The implementation of the Freedom of Information Act 2000 represents a fundamental shift in the balance of power between the state and the citizen. It is a statute of constitutional importance.

Commentary

In 1996 Tony Blair, the then leader of the British Labour Party, who in 2000 as UK Prime Minister led the passing of the Freedom of Information Act[1] (FOI) championed freedom legislation. Blair speaking at the 1996 Freedom of Information Act Awards gushed with admiration for the ability of a FOI to open up government and shift the power of the state towards the citizen:

> It is not some isolated constitutional reform that we are proposing with a Freedom of Information Act. It is a change that is absolutely fundamental to how we see politics developing in this country over the next few years…information is power and any government's attitude about sharing information with the people actually says a great deal about how it views power itself and how it views the relationship between itself and the people who elected it" [2]

Blair saw FOI as a key constitutional reform. An opportunity to open up the public sector and give transparency accountability principals to public authorities. Elected in 1997 with a mandate it was Blair who led the introduction of the bill, subsequent passing of the act and then supported a delay of implementation[3], when the realities of government and full transparency became clear once he was in office.

In 2011 he made his dislike for the legislation well-known, in his memoir he wrote:

> Freedom of Information. Three harmless words. I look at those words as I write them and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it.
>
> Once I appreciated the full enormity of the blunder, I used to say - more than a little unfairly - to any civil servant who would listen: Where was Sir Humphrey when I needed him? We had legislated in the first throes of power. How could you, knowing what you know have allowed us to do such a thing so utterly undermining of sensible government? [4]

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[1] Freedom of Information Act 2000 c.36

[2] Cfoi.org.uk. (2019). *Campaign for Freedom of Information » Speech by the Rt.Hon. Tony Blair MP, Leader of the Labour Party at the Campaign for Freedom of Information's annual Awards ceremony, 25 March 1996.* [online] Available at: https://www.cfoi.org.uk/1996/05/speech-by-the-rt-hon-tony-blair-mp-leader-of-the-labour-party-at-the-campaign-for-freedom-of-informations-annual-awards-ceremony-25-march-1996/ [Accessed 2 Oct. 2019].

[3] Hencke, D. and Evans, R. (2019). *Blair 'big bang' theory to delay freedom act*. [online] the Guardian. Available at: https://www.theguardian.com/politics/2001/oct/26/uk.freedomofinformation [Accessed 2 Oct. 2019].

[4] Blair, T. (2011). *A journey*. 1st ed. United States: Random House, p.516.

Blair went from sponsor to sceptic. A politician who bore the FOI, now hating the very child he gave birth to because it was all powerful, could be seen as a win for the citizen. Clearly one could say that his legacy was the Iraq war. A defining point in FOI.

The British Labour party who before their election in 1997 had included the provision for FOI legislation in every election manifesto on arriving in power had lost their appetite for transparency. In their 1997 manifesto promising a statutory regime for information release, the Labour Party said, "Unnecessary secrecy in government leads to arrogance in government and defective policy decisions[5]" . Less than 10 years later their appetite had changed when for the first time[6] a Labour minister, Jack Straw used the ministerial veto that resides within the act[7] when refusing to disclose cabinet minutes following the invasion of Iraq. This following a protracted legal challenge in tribunals in *Cabinet Office v ICO and Dr Christopher Lamb*[8] that upheld the ICO[9] decision that the minutes of meetings should be disclosed.

The actions of Straw and the words of Blair make it clear that elected politicians did not wish or feel they should cede power to the citizen, in Straw's case on a matter that involved the country going to war. However, the comments of politicians should not be taken as an objective measure of whether the FOI actually made a "difference".

This is my starting point for this critical analysis, starting with whether access to information is a "constitutional right?" and if it is, has FOI achieved its stated objectives and meets the criteria for a real constitutional change.

In their 2011 paper entitled "The constitutional right to information"[10] the authors Peled and Rabin outline the justification for global recognition of the right to information from government but moreover, see this right as a constitutional right rather than a mere legal right per se.

In the paper, they progressed the argument[11] that this is a constitutional right, due to its political nature and its role in protection of democracy. To support that proposition, they proposed four "theoretical" justifications by which to judge the necessity of legislation to meet the requirements of real constitutional effect. These being:

- Political-Democratic Justification
- The Instrumental Justification
- The Proprietary Justification
- The Oversight Justification—Transparency

I shall use these four justifications to support the argument that FOI has met the criteria for real constitutional change.

