UK or Canada. The official annual reports produced by federal departments and agencies detail the median number of days it takes an agency to respond. Performance across the departments and agencies is mixed[62]. Eight agencies reported that the median number of days to process simple requests was less than 10. However, some agencies (within the Department of Justice, for instance) reported that the median number of days to process such requests was over 100. This performance across the agencies dealing with complex requests was similarly mixed. The performance of those departments using single track processing[63] was also inconsistent, with the median number of days for responding to requests varying from five to 173. The year on year change in median processing times is also wide-ranging, with many agencies showing increased processing times and many improving; there is no discernable pattern.[64]

As the Coalition of Journalist for Open Government suggest, the reporting method is somewhat vague.

> "The government reports only hint at how long people have to wait for information they've requested. The reports list the median number of days it takes an agency to respond, a somewhat inexact indicator by itself, and one that notes only the first part of the story. "Response" under the law means only the government has told the requester whether the request will be granted all or in part, denied, if no such record exists or the record is held by another agency, or if there are administrative issues that need to be resolved before a final decision can be made."[65]

[62] GAO, 2006. p 21.
[63] See section 4 Practical Issues for Authorities.
[64] For a more detailed view of median processing times, see GAO 2006 on which this section is based.
[65] Coalition of Journalists for Open Government. *A Review of the Federal Government's FOI Act Performance*. 2004. http://www.cjog.net/documents/Combined_FOIA_Performance_Report_Tables.pdf

Case study

Introduction – Media's use of FOI in the UK, 2005

In the preceding pages we examined general patterns in the usage of freedom of information legislation (FOI). This case study focuses on one particular category of requester's use of FOI – the print media. Not only are the media frequent users of FOI – one study estimates that they are the third single largest category of requester in the UK, and fourth in Canada[66] – but they are also the most visible type of requester. The use they make of the act is frequently put in the public domain and on the public's 'radar'. Of those members of the public who had heard of the FOIA 2000 in the last three years, an average 41 percent learned about it through the print media[67]. As the most up-to-date data pertains to UK journalists writing in national newspapers in 2005, this is the core of the case study.[68]

As this case study will encapsulate the wider themes of this section, it is worth returning to four of the key questions listed at the outset of this section and an additional one:

1. How many FOI requests are made to government and by whom are they submitted?
2. Can we draw any conclusions about requesters and their reasons for seeking information?
3. Can we say which types of information are most commonly sought be requesters?
4. Which authorities receive the most requests?
5. What prominence is given to articles based on information obtained under FOI?

1. How many requests and by whom?

Although it is impossible to say how many requests have been made by journalists, a number of alternative indicators are available: number of published articles based on information obtained under FOI and the distribution of these articles over the year, according to newspaper type and individual newspaper.

In 2005, the first year of the UK's FOI Act's implementation, national broadsheets and tabloids published 707 newspaper articles based on information gained through FOI. (The total number is assumed to be higher because we know that some journalists used FOI, or information obtained under it, but did not cite the act in their article.) This is a significant proportion of the 1800 stories that appeared with the term 'freedom of information' in them in 2005, and works out to be approximately two per day for the year. Other stories were specifically about the operation of the act or mentioned FOI in another context.

Table 11 Stories in UK newspapers using FOI, 2005

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
55	111	106	24	48	57	40	48	44	77	33	64

Table 11 shows the distribution of stories based on FOI over 2005. The average per month is 59 requests. February saw the highest number of requests, with 111; April the lowest, with 24. It is

[66] See Table 8, for example.
[67] Information Commissioner's Office, *Report on Information Commissioner's Annual Track 2006 – Individuals*, July 2006. http://www.ico.gov.uk/upload/documents/library/corporate/research_and_reports/2006_annual_tracking_report_individuals_final.pdf.
[68] This information for this case study is drawn from the unpublished preliminary findings of the Constitution Unit's study of media use of FOI in the UK, based on media content analysis and interviews with journalists. Do not cite without permission.

too early to identify any real trends, and the variation over the year prevents this. Yet it is possible to hypothesize that February saw the highest number stories as the flood of information requested in January started to be disclosed. The subsequent drop might reflect the declining novelty value of the Act, or journalists' growing frustration with the level of disclosure.

2. Requesters and their reasons for seeking information

The journalist requester category may be divided further into newspaper type and newspaper title. More articles based on FOI appeared in broadsheets than tabloids.[69] Over the course of the year 56 percent of articles using FOI appeared in broadsheets, 44 percent in tabloids. In terms of individual newspapers, the three with the most stories included two broadsheets and a tabloid: first was a broadsheet, the *Times* and a tabloid, the *Daily Mail* with 14 percent; next, the *Guardian* with 13 percent.

Journalists' motivation for seeking information is driven by the need to sell newspapers, their nose for a story and their desire to put information in the public domain. Journalists have listed the following motivations for using FOI: uncovering a piece of information that would otherwise have remained undisclosed and which the public notice and act on; uncovering the workings of government; and finding information that would bring the government down.

3. Types of information

The types of information requested by journalists appears to fall into two broad categories: information thought most likely to either shed light on (scandalous) government workings and official behavior, and information thought directly to inform and affect the everyday lives and choices of the individual. The most popular types of request, as shown in Table 12, are information relating to government and public officials' costs and/or expenses and information relating to institutional rules, procedures and policies. Both of these types would be included in the first category, and each featured in more than 20 percent of articles using FOI in 2005. The next most prominent type of information sought was that relating to performance measures, which featured in approximately 10 percent of articles and which may broadly relate to the second category. Crime and health and safety information would also be included in the second category.

Table 12 Types of information used in stories in UK newspapers using FOI, 2005

Type	Total	%
Costs / Expenses	195	21.3%
Institutional rules, procedures and policies	191	20.9%
Performance measures	97	10.6%
Historical	86	9.4%
Whimsical / Trivial	83	9.1%
Crime	65	7.1%
Health and safety warnings	64	7.0%
Malpractice or impropriety	57	6.2%
International relations	39	4.3%
Contracts with government	23	2.5%

[69] Under 'broadsheets' we included *The Times*, *The Guardian*, *The Daily Telegraph*, *The Independent*, *The Financial Times*, *The Sunday Times*, *The Observer*, *The Sunday Telegraph*, *The Independent on Sunday* and *The Business;* under tabloids we included: *The Daily Mail*, *The Daily Express*, *The Daily Mail*, *The Sun*, *The Mail on Sunday*, *The Sunday Express*, *The Sunday Mirror*, *The News of the World*, *The Morning Star*, *Daily Star* and *The Business*.

Domestic (UK) security matters	14	1.5%
	914	100.0%

A similar trend can be seen in the Campaign for Freedom of Information's sample of '500 Stories from the FOI Act's First Year'.[70] According to this study, of the sample of 500, the National Health Service (NHS) generated the most articles (36), followed by education (29), and expenses (24).

4. Most requested authorities

From which government departments or public authorities did journalists most frequently request information? The UK central government accounted for just under half of all media articles using FOI. 'Other' authorities accounted for around a third of media stories, whilst the police and local authorities were the recipients of about one-fifth of the requests that became news stories. Universities and the NHS were each featured in about 5 percent of articles.

Table 13 Public authorities receiving FOI requests for newspaper articles

Target Authority	Story using FOI	
UK Central Government	**239**	**48%**
Other	**141**	**28%**
Police	**65**	**13%**
Local Authority	**24**	**5%**
NHS	**15**	**3%**
University	**11**	**2%**
	495	**100%**

The individual government departments that feature most in the media's stories using FOI were the Ministry of Defence (MOD), the Treasury, the Cabinet Office, the Foreign and Commonwealth Office (FCO) and the Home Office. These departments accounted for around 50 percent of all media stories using FOI, and therefore around a quarter of all media stories using FOI.

Table 14 'Top ten' government departments receiving FOI requests for information featured in newspaper articles

Department	Story using FOI	%
Ministry of Defence (MOD)	**42**	**17%**
Her Majesty's Treasury (HMT)	**31**	**12%**
Cabinet Office	**29**	**12%**
The Foreign and Commonwealth Office (FCO)	**28**	**11%**
Home Office	**26**	**10%**
Department for Transport (DfT)	**18**	**7%**
Department for Culture, Media and Sport (DCMS)	**13**	**5%**
Department for Education and Skills (DfES)	**13**	**5%**
Department of Health (DoH)	**10**	**4%**
10 Downing Street	**7**	**3%**

[70] The Campaign for Freedom of Information. *500 Stories from the FOI Act's First Year*. 2006. http://www.cfoi.org.uk/pdf/FOI%20Disclosures.pdf

5. Prominence of FOI articles

The prominence of FOI articles in the newspaper gives an indication of how newsworthy stories generated by FOI requests are thought to be, and allow us to infer – with caution – the extent of public awareness of the act.

FOI does not appear to be generating front page news. Only 41 articles achieved this position, a proportion of approximately 6 percent of articles citing information gained through FOI. Journalists indicate that information from FOI requests have not generated any 'big' stories, as the government would be unlikely to allow disclosure of information that would lead to such a story. Nevertheless, some requests did generate controversy; for example, landowners and large companies benefiting from European Union farming subsidies,[71] and advice on the Iraq war[72].

Conclusion

The research project on which this case study is based on is still in its preliminary stages and certain data, such as the number of requests made by journalists, the proportion of requests that result in full disclosure and the proportion turned into stories, remain obscure. Conclusions should therefore be drawn with caution. Initially, however, the data points to the fact that FOI has become another tool in journalists' toolboxes and that it is responsible for the creation of newsworthy articles, especially when the articles are of the investigative kind.

[71] Hencke, D. & Evans. R. "Royal farms get £ 1m from taxpayers". *The Guardian*. March 23, 2005.
[72] Brown. C, "The Smoking Gun?" *The Independent,* March 24, 2005.

4. PRACTICAL ISSUES FOR AUTHORITIES

Introduction

When deciding whether to pass a freedom of information law or how to implement a law, government officials and politicians often fail to think carefully about the practicalities of putting the law into force. Few think seriously about how the law will affect the jobs of civil servants and other government employees or, conversely, how the staff's abilities and attitudes will affect the success of the law's implementation. Yet those who answer requests and respond to complaints are the key players in the process of FOI implementation. Besides FOI officers, records managers play a large role in ensuring that implementation goes smoothly. Those who are not prepared face many problems as they scramble to organize the information being requested. In this section we will look at some specific issues that public authorities and their staff face when dealing with FOI requests. In particular we are interested in the following:

Key issues

1. The process of responding to FOI requests;
2. The costs of complying with the legislation;
3. The amount of time spent the processing requests;
4. Whether the authorities accumulate significant backlogs, and whether effective procedures are in place to reduce them;
5. The ways in which authorities deal with exemptions;
6. The ways in which authorities classify and deal with 'vexatious' requests and requesters;
7. The extent of staff training and awareness of FOI;
8. The nature and extent of support from senior management;
9. The seniority of the FOI officers' ranking in the authority's hierarchy;
10. The extent to which a culture change has taken place in government offices, and the extent to which it is managed;
11. The extent to which record keeping is recognized as a key factor to the success of FOI response systems.

As points two to eleven influence the efficiency of the FOI 'supply chain', it is sensible to look first at the response process in detail.

Logistical complexities of the request process[73]

The request process entails many steps. While the basic elements of a 'generic FOIA process' are broadly similar in each jurisdiction, it is worth focusing on areas of inefficiency as well as good practice in each system and the effects they have on each of the following areas: the type of tracking system; the nature of the request; the number of interested parties.

The tracking system can be either paper or electronic, and either 'single' or 'multi-track'. Canada is lauded for its centralized system and dedicated software, which is used by most authorities. On a government-wide level, the CAIRS (as Co-ordination of Access to Information Requests System) database, created by the Treasury Board Secretariat and implemented in 1998,[74] allows requests to be entered daily by federal institutions and is used to coordinate requests across

[73] The reader is referred to the FOI request flowcharts for each country in figures, 4, 5 and 6.
[74] Government of Canada. Access to Information Review Task Force. *New Reporting Framework for Assessing the Performance of the Freedom of information Program. Report 29*. Ottawa. 2002. Section 3.3.3

departments. For the individual departments, there is also the Access Pro Suite software - previously the Access to Information and Privacy (ATIP) suite - developed by Canadian firm Privasoft[75]. AccessPro Redaction (previously ATIPimage) allows the files to be scanned and edited electronically, AccessPro Case Management (previously ATIPflow) manages the request process, while the new AccessPro Workgroup purports to be 'a complete collaboration environment that will improve communications and streamline the handling and response process.'[76] The use of this software enables officials to manage a large volume of requests,[77] and offers other advantages associated with digitization (allowing quick review, simple monitoring of progress for future reference and lessons, standardization, and reduced waste).[78] ATIPflow also allowed data to be directly uploaded to CAIRS.[79]

The UK and USA request processes are not centralized; nor do individual departments use a common tracking software or database. While many UK authorities had tracking software in place prior to January 2005, the need for well-designed tracking systems was not recognized by many until after implementation.[80] Only 56 percent of UK local authorities used an electronic logging system in the first six months after implementation,[81] and almost two years after implementation, no more than fifty percent of respondents in any given sector use dedicated software.[82] In the USA, there is no centralized database or monitoring system but the Office of Information and Privacy (OIP) in the DOJ feels a system like CAIRS would be of use in monitoring FOIA compliance and consultation between agencies,[83] for while electronic tracking systems are in place in most agencies, they vary widely in type and standard.[84] Systems range from the *ad hoc* (based on standard office software), to commercial solutions (e.g., FOIAExpress) or those developed in-house. One example of the latter is that developed by Vredenburg Inc. for the FBI, whose imaging system minimizes manual data entry, and can be linked to other systems.[85] British Telecom and Privasoft are said to be working on similar software for the British market.[86]

There are disadvantages associated with the automation of the request process. One report states that the preliminary clerical work preparing files for ATIPimage in Canada is extremely time-consuming and carried out by ATIP analysts (as the authority cannot afford to employ clerical

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[75] Although ATIPimage and ATIPflow have been superseded by newer software, many departments still use the older versions. Further, several of the issues raised may apply to the new software as well as the older version.

