

Freedom of Information in the United States: Historical Foundations and Current Trends

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Introduction

James Madison, one of the founders of the United States, wrote in a famous letter to W.T. Barry:

A Popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

It is very common to invoke this sentiment, especially to justify the need for governments to be open to the scrutiny of the citizens that they serve. Making this grand vision a reality requires constant vigilance by the people and the media, cooperation between governments and other stakeholders in open societies, and social structures to support this ideal.

Today, I will share with you some thoughts about the U.S. tradition of freedom of information as embodied in the Freedom of Information Act (FOIA) and its amendments, beginning with some of their historical roots. I will then examine some of the major successes and failures of FOIA, identifying special threats to this body of law. Finally, I will conclude with some observations that might be of some use to other nations, based on the almost 35 years that FOIA has been in place in the United States. I offer such observations in humility, recognizing that all nations must find their own paths in determining if and how freedom of information matters to them. One thing is clear, however; Mexico is at a historic crossroads in its history, and freedom of information is a compelling concern for all modern states.

Historical Roots

While there is no right of access to information in the U.S. Constitution, it is common to assert that FOIA is in the "tradition of citizen sovereignty and self-rule" (Relyea, 1987, p. 64). Relyea goes on to identify the major elements of this tradition: an inherent suspicion about the state, skepticism about the workings of the state, the ability and responsibility of citizens to challenge the operations of the state, the need for citizens to exercise that right and responsibility by informed oversight, and the resulting need for citizens to get information about the state not censored by the state, in response to citizens' own requests. In the United States, this tradition has been specified in freedom of speech, freedom of the press, and the right to petition government to redress grievances, all guaranteed by the First Amendment to the U.S. Constitution. These

guarantees, however, are meaningless without independent courts willing and able to protect these rights and without media willing and able to use, protect, and report on these rights. Further bases of these elements include the assumption that government and the state are not equivalent and that the state is greater than and more important than any particular government. U.S. political tradition also assumes that the state and society are not equivalent and that society is both greater than and more important than the state.

There are a number of examples of and milestones in open governmental processes in U.S. history. Chief among these are (Relyea, 1989, pp. 142-144):

- The printing and distribution of laws and treaties
- The systematic preservation of state papers
- The maintenance of agency and departmental files
- Establishment of the *Congressional Record* in 1873 as the official record of Congressional floor deliberations
- Establishment of the Government Printing Office in 1860
- Foundation of the Depository Library Program in 1895 to distribute Federal publications at no cost to libraries around the country

- Establishment of the *Federal Register* in 1935 to serve as the vehicle to announce regulatory and agency policy initiatives and changes
- Foundation of the *Code of Federal Regulations* in 1937 to codify the administrative law as generated by agencies
- Passage of the Administrative Procedures Act in 1946. This Act established uniform procedures and mechanisms for the promulgation of departmental and agency regulations.

Despite these significant advances in systematizing the free flow of information about government to the people, there was also a parallel and growing frustration with the availability of federal information, particularly information from federal departments and agencies (Cross, 1953; Lewis, 1995).

Sources of such frustration included:

1. The rise of the modern administrative state. This movement was especially reinforced by the growth of the Progressive Movement in the beginning of the 20th century, the explosive growth of government in the New Deal of Franklin Delano Roosevelt, the general growth of modern (Fordist) management and administrative practices, the increased role of the U.S. on the global stage, and the domestic regulations that arose during both World Wars, e.g., price controls, rationing, and labor regulation.

2. Increased and more public concerns with "secrecy" in government. World War II censorship of the press and the government's use of public relations and propaganda in that conflict, the global Cold War, and governmental surveillance of citizens were all major contributors to this concern.
3. Short- and long-term problems with the Administrative Procedures Act of 1946. Among the most obvious of these problems involved the circumstances in which secrecy was allowable, e.g., when and how agency officials should be able to assert that secrecy is "in the public interest" and the exemption of internal management records; lack of effective remedies for breaking the law by officials; and the presumption that information is only for "persons properly and directly concerned" with the information and its use.