Political – Democratic Justification

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[5] New Labour, Because Britain Deserves Better, Labour Party Manifesto 1997.
[6] Oonagh Gay and Edward Potton, 'Foi And Ministerial Vetoes' (*Researchbriefings.parliament.uk*, 2019) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05007#fullreport> accessed 3 October 2019.
[7] Freedom of Information Act 2000 c.36 s.36
[8] Upper Tribunal (Information Tribunal: [EA/2008/0024] & [EA/2008/0029 UKUT 1 (IT)
[9] UK Information Commissioner's Office
[10] Peled, Roy and Rabin, Yoram, The Constitutional Right to Information (November 10, 2010). Columbia Human Rights Law Review, Vol. 42, No. 2, 2011. Available at SSRN: https://ssrn.com/abstract=1706606
[11] Peled, Roy and Rabin, Yoram, The Constitutional Right to Information (November 10, 2010). Columbia Human Rights Law Review, Vol. 42, No. 2, 2011. Page 358, Available at SSRN: https://ssrn.com/abstract=1706606

A democratic regime rests upon proper conduct. In order for the citizens to play, their part the need for access to information and decision making is key. The foundation of the right to request and obtain information resides at a global level in Article 19 of the 1948 Universal Declaration of Human Rights[12].

Clearly access to information allows citizen the opportunity to engage in the democratic process should they wish, the lack of information would inhibit real engagement in the democratic game.

In 2012 the House of Commons Justice select committee concluded a post - legislative review of FOI[13] in which it concluded:

> The Freedom of Information Act has been a significant enhancement of our democracy. Overall our witnesses agreed that the Act was working well. The right to access information has improved openness, transparency and accountability. The principal objectives of the Act have therefore been met, but we are not surprised that the unrealistic secondary expectation that the Act would increase public confidence in Government and Parliament has not been met. [14]

The committee concluded that democratic process had been enhanced by FOI, however the admission that by merely releasing information would then bring about a perceptional change the way government operated, was at best hopeful, at worst naïve.

The MPs expenses scandal of 2009 was an example of such, a case which I am very familiar with.[15] Attempts to access the details of MPs expenses start as soon as the act came into force in 2005.[16] However, despite repeated attempts to access the information via FOI routes, ICO and Tribunal the case eventually arrived in the High Court.[17] In this case[18] the Corporate Officer of the House of Commons refused to release MPs expenses data. This was deemed unreasonable by the High Court who determined no legal issues standing in the way of releasing MPs data, though redaction could take place where personal security was at risk. The irony is not lost, that MPs who for years had been progressing more openness and transparency to improve democracy would at the first gunshot run to the barricades and prevent publication of data which would clearly have an effect on the citizens trust in democracy if withheld. A year later a leak to the Daily Telegraph brought the MPs expenses scandal to the front pages and had a profound effect on the democratic process.

The effects were dramatic, the speaker resigned, MPs stepped down, a number lost their seats at the 2010 election tainted by the exposure of unjustifiable expenses, 4 MPs including the former Europe Minister Denis McShane went to jail[19]

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[12] Universal Declaration of Human Rights. G.A res 217A at 71 U.N Doc a/810 (Dec, 12, 1948) (hereafter UDHR)
[13] 'House Of Commons - Post-Legislative Scrutiny Of The Freedom Of Information Act 2000 - Justice Committee' (*Publications.parliament.uk*, 2019) <https://publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9612.htm> accessed 3 October 2019.
[14] 'House Of Commons - Post-Legislative Scrutiny Of The Freedom Of Information Act 2000 - Justice Committee' (*Publications.parliament.uk*, 2019) <https://publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9612.htm> accessed 3 October 2019.
[15] I was interim Operations Director at ISPA (Oct 2009 – June 2010)
[16] Matt Burgess, *Freedom Of Information, A Practical Guide For UK Journalists* (1st edn, Routledge 2015). Page 138
[17] Corporate Officer of the House of Commons v Information Commissioner, Heather Brooke, Ben Leapman and Jonathan Ungoed-Thomas (2008) EWHC 1084
[18] Corporate Officer of the House of Commons v Information Commissioner, Heather Brooke, Ben Leapman and Jonathan Ungoed-Thomas (2008) EWHC 1084
[19] 'Macshane Jailed For Expenses Fraud' (*BBC News*, 2019) <https://www.bbc.co.uk/news/uk-politics-25492017> accessed 3 October 2019.

Thus, in the wake of the MPs expenses scandal there is no wonder that the link between publishing information and expecting an improvement in confidence is naïve and can be perverse.

FOI has a place in improving and supporting democracy, however depending upon the nature of the data released or withheld can have the reverse effect.

The Instrumental justification

This justification for the constitutional right to information is best summed up by Pled and Robin who said:

> In order for people to be capable of independently protecting their rights and thereby avoid the dependence on the protections that the state profess to grant, they must have the tools necessary for such protection at their disposal. [20]

The argument can be brought forward that without the legislation and change in culture it supported the full exposure of the MP expenses and the Iraq war "dodgy dossier"[21] would have never been exposed.

