

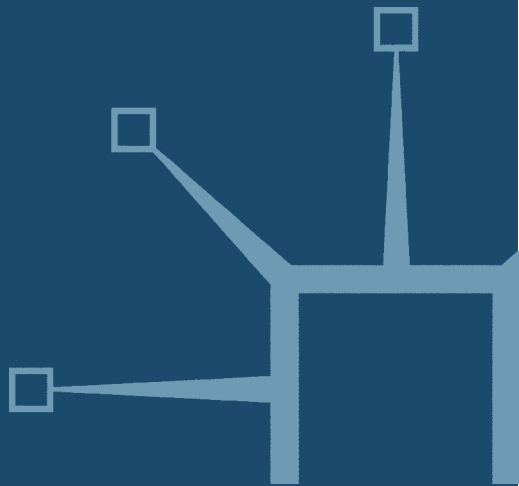
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# The Impact of the Freedom of Information Act on Central Government in the UK

Does FOI work?

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Robert Hazell, Ben Worthy and  
Mark Glover



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# The Impact of the Freedom of Information Act on Central Government in the UK

Does FOI work?

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*This book is dedicated to  
Salvatore Ridda (1947–2009)*

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# Notes on Contributors

**Mark Glover** was a research assistant at the Constitution Unit, which he joined in 2006 after obtaining an MA in European Society from University College London. He mainly worked for the FOI/DP team on its evaluation of the impact of FOI on Whitehall, and contributed to two chapters in *Constitutional Futures Revisited: Britain's Constitution to 2020* (2008).

**Robert Hazell** is the founder and director of the Constitution Unit at University College London. The Constitution Unit has done work on every aspect of the government's constitutional reform programme, and is the UK's leading research centre on FOI. During his time in the Home Office, Robert Hazell spent a year studying the implementation of FOI in Australia, Canada and New Zealand. He has advised overseas governments and UK government departments on introducing FOI, and been a special adviser to parliamentary inquiries. He was a member of the government's project board on implementation of FOI, and is currently a member of their Information Rights user group. He has published extensively on FOI in academic journals as well as in the media.

**Ben Worthy** is the Research Associate in Freedom of Information and Data Protection at the Constitution Unit. He has been in charge of the day-to-day running of the unit's study of the impact of FOI upon British central government. He is now co-investigator on two projects examining the impact of FOI upon local government and Parliament. He has written and presented on various aspects of FOI. His PhD from the University of Manchester analysed the development of FOI in Britain.

# Foreword

This book is a systematic evaluation of the impact of FOI on central government in the UK. Like all the Constitution Unit's work, it is a collective effort. This foreword records our thanks to all those involved with this project, and explains the unit's collective approach to research.

The Constitution Unit is the leading research centre on FOI in the UK. Since 1997 we have been closely involved in the preparations for the introduction of FOI, and then its effective implementation. We have provided training sessions and consultancy for central government, local government and other public bodies. We organise a monthly seminar series for the leading FOI policy-makers and practitioners, and an annual conference, FOI Live, which is the biggest event in the FOI calendar. We have a dedicated website where we publish monthly information policy updates, and all our research reports, at <http://www.ucl.ac.uk/constitution-unit/foidp/index.html>. Most of our research is in the UK, but we also do comparative research, greatly assisted by our network of Associates in the UK and overseas.

We could not do all this work without our Associates, and it is to them that we should record our first debt of gratitude. As always, they have been generous with their time and expertise in supporting this project. The Associates who have helped this time include Jim Amos, Prof. Patrick Birkinshaw, Megan Carter (Australia), Sarah Holsen (Switzerland), Bob Morris, Prof. Alasdair Roberts (USA), Duncan Simpson, Rick Snell (Australia) and Peter Waller. We should also record our thanks to the members of the project's Advisory Committee, Maurice Frankel, Prof. Matthew Flinders, Mike Granatt, Sarah Holsen, Gervase Hood, Sir Robin Mountfield, Prof. Charles Raab, Peter Riddell, Prof. Alasdair Roberts, Graham Smith, Prof. Kevin Theakston, Jennifer van Heerde, Brian Walker and Andrew Whetnall.