Thus, there was a building set of circumstances and constituencies putting increased pressure on the Federal government to make its deliberations and decision making more open to inspection, especially after the fact. Such pressure was, of course, often cloaked in the rhetoric of the sovereignty of the people and the need for citizens' informed oversight of governmental activity, especially using the press and other media as surrogates of the people's right to know.

Harold Cross and *The People's Right to Know*

As should be clear, there was growing frustration during the first half of the 20th century with the availability of Federal information, especially from executive branch departments, agencies, and autonomous entities. A series of popular books served to make this general but still unfocused frustration the seed of legislative change. Brucker's *Freedom of Information* (1949), Cooper's *The Right to Know* (1956), Wiggins' *Freedom or Secrecy* (1964), and others were influential (Relyea, 1996). The most important, however, was Harold Cross's 1953 book, *The People's Right to Know: Legal Access to Public Records and Proceedings* .

Cross was an attorney hired by the American Society of Newspaper Editors (ASNE) to study how available government records were to the public and especially the press as the representatives of the public. The book is his report to that group. It is a clearly and specifically documented work, both a scholarly and accessible accounting of hundreds of examples of restrictions on the people's right to know about the workings of its government. The report looked at Federal, state, and local governments, with analysis of the governmental policy instruments and practices that created such restrictions. Its major conclusion was that the public and its surrogates, specifically the press, are subject to what has been termed the arbitrary, capricious, and unsupervised whims of official discretion in providing information. This book was a national sensation and, along with the others noted above, led to Congressional hearings and, eventually, the Freedom of Information Act in 1966.

What is FOIA?

The first Freedom of Information Act in the United States was passed in 1966 (80 *Stat.* 383, 250; PL 89-487), with major amendments added in 1974, 1986, and 1996. The law is codified in the *United States Code* in Title 5 (Government Organization and Employees) §5 (Administrative Procedure). FOIA is an example of statutes through which the legislative branch guides the behavior of sub-units of the executive branch, with the Congress having oversight and enforcement powers as well.

FOIA applies only to executive branch and independent departments and agencies, from whom all members of the public may request documents related to the administrative procedures of these entities. The purpose of the request is not ordinarily considered, except in terms of fees. Fees are generally assessed either for copying (for private persons), for search and copying (for commercial requesters), or fees are waived if a compelling public interest is served in doing so. Each agency must report annually on the number and character of its requests, as well as the number and character of denials of such requests.

Besides internal agency appeals, remedies exist in Federal court if requesters believe that they have been unfairly or illegally refused. The Department of Information and Privacy at the Department of Justice, under the aegis of the U.S. Attorney General, has responsibility for investigating such accusations and, as appropriate, seeking legal remedies. These remedies, along with FOIA generally, seek to balance the right of the public to know with the need of government to keep some information confidential.

Among the most important elements of FOIA are its nine specific exemptions, instituted to help keep this balance. These exemptions are (5 *USC* 552(b)):

1. Information protected by Executive Order by the President or by security classification
2. Information related to agencies' internal personnel rules and practices
3. Information protected by other statutes
4. Trade secrets and privileged financial information
5. Inter-agency or intra-agency memoranda or letters if they would not usually be available except in litigation
6. Personnel, medical, and other files the "disclosure of which would constitute a clearly unwarranted invasion of personal privacy"
7. Law enforcement information if disclosure would interfere with law enforcement, right to a fair trial, privacy, and other goals
8. Information related to the supervision of financial institutions
9. Geological and geophysical information concerning wells.

These exemptions and the way that they are sometimes arbitrarily enforced are among the most controversial characteristics of FOIA in the United States.

How has FOIA been implemented?