[76] See Privasoft website at: http://www.privasoft.com/accesspro.htm and, Plotnikoff, J and Woolfson, R. (for the Department of Constitutional Affairs), *Management of Freedom of Information Requests in other Jurisdictions*. 2003, p.7. http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/uk/management_foi_requests_other_jurisdictions.pdf

[77] Roberts, A. "Government secrecy is a law unto itself." *Vancouver Sun* 23 Sept. 2003.

[78] The downside is political interference in disclosure process. See: Roberts, A. "Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada." *Public Administration* 83.1 (2005) 1-23, and Rees, A., "Red File Alert: Public Access at Risk", *The Atkinson Fellowship in Public Policy. A Special Report*, p. 1. Available at: http://www.atkinsonfoundation.ca/publications/Atkinson1_Ann_Rees.pdf

[79] Plotnikoff and Woolfson, p. 10

[80] Jim Amos and Sarah Holsen. *Freedom of Information Act 2000: The first six months. The experience of local authorities in England*. Paper Prepared for Improvement and Development Agency. September 2005. London, I&DeA. p.33

[81] Amos and Holsen, p.42

[82] Holsen, S. and Rahman, M. *Freedom of Information in the first 16 months: the FOI practitioner's perspective*. Delegate Survey Report from Fourth Annual Information Conference for the Public Sector: FOI Live 2006. August 2006. p .11 http://www.ucl.ac.uk/constitution-unit/foidp/downloads/FOI%20Live%202006%20survey%20report1.pdf

[83] Plotinikoff and Woolfson, p. 22

[84] Many databases are unable to locate the oldest requests. See: Blanton, T., Fuchs, M. and Elias, B. *Justice Delayed is Justice Denied: the Ten Oldest Pending FOIA requests. The National Security Archive Freedom of Information Act Audit.* December 2003

[85] Plotnikoff and Woolfson, p. 6

[86] Plotnikoff and Woolfson, p. 7

staff), thereby reducing the time spent on more significant work.[87] Other disadvantages of ATIPimage include large electronic memory and speed requirements, the need for detailed user training, the difficulty of working entirely on screen without large monitors and anti-glare applications, and the fact that the document search and compare feature is only as good as the effort applied to the indexing.[88] However, overall it appears to increase efficiency.[89]

The two methods for moving requests through the system are 'single track' and 'multi-track'. In a single track system, all requests are effectively placed in a pile and dealt with in the order they arrive; in the 'multi-track' system, simple requests (those requiring minimal administrative effort) are put in one 'track', complex or 'voluminous' requests in another, and the different tracks are dealt with independently, allowing more flexibility and quicker turnaround on the simple requests. US agencies can also process requests on an 'expedited' track, 'when a requester has shown a compelling need or urgency for the information'.[90]

The processing system varies across the three countries. While both systems exist in the USA, the multi-track system appears to be more prevalent – only six agencies use a single track system.[91] Multi-tracking has also been encouraged by the E-FOIA amendments and Executive Order 13392. In the UK, requests are divided according to their complexity in the UK (see Figure 5) and the Information Commissioner also claims to be moving away from the first come first serve 'cab rank' basis towards greater prioritization and increased case management, presumably in the interests of efficiency.[92] In Canada, although only one department has formally instituted guidelines to grade the complexity of a request, many respondents to survey of ATI units indicated how requests are graded in complexity.[93] However, one report recommends further integration of the USA multi-track system.[94]

Despite the drive towards the multi-track system and the apparent benefits that it entails, it is worth noting the findings of one US report, which 'show that no one pattern emerges across tracks and types of reporting, and the numbers of agencies and components involved vary from track to track'.[95] Similarly, the Canadian Information Commissioner has wondered what the statistics may hide: '(i)f priority is being given to routine requests, the number can improve while there remains a potential that the more complex requests in deemed-refusal situations are suffering further delays'. [96]

It goes without saying that the nature of the request can influence the response process by bringing more moving parts into the FOI 'supply chain'. The first hurdle is the clarity of the request: if the request is not clear, the official will have to contact the requester in order to inform a search for specific documents. While no Canadian authority lists this as a factor adding to complexity, it is an element that accounts for a 104 percent increase in the cost of responding to

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[87] Office of the Information Commissioner of Canada. *Annual Report 2004-5*. Ottawa. 2005. p. 11
[88] Plotnikoff and Woolfson, p. 8
[89] Plotnikoff and Woolfson, p.15
[90] GAO, 2006 p. 7
[91] GAO, 2006. p.21
[92] *Freedom of Information - One Year On. Report, together with formal minutes, oral and written evidence*. HC 991.
[93] Government of Canada Access to Information Review Task Force. *Freedom of Information Review Survey of ATI Units. Report 22*. Ottawa. Canada, 2002, Annex 6. http://www.geai-atirtf.gc.ca/paper-fees2-e.html
[94] Government of Canada Access to Information Review Task Force. *Managing Response Times Under Canadian Freedom of information Legislation. Report 25*. Ottawa. 2001. http://www.atirtf-geai.gc.ca/paper-responsetimes1-e.html
[95] GAO, 2006. p. 23
[96] Office of the Information Commissioner of Canada. *Citizenship and Immigration Canada, Report Card on Compliance with Response Deadlines Under the Access to Information Act*. Ottawa: Public Works and Government Services Canada. March 1999. p. 14. http://www.infocom.gc.ca/publications/pdf_en/Ci_rpt.pdf

complaints since 1994.[97] Similarly, the Information Commissioner's Office (ICO) in the UK states that even by the time the request reaches his office as a complaint, it is still not entirely clear what information is being sought.[98] In the USA, one potential reason for non-disclosure is 'records not reasonably described', that is 'the requester did not describe the records sought with sufficient specificity to allow them to be located with a reasonable amount of effort'.[99]

The second hurdle is also obvious: the nature of the files that have to be consulted in order to respond. For one Canadian authority, disclosing over seven hundred pages constitutes a high complexity request, while for another three hundred pages suffices.[100] Collating the files from different departments also potentially entails additional time and coordination, especially if the databases of different authorities are not well integrated. If the files are not subject to an absolute exemption, the 'public interest test' will also have to be considered.[101]

In many agencies, another process can be put into action depending on the visibility of the request. In Canada, if a request involves a high-profile requester (the media, for instance), a department already in the media, or a policy attracting media attention, a 'heads up' is sent out, adding extra steps of approval into the process.[102] This signal warns the ministers about potentially high profile requests and adjusts the ATI software allowing sensitive requests to be tagged. Dr Roberts states that, "communications officers can be closely involved in the processing of these requests, developing 'media lines' and other 'communications products' to minimize the political fallout of disclosure." In addition to the database, a list of new requests goes to ministers' offices and PCO where it is reviewed for sensitivities. This process is known as the "amber light" process, and such "sensitive" files may be variously referred to as either "red files" or "purple folders".[103] Despite the fact that all requests are supposed to be treated equally, requests from journalists are often treated as "suspect" because of their origin.[104] In the UK, the act is supposedly 'requester blind', but the oversight of sensitive cases with media attention is evident in the handling of cases by the DCA Clearing House.[105] Given the latest Department of Justice Ashcroft Memorandum, the political oversight of the disclosure process in the USA is also controversial and may add steps to the logistical process.[106]

The logistical complexity of the FOI process is therefore influenced by the nature of the tracking system and the nature of the request. The process becomes more complicated and unwieldy as the more moving parts lead to the involvement of more actors and increasing the necessary coordination. Actors needing to be involved include legal services for advice, consultations with other departments, other levels of government and, which tends to be most time-consuming, with foreign governments. If the request is refused and the requester dissatisfied, additional actors are involved: internal reviews (UK and US), a case decision by the Information Commissioner (UK and Canada), and finally an appeal to a higher court (the UK Information Tribunal, the Federal Court of Canada).

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[97] Government of Canada Access to Information Review Task Force. *Freedom of information: Making it Work for Canadians. Report of the Access to Information Review Task Force*. 2002. Ottawa, Public Works and Government Services Canada. 2002. p. 10
[98] HC 991, ev. 2
[99] United States Government Accountability Office, *Information Management. Implementation of the Freedom of Information Act.* Washington: GPO. 2005. p. 8
[100] Access to Information Review Task Force. *Survey of ATI Units.*
[101] Carter & Bouris
[102] Access to Information Review Task Force. *Survey of ATI Units.* See figure 6.
[103] Rees, A.
[104] Roberts, "Spin Control and Freedom of Information". p. 7
[105] One take on this reads: 'A secret "spin department" has been set up inside Whitehall to deal with questions brought under the *Freedom of Information Act* that threaten to damage or embarrass the Government'. See: Woolf, M. "The Legality of War: Secret spin unit was set up to protect the government." *The Independent*. 25 March 2005.
[106] See the case study in section 2 for further details.

Cost of compliance

The precise cost of complying with FOI legislation in the three countries is virtually impossible to calculate. One reason for this is that some organizations keep track of costs while others do not; another is the wide variation in how the costs are calculated. For example, are only the salaries of FOI officers who work full-time on FOI counted or is the hourly rate of anyone dealing with any aspect of requests what counts? Is the cost of senior managers' time when considering difficult or otherwise sensitive requests included? Are the physical costs such as computers, photocopiers, office space, etc. used by those who respond to requests taken into account? The answers to these questions are not only different across countries – they are also different across organizations in the same country. However, the information we have obtained is enough to give a glimpse of the amounts spent on FOI compliance in Canada, the UK and the USA. We are particularly interested in understanding whether costs rise or fall from the time a law is put into force, whether fees contribute in any significant way to a reduction in costs, and how the costs of FOI can be weighed up in connection with the 'bigger picture'.

The total cost of administering the USA FOI Act in 2003 was recorded as US $323,050,337.33.[107] In Canada, it is said to be in the order of CA $30,000,000 annually (US $26,342,818.04),[108] while in the UK a pre-implementation estimate was £90 – 125m per year (US $165 – 229m).[109]

The cost per department varies. In the USA, the top three departments in 2003 spent USD68 million, US $49 million and US $39 million (the Department of Justice, Department of Defense and the Department of Veteran Affairs respectively) while at the opposite end of the scale, the five departments spent less than US $4 million (Department of Education, Commerce, Housing and Urban Development, Energy).[110] Comparable figures for the UK and Canada are not available, but the cost per UK local council was estimated at £122,100 per year.[111]

The discrepancies between the scope of the comparators mean a more useful yardstick would be cost per request. Once again there is no figure in the UK, but the average cost per request in the USA is US $40.36 - ranging from $10.02 at the Social Security Administration to $2550.21 at the State Department.[112] In Canada, the average cost per request is CA $1035 (US $909).[113] Of the total cost in the USA, 2.08 percent (US $6,725,902.43) was recouped through fees;[114] in Canada in 2001, the average fee collected per request was CA $12.47.[115]

In terms of wider trends, costs to departments subject to FOI have been rising. The last US Department of Justice detailing federation-wide FOI statistics reports an increase of 7.7 percent on the previous fiscal year,[116] while in Canada the cost of ATIA compliance has been increasing since 1985/86.[117] The UK legislation is too recent to enable a meaningful comparison.

It seems, then, that the authorities are in a 'catch 22' situation: the more successful the legislation (if measured by amount of requests received), the higher the associated costs. Yet the push towards electronic data could mark a route out. The total cost of the US FOIA is expected to

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[107] United States Department of Justice, Office of Information and Privacy. "Summary of Annual FOIA Reports for Fiscal Year 2003". *FOIA Post* 22, 2004. Available at : http://www.usdoj.gov/oip/foiapost/20004foiapost22.htm
[108] Access to Information Review Task Force. *Making it work*, p. 3
[109] Hazell, R. *Commentary on Draft Freedom of Information Bill*. London: The Constitution Unit, 1999. p. 10. Currency conversions at the rate of CA $1: US $ 0.878 and GB £ 1: US $ 1.84373, as on 26/7/2006
[110] *FOIA Post* 22
[111] Amos and Holsen, p. 19
[112] *FOIA Post* 22
[113] Access to Information Review Task Force. *Making it work*, p. 77
[114] *FOIA Post 22*
[115] Access to Information Review Task Force. *Making it work*, p. 77
[116] *FOIA Post* 22
[117] Access to Information Review Task Force. *Making it work*, p. 8

decrease after the bedding down of E-FOIA, as electronic data is thought to be less expensive to disclose either in reading rooms or on request.[118] Extrapolating, as the UK's FOIA already includes provision for electronic data, the same trend could take place there if a similar push to digitization takes place.[119] In Canada there is also a view that costs could be decreased, that they are looking to 'streamline' their legislation to this end, and one aspect of this is increased use of the internet.[120]

It is interesting, however, to relate the FOI costs to the 'bigger picture', as one commentator on the USA has. Comparing FOI and Public Relations, he states that 'it is considerably less expensive to provide the public with the information it seeks through the FOIA than it is for the government to provide what it determines the public should know about agency activities and operations'.[121] Similarly, in Canada the ATIP Task Force was keen to point out that the total cost of compliance is less than CA $1 per Canadian per year.[122] The cost of compliance is of course also dependent on the efficiency of the procedure, and therefore also the time dedicated to achieving compliance, which is the subject of the next section.