My own interest in FOI goes back over 20 years, to the time when I was awarded a Civil Service travelling fellowship to study the implementation of FOI in Australia, Canada and New Zealand. I did so in 1986–87, when their new FOI laws had been in force for three years. This study of the impact of FOI in the UK was undertaken at broadly the same stage, starting in the third year of FOI. It led me to renew contacts I had first developed when studying FOI in those three countries, and I should record my personal thanks to those who also helped my original study,

John McMillan and David Bell in Australia, the Ombudsmen in New Zealand, and David Brown and the late Peter Gillis in Canada.

The lead researchers in the Constitution Unit were Dr Ben Worthy and Mark Glover. They have done most of the work on the project, conducted all the interviews, and written most of this book. Sarah Holsen led the project in its first year. Vicki Spence managed the finances and kept us all in order. The team were ably assisted by successive cohorts of interns, who helped with background research and analysed the large number of FOI stories in the press. The interns included Erica Grigg, Lucy Dale, Gloria Dawson, Maria Stemmler, Shokofeh Hejazi, Naomi Holford, Kerem Nisancioglu, Richard Carr, Simon Kaye, David Parker, Daniel Lawrence, Jules Norton Selzer, Tony Daly, Chris McCarthy, Senay Nihat, Agnieszka Smolenska, Drew Swinerd, Rene Holbach, Gabriel Pereira, Chris Austin, James Asfa and Ross Jones.

Others who have helped the project include Andrew Ecclestone and numerous members of the ICO. We would also like to thank all those officials, requesters and other interviewees who gave their time to speak to us as well as all the requesters who filled out our survey. The project could not have happened without their help, time and commitment.

Finally, we should thank the funders of this research, the ESRC (research grant no. 062 23 0164) and the Ministry of Justice. They kindly awarded us funding to carry out a major research project over two and a half years, from January 2007 until June 2009. Without their support we could not possibly have carried out such a large-scale or systematic evaluation of the impact of FOI.

Robert Hazell  
June 2009

The Constitution Unit  
School of Public Policy  
University College London

# Abbreviations and Acronyms

AIA	Access to Information Act (Canada)
AIRTF	Access to Information Review Task Force
BAA	British Airways Authority
BERR	Department for Business, Enterprise and Regulatory Reform
CASC	Constitutional Affairs Select Committee
CIC	Canadian Information Commissioner
CFOI	Campaign for Freedom of Information
CSPL	Committee on Standards in Public Life
DA	Domestic Affairs
DCA	Department for Constitutional Affairs
DFES	Department for Education and Skills
DFT	Department for Transport
DP	Data Protection
DTI	Department of Trade and Industry (now BERR)
DWP	Department of Work and Pensions
ED	Economic Development
EIR	Environmental Information Regulations
ERM	European Exchange Mechanism
EU	European Union
FCO	Foreign and Commonwealth Office
FOI	Freedom of Information
IC	Information Commissioner (Ireland)
ICO	Information Commissioner's Office (UK)
ICT	information and communication technologies
IT	Information Tribunal (UK)
JIC	Joint Intelligence Committee
JR	Judicial Review

L	Legislation
MOD	Ministry of Defence
MOJ	Ministry of Justice
MSP	Member of the Scottish Parliament
NAO	National Audit Office
NGO	Non-Governmental Organisation
NSID	National Security, International Relations and Development
NSLG	National Security Liaison Group
OIA	Official Information Act (New Zealand)
PASC	Public Administration Select Committee
PFI	Private Finance Initiative
PQ	Parliamentary Question
Sp Ads	Special Advisors
TSOL	Treasury and Solicitors Department

# **Part I: Freedom of Information in Theory**

# 1

## Introduction: Why Evaluate the Impact of Freedom of Information, and How?

How often do we go back and evaluate whether a policy which went through a couple of years ago actually achieved the objectives which were claimed for it at the time it was formulated? The answer is very rarely. We ought to do it a lot more. (Sir Richard Wilson, Head of the Civil Service, addressing a civil service conference in 1998: quoted in Talbot 2003)

### **Systematic evaluation of Freedom of Information**

This book is the first systematic evaluation of the impact of Freedom of Information (FOI), anywhere in the world. Given the rapid spread of FOI, it is surprising that there has not been more systematic study of its effects. There is little academic literature on FOI, and most of the books are by lawyers, offering commentaries on the legal texts, rather than by political scientists analysing its effects.