The FOI has a number of compliance requirements for public authorities and an appeal process with recourse to the ICO, tribunal and courts if the request is not forthcoming. Whilst section 5.1 of the Code of Practice[22] suggests public authorities should have an internal review process because it is "good practice" this is not mandatory on authorities as it is in Scotland. The only mandate for an internal review is under s.17(7) of the FOIA whereby the Public Authority is duty-bound to advise whether an internal review process exists. Though as pointed out by Peter Carey[23] that a complaint is 'best resolved' within an organisation as by virtue of s.50(2)(a) as the ICO will not entertain a complaint unless it has first exhausted an internal process.

The ability to challenge through appeal and the judicial process has been key to delivering constitutional justification for FOI legislation in the area of the UK Crown. The UK Crown is the monarch, is part of the tripartite 'Crown in Parliament' with the House of Commons and the House of Lords. Whilst the monarch has a supreme role in the constitutional landscape, the exercising of that right would have serious constitutional consequences considering the convention of the Crown being 'a political'. The Crown and its heirs have secured a qualified exemption from the FOI on the basis they are not a public authority under section 37 of the FOI and reinforced again in 2010 when this exemption was extended under the Constitution Reform Governance Act 2010.

For the FOI to have truly changed the constitutional balance the Crown would need to be held to account within the process. The ability for citizens to challenge the Crown in the courts was a vital requirement to assess the FOI effectiveness, and this was evident in the case that became known as the "Black spider"[24] memos.

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[20] Peled, Roy and Rabin, Yoram, The Constitutional Right to Information (November 10, 2010). Columbia Human Rights Law Review, Vol. 42, No. 2, 2011. Page 363, Available at SSRN: https://ssrn.com/abstract=1706606

[21] 'Lessons Still To Be Learned From The Chilcot Inquiry' (*Publications.parliament.uk*, 2019) <https://publications.parliament.uk/pa/cm201617/cmselect/cmpubadm/656/656.pdf> accessed 21 October 2019.

[22] 'Freedom Of Information Code Of Practice' (*Assets.publishing.service.gov.uk*, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf> accessed 4 October 2019.

[23] Peter Carey and Robin Hopkins, *Freedom Of Information Handbook* (3rd edn, The Law Society 2019). Page 321

[24] 'The Release Of The 'Black Spider Memos' (*BBC News*, 2019) <https://www.bbc.co.uk/news/uk-32080182> accessed 4 October 2019.

The memos, named after Prince Charles handwriting, heir to the UK throne were a set of letters between him and the government. The convention that the heir to the throne is 'A political' was in doubt after it was believed that the memos were an attempt by the Crown to influence government policy. A near 10-year campaign by the Guardian's Rob Evans culminated in a landmark Supreme Court ruling[25] that said that the then Attorney General, Dominic Grieve had acted unlawfully[26] in using the ministerial veto to block publication of the documents.

The veto used by Grieve as highlighted by Peter Carey 'under the controversial s.53 of FOIA, a decision notice or an enforcement served by on a government department that can be overridden by a politician'. The Upper Tribunal [27]on behalf of the ICO and Evans held that the documents should be released, Grieve ignored the determination and issued his own Executive veto[28] under s.53 which was eventually overturned on judicial review.

The importance of this case on transferring the rights of the citizen to information but wider societal safeguards are summed up in the Supreme Court judgement by Lord Neuberger in the *Evans* case who said:

> A statutory provision which entitles a member of the executive to overrule a decision of the judiciary merely because he does not agree with it would cut across constitutional principles which are fundamental components of the rule of law.[29]

The Propriety Justification

"The Propriety justification states that information held by public authorities is, in fact, the property of a state's citizens and residents[30]" is the opening line to justify by Peled and Rabin to justify the 3rd requirement to assess access to information. They go on to state that access should be free, and the civil servants work on behalf of the citizen so therefore there should be unfettered access to such information.

In the UK there has been a marked understanding that the citizen owns not only their own data but also that of the state. Since the 1980s legislation supported access and this principle, these included the following legal safeguards:

Data Protection Acts 1984[31] & 1998[32] (Driven by EU directives)

Data Protection Act 2018[33]

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[25] 'Evans & Anor, R (On The Application Of) V Attorney General (Rev 1) [2015] UKSC 21 (26 March 2015)' (*Bailii.org*, 2019) <http://www.bailii.org/uk/cases/UKSC/2015/21.html> accessed 4 October 2019.
[26] The Supreme Court C ruling was a Judicial review into the applicability of overruling a lawful instruction.
[27] *Evans v (1) Information Commissioner (2) Seven Government Departments [2012] UKUT 313 (AAC)*
[28] (*Right2info.org*, 2019) <https://www.right2info.org/resources/publications/case-pdfs/united-kingdom_evans-v.-ic/uk_evans-v.-ic_attorney-general_statement-of-reasons> accessed 4 October 2019.
[29] *R (Evans) v Attorney-General* [2015] UKSC 21 para.51-52
[30] Peled, Roy and Rabin, Yoram, The Constitutional Right to Information (November 10, 2010). Columbia Human Rights Law Review, Vol. 42, No. 2, 2011. Page 365, Available at SSRN: https://ssrn.com/abstract=1706606
[31] Data Protection Act 1984 c. 35
[32] Data Protection Act 1998 c. 29
[33] Data Protection Act 2018 c. 12