Despite its many admitted weaknesses, FOIA has been relatively successful in achieving its political goals of allowing citizens and their surrogates, especially the press and electronic media, to learn about the workings of government. Gellman (1997, p. 1) identifies the greatest strength of the law: “The law keeps bureaucrats and politicians from being the sole arbiters of what government information will be available.” Government and its decision-making processes in the U.S. are more open to scrutiny with FOIA than they would be without FOIA. The legislative and regulatory superstructure that supports FOIA gives advocates of open government and informed oversight of government by the people a rhetorical and political platform for pursuing their policy goals.

In addition, FOIA, and the movements on which it has historically been based, has been so successful that all 50 states have analogues to it. Many of these state laws, and their related administrative regulations, mirror the tenor, exemptions, strengths, and weaknesses of Federal statutes and regulations.

Part of the success of FOIA, and the success of other programs to distribute government information such as the Depository Library Program, stems from the existence of trained librarians, archivists, information resource managers, and other information professionals both external and internal to government. These important intermediaries, and their professional associations, are essential to distributing government information, helping private citizens, journalists, and businesses use such

information successfully, and keeping pressure on government to be more open and responsive to the needs of the people.

According to an earlier snapshot, about 60% of Federal FOIA requests came from private businesses trying to gather competitive information about other businesses, 25% from the public, and 5-8% from the press (Relyea, 1987). Currently, those proportions may still be roughly accurate, although fewer newspaper stories and editorials refer to their reliance on FOIA requests than in the past (Harold Relyea, 2000, personal communication). While the press appears not to be a major FOIA requester, the press often does not need a formal request to get access to information. Instead, it is common in the U.S., as elsewhere, for members of the news media to rely on personal/professional relationships with policymakers and their staffs to get access to information that is, ostensibly, public. That sort of access has many benefits for the public, but it also hints at possible compromise of the press' independence from government.

While we can recognize the success of FOIA, there are still major obstacles to achieving its goals. The most serious of these obstacles is bureaucratic inertia in the agencies themselves. There are thousands of inappropriate denials of FOIA requests every year, and fees that should be waived often are not. It is not simple intransigence or fear on the part of agency personnel that explains these problems, however. In fact, there are hundreds of dedicated FOIA personnel in Federal agencies who do all in their power to adhere to the spirit of FOIA and to make government more open. FOIA activities in Federal agencies are notoriously under-funded, and costs of the program as a whole total in the hundreds of millions of dollars per year. Formal FOIA requests for some 88 Federal agencies in FY1999 totaled over 1.9 million, with approximately 1.0 million to

the Bureau of Veterans' Affairs. Most FOIA requests are fulfilled expeditiously, largely because they do not involve information that could be regarded as controversial.

Requests for controversial information, however, generate much of the criticism of FOIA and its administration (Harold Relyea, 2000, personal communication). One of the other difficulties of FOIA administration is the fact that reliable, up-to-date information about it, despite reporting requirements, is scarce. The lack of incentives for agency FOIA officers, coupled with the lack of adequate funding, make it very difficult to achieve the public policy goals of FOIA. This situation is exacerbated by the need to adjust FOIA to digital information, as discussed below.

Current trends and challenges to FOIA in the U.S.

As has been noted throughout my remarks, realizing the promise of FOIA is far from complete. Besides the tendency of governments to be secretive, there are other trends in society that pose particularly significant difficulties for achieving the ideals of FOIA. I can mention them only briefly, but they are important to a realistic understanding that United States has experienced significant failures in implementing the freedom of information. Many of these are of long-standing importance, while others are of more recent origin. Especially significant problems are:

- The need for Congress and the Office of Management and Budget to be active overseers and enforcers of the law; enforcement and oversight are especially difficult across both legislative and executive branches

- Difficulty of defining exactly what is and what is not a government record subject to a freedom of information request
- Determining what effective, expeditious access to government information means for private citizens and other users of FOIA
- Funding, especially for qualified and motivated personnel; despite this long-term need, no agency has yet asked for a budget line for FOIA (Harold Relyea, 2000, personal communication)
- Growing use of copyright by states and government/private sector partnerships
- The use of information locator services and indexes
- Interaction of freedom of information with privacy protection and information resources management (IRM).