Time spent on processing

The amount of time authorities take to respond to and process a request for information constitutes the requester's primary experience of FOI legislation and colors his/her view of its success. Since the legislation was introduced in the USA, commentators have criticized authorities for circumventing the push to transparency by way of 'secrecy by delay'. Any part of the process causing particular delay also sheds light on the FOI 'supply chain'. An analysis of the time spent on processing is therefore useful.

The statutory guidelines for time needed for compliance are broadly comparable across the three jurisdictions. In the UK, the authority must comply 'not later than the twentieth working day following the date of receipt';[123] in the USA '(once) an agency properly receives a FOIA request, it has twenty working days in which make a determination on the request';[124] while in Canada the response must be made 'within thirty days after the request is received'.[125]

In each jurisdiction, however, these statutory response times are often not adhered to - delays are the most common reason for requester dissatisfaction in Britain and Canada[126] - and response times are mixed in each jurisdiction. In Britain the authorities with the best timeliness (the BBC, the Association of Chief Police Officers and the National Archives) complied with the statutory guidelines in over 94 percent of cases.[127] On the other hand, central government organizations' adherence to the time limit varied between 64 percent and 92 percent according to one set of

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[118] Botterman, M., Bikson, T., Bosman, S., Cave, J., Frinking, E., and de Pous, V. *Public Information Provision in the Digital Age. Implementation and Effects of the U.S Freedom of Information Act. Report of a Study for the Ministerie van Binnenlandse Zaken en Koninkrijksrelaties*. RAND Europe, 2000. p. 41

[119] Although it may require an increased initial outlay, according to Natalie Ceeney of the National Archives. See: HC 991, ev. 30. As a counterweight to this, we shall see below that the time spent on each request increases after the push to increased electronic disclosure owing to a higher proportion of complicated requests in the authorities.

[120] Government of Canada Access to Information Review Task Force. *Review of Costs Associated with Administering Access to Information and Privacy (ATIP) Legislation Report of the Access to Information Review Task Force*. 2002. Ottawa, Public Works and Government Services Canada. 2002. Section 4

[121] Relyea, H. C., 'Access to Government Information in the Information Age', *Public Administration* Review, Vol. 46, No. 6. (Nov.-Dec., 1986), p. 636. The figures stated are $45 million to $1 billion.

[122] Access to Information Review Task Force. *Making it work*, p. 3

[123] UK *Freedom of Information Act 2000*

[124] United States Department of Justice. *Freedom of Information Act Guide May 2004*. Washington: GPO, 2004. http://www.usdoj.gov/oip/procereq.htm#limits

[125] Canada's *Access to Information Act*

[126] HC 991, p. 10; Access to Information Review Task Force. *Making it work*, p. 9

[127] HC 991, p.16

statistics.[128] Comparable figures for the USA are hard to come by, owing to the decentralization of the process and compilation of statistics which do not include delay time.[129] Among 'cabinet-level' agencies, the lowest median number of days was twenty-two, while the highest was 312 (the Department of Commerce and the Department of State respectively).[130] Twelve government agencies had at least one operating unit whose median response time for 'simple' requests was higher than the designated response time, while of those who deal with 'complex' requests – either the agency or a sub-unit – reported median response times exceeding the limit. [131] Even 'expedited' responses exceed the deadline.[132] The median response time for simple requests in the Office of the Inspector General (Department of the Interior) was 834 working days.[133] Under the Canadian legislation, a late response constitutes a 'deemed refusal', and after a marked decrease in the number of deemed refusals following the introduction of the report card scheme[134], the number is on the rise again: the lowest being 5.9 percent, the highest 60.1 percent (Citizenship and Immigration Canada and Department of Foreign Affairs and International Trade) respectively).[135]

In terms of more concrete, global statistics, a total of 5007.61 employee work-years were spent on administering the USA FOIA in 2003 – a decrease of 4.4 percent on the previous year.[136] In Canada, the average number of hours taken to respond to an individual request was 38 hours in 1998-99 – a decrease of two hours from 1993-4, despite the fact that the number of delays and corresponding complaints has decreased.[137] In the UK, 47 percent of respondents to a survey by the Information Commissioner spent up to 10 percent of their time on tasks related to FOI in an average month.[138] A survey of local government put the average time per request at 13.8 hours during the first six months,[139] while another put it at six hours.[140]

Given the relative youth of the UK Act, it is difficult to discern any trends in the time spent on processing. The time spent on each 'unit', or request, has increased in the USA, but this could correspond with the higher proportion of complicated requests in the agencies, with simple requests being solved in electronic reading rooms. In contrast, time spent per unit in Canada has decreased, although this does not correspond with a decrease in cost.[141]

However, compliance - or lack of - with the statutory deadlines does not tell the whole story. A 'response' under the US legislation 'means only that the government has told the requester whether the request will be granted all or in part, denied, if no such record exists or the record is held by another agency, or if there are administrative issues that need to be resolved before a final

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[128] HC 991, p.16
[129] Similarly, the collection use of median time periods may not be the most instructive: 'The median processing time statistics provide no means of assessing the outer limits (represented by the oldest requests) or average length of an agency's backlog, both of which are critical to understanding how long a FOIA requester may have to wait for a substantive response. Moreover, the median times reported to Congress do not include the delays associated with referrals or wrangling over fees, which can add months or years to the process, all the while generating more administrative paper than is produced by the ultimate substantive response.' See: *Justice Delayed*, p. 2
[130] *FOIA Post* 22
[131] Coalition of Journalists for Open Government. *A Review of the Federal Government's FOI Act Performance, 2004*. Coalition of Journalists for Open Government, 2004. p. 2
[132] Coalition of Journalists for Open Government, p. 2
[133] Coalition of Journalists for Open Government, p. 2
[134] See pg.65 for an in-depth explanation of the case study program in Canada.
[135] Information Commissioner of Canada Annual Report 2005/6, p. 20.
[136] *FOIA Post* 22
[137] Access to Information Review Task Force. *Making it work* p. 9
[138] United Kingdom Office of the Information Commissioner. *Freedom of Information: One Year One*. London. 2006. p. 20
[139] Amos and Holsen, p. 20
[140] Pindar, R. "Freedom of Information: Room for improvement in architecture." *The Guardian*. June 2, 2005
[141] Access to Information Review Task Force. *Review of costs*. Section 2.

decision can be made. It does not mean the information itself has been delivered'.[142] Similarly, in the UK the twenty-day limit may be deceptive. 'Permitted exemptions' were used for 10 percent of requests in 2005,[143] yet there is no information as to the length of the additional time taken. 'Provided that the authority has advised the applicant that it requires extra time, these data are included in the statistics for requests dealt with "in time". The delay could be just a matter of days but the evidence from requesters shows that it is sometimes many months'.[144] Equally, where the authority is considering a public interest test, after communicating this fact to the requester the authority can take as much time 'as is reasonable' to respond.[145] 'In practice, this means that there is no statutory response time limit whenever an authority is considering one of the 17 exemptions which requires consideration of the public interest'.[146] Neither are there time limits on internal reviews, and the Information Commissioner's Office is unable to take action on a complaint until the completion (even if delayed) of an internal review.[147] In the words of the UK Information Commissioner, 'I am increasingly skeptical they need as much time as they are taking'.[148]

Dealing with backlogs

Like delays, backlogs reveal inadequacies in the FOI process either in terms of logistical inefficiencies, or a mismatch of resources and workload. The complexities in the process that may cause backlogs have been outlined in section 1, but at the same time, a large backlog can in itself be a cause of further delays. Here it is only necessary to ask two questions: to what extent are backlogs an issue in each jurisdiction, and what procedures are in place for either dealing with or preventing the accumulation of backlogs?

Table 10 on page 39 shows the extent of backlogs in each country. 18 percent of requests in Canada are turned into a backlog, 7.1 percent in the USA and 2.6 percent in the UK. Although UK departments have not managed to accumulate a backlog at this early stage, the information commissioner has. Indeed, in both the UK and Canada, there is a worse backlog problem with the commissioner than the departments themselves. The backlog – or 'work in progress' - at the UK Information Commissioner's Office totaled 1290 cases at the end of 2005, or 48 percent.[149] In 2004 the Canadian Commissioner described how his office's workload increases every year and his backlog that year was at an all time high, representing 'more than a full year of work for every one of the commissioner's 23 investigators'.[150] Both countries' commissioners believe the root of the problem lies in a mismatch of resources and workload. The Canadian Commissioner complains that his requests for 'adequate' resources are 'routinely denied or pared down to bare bones'.[151] But he invested increased resources in clearing the backlog in 2005/6, and closed 850 cases.[152] The UK Commissioner requested an additional £1.13 million for 2006/7 in order to clear 700 cases, and received £550,000.[153]

While backlogs in the USA are currently low, by some measures they appear to be on the rise. In 2003 there had been a 4.5 percent increase on the previous year, while the government-wide backlog for 2004 increased 15 percent.[154] According to one source, 'when the three highest-

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[142] Coalition of Journalists for Open Government, p. 2
[143] HC 991, p.11
[144] HC 991, p.11
[145] HC 991, p.10
[146] HC 991, p.28
[147] HC 991, p.12
[148] HC 991, p.12
[149] United Kingdom Office of the Information Commissioner. *Annual Report 2005 – 2006.* London: The Stationery Office. 2006. p. 8. Cases received: 2713; closed: 1666; 'work in progress': 1290.
[150] Information Commissioner of Canada Annual Report 2004/5, p.12
[151] Information Commissioner of Canada Annual Report 2004/5, p.12
[152] Information Commissioner of Canada Annual Report 2005/6, p. 29
[153] HC 991, p. 23
[154] *FOIA Post* 22 and Coalition of Journalists for Open Government, p. 1

volume agencies are excluded, the backlog numbers show the remaining departments are running 20 percent behind their request load. One agency, the Securities and Exchange Commission, reported a 225 percent backlog'.[155] It is therefore useful to look at the measures proposed to lessen the burden of these backlogs.

Most of the measures proposed relate to Executive Order 13392, 'Improving Agency Disclosure of Information', which calls for agency reviews to develop plans 'for improvement of the administration of the Act, *id.* at Sec. 3(b)(i) -- plans that must include "concrete milestones, with specific timetables and outcomes to be achieved'. To this end, the Department of Justice lays out a template, of which backlog reduction is one step. However, it would seem that as backlogs are a yardstick for the efficiency of the FOI process as a whole, the steps, if successful, would lead to a backlog reduction anyway. The most salient of the proposed measures are:

1. Affirmative disclosure under subsection (a)(2).
2. Proactive disclosure of information
3. Overall FOIA Web site improvement
5. Automated tracking capabilities
6. Electronic FOIA -- automated processing
7. Electronic FOIA -- receiving/responding to requests electronically
8. Multi-track processing
10. Case-by-case problem identification
11. Expedited processing
12. Backlog reduction/elimination
16. System of handling referrals.
17. System of handling consultations
22. Increased staffing (where applicable)
25. Purchase of new equipment.[156]

Despite the guidance, a GAO report finds that only twelve had 'outcome oriented goals' for reducing their backlog.[157] Nevertheless, the authorities follow these measures to a greater or lesser extent with particular emphasis on technology and staffing to alleviate their problems.[158]

Dealing with exemptions

Looking at the authorities' procedure for dealing with exemptions is fruitful for a number of reasons. First, an inefficient procedure in this regard is one clear hitch in the larger procedural chain. Second, it provides an insight into the extent of 'FOI culture' in the country: is the default approach to attempt to avoid disclosure by picking the most likely looking exemption at the outset, or disclose and ask questions later? Whether the use of exemptions is on the increase or the decrease is another yardstick in this respect. Thirdly, the public's feelings about the authorities' use of exemptions is a window into their general perception of the legislation and how well it is administered.

At first glance it appears that exemptions do not cause delay or inefficiency in the process of dealing with requests because staff appear to be able to deal with them. Among the UK local authorities, after six months of FOI only two percent felt more guidance on the application of exemptions was needed.[159] However, after one year 59 percent reported that applying exemptions

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[155] Coalition of Journalists for Open Government, p.1
[156] *FOIA Post 6*. 2006. At: http://www.usdoj.gov/oip/foiapost/2006foiapost6.htm
[157] GAO, 2006. p 3
[158] For further details see OpenTheGovernment.org's *FOIA's 40th Anniversary. Agencies Respond to the President's Call for Improved Disclosure of Information*. 2006. http://www.openthegovernment.org/otg/FOIAplans.pdf
[159] United Kingdom Information Commissioner Office, 2006. p.22.

was their first or second most significant challenge when responding to requests.[160] Similarly, those in U.S authorities were aware of guidance related to the use of exemptions in the form of the Ashcroft Memorandum.[161] On the other hand, departments in Canada note 'legitimate difficulties of applying the exemptions in the Act to a complex set of records'[162] In other departments, they do not have to 'since mandatory ATI training is not required in most of the institutions surveyed, [and] program staff would not be knowledgeable enough about the Act to propose specific exemptions.'[163]

As outlined in Section 2, some exemptions are discretionary and subject to a 'public interest test'. According to a 2006 survey of UK practitioners who attended an annual FOI conference, applying the public interest test is one of the three 'most difficult FOI request processing tasks'.[164] In Canada: 'the application of discretionary exemptions depends on the nature of the records requested. ATI analysts must work closely with the program staff who have a greater knowledge and expertise of the issues, to understand and consider the rationale for exempting any information subject to discretionary exemptions.'[165]

However, the transition from the Reno to Ashcroft Memorandum marks a shift in the default approach in the USA: 'when you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records'. This coincides with a shift from openness to secrecy post-9/11. Professor Alasdair Roberts believes that this trend is not confined to the USA, calling the UK Section 36 (Prejudice to the effective conduct of public affairs) less an exemption than 'a class exclusion'.[166] Other commentators concur that exemptions- particularly those relating to personal data - are applied too broadly or literally.[167] Furthermore, Professor Roberts has stated that departments responded to requests for data contained within electronic databases by asserting that the 'labor required for extracting the data would exceed the cost limit' without consulting IT or database specialists.[168]

If this shift towards secrecy entails the vetting of all requested information before disclosure, there may be a corresponding increase in workload, cost or backlog. These can also be increased by a particular class of request.