General Data Protection Regulation 2016[34]

Local Government (Access to Information) Act 1985[35]

Access to Personal Files Act 1987 [36]

Access to Medical Reports Act 1988[37]

Environment and Safety Information Act 1988[38]

Access to Health Records Act 1990[39]

Human Rights Act 1998[40]

Environmental Information Regulations 2004[41]

The introduction of FOI, despite the exemption regime, is a marked step in the acknowledgement that the citizen had a right to that data. In the UK this was further acknowledged in Part 6, Protection of Freedoms Act 2012[42] whereby FOI was extended to open data sets residing with public authorities and widened the scope to include previously excluded public entities such as Network Rail, thus allowing greater access to information. This combined with the existing publication schemes is a clear shift in the "ownership" regime to the citizen in the digital age.

Oversight Justification

The final justification brought forward by Peled and Rabin is that for constitutions to have truly transferred power to the citizen that information in the public domain allows transparency and oversight and allows scrutiny of decision making.

It follows logically that if public administration serves the public then the public should be able to participate (Democratic justification) in scrutinising the actions of those who apply decisions and sanctions. Freedom of Information requests have been made by citizens and the press[43]

Conclusion

To support the statement that a "fundamental shift in the balance of power between the state and the citizen' had taken place. I have used the four constitutional justifications outlined by Peled, and Rabin, for determining the effectiveness of FOI in meeting this "shift" of power.

You could argue that the shift was inevitable in a modern digital Western democracy with a framework of data laws being driven, citizens with modern technology and access to information via the internet and armed with access to the courts it was only a matter of time.

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[34] General Data Protection Regulation [2016] OJ 1 679/1
[35] Local Government (Access to Information) Act 1985 c 34
[36] Access to Personal Files Act 1987 c. 37
[37] Access to Medical Reports Act 1988 c. 28
[38] Environment and Safety Information Act 1988 c. 30
[39] Access to Health Records Act 1990 c. 23
[40] Human Rights Act 1998 c. 42
[41] Environmental Information Regulations 2004
[42] Protection of Freedoms Act 2012 c.9
[43] 'Freedom Of Information Reports - BBC News' (*BBC News*, 2019) <https://www.bbc.co.uk/news/uk-politics-21768148> accessed 6 October 2019.

I conclude that the citizen armed with information and knowledge, supported by legislation, an appeals framework with a willingness of government to support citizen ownership of data and greater transparency as we enter a digital age that the FOI has:

- Through data requests, publication schemes and open data[44] handed the citizen access to information held by public authorities and partners.
- That through the FOI and subsequent legalisation[45] there is, in some cases[46] a reluctant acknowledgement by government that the information held by the State is owned by the citizen.
- That transparency can aid good decision making and public acknowledgement of decisions. Though accepting that the tangible evidence is variable in supporting this premise.

In 2010 the report to the Justice select committee civil servants concluded:

> The FOI legislation set out to improve transparency and accountability, and evidence to date indicates this has been achieved[47].

In 2012, in evidence to the Commons select committee the National Union of Journalists said:

> FOI brought about a profound change for the better in the political life of this country.[48]

This support of the Act from two different sides of the argument draws me to the conclusion that the FOI is far from perfect. I have evidenced political interference and examples of obstruction, however with a framework of legal checks and balances the citizen has transparency and access that they could only have dreamed of prior to the introduction of the FOI.

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[44] 'Find Open Data - Data.Gov.Uk' (*Data.gov.uk*, 2019) <https://data.gov.uk> accessed 6 October 2019.
[45] Protection of Freedoms Act 2012 c.9
[46] MP Expenses 2009, Iraq Cabinet Minutes and Black Spider
[47] 'Memorandum To The Justice Select Committee Post-Legislative Assessment Of The Freedom Of Information Act 2000' (*Assets.publishing.service.gov.uk*, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217339/post-legislative-assessment-of-the-foi-act.pdf> accessed 6 October 2019.
[48] 'House Of Commons - Justice: Written Evidence From The National Union Of Journalists' (*Publications.parliament.uk*, 2019) <https://publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96we18.htm> accessed 21 October 2019.

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<https://publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96we18.htm> accessed 21 October 2019