These overarching difficulties are significant, and any jurisdiction contemplating the establishment or modification of freedom of information requirements must be able to identify and address the local versions of these problems, as well as other significant obstacles.

There are three other trends that pose special threats to FOIA that I would like to examine a bit more closely here: the digitization of government, the commoditization of information, and increased surveillance by governments.

The first significant trend is the increased digitization of government. This trend holds great promise, of course, for making governmental officials and information more available to the people and their surrogates such as the press. The growth of digital technologies, especially the Internet and World Wide Web, have greatly enhanced the distribution of some kinds of government information and have made many thousands of freedom of information requests unnecessary. At the same time, however, the growth of digital government poses three major threats to FOIA, despite the Electronic FOIA amendments in 1996. The first threat is the ease with which digital information can elude FOIA and frustrate a complete search for all governmental records related to a particular topic. Email is only the most obvious of such governmental “records.” The second is what has been termed the digital divide. The digital divide is a complex concept, but, generally speaking, as governments rely increasingly on digital information, citizens without access to advanced digital technologies are effectively eliminated from participation in public life. This concern is gaining increased focus related to FOIA as even the century-old Federal Depository Library Program in the U.S. phases out its print publications and evolves into a largely electronic distribution mechanism. Citizens and institutions without digital tools and without sophisticated knowledge of the tools and how to use them cannot access and use information supposedly created and distributed for them. The third problem related to digitization is the need to ensure access over heterogeneous platforms and formats as well as multiple generations of technologies.

This last requirement is especially important in view of the physical deterioration of magnetic and optical media. While even highly acidic paper can last centuries, magnetic disks usually last only a few years, and CD-ROMs are likely to last no more than 25 years.

The second major trend is the increased commoditization of information. Partially fueled by and lending support to digitization, commoditization of information provides many entrepreneurial and political opportunities for government, businesses, and private citizens. But such commoditization often results in situations where citizens must pay fees for access to information they have already largely paid for through their taxes. Further, increasing amounts of government information are now either privatized or available from government only for a fee. As governments increasingly rely on fees for government-held information to enhance their revenue stream and/or recover costs, less information, rather than more, will be available to all citizens without cost.

Some private parties are allowed to examine, copy, and sell agencies' internal records when members of the public or others cannot even see such information. One example of the many such Federal arrangements is the RAND Corporation's exclusive rights to information about contractors with the U.S. Department of Defense. RAND can copy and then sell this information for a price of several thousand dollars, despite the fact that the information should be available under the ordinary provisions of FOIA (National Research Council, 2000, pp. 112-113). The increased financial value of information held by government offers significant opportunities to the private sector for the provision of value-added information products and services. At the same time, however, such economic value tends to lead to "cream skimming" where only the most economically

valuable information is widely distributed, while socially valuable, but economically unimportant, information is under-produced and under-distributed.

The third and final trend I would like to note is the increased use of sophisticated surveillance and database technologies by government. The exemptions to FOIA for national security, inter-agency and intra-agency communication, and law enforcement ally themselves with the tendency of many governmental officials to avoid public scrutiny. This combination leads to a situation where privacy is seriously threatened by government, as well as by businesses, but such intrusion is sometimes inappropriately hidden by claims for exemption under FOIA.

These and other trends make the pursuit of the ideal of open government and open societies even more difficult. Without aggressive and independent courts, prosecutors, and media and information professionals, the prospect for a healthy FOIA, even in the United States, is by no means assured.

Conclusion

The reasons for whatever success FOIA has experienced in the United States are many. Several of these have been mentioned earlier: a tradition of self-rule, many policy instruments to open government to scrutiny, a cadre of well-educated and politically astute information professionals, a relatively free press, largely independent courts and prosecutors, dedicated FOIA personnel in Federal agencies, and a national tradition of openness in public communication.