The way authorities classify and deal with 'vexatious' requests and requesters

Defining a 'vexatious' request is difficult. The underlying idea seems to be a proportional relationship between the burden placed by the request on the authority and the intent of the requester to be burdensome or acquire 'unimportant' information. It raises the question of a moral obligation on the part of the public: just as, within certain boundaries, the authorities have the obligation to disclose information, a requester may have to consider certain boundaries which may circumscribe what he or she may ask for. The issue is not equally problematic across the three jurisdictions. Moreover, as the category provides a class exemption and a request could be unusually burdensome through the fault of the authorities record keeping - not the requester - it

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[160] Amos and Holsen,
[161] 88 percent of FOI officers who responded to the survey had read it. United States General Accounting Office. *Freedom of Information Act. Agency Views on Changes Resulting from New Administration Policy*. Washington: GPO, 2003, p. 21
[162] Access to Information Review Task Force. *Managing Response Times*, Section 2.2.2
[163] Access to Information Review Task Force. *Survey of ATI Units,* Section 3
[164] Holsen and Rahmen, p. 9
[165] Access to Information Review Task Force. *Survey of ATI Units*, Section 5
[166] HC 991, p. 41
[167] HC 991, p. 54
[168] HC 991, ev. 99

is worth examining the process for dealing with 'vexatious' requests and requesters, starting with the legislation, before moving on to their classification, prevalence and implication.

The provision for vexatious requesters varies across the jurisdictions' laws. The provision in the UK Act 'does not oblige a public authority to comply with a request for information if the request is vexatious'.[169] However, the Canadian legislation contains no provision for vexatious requests – even if a proposed amendment may do[170] – and there is no exemption related to vexatious requests in the US federal legislation – the closest is the provision in article 6 to extend the deadline in 'unusual circumstances', including 'the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request'.[171]

If a request or requester is classified as vexatious in the UK, the request can be refused. What is the approach to this classification? In the UK, the Information Commissioner's Office (ICO) anticipated a problem with vexatious requesters and prepared guidance they describe as 'robust'.[172] The guidance states that a vexatious request would 'impose a significant burden' on an authority. The ICO's guidance goes on to say that the *effect* of the request, as well as the intention of the requester, needs to be considered:

> 'Even though it may not have been the explicit intention of the applicant to cause inconvenience or expense, if a reasonable person would conclude that the main effect of the request would be disproportionate inconvenience or expense then it will be appropriate to treat the request as being vexatious.'[173]

It seems therefore, that even if a request is not intended to be vexatious it can still be *treated* as if it is. This seems sensible; indeed, one commentator has said, 'the real concern is not vexatious requests. The commissioner has demonstrated he has a workable mechanism to stop that'.[174] Yet there are a number of caveats. The cause of unintentionally disproportionate inconvenience may not be the requester, but the records management of the authority. Similarly, while it is important to allow FOI officers to use their discretion, the classification of a request as 'vexatious' is clearly subjective. The Lord Chancellor stated that 'it is also true, inevitably, that this culture is being undermined by requests under the Act which arguably do not impact so positively - like what a central government department spends on toilet paper or make-up, or whether written proof can be provided under the Act of a Minister's existence.'[175] In response to these comments, FOI expert Steve Wood describes the assessment of 'vexatious or frivolous' requests as 'highly subjective', stating 'the need for documented evidence of the scale of the problem cited'.[176] Terms from the ICO guidance in the UK - 'reasonable person' and 'manifestly unreasonable' – also appear to leave scope for subjective interpretation. Given the relative lack of importance ascribed to the 'vexatious' category in the UK and Canada other jurisdictions, the fact that an administration characterizes the requesting public as 'inevitably' vexatious, may be a telling insight.

Nevertheless, the proportion of requests categorized as vexatious is small. The UK Information Commissioner has said that he is 'very surprised that governments are not making more use of the existing provisions,'[177] while only 6 percent of respondents to the ICO's survey of authorities

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[169] UK *Freedom of Information Act*
[170] Roberts, A."The Insider" *Saturday Night Magazine*, October 2005, p. 15.
[171] US *Freedom of Information Act*
[172] HC 991, ev. 15
[173] *Freedom of Information Act Awareness Guidance No 22: Vexatious and Repeated Requests.*, p. 5
[174] Leigh, D. "Persistent Requester is Barred." *The Guardian*, August 1, 2006.
[175] Lord Falconer of Thoroton. "Freedom of information and scholarship - year one". The National Archives - British Academy Seminar, February 11, 2006.
[176] HC 991, ev. 75
[177] HC 991, p. 32

in 2005 identified vexatious requesters as a problem.[178] In a Canadian report on the subject, the authors conclude that 'there exist requests that are frivolous, vexatious or abusive, but that the number of such requests is very small'.[179] In the US there is no statutory basis for treating a request differently due to its 'vexatiousness' per se; therefore, it is difficult to discern the extent of the classification in that country. However, there are reports of requesters who could be regarded as 'vexatious'. Salient examples are Michael C. Antonelli who, twenty years ago, made hundreds of 'surrogate' requests (requests on behalf of others) to various federal authorities and filed lawsuits against the agencies when dissatisfied with the outcome.[180] His actions led to an extraordinary court order regulating his use of the FOIA process. More recent is the case of Barbara Schwarz who, according to one article, has 'carpet-bombed every federal department and agency with thousands of requests for public records the government says don't exist', and has been dubbed an 'FOI terrorist'. In order to deal with her requests, the Department of Justice is firmly holding her to the fee requirements of the law. The department has notified all FOI officers that until Schwarz has paid outstanding search and copying charges, her requests can be legally denied.[181]

Even a small proportion of vexatious requests have implications. Firstly, processing vexatious requests – the requests thought to entail disproportionate effort – will necessarily represent a 'waste of resources' or public money[182]; otherwise they would not have been classified as vexatious at the outset. Thus, in Canada the 1.5 percent of requests that require a review of more than 1000 pages could 'result in other requesters being expected to accept delays, taxpayers paying for the hiring of extra staff or contractors to do the work, or other programs being compromised'.[183]

A further implication regards the official 'openness culture'. 'Vexatious' requests are said to have a harmful effect on the reputation of FOI in the authority,[184] which may have a knock-on effect in the wider 'culture of openness'.[185] Indeed, one official feels that the actions of one 'vexatious' requester 'border on harassment' and are 'unnerving'.[186] A final implication for the classification of requests as vexatious comes from a report on Canada. If the cause of the disproportionate burden of effort lies with the authorities' records management as opposed to a malicious requester, it should be noted that 'occasionally, the persistence of serial applicants did uncover deficiencies in record management practices or less than exemplary decision-making processes'.[187]

Training and awareness within public service

In the US, the Office of Information and Privacy (OIP) have stated that FOI training is a significant investment. It is a lengthy process, often carried out on a one-to-one basis. The OIP states that it takes a year to train an FOI analyst.[188] The OIP requires applicants to FOI to have a college degree, while the FBI, which has the biggest FOI workforce in the US, considers knowledge of the FBI's records, good communication skills and analytical ability to be sufficient for a job answering FOI requests.

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[178] UK Information Commissioner's Office, *One Year On*, p. 17
[179] Snell, R. "FOI Officers - a constituency in decline?" *Freedom of Information Review*.102. 2002. p. 73.
[180] United States Department of Justice, "Surrogate FOIA Requests Increasing", *FOIA Update*, Vol VII,No. 1. 1986. p 2. Available at: http://www.usdoj.gov/oip/foia_updates/Vol_VII_1/page1.htm
[181] Smith, C. "Woman's Quest Strains Public Records System, Salt Lake Tribune. May11, 2003. Available at: http://www.cs.cmu.edu/~dst/Secrets/barbara_schwarz.html
[182] HC 991, p. 32; Snell 2002, p. 73
[183] Snell 2002, p. 82
[184] UK Information Commissioner, 2006. p. 17
[185] Snell 2002. p. 73
[186] Roberts.*The Insider.*
[187] Snell, 2002. p. 70
[188] Plotnikoff and Woolfson, p. 26

The OIP have commented that there is a lack of awareness about FOIA amongst senior staff and political appointees in the FBI, which is alarming considering that it has the biggest FOI operation of any government department[189]. For this reason it has been recommended that "FOIA awareness-raising…be aimed at staff who create and hold records as well as those managing requests. […] There is a need to complement the training provided within agencies with training from the centre designed to create a common understanding of FOI principles and to harmonize the quality of response to requests across agencies."[190]

The picture in the UK is also mixed: while much training took place before the law went into effect, some authorities waited until the last minute and were not well prepared. The situation is similar with FOI guidance, which appears to be unsatisfactory in places. Commentators have recommended 'revision and consolidation activity' of public sector FOI guidance (that the Department for Constitutional Affairs (DCA) for instance), and also of certain FOI clauses that are not clear, relevant or appropriate[191], as well as the need for guidance issued by the Information Commissioner's Office (ICO) to be reviewed, clarified and made consistent with DCA guidance.[192] The DCA is undertaking measures to achieve this, such as publishing Working Assumptions to supplement the 2004 guidance (in 2005) and launching the *Information Rights Journal*; it is also investigating ways to improve the FOI website and improve training.[193]

Levels of training in access work also vary across departments in Canada, where it is usually sparse, generally voluntary as opposed to mandatory, and mostly takes the form of voluntary information sessions. The importance of training has, however, been recognized and recommendations are on the table.[194] Initiatives are being undertaken to provide formalized FOI training. Two certificate programs for FOI officers have been established, one at the University of Northumbria in the UK and the other at the University of Alberta in Canada. It goes without saying that some of the impetus has to come from above. Problems with availability of resources can also adversely affect the availability and quality of training provided. This has been the case in the Secretariat and the National Archives.[195]

Support from senior management

Support from senior management is seen as crucial for successful implementation, not only with regards to training, but its knock-on effects for their attitudes towards the work. The direct involvement of managers in access work and sensitivity towards time constraints of employees can do much to facilitate access work as well boost morale. Senior management has been reproached in each jurisdiction, however, for their lack of support. It is said that senior managers in the USA do not pay not enough attention to FOI, while their Canadian counterparts are too reactive, only showing interest in specific issues and files[196]. This was also identified as a problem in local authorities in the UK.

In Canada an additional problem is that access work often has to be juggled with other operational priorities. It is often not perceived as "valued" work or part of a worker's "real job".[197] This has implications for morale, as well as problems caused by "dual demands", and lack of control. Another major issue is that public servants do not have the training, tools and support

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[189] Plotnikoff and Woolfson, p. 6
[190] Plotnikoff and Woolfson, p. 27
[191] HC 991, p. 37
[192] HC 991, p. 47-8
[193] HC 991, p 21-23
[194] Government of Canada Access to Information Review Task Force. *Constructing a Culture of Access In The Federal Public Service. Report 10*. Ottawa: Public Works and Government Services Canada. 2002. http://www.geai-atirtf.gc.ca/paper-culture2-e.html#culture
[195] Access to Information Review Task Force. *Making it Work*, p. 141
[196] Access to Information Review Task Force. *Survey of ATI Units*, Section 3. At:
[197] Access to Information Review Task Force. *Constructing a Culture of Access*, section 3.

they need to do access work.[198] However, there is now said to be 'top level' support for information records management experts to collaborate with FOI officers in America,[199] and its importance has been recognized by a Canadian report, not least with regard to the time constraints of employees involved in FOI.[200]

Seniority of FOI officer's position in the office

Senior management's positive attitude toward freedom of information could have a positive impact on the FOI officer's standing in the office. It seems, however, that this position is not particularly prestigious in any of the three countries. It has been low in the USA in the past, hence the need for Executive Order 13392, which encourages the creation of a high level chief FOI officer, and is currently reported as generally low in Canada.[201] According to one Access to Information Review Task Force report, 'staff working with coordinators often are entry-level positions with considerable turnover and a high burnout rate, because of the extremely tedious character of much of the work; this is a fact of ATI life.'[202]

Canadian departments report that the ATI officer is usually separated from senior management (Minister, Deputy Minister or Assistant Deputy Minister) by about one or two steps.[203] Delegation of authority appears to vary between departments but it seems common to delegate signing authority for most "high profile" requests to senior management while the ATI Coordinator has signing authority for day-to-day requests. In the UK, the position of FOI officers in various government departments appears to be separated from the permanent secretary or secretary of state by the same one or two steps. Some examples of the positioning of FOI officers in departmental hierarchy follow:

Home Office
Permanent Secretary → Home Office Board → Director General → Financial and Commercial → Chief Information Officer

Department for Education and Skills
Corporate Services and Development Directorate → Information Services → Information Access Officer

One possible boost for the status of the FOI officer is the recent creation of two certificate programs (one at the University of Alberta in Canada, and one at the University of Northumbria in the UK), both designed to create a standard for FOI officers by teaching them about the legislation itself and how to deal with it. This may also help start a more formalized FOI career path. In the United States, the Office of Information and Privacy has established an annual government-wide award for outstanding service by a FOIA officer. The Department of Justice has had its own such annual award, "The Attorney General's Award for Outstanding Service in *Freedom of Information Act* Administration", for the past twelve years. The seniority of the FOI officer is clearly part of a wider FOI 'culture', however. The Attorney General Janet Reno made a strong show of support to FOIA during her tenure, stating: "I appreciate your commitment more than I can tell you, because FOIA is at the heart of open government and democracy cannot be effective unless its people understand [its] processes."[204]

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[198] Access to Information Review Task Force. *Constructing a Culture of Access*, *section* 1.ii.
[199] RAND, 2002. p. 44.
[200] Access to Information Review Task Force. *Constructing a Culture of Access*, *section* 1.ii.
[201] Access to Information Review Task Force. *Survey of ATI Units*. Section 6.
[202] Access to Information Review Task Force. *Managing Response Times*, section 2.2.2
[203] Access to Information Review Task Force. *Survey of ATI Units*, Annex 7
[204] United States Department of Justice, Office of Information and Privacy, "Attorney General Encourages FOIA Officers." *FOIA Update* XIX.4 (2000).