In the absence of research FOI proponents have developed an ambitious set of expectations about what FOI can deliver, matched by an exaggerated set of fears expressed by its opponents. Our purpose is to test both sets of expectations against the realities of how FOI works in practice.

The lack of research on FOI is surprising given how rapidly it has spread across the world. Britain is a relative latecomer, part of the 'third wave' of countries that introduced FOI after the democratic revolutions of the 1990s. The first wave consisted of two pioneers: Sweden, whose access laws date back to 1766, and the USA, which legislated in 1966. In the second wave a few other European countries followed suit, together with Australia, Canada and New Zealand in 1982. The third

wave includes the UK and most other advanced democracies: 26 of the 30 OECD countries now have FOI laws. But it also includes large numbers of new and emerging democracies, so that some 75 countries worldwide now claim to have FOI (Banisar 2006: 6).

Why has there been so little research on FOI? Perhaps one reason is that it is automatically assumed to be a 'good thing'. Our study asks, good for what?

What are its main effects? What are its side effects, and does it have any damaging effects? To analyse good for what, we ask what FOI is intended to achieve: what are its policy objectives? We then assess to what extent it has delivered these objectives.

This is what we mean by 'systematic evaluation': a study that analyses the extent to which FOI achieves its declared objectives, and that uses a battery of different research methods to do that. Our own study begins with an analysis of the policy objectives of FOI, in Chapter 2, and goes on to explain our research methods in Chapter 4.

The need for more systematic studies is being increasingly recognised, nationally and internationally. Intergovernmental bodies like the EU, OECD, UNDP and World Bank, and non-state actors like the Open Society Institute have been strong promoters of FOI (Ackerman and Sandoval-Ballesteros 2006: 122). But they are becoming concerned that many of the laws passed in response to international pressure are 'paper laws', with little usage and no impact (Open Society Justice Initiative 2006; Rely and Sabharwal 2009: 154). Hence the interest in developing means of evaluating whether FOI laws are properly administered, with independent appeals systems etc. (Islam 2003; OECD 2005: 6). But even laws which are reasonably well administered have not been subject to any evaluation to see whether they are having their desired effects. That is the purpose of our study: to evaluate the extent to which the UK FOI Act is achieving its intended objectives.

## **The systematic evaluation of government policy**

Interest in policy evaluation emerged in the 1960s and 1970s, and quickly led to a burgeoning literature (for summaries see Dolbeare 1975; Palumbo 1987; Rist 1995). In the UK, pressure for more regular systematic evaluation of new policies, or 'post-legislative scrutiny', has come from Parliament in the last five years. The initiative came first from the House of Lords Constitution Committee, in their 2004 report, *The Legislative Process* (House of Lords Constitution Committee 2004). This was followed by a Law Commission Report in 2006 and

a government White Paper in 2008 (Law Commission 2006; Office of the Leader of the House of Commons 2008). We do not seek to review this literature, but to place our evaluation within it. There are four ways in which our study is a systematic evaluation of a government policy.

First, we cover both dimensions of policy evaluation. Evaluation research addresses both how a policy may be measured against the goals it sets out to attain and the actual impact of the policy (Parsons 2005: 545; Weiss 1998: 4). This is also the approach endorsed by the UK government in its White Paper, which describes the need for ‘an assessment of the effects of the legislation relative to its stated objectives’, or ‘how the legislation is working out in practice’ (Office of the Leader of the House of Commons 2008: 10). Our main purpose is to evaluate to what extent FOI has achieved its objectives. This is classic policy or ‘goals-based’ evaluation, as described by Sir Richard Wilson in the epigraph to this chapter, and in the academic literature:

Policy evaluation research is the objective, systematic, empirical examination of the effects ongoing policies and public programmes have on their targets in terms of the goals they are meant to achieve. (Dye 1987: 351, quoted in Parsons 2005: 545)

But our secondary purpose is to evaluate the impact of FOI on Whitehall, and whether it has affected any of the key features of the Whitehall model. This part of our evaluation asks whether FOI has had side effects, a line of interrogation which is a part of comprehensive evaluations (Weiss 1998: 129).

Second, it is a ‘summative’ as opposed to a ‘formative’ evaluation. Sometimes an early evaluation is conducted during the implementation stage (‘formative evaluation’) to help improve the implementation process. Early reviews of FOI laws abroad have been in this mould, for example, in Australia, Canada, New Zealand and Ireland (see respectively Senate Standing Committee on Legal and Constitutional Affairs [Australia] 1987; Standing Committee on Justice and Solicitor General [Canada] 1987; Information Authority [New Zealand] 1985; and High Level Review Group on the Irish Freedom of Information Act 1997 2002). The UK Act has also been subject to two formative evaluations. The Constitutional Affairs Select Committee (CASC) reviewed progress towards implementation in 2004 and the first year of the Act’s operation in 2006 (CASC 2004; 2006). Summative evaluations take place after the implementation phase in the policy cycle, and seek to measure how the policy has impacted on the problems it was meant to address (Cabinet

Office 2003: 5; HM Treasury 2003: 45; Palumbo 1987: Fig. 1.1; Rossi and Freeman 1993: 215). The House of Lords Constitution Committee (2004: para. 180) stated that post-legislative scrutiny should normally be carried out within three years of the legislation's commencement or six years after its enactment. Our evaluation took place from 2007 to 2009, three to four years after the Act came into force.

'Formative' evaluation has a second meaning in the literature (Cabinet Office 2003: 4). Where summative evaluation asks *whether* a policy has achieved its objectives, formative evaluations can ask *why* a policy has or has not had a given impact. Our evaluation is mainly summative, but we find that the two questions are not entirely distinct and drill down into the reasons why FOI has or has not achieved its objectives.

Third, the evaluation is systematic in that a variety of methods is used to interrogate our research questions. This is 'paramount' in rigorous evaluations (Cabinet Office 2003: 3; Weiss 1998). As described in Chapter 4, our methods interrogate civil servants, who administer the legislation and are affected by it; FOI requesters, who use the legislation; the case law of the Information Commissioner and Tribunal, the regulators; and the media, who report the outcomes of requests to the public at large.

Finally, we analyse both the outputs and outcomes of FOI. Definitions of outputs and outcomes vary, but in principle the difference is one between immediate results of government policy and the final impact of these policies. The former are outputs, the latter are outcomes. Transparency and accountability are closer to outputs of FOI; public trust in government or public participation, for example, are closer to outcomes. One important difference is that whereas it is reasonable to hold government responsible for outputs, it is harder to hold them responsible for outcomes, because these may be influenced by many other factors beyond government's control (OECD 2009).

## **Difficulties of evaluation 1**

Any 'goals-based' evaluation must first ascertain the objectives of the legislation. That is what we set out to do in Chapter 2. It was not entirely straightforward. The UK FOI Act does not have a purpose clause, unlike Australia and New Zealand (see Hazell 1999: para 4.1). The lack of clear objectives is not unusual among government policies, which often have multiple objectives, some of which may be inconsistent, and which may also include elements of wishful thinking. Failure to articulate

clearly the objectives of a new policy may sometimes reflect political artfulness as well as simple oversight.

In the case of FOI it was oversight. It was assumed that FOI was a good thing, which required no separate justification. So to find the justification we went to all the background documents which preceded and supported the legislation. In this we were following the government guidance on post-legislative scrutiny, which states that a law's objectives can be found in a variety of places:

including the Explanatory Notes on the Bill, any Impact Assessment (formerly Regulatory Impact Assessment), ministerial speeches (in particular, on the floor of either House) and in other policy documents. (Office of the Leader of the House of Commons 2008: 9)

Lord Steyn (2001: 71) and the Lords Constitution Committee (2004: para. 176) give particular prominence to the Explanatory Notes for a statement of an Act's objectives. In the case of the FOI Act, the Explanatory Notes refer the reader back to the 1997 White Paper to find the purpose of the Act (Home Office 2000). The objectives set out in the White Paper will thus be given due weight. Lord Falconer (2005) proposed looking at three performance indicators: authorities' compliance; the citizen's experience of using the legislation, including whether it helps them make decisions about public services; and perceptions of the impact of the legislation.