Culture of office – management of change

The culture of the office and the management of change bring together various elements: it relates to the general outlook of the office (is it open or more secretive?), the attitudes of the senior management and the prestige of FOI in the office. Is the culture of access already pervasive, and if so, how did it come about? Were there any incentives? Is it seen as an automatic consequence of the legislation?

While FOIA has been said to herald a new "culture of access", in reality there are many documented examples of Canadian officials attempting to limit freedom of information by what Professor Alasdair Roberts describes as "the development of administrative routines designed to centralize control and minimize the disruptive potential of the FOI law." [205] Some authorities implement the "amber light process" to monitor the process of "sensitive" requests, while public access is not being allowed to any part of the Coordination of Access to Information Requests System (CAIRS) even though the program was designed to allow public access to some parts of it.[206] As one previous political staffer to the Canadian government put it 'there is no end to the ways you can thwart legitimate requests for information to avoid bad headlines and public relations'.[207]

On the other hand:

> 'In recent years, governments and public servants are coming, albeit slowly, to the realization that good record-keeping is essential to good, accountable governance. Conducting government business in an oral culture (in the belief that the rigors of accountability through openness can be avoided) is not as comfortable for officials as originally thought. It has come to be seen as fraught with danger: that capable, honest officials may be put at the mercy of the versions of events recounted by officials who are incompetent, dishonest or embarrassed by their predicaments; that the authority for action may not be provable when challenged; that government decisions will not be fully informed by past experience and that there will be no continuity of knowledge when officials resign or retire.'[208]

Similar to developments in Canada, after the implementation of the original FOIA in the USA, there was a "knee-jerk" reaction by authorities and there were attempts to find ways to side-step the Act. Indeed the Department of Justice describes aversion to change as natural in individuals and bureaucracies alike.[209] According to the Department of Health, Education and Welfare, writing a decade after original implementation, a gradual but not all-encompassing change took place over that period as a result of a mixture of measures, including both training and sanctions.[210] In contrast, the DCA is heralding the beginnings of a culture of openness in the UK,[211] while the results of a survey of local authorities seem to support this view.[212]

Record keeping as part of the job

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[205] Roberts 2005, p. 4
[206] Plotnikoff and Woolfson, p 7.
[207] Kelly, P. 'Information is Power', *Journal of Open Government*, Volume 2, Issue 1. (2006).
[208] Information Commissioner of Canada, Annual Report 2004/5, p. 7
[209] United States Department of Justice, "OIP Gives FOIA Implementation Advice to Other Nations", *FOIA Post* 30, 2002. http://www.usdoj.gov/oip/foiapost/2002foiapost30.htm
[210] Roberts, R. M. "Faithful Execution of the FOI Act: One Executive Branch Experience", *Public Administration Review*, 39, 4, pp. 318-323
[211] HC 991, p. 35
[212] Amos and Holsen.

The importance of record keeping has been flagged with the implementation of FOIA legislation. Record keeping does appear to have risen towards the top of the agenda as a result of FOI in the UK. Thirty-four percent of local authorities surveyed in 2005 felt that FOI had had a positive impact on records management, with issues being recognized and progressed[213]. Twenty-seven percent of public authorities surveyed by the UK Information Commissioner in a January 2006 survey stated that they feel record keeping has improved, and 57 percent of these thought their filing system was likely to change within the next year to comply with FOI.[214] In a 2006 survey of local authorities undertaken by the Constitution Unit, 29 percent of respondents stated that the most significant benefit of FOI to their organization had been that it had encouraged them to improve their records management system. At the same time, inadequate records management was identified as a major obstacle to efficient FOI request processing.[215] Scope for authorities to use specialized software has also been identified. In the US, E-FOIA is thought to have had a beneficial effect on database quality, but information record management (IRM) expertise is still going to be deployed on the authorities' databases. In Canada, the quality of filing systems has been flagged up and, despite confusion over the definition of a 'record,'[216] recommendations have been made for explicit guidelines in this respect.[217] Information management has also been described as a responsibility of public servants.[218]

There are a number of factors that complicate the relationship between FOI and records management in government departments in all three countries. First, there is lack of clarity regarding the status of e-mails in federal departments in the US.[219] One government department refused in the past to archive its emails on the basis that they were "like phone messages", although a court order issued later required it to save all emails electronically. E-mails are still not considered to be part of permanent FBI records but if an e-mail forms part of an investigation, an agent is required to include a printed copy of it in the file. Professor Tom Blanton suggests that departments follow best practice in the case of saving e-mails (a process facilitated by the falling cost of digital storage), and bring together the Office of the E-envoy, Government Communication Headquarters (GCHQ) and security agencies to shape policy on electronic indexing. It has also been suggested that indexing could be performed using an automated system (already practiced by the State Department) and the integration of e-mail indexing into FOI systems.

A significant issue is the shift from paper-based to electronic records systems. In some Canadian departments, this has led to poorer management of paper records and an increase in the amount of information being generated (particularly in electronic formats)[220]. The more recent E-FOI was specifically designed to change the structure of US information systems, which have become more standardized.[221] The change in culture is thought not to have happened. These types of interaction might see record keeping further integrated into the day-to-day activities of the authority.

Another major issue with electronic records management is the risk that software will rapidly become outdated and old records will become unreadable on newer versions of software. In the UK, the DCA and the National Archives plan to implement a "strategic approach to records management" in which all records which are kept electronically are regularly backed up and moved on to the latest system.[222]

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[213] Amos and Holsen
[214] UK Information Commissioner, *One Year On*, p. 14
[215] Amos, Holsen and Rahman.
[216] Access to Information Review Task Force. *Constructing a Culture of Access*, Section 1.ii.
[217] Access to Information Review Task Force. *Constructing a Culture of Access,* Section 1.ii.
[218] Access to Information Review Task Force. *Constructing a Culture of Access,* section 2.
[219] Plotnikoff and Woolfson, p. 26
[220] Access to Information Review Task Force. *Making it work,* p. 141
[221] RAND, pp. 39 and 44
[222] HC 991, p. 41

With the increased proliferation of personal computers comes the added complication that individuals and/or organizations may use different methods of storing and managing information. Lack of adequate IT training and support can also cause problems.

Canadian departments have also experienced problems with resources: the 1990s saw a lack of funding for information management and documentation activities. A lack of resources has led to a reduction of central leadership and a drastic reduction in government-wide information management monitoring, training and guidance.[223]

The Canadian Task Force Report suggests that "a great help to public servants – who must now function as their own electronic file clerks – could be the development and implementation of schemes linking each institution's records classification structure to its business processes (as opposed to the records classification structure based on subject, which is now used)."

An investigation conducted by the National Archives of Canada in 2001 indicated that the ATIA has had no significant impact on record-keeping: however the study did not examine active records and how departments apply ATIA to that documentation.[224]

Figure 4 Generic FOI process in the USA[225]

[223] Access to Information Review Task Force. *Making it Work*, p. 141
[224] Access to Information Review Task Force. *Making it Work*, p. 143
[225] GAO 2006, p. 6

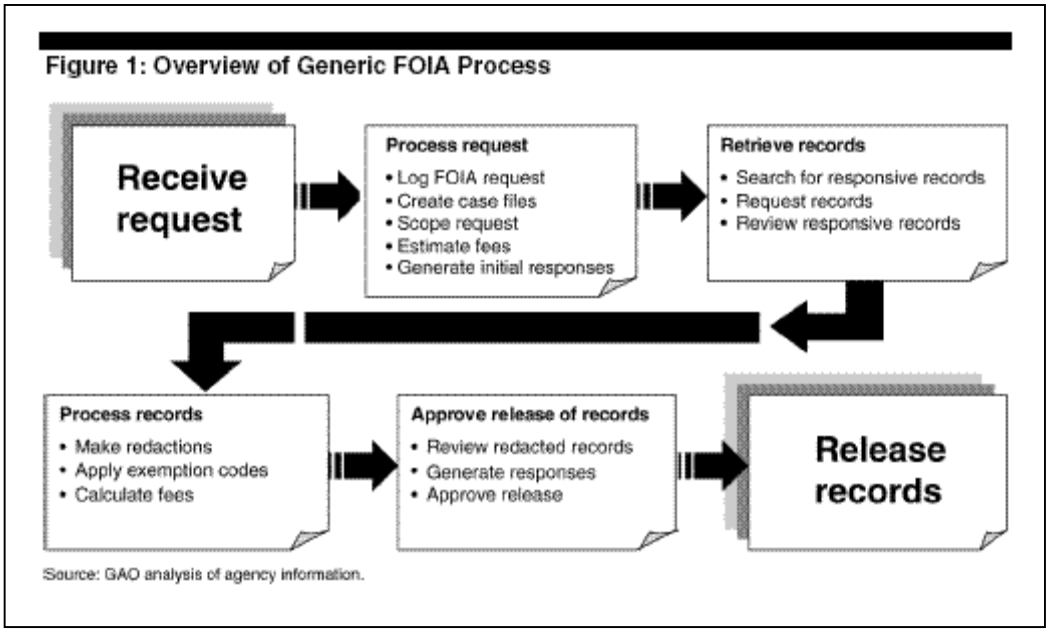
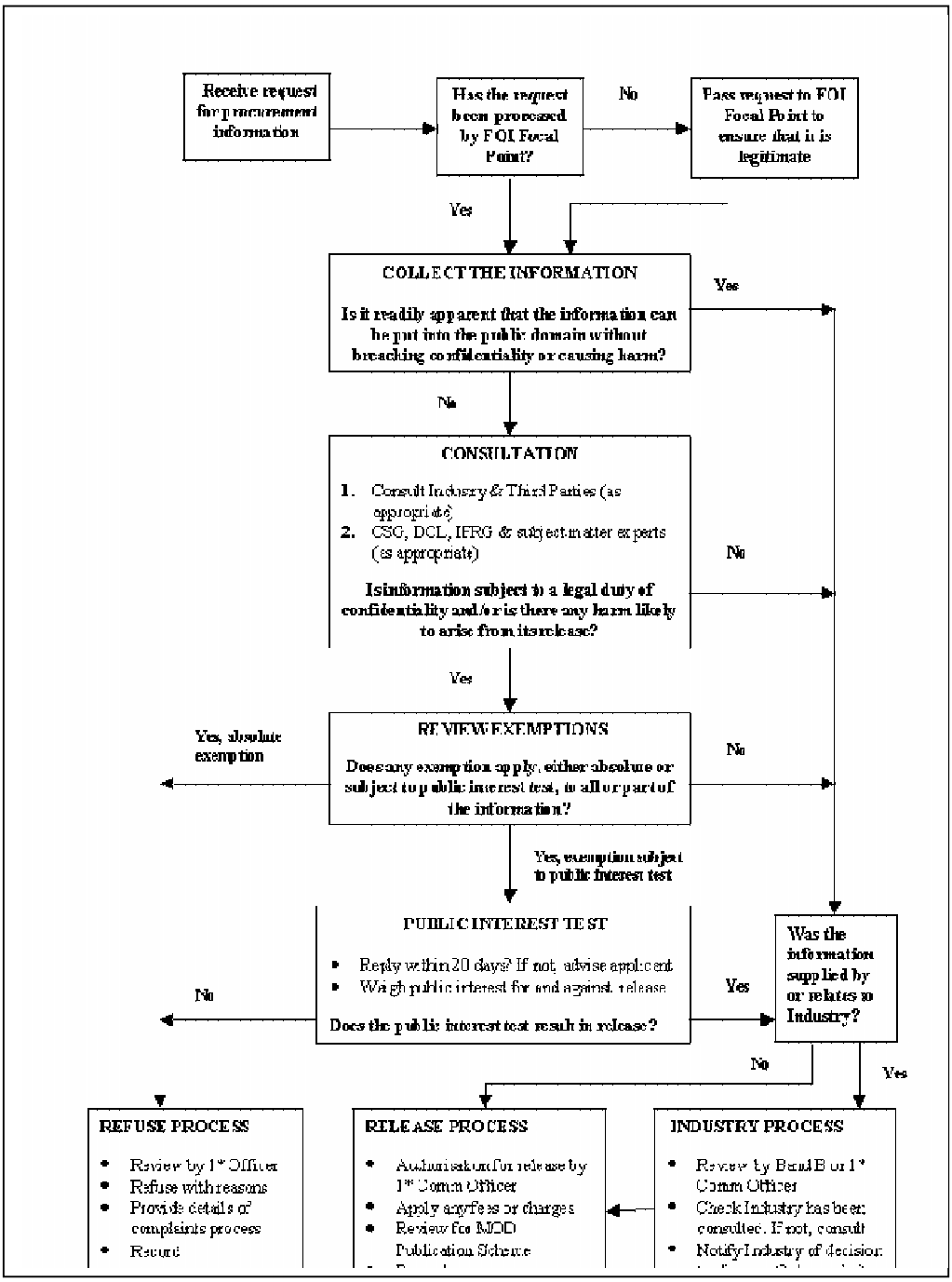
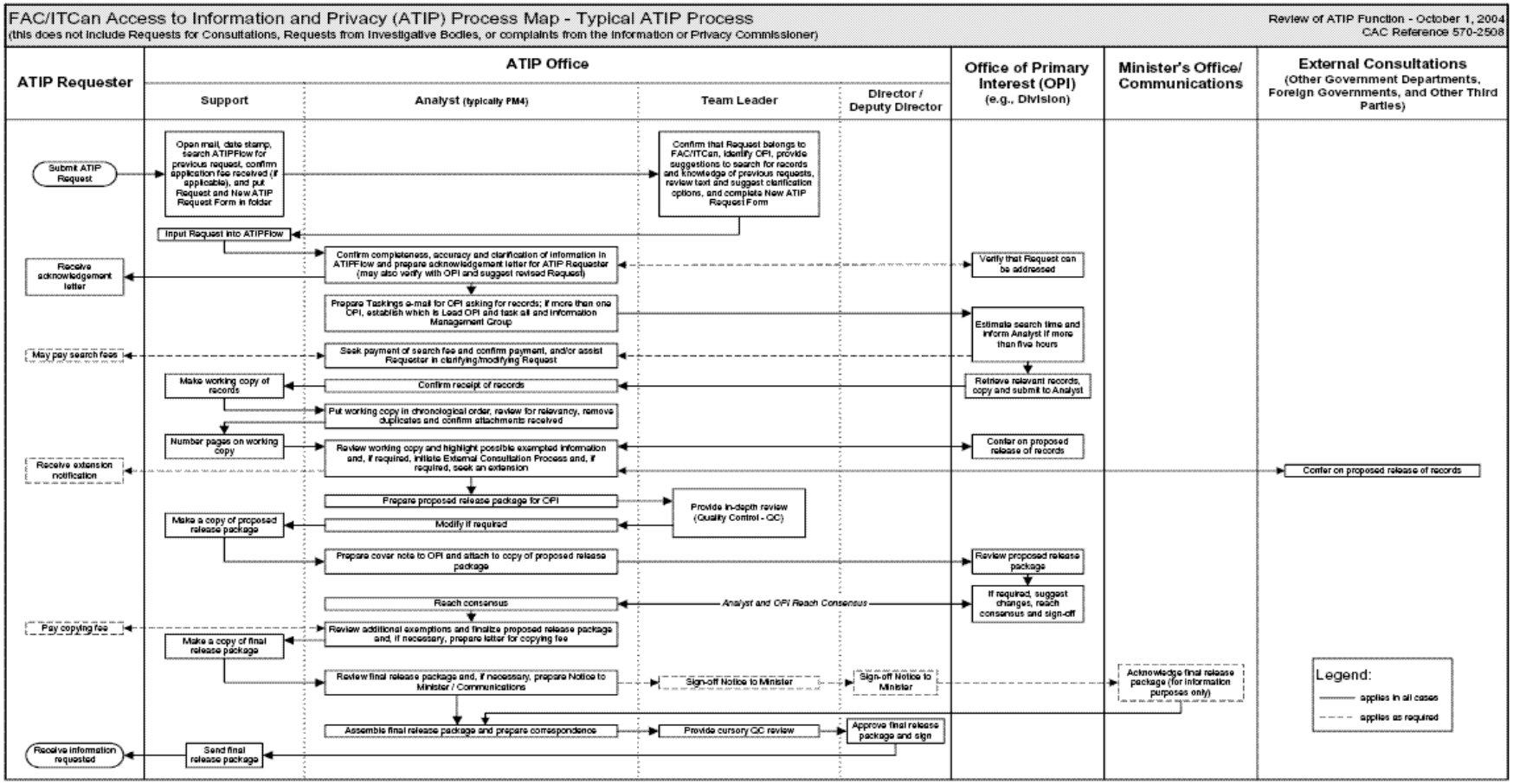


Figure 5 FOI request response process in the UK (Ministry of Defence)[226]



[226] Ministry of Defence. 'Annex A. Process Map for Handling Requests'. At: http://www.ams.mod.uk/ams/content/docs/toolkit/gateway/guidance/fofi.htm

Figure 6 Example of an ATI process in Canada[227]



[227] Office of the Inspector General, Evaluation Division. *Review of the Freedom of information-Privacy Protection Function at Foreign Affairs Canada-International Trade Canada.* March 2005. p. 23.
http://www.dfait-maeci.gc.ca/department/auditreports/evaluation/evalATIP05-en.pdf

CASE STUDY

Report card background

On the preceding pages we outlined and described in detail the practical issues with which FOI officers deal and aspects of their jobs that can affect performance and efficiency. The impact of these issues will become clearer by looking at two Canadian government departments whose experience will provide lessons on how the issues can be managed successfully – or not.

This case study centers on the Canadian Information Commissioner's Report Card system and two departments' 'grades' since its inception in 1998. The system was established to evaluate departments 'on the basis of the percentage of the access requests received that were not answered within the statutory deadlines of the *Access to Information Act*', as late answers (longer than 30 days or any extended period properly claimed) are 'deemed refusals'. The Report Cards were first published as special reports, but since 2001 have been included in the Commissioner's annual report. A summary of Report Card findings was published in the 2005-2006 annual report.[228]

The report card system was instituted because the previous Information Commissioner deemed that the Treasury Board was not reporting the extent of the delays to Parliament as specified in the Act.[229] According to the commissioner, delays had reached 'crisis proportions'.[230] Singling out CIC[231] and two other institutions, he said of Citizenship and Immigration Canada: 'it is time for CIC to make a concerted effort to put the practices, procedures, resources and training in place to ensure that deadlines are met and that exemptions are sparingly applied."[232] Performance monitoring was therefore introduced.

When using the system, there are caveats: the Information Commissioner's Office feels it is important to note that they do not see their Report Cards as commenting on the overall performance of an institution, but rather comments on how well institutions are complying with the timeframes established in the Act.'[233] Equally, critics note that 'it is unfair to aggregate all requests as equal,[234] and it should be borne in mind that there are no sanctions imposed as a result of a poor score card. Nevertheless, the consensus seems favorable: it is 'by all accounts, this is a simple yet effective indicator'.[235]

The grading system ranges from A (ideal compliance) to F (red alert) as set out in the table 15. All departments are graded according to this system. The data is obtained by means of a 'self-audit' questionnaire, and is based on the period from April 1 to November 30.

Table 15 Report card compliance criteria

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[228] Information Commissioner of Canada, Annual Report 2005/6. p.21. All Annual Reports are available at: http://www.infocom.gc.ca/reports/default-e.asp
[229] Information Commissioner of Canada, Annual Report 1998/9. p.6
[230] Citizenship & Immigration Canada. *Report Card on Compliance with Response Deadlines Under the Access to Information Act*. March 1999, p. 4.
[231]
[232] Citizenship & Immigration Canada.1999, p. 4.
[233] Access to Information Review Task Force. *New Reporting Framework*. http://www.atirtf-geai.gc.ca/paper-framework3-e.html, section 3.2.2
[234] Access to Information Review Task Force. *New Reporting Framework*, section 3.2.2
[235] Office of the Inspector General, 2005. p.11.

Grade	Comment	% of Deemed Refusals
A	Ideal compliance	0-5%
B	Substantial compliance	5-10%
C	Borderline compliance	10-15%
D	Below standard compliance	15-20%
F	Red alert	More than 20%

In order to look more closely at the system and how it works, we focus on two departments that seem particularly suitable: Citizenship and Immigration Canada (CIC) and Department of Foreign Affairs and International Trade (DFAIT). These two departments have been graded every year since 1998 and obtained a wide range of grades over the eight years since the report card scheme was introduced. Their results are shown in Table 16.

Table 16 Grading of CIC and DFAIT from 1998 to 2005 (April 1 to November 30)[236]

DEPT	1998	1999	2000	2001	2002	2003	2004	2005
CIC	*F*	*F*	*D*	*C*	*A*	*C*	*C*	*D*
DFAIT	*F*	*F*	*F*	*D*	*B*	*F*	*F*	*F*

Departmental background

ATIP responsibility in the CIC lies with the Public Rights Administration Division (PRAD) of the Corporate Services Sector, under the direction of the Access to Information and Privacy Coordinator. The Coordinator is responsible for policies and procedures related to the Access to Information and Privacy Acts, and ensuring departmental compliance with legislative obligations. PRAD's role is in the processing of requests for information and coordinating activities related to the legislation and the associated regulations, directives and guidelines. ATIP requests are processed on a centralized basis at National Headquarters by officials who are designated by the Minister to authorize all exemptions.[237]

In 2005, DFAIT's ATIP structure was defined as follows. The Director of the *Access to Information* and Privacy Protection Division (the ATIP Office of FAC and ITCan) has the authority to exercise the powers of the *Access to Information Act* and the *Privacy Act*. The ATIP Director reports to the Director General of the Executive Services Bureau. In addition to the Director, the ATIP Office has a complement of one Deputy Director, Team Leaders, analysts and support staff, all of whom are dedicated to access, privacy and directly related issues on a full-time basis.[238]

Both departments were restructured between 1998 and 2005: CIC in 2003/4 with the creation of the Canadian Border Services Agency (CBSA);[239] DFAIT was split into the Department of Foreign Affairs Canada and International Trade Canada in December 2003, before being reintegrated by

[236] Information Commissioner of Canada, Annual Report 2005/6. p. 21
[237] Citizenship and Immigration Canada. *Privacy Act, Access to Information Act. Annual Report 2005*/6. Introduction. At: http://www.cic.gc.ca/english/pub/atip2005-06.html#partII
[238] Office of the Inspector General, 2005. p. 6
[239] Information Commissioner of Canada *Annual Report 2003/4*, p. 93

Prime Minister Harper in 2006. While this inevitably had a knock-on effect on allocation of resources to ATIP and the request process, it will not be viewed as a mitigating circumstance here for the pragmatic reason that restructuring and reform, like complex requests, are an inevitable fact of public sector life.

Contributing factors

There is a set of factors which are critical in influencing the grade of deemed refusals. These factors are:

1. Logistical complexities of the response process. This in itself can be divided into:
   1.1. The nature of the files requested;
   1.2. The number and distribution of actors involved;
   1.3. Use of technology;
   1.4. Type of tracking system
2. Support from senior management
3. Staff training and awareness

Poor ATIP compliance (1998/1999)

CIC and DFAIT were given grade F in both 1998 and 1999.

1.1. Response process: nature of the files requested

In a period of poor compliance it sounds almost tautological to suggest that the nature of requests was problematic. Yet in both departments the nature of the files requested are reported to have added to the complexity of the process because both departments were subject to the trend of a higher proportion of complex requests. While DFAIT 'does not fall above the norm in this regard',[240] CIC receives many non-specific research requests - all emails sent or received by an individual, for example. CIC also found that lawyers were creating a burden by requesting original documents for litigation proceedings while also requesting copies under the ATIA.[241]

1.2. Response process: number and distribution of actors involved

The response process is complicated when more actors become involved in the request process by either the sensitivity of the request, or the location of the files in question. Both departments keep files 'off site', be it overseas, in other offices or in storage. While this in itself is an added and, until complete digitization takes place, unavoidable complication, the problem is exacerbated by their lack of integration. In CIC, for example, the file journey time required is not factored into the request processing timeline. The centre and overseas branches in both departments are linked in the same way: the DFAIT Signet Communications System is used to send messages of request – but is often down or blocked; while the shipping of files takes place with the diplomatic courier system, whose pick-up frequency varies, and is infrequent as every two or three weeks in some areas.[242]

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[240] Department of Foreign Affairs and International Trade Canada. *Report Card on Compliance with Response Deadlines Under the Access to Information Act*. March 1999, p. 10
Citizenship & Immigration Canada.1999, p.11
[242] Citizenship & Immigration Canada.1999, pp. 9-10; Department of Foreign Affairs and International Trade Canada. *Report* 1999, p. 10

Owing to the government's attempted monitoring of disclosure, sensitive requests also involve more actors. For DFAIT, 'experience has shown that the likelihood of meeting deadlines is improved if media relations offices are not in the approval chain'.[243] For both departments it is therefore recommended that the media approval process take place in parallel so that if it falls behind the rest of the process can continue.[244] Involvement of the Minister also causes delays. At DFAIT, before the time in question, Ministers were supplied with the request as well as prepared responses and accompanying communications materials, a communications plan and suggested answers the Ministers could give to questions in the House or from the media, resulting in a 'bottleneck' which 'made it virtually impossible to answer even the most routine requests in a timely manner', suggesting over-caution and an urge to control on the part of the government.[245]