Is there awareness of freedom of information? Is it growing? Are people using their information rights? Do people see evidence of greater openness? Is that greater openness making a difference to people's experience of being a citizen, and to the way government is doing its job on their behalf? Is decision-making by government getting better?

We have mostly drawn on the Cabinet Office 1997 White Paper, the Home Office 1999 Green Paper, parliamentary debates and ministerial speeches to identify the intended objectives. Chapter 2 sets out the different objectives which are mentioned in these documents, including the number of mentions for each, and ranks them as follows:

- Increasing the openness and transparency of government
- Increasing the accountability of government
- Improving the quality of government decision-making

- Improving public understanding of government
- Increasing public trust in government
- Increasing public participation in government.

These six objectives provide the framework for our policy evaluation. In Part 2 of the book there are six separate chapters analysing the extent to which FOI has delivered each of these objectives. To anticipate our conclusions, we find that the first two objectives have been realised, but the last four objectives have not.

Unintended or negative consequences are covered too: for each objective we ask whether FOI has had a positive or negative impact. A second major strand in our study looks specifically at the impact of FOI on Whitehall, since many of the concerns about negative impacts focused on damage to the efficiency and effectiveness of the working of Whitehall. This required us also to identify the key pillars of the Whitehall model. For the purposes of this study, Chapter 3 identifies the following key features:

- The culture of secrecy
- Civil service neutrality
- Ministerial accountability to Parliament
- The Cabinet system
- Effective government.

These five features provide the framework for our evaluation of the impact of FOI on Whitehall. Part 2 of the book also contains separate chapters analysing the impact of FOI on each of these five features. We find that none of the five features has been adversely affected by FOI. The pillars of the Whitehall model remain in place.

## **Difficulties of evaluation 2**

The next difficulty in any evaluation study is working out whether perceived changes can properly be attributed to the policy in question, rather than to extraneous factors. So in the chapters in Part 2 of the book we follow a common pattern. We ask first whether there has been a change: for example, is there greater openness and transparency? We next try to assess how significant is the change, using quantitative measures where possible. And we then lay out all the other causal factors which might have contributed to the change, and try to separate out the specific contribution of FOI.

None of this is easy. Freedom of Information has been introduced at the same time as a range of other initiatives intended to open up the policy-making process in Whitehall, to make government more accountable, to improve the delivery of public services and make them more responsive to the needs of citizens. These include:

- The 1999 White Paper on *Modernising Government* (Cabinet Office 1999a), to introduce more open, participatory and evidence-based policy-making.
- Public Service Agreements introduced as part of the 1998 Comprehensive Spending Review, to link public spending to key performance targets and tighten accountability for their delivery.
- Focus on delivery, as found in *Reforming Our Public Services – Putting Principles into Practice* (Office of Public Services Reform 2002), and later driven by Sir Michael Barber's Delivery Unit.
- Focus on making public services more responsive to the citizen, driven by Sir David Varney's 2006 *Service Transformation* review (Varney Review 2006).

There has also been a powerful set of external forces adding to the pressures for greater openness and disclosure. Chief among these is Parliament. Parliament continues to bombard the government with parliamentary questions (PQs), whose number rose from about 42,000 in 2001–02 to around 63,000 in 2006–07 (House of Commons Library 2008). Select Committees, with better resources and core tasks conduct more searching inquiries to which government has to respond (Liaison Committee 2003; Modernisation Committee 2002). MPs send huge amounts of correspondence to ministers, all generating replies. The reformed House of Lords is also much more effective in calling the government to account (Russell 2009).

The modern media also add enormously to the pressures for greater openness. The 24/7 news cycle and the proliferation of media outlets has meant that ministers are in constant demand to be interviewed on news programmes of all kinds. The rise of blogs and digital democracy has created yet more pressure for openness, and more outlets for circulating information, including leaks. Unauthorised leaks continue to be an important means of disclosing sensitive or embarrassing information, which is frequently but wrongly attributed to FOI. Sometimes the conflation is understandable: consider the leak in spring 2009 to the *Daily Telegraph* of the details of MPs' expense claims, information being prepared for disclosure under FOI (and released by Parliament in June).