1.3 Response process: use of technology

During the period in question, neither department made the most of the available technology to streamline its response process. While CIC implemented a Computer Assisted Immigration Processing System in 1997, which allowed files to be accessed electronically and printed out, operating systems varied between CIC and visa offices, making files incompatible.[246]

1.4. Response process: type of tracking system

Further, CIC's ATI tracking system was lacking. It was not able to highlight 'requests not assigned; requests in danger of not meeting the 30-day deadline; requests nearing or past the end of the extension period; or requests almost one year old'.[247] Statistical reports, already infrequent, would not bring to the attention of senior management particularly problematic areas, and workflow was not managed properly. By 1998, DFAIT had already implemented ATIPflow, and CIC hoped to follow suit by fiscal year 1999/2000.[248]

2. Senior management

Senior management at all levels can exert influence on the operations of the response process. In both departments, the report recommends more 'project management', with clear milestones and objectives. The Coordinator is to be more authoritative in correspondence to the office of primary investigation (OPI), and is to take a strong leadership role in establishing a culture of compliance, with the support of the Minister and Deputy Minister. The latter is also to take on a 'hands-on' approach by receiving ATI reports which including areas of delay and suggested remedial action.[249] Perhaps as a result of its decentralized nature, responsibility for decision-making under the act is not clearly delineated. [250]

3. Staff training and awareness

With regards to staff training, a number of recommendations were made which allow a glimpse of areas of potential improvement. Further staff training was earmarked by the ICO as a way of

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[243] Department of Foreign Affairs and International Trade Canada.1999, p. 13
[244] Citizenship & Immigration Canada.1999, p. 17
[245] Department of Foreign Affairs and International Trade Canada.1999, p. 9
[246] Citizenship & Immigration Canada.1999, p. 9
[247] Citizenship & Immigration Canada.1999, p. 9
[248] Citizenship & Immigration Canada.1999, p. 13
[249] Citizenship & Immigration Canada.1999, p. 16
[250] Citizenship & Immigration Canada.1999, p. 16

integrating decentralized parts in CIC's response chain, by encouraging overseas branches to recognize scope for extensions and notify the ATI office in advance.[251] A need for OPI-specific training and mandatory ATI training was highlighted. Managers were also earmarked for refresher courses. However, for DFAIT there were not enough resources to further train ATI workers without detracting from their other functions.[252] CIC are also encouraged to incentivize their staff, by introducing performance contracts with sanctions, while one of DFAIT's weaknesses was that 'no consequences [were] identified for the managers of operational areas who fail to comply with turnaround times.'

Improved ATIP compliance (2002)

Both departments' grades improved steadily between 2000 and 2002. CIC went from a 'D' in 2000, to a 'C' in 2001, peaking with an 'A' in 2002. Correspondingly, DFAIT's grade rose from 'F' to 'D' to 'B'.

1.1 Response process: nature of requests

In a period with a low deemed-refusal rate and therefore effective request processing, the nature of the request has clearly not been problematic. It is unlikely, however, that requests became easier, rather that the process as a whole was operating more smoothly. Yet the nature of the request can be rendered more manageable still by communicating with the requester. Thus, in 2002 CIC began encouraging requesters to clarify their requests, in order to cut down on the amount of administrative time taken to clarify requests once they had already been received. [253]

1.2. Response process: number and distribution of actors involved

Previously, the number of actors involved in the processing of a request and their fragmented or decentralized distribution led to inefficiencies. DFAIT attempted to make improvements to its response process by producing a business plan, *The Road to Improvement,* and basing this largely on the recommendations in the January 2001 Status Report produced by the Information Commissioner's Office (ICO). It focused further on refining and improving its response process by engaging a consulting firm to conduct a study of the costs of administering the Act through process mapping, so as to identify pressure points in the process and where economies could be made.[254]

DFAIT thus eradicated some duplication of effort by making certain changes to the file processing system, including freeing up OPIs to an extent by allocating some of what were previously their responsibilities to ATI staff. The response process was altered to allow for increased personal contact between OPIs and ATIP division staff early in the access process, with a view to clarifying and accurately scoping access requests.[255] In CIC, the process was adjusted further by reallocating responsibility for ATIP policy to one work area in PRAD (Public Rights Administration Directorate) when previously it was disbursed as a part-time responsibility amongst request-processing staff.[256]

Both departments also made attempts to improve their records management systems. In 2002, DFAIT adjusted the system by making the retrieval of records the OPI's responsibility while the ATI office was put in charge of providing a package of the information proposed for release. Previously

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[251] Citizenship & Immigration Canada.1999, p.11
[252] Department of Foreign Affairs and International Trade Canada.1999, p. 13
[253] Information Commissioner of Canada *Annual Report 2002/3*, p. 140
[254] Information Commissioner of Canada, *Annual Report 2001/2*, p. 147
[255] Information Commissioner of Canada, *Annual Report 2002/3*, p. 146
[256] Information Commissioner of Canada, *Annual Report 2002/3*, p. 140

both these tasks were the responsibility of the OPI.[257] In 2002, CIC adjusted the process by starting using couriers to ship files overseas, instead of relying on the more time-consuming and delay-prone "diplomatic pouch" method.[258]

1.3 Response process: use of technology

DFAIT's 2002 'complete review' of the ATIP process focused on the processing software ATIPflow, including an analysis of delays over the 2001-2 period. They came to the conclusions that delays resulted from: slowness in obtaining records from OPIs, increases in workload volume arising from multiple requests received on the same day, increased complexity of received requests and the growing need for consultation, and what they label 'work crisis' situations, or 'workload pressures outside the control of either the ATIP office or the OPI'.[259] The DFAIT ATIP Division also developed a software application in 2001 aimed at keeping OPIs and management updated on the status of access requests in their respective areas. [260]

2. Senior management

The availability of senior management support, or lack thereof, can have a considerable impact on procedural efficiency and staff morale. In both departments an effort was made to enlist the support and increased involvement of senior management during the years under scrutiny. In the case of DFAIT, the approval of various financial measures to support the new ATIP 2001 business plan effectively secured commitment on the part of DFAIT senior management.[261] CIC's request process was further facilitated by the reception of increased funding from the Treasury Board Secretariat for the 2001-2 and 2002-3 fiscal years. PRAD (Public Rights Administration Directorate, who have responsibility for implementation of ATIA legislation within CIC) also developed a strategic plan as part of the 2003/4 budget progress.

In 2001, the Delegation Order went under revision in order to strengthen the wording of the delegated authority of the DFAIT ATIP director.[262] In the case of CIC, in 2002, PRAD started tracking and monitoring access requests through ATIPflow. It was decided to give PRAD staff "ownership and accountability" for designated requests to CIC. This has reduced the number of occasions when an access request that could potentially end up in a deemed-refusal situation requires the attention of the Director General in the programme OPI. CIC's ATIP Division's monthly reports were sent to the Director General of Executive Services, who would then pass the report on to the Deputy Minister.[263] Impetus from senior management may also have influenced DFAIT's 2001 effort to unburden itself of its backlog of access requests left over from the previous fiscal year.

3. Staff training and awareness

CIC's grade also improved because they began to deal with extensions correctly under section 9 of the ATIA.[264] Whilst partly a superficial improvement, the use of section 9 depends on staff awareness of this aspect of the procedure, and does impact requesters' perception of the response process and

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[257] Information Commissioner of Canada, *Annual Report 2002/3*, p. 146
[258] Information Commissioner of Canada, *Annual Report 2002/3*, p. 140
[259] Information Commissioner of Canada, *Annual Report 2002/3*, p. 148
[260] Information Commissioner of Canada, *Annual Report 2001/2*, p. 148
[261] Information Commissioner of Canada, *Annual Report 2001/2*, p. 145
[262] Information Commissioner of Canada, *Annual Report 2001/2*, p. 148
[263] Information Commissioner of Canada, *Annual Report 2002/3*, p. 141
[264] Information Commissioner of Canada, *Annual Report 2002/3*, p. 140
http://www.infocom.gc.ca/reports/section_display-e.asp?intSectionId=379

the legislation. The proper use of section 9 is an improvement on the previous system wherein extensions were missed or could not be taken because the request was already in a deemed-refusal situation.

Training and awareness was improved by ATIP and Information Management staff at CIC launching an "ATIP and email management" course for CIC managers and employees. This focused on adherence to applicable Government of Canada laws, policies and guidelines. [265] DFAIT also made efforts to improve the awareness of its staff by improving the training available to ATI and OPI staff: it launched an enhanced training program in 2001, and OPIs began requesting further training. The tasking memo to OPIs was also improved. [266]

Decreasing ATIP compliance (2003-5)

After peaking in 2002, grades dropped sharply in 2003: CIC from A to C and DFAIT from B to F.

1.1 Response process: nature of requests

The nature of the request is deemed to be a contributing factor to the decline in both departments, more than DFAIT's decline in 2003, which was dealing with apparently complex and high profile requests requiring a great deal of operational involvement. Yet requests did not suddenly become simpler during the time of increased compliance - indeed the number of pages reviewed per request appears to have been higher in at CIC in 2003.[267] The nature of requests is only a problem when the global process allows them to become on and, as stated above, complex requests are a fact of life.

1.2. Response process: number and distribution of actors involved

Despite the improvements mentioned above, the difficulty of coordinating DFAIT's fragmented system is commented on in reports of its fall from grace. In an attempt to overcome this fragmentation, a superfluous step in DFAIT's response process was outlined in a report of 2005. The additional step, which is not common practice elsewhere, is that the ATIP Office goes back to the OPI for final approval of the proposed release package. The more common practice in other departments is to expect each OPI to prepare the justification for not releasing any record or part of a record in accordance with the *ATI Act* or the *Privacy Act* at the time that relevant records are provided to DCP (Access to Information and Privacy Protection Division).[268]

1.3 Response process: use of technology

According to the same report, existing technologies are still not being exploited. For example, DCP currently uses a manual/paper review and redaction process, which relies heavily on the use of color photocopying. At the time of the report, this was an old machine prone to breakdown and whose replacement parts are hard to get hold of. Procuring ATIPImage 'improved the process in that there would be a lot less document management and much more electronic records management which would save time, photocopying and filing space.' Effectiveness in other offices is said to have improved by 10 to 15 percent after its introduction.[269]

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[265] Citizenship and Immigration Canada, *Privacy Act, Access to Information Act. April 1, 2002 – March 31 2003*. http://www.cic.gc.ca/english/pub/atip2002-03.html
[266] Information Commissioner of Canada, *Annual Report 2001/2*, p. 145
[267] Information Commissioner of Canada, *Annual Report 2003/*4, p. 92
[268] Office of the Inspector General 2005, p. 14
[269] Office of the Inspector General 2005, p. 15

Additional software is thought to be another avenue for potential improvement. Infobank, said to resemble the Records Document Information Management System (RDIMS), has been recommended for enabling staff to quickly find and track all documents relevant to a particular ATIP request.[270]

1.4. Response process: type of tracking system

Despite improvements outlined in 2002, in 2003, CIC was still using 'ad hoc' tracking systems.[271] However, by 2005 they had taken to emailing files to each other and had instituted a 'bring forward' monitoring system using ATIPflow in order to monitor due dates.[272] Nevertheless, it is still recommended that the extent and detail of monitoring reports produced for management be augmented, for example in order to compare time allocated for tasks in the response process with time actually taken, allowing managers to be better informed.

2. Senior management

However, responsibility lies with senior management which, particularly at DFAIT, appears to need improvement. In 2003 there were two vacant managerial positions, which were filled by analysts. One may only speculate as to the extent of their managerial skills, but in any case, once in position, their output as analysts dipped.[273] Senior management were also told to make ATI processing a priority, and in 2005, were told once more to take a more 'hands-on' approach.[274] In a DFAIT 'process mapping' report the Deputy Minister was also recommended to reinforce at senior management level, and on a yearly basis, the department's obligation to meet ATIP legislative requirements.[275]

3. Staff training and awareness

In the same report, needs for further staff training were identified, leading to the following recommendations: developing 'a permanent and structured ATIP Awareness Program for departmental employees' to be implemented in fiscal year 2006/2007, developing a Human Resource and Staffing Plan in order to staff 15 new FTEs by fiscal year 2006/2007, and DCP developing and implementing a structured Staff Training Program for existing and new employees of the division by the Fall 2005.[276]

Senior management may also be responsible for the DFAIT ATI office's involvement in other departmental projects. While this may engender an increasingly 'joined up' department with records and information management benefits, it reduced the processing capacity of the office for the time in question. Senior management would also be held responsible for what is probably the single biggest factor affecting DFAIT's grade slump – the fact that the high grade was reached largely because of increased processing power bought by increased overtime, a processing power that could not be maintained without further resources.[277]

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[270] Office of the Inspector General 2005, p. 15
[271] Information Commissioner of Canada, *Annual Report 2002/2003*, p. 95
[272] Information Commissioner of Canada. *Citizenship and Immigration Canada. Status report on access requests in a deemed-refusal situation*. 2004-2005. p. 7
[273] Information Commissioner of Canada, *Annual Report 2003/*4
[274] Information Commissioner of Canada. *Department of Foreign Affairs and International Trade Status Report on Access Requests in a Deemed-Refusal Situation*. 2005-6. p. 4
[275] Office of the Inspector General 2005, p. 20
[276] Office of the Inspector General 2005*, p. 22*
[277] Information Commissioner of Canada, *Annual Report 2003/3*, p. 118

Conclusion

What conclusions can one draw from this brief analysis? The most obvious is that the request process has to be looked at as a whole, albeit with many moving parts. When the process is functioning smoothly, there appear to be no systemic weaknesses. Yet when the system is exposed to pressure – a blip in the number of requests, a drop in resources, etc. – the process in its entirety slows down. It is possible, however, to go beyond this superficial analysis and, having done so, sketch out the broad challenges for government, FOI officers and records managers as they appear from the evidence of this case study.

Having followed one set of factors through the CIC and DFAIT's FOI request process, problematic factors seem to disappear in successful periods, only to reappear in a similar form in less successful periods. This may be evidence of a somewhat superficial approach that results in systemic weaknesses being temporarily hidden. One such weakness appears to be the unsustainable manner in which staff overtime is used. While this may appear indispensable, it is impractical to increase staff overtime sporadically in order to clear a backlog that is likely mount up again once it is cut. A more productive use of staff over time would be to use it to reduce a backlog prior to instituting wider improvements in the process.

It almost goes without saying that resources – human or otherwise – are stretched. How can staff efficiency be improved, for instance, if training would detract from their other functions? It is always worth campaigning for more resources, yet they will never be abundant. More pressing, then, is maximizing the efficiency of limited resources. The key here is integrating the moving parts of the process; the challenge is that the government is being pulled in two competing directions.

In the two departments in question, the process has not always been fully integrated. Hard copies of files are necessarily kept in different locations, electronic files unnecessarily in incompatible formats. Requests need to go round different offices for approval; superfluous steps in the process remain. The different moving parts lead to inefficiencies in the process, delays and poor report card grades. Integrating them will make the process more efficient, whether using the potential of often already existing technology to increase the monitoring of requests – implement a 'bring forward' system[278] for example – or improved logistics to speed up the transport of concrete files. Such integration appears to require a dose of centralization, or at oversight from the centre to coordinate.

Yet this central oversight is also part of the challenge. The centralization of the request process may increase its efficiency, but it may also tempt the government to increase their control over the request process. We have outlined in this study that the monitoring of sensitive requests by worried ministers can be a major source of inefficiency and delay. It is also worth remembering it can hinder freedom of information.

[278] A BF (Bring Forward) system to monitors due dates within ATIP*flow* and can be monitored by administration staff and analysts. Information Commissioner of Canada. *Citizenship and Immigration Canada. Status Report on Access Requests in a Deemed-Refusal Situation*. 2004-2005.

5. Freedom of information legislation and the role of the records manager

Section 11 of *Practical Issues for Authorities* noted some of the implications of record keeping and management for organizations in the implementation and operation of FOI. The section below looks more broadly at how records management sits within the framework of FOI and how records managers can – should – look to enhance their role and usefulness.

There is no doubt that freedom of information legislation is an opportunity for records managers, if they are willing to seize it. It is not by chance that the UK legislation includes provision for a Code of Practice on records management. Staff of the National Archives fought hard for it to be there, against considerable opposition. Its very existence now makes the point to all that you cannot operate an effective FOI regime unless you have good records management systems in place. In the UK, the Information Commissioner now regularly refers in public presentations to the importance of records management. Local authorities' staff in the UK suggest that the existence of the code, by emphasizing the importance and relevance of records management, has enabled them to push their work a little higher in the priorities of their authorities – never an easy task.

Any freedom of information legislation is only as good as the quality of the records to which it provides access. Such rights are of little use if reliable records are not created in the first place, if they cannot be found when needed or if the arrangements for their eventual archiving or destruction are inadequate. *(from the Introduction to the Code of Practice on Records Management issued by the Lord Chancellor under section 46 of the UK FOI Act.*

It is important to remember that the Act brings with it not only the obligation to publish and provide information but also a much more rigorous approach to records management than many public authorities have been used to up until now. *(Comment taken from the website of the UK Information Commissioner)*

Government initiatives such as Modernizing Government, Freedom of Information legislation, and e-Government targets all impose obligations to manage electronic records. However it has not yet been an issue that has achieved a significant profile among local government policy makers.

From *Archives in the Digital Age - A Study for Resource*, Dec 2002

What then are the main points for records managers to be aware of and to make to their senior management?

Points for records managers

- The involvement and understanding of senior management is essential in developing adequate RM policies and systems to meet information access needs.
- Records management and information access need to sit in the same management chain and communications between the teams (if they are separate teams, rather than parts of the same) need to be good.
- Records managers' knowledge of the organization's records is an asset and could be used effectively in developing access policy as well as advising on processing of requests.
- Electronic Records Management Systems (ERMS) are essential to all organizations as we move to an environment where almost all records are created, stored, managed through their

whole life cycle and disposed of electronically. ERMS is increasingly also the only way to underpin information access and retrieval adequately.

- Having the right systems may depend on technology but defining and using them to secure effective freedom of information is a management issue not a technological one. It should be led by records managers or at least they should have a key role in it.
- Having a wide range of separate public sector and government bodies operate the same systems and procedures for FOI is excellent if it works well. But it is not essential. What is essential is that each organization should have an effective set of systems and processes that meets its needs and the needs of the legislation currently in force.
- Records or Information? In practice it should make little difference which of these two your own Act requires you to produce. In both cases though there will be specialist issues, such as the competent redaction of information where only part of a file can be released, which will involve the records manager.
- There are clear workload and staffing implications for records managers when FOI legislation is introduced or amended. New or changed needs may require both more staff and staff with new and different skills. These are part of the overall resource implications of freedom of information.
- Records management staff should always be sensitive to culture change and change management needs in their organization. They are well placed to support and encourage a culture of openness.
- That said they will also need to adapt to the policies of the current administration even where these reverse trends towards openness. But it is to be hoped that in principle all records managers see their task as enabling, not restricting, access to the information they manage.

Freedom of information as an opportunity to develop better records management

If everything is in place in your organization's records management you do not need this opportunity. If it is not then the need to comply with high-profile FOI legislation, especially new acts, or revisions of older acts, give a prime opportunity to state the case for improved records management.

There is no easy solution to how to do this. But, given the right incentive and commitment, most public bodies can be persuaded, over time, make the necessary steps. You need to:

- *Recognize the issue:* everyone in your organization, especially its senior managers, must recognize the need for records management which is fitted to purpose and agree to work together to achieve it.
- *Be explicit:* your corporate policies, your corporate plan, your IT or e-business strategy, whatever you have, must clearly indicate your corporate commitment to the importance of dealing with the issue of sustaining the management of your electronic information and records so they can do all that is required of them
- *Think carefully about what records you have:* a good starting point is an information audit, telling you exactly what records you hold or are responsible for, how many there are, how long you need to keep them and so on.
- *Find the solution that works for you:* you don't have to have the most complex or expensive solution. You need one that's geared to what you do.
- *Plan carefully:* don't jump straight in by buying a new and expensive system. Preparatory work will repay the time and effort it takes.

- *Get your management team on board:* senior managers and departmental managers have to understand, and support, what is being done and be prepared to sell it to their staff.
- *Get the right help:* you need trained and experienced records management staff, or advisors with the right skills to help you.
- *Don't just think IT:* managing electronic records is a management, not an IT, problem. The system you buy is only part of it. You must also:
    - Make all your staff understand what is needed and why – change the culture.
    - Spend time preparing and training staff so they play an active part
    - Make sure the training and the change is firmly embedded.
- *Use others' experience:* Talk to other organizations you deal with. Their experience may well be relevant to your specific needs and complement advice and guidance you get, for example, from a website.
- *Allow enough time:* you can't do a quick fix and make it work. Typically, from start to finish, specifying, procuring and implementing a full EDRMS is going to take at least two years and it could be double that, depending on things like size, complexity and available resource. Doing it fast isn't the issue; doing it well is.

CONCLUSIONS

Freedom of information (FOI) laws are becoming increasingly common around the world. In the last two decades more than 50 states have introduced FOI legislation. Such legislation is often touted by supporters and campaigners as a window into the workings of government, and by administrations introducing the legislation as proof of their commitment to transparency and accountability. How FOI works in practice, however, is often far from the ideal vision of either group.

There are many justifications put forward for introducing freedom of information legislation. FOI is said to engender greater transparency; increased accountability of government; better public understanding of government decision making; more effective public participation in government decision making; increased public trust and confidence in government; higher quality of government decision making; better record keeping and records management; the exposure of waste, incompetence or corruption; and in more general terms, 'open' government. However, the impact of FOI on each of these areas is unclear. There has been very little research conducted and therefore limited firm evidence to support such contentions.

One basic objective of FOI that is often overlooked, but has been achieved in most countries that have legislated, is to give citizens the statutory right to request and receive certain information from public authorities. The extent of this benefit depends of course on a number of factors that have been addressed in this study.

There are few 'horror stories' that one can cite where freedom of information has brought about any harmful effects, i.e. there are few cases where information that should not have been released has been released in error. It might be argued that the need to protect information is still too strong. Many public servants still generally err on the side of concealment rather than openness without sufficient demonstrable cause. The tendency of public servants to regard the information they hold as private, even as a threat, as something that the citizen should not see, is changing – slowly, perhaps, but it is changing.

No single or dominant conclusions emerge from this broad survey of the FOI acts in the USA and UK and the ATI Act in Canada. But from the mass of information presented it is clear that structured and thoughtful monitoring is a key aspect of any FOI regime, one that must be incorporated from the very start and one that is not yet done with sufficient coherence or consistency.

It is perhaps at more 'mundane' levels that freedom of information has worked best and least controversially for the average citizen. Research is sparse, but it is more likely that it has worked for people seeking information on local services, decisions and policies, if not for journalists seeking information on more contentious matters from central or federal government. For the former, FOI brings real benefits at relatively little risk or cost to public authorities. True, such requests can increase the workload of officials and put new strains on already strained systems, including those for the creation, management and disposal of records.

This study also exposes gaps in our knowledge of FOI. It is not easy to see exactly how FOI has worked, what benefits it has brought, or at what cost it has been implemented. We do not know enough about how much it costs to comply with freedom of information laws. Where administrations have moved away from openness it is not clear whether this has been either necessary or effective. So there is scope here for further studies.

With regard to record managers, one of the key points the study brings out is that records management is at the heart of the successful implementation of FOI legislation. Records managers need to be aware of this, and to regard freedom of information as an opportunity as well as a challenge.

Governance and management of the legislation: The US legislation is innovative and has given the rest of the world 40 years of experience on which to draw. Canada should also take credit for a carefully structured act that has incorporated most of the key points for good FOI legislation.

In the US the FOIA is enforceable in court. Canada and the UK have established Information Commissioners to ensure compliance with the Act, backed by court action in the case of Canada. However, though unused, both Canada (less so) and the UK incorporated a 'government veto' into in the legislation; a somewhat tentative commitment to FOI when compared to the US legislation.

It is clear that freedom of information is not static; the right to access and the 'openness' of government ebbs and flows, and is often impacted by major political events. An example of this flux is provided in the case study of section 2 where the change in the balance between freedom of information and national security was shown to have shifted markedly in favour of the latter. In addition, the UK Act has minimal reporting requirements, which may be suggestive of an administration wary of having the effects of its legislation too closely monitored.

Elements Reserved from Coverage and Protected by the Legislation: There is a set of exemptions common to all three pieces of legislation. The practice of exempting information from disclosure in order to protect essential functions of government is universal in freedom of information legislation. These cover issues such as national defense, international relations, law enforcement, information provided in confidence, personal information and policy advice. There are few significant differences in the scope of the exemptions in each country. The exemption used most often across all jurisdictions is that covering personal information.

Each law incorporates the 'public interest' into its exemptions in different ways. In the United States the public interest is built into the exemptions. In the UK, in contrast, for each of the 17 qualified exemptions the FOI officer must apply a 'public interest' test, and decide (and specifically justify) whether it is in the public interest to disclose or withhold the requested information. The Canadian legislation uses this test sparingly.

Usage and Statistics: Monitoring provisions and processes vary considerably between the three countries so it is difficult to make clear comparisons. It is also a cumbersome subject so analysis has been restricted to the national level – which tends to be subject to at least some consistent monitoring.

FOI is used by very few people; in the USA, Canada and the UK less than 1 percent of the population in each country have ever made an FOI request. Private citizens, the media and business are the most frequent users. A loose comparison in section 3 illustrates that people in the United States use the act far more than people in the UK or Canada. It is also clear that over time usage of FOI increases. Since 1998 the total number of requests in the US has doubled and increased threefold in Canada; however, a small number of central government departments account for the vast majority of requests.

Practical Issues for Authorities: The most practical of the four topics chosen within the overall study, shows how difficult compliance can be and what problems can arise. It also looks sympathetically at the ways of managing those problems and indeed managing implementation overall in order to secure the best results. As the case study shows improvement is possible, but difficult to maintain.

Section 4 shows that senior management has an important role in creating an effective FOI response process. As well monitoring the overall process, senior management have a significant affect upon the culture of the office and the attitude toward freedom of information; it senior management that must push towards 'open government'. Just with any other form of senior management, FOI managers need to sensitive to their staff's time constraints and encourage their development through training.

Centralization of the request process can have a positive and negative impact on the working of the overall process. Whilst centralization through the use monitoring systems and software may desirable and can create more efficient and effect request process, it also provides the opportunity for increased monitoring of potentially politically sensitive requests. This is illustrated by the 'amber light process' in Canada. There are legitimate reasons for politicians to take an interest in such requests; however, overzealous monitoring of the process can lead to significant delays and backlogs.

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