Another important element in policy formation and evaluation is what is sometimes called a policy issue network. Such a network includes policymakers, policy analysts, media representatives, public interest groups/non-governmental organizations, and others that are experts in the particular topic. Without such a network, and the social and financial resources that support it, it is very difficult to educate the public and its representatives about the topic and to keep the topic in the forefront of public attention and governmental action. FOIA has such a network in the United States. An important strategy in supporting freedom of information or other public policy issue is the use of existing political networks, creation of new intellectual and political groups, the establishment and maintenance of educational programs, cooperation among professional associations and government, conferences such as these, and other initiatives. Legislation in itself is insufficient to establish and protect freedom of information. At the same time, however, specific and enforceable legislation is necessary – without it, freedom of information, and its political and economic benefits, will remain out of reach.

While there has been relatively little research into the topic of policy transfer between and among countries, several themes are clear: globalization of policy initiatives is becoming more common; international governmental organizations such as the G-7, the Organisation for Economic Co-operation and Development, the International Monetary Fund, and the United Nations are catalysts for much of the policy transfer that takes place among nations; these organizations often rely on (financial) coercion to influence policy development; and digital communication adds to the increased similarity of policy developments in varied nations (Dolowitz & Marsh, 2000). Dolowitz & Marsh continue their argument, saying that the keys to successful policy transfer are voluntary

adoption, clear aims, informal and wide-spread initiatives, and appropriate local social and political structures.

There are useful comparative studies of other freedom of information efforts globally beyond the United States. These include FOIL, the Freedom of Information Law in Israel (Rabina, 1999), and the Canadian Access to Information Act (Macaulay, 1999). Of particular interest might be freedom of information efforts in the United Kingdom, itself “steeped in a tradition of secrecy and zealous protection of official information” (Birkinshaw, 1999, p. 93). The FOI bill has been approved by the House of Lords committee and is likely to be supported by the Queen and become law soon (Patrick Birkinshaw, 2000, personal communication). The UK’s experience with freedom of information has been quite contentious and is likely to remain so. These other countries’ experiences, successes, and problems provide useful models for us all, as long as we do not blindly assume that “one size fits all.”

Freedom of information advocates in the People’s Republic of China and South Africa have noted that countries with high levels of illiteracy experience severe problems with freedom of information initiatives. The first is the general difficulty that all nations have with the pursuit of open government. The second is more subtle. Social and political elites can use freedom of information to solidify their privilege. These countries, among others, clearly demonstrate the essential role that (non-profit) public interest groups play in putting freedom of information on the political agenda and overseeing its implementation (Harold Relyea, 2000, personal communication).

Based on the past two days of presentations and especially discussion with the audience, I would like to describe four tensions or riddles that characterize freedom of

information in the U.S. that may be of interest to you. Naturally, these paradoxes have analogues in many nations.

The first is the riddle of what I loosely call federalism. There are many component parts of this riddle:

- The absolute need for a centralized policy instrument, a statute passed by the legislature requiring freedom of information
- The ability of various governmental bodies subject to freedom of information to maintain localized control of their working records and administration of the statute
- The press/media, especially investigative journalists and political commentators throughout the country
- Public interest groups, essentially non-governmental organizations (NGOs), as important elements of this policy issue network
- Effective legal remedies for requesters who feel they have been illegally denied or charged
- Oversight by all three branches of government to ensure that the spirit of freedom of information is supported, not just the letter of the law – legislative oversight and

review, executive review and development of appropriate procedures, and judicial review by independent judges and prosecutors

- Most importantly, citizens engaged in overseeing their government and demanding information from it.

The second riddle involves the relationships among the many actors I have just mentioned. These relationships demand mutual cooperation **and** mutual skepticism. These relationships must be **both** adversarial and collegial. Such relationships result from a political culture of mutual engagement, discussion, and study, all of which contribute to a vital policy issue network.

The third riddle involves the essential question of how to translate information into political action. We need (1) to understand the relationship between information and citizenship, a job for academicians and theorists and (2) to then turn information into a pragmatic politics.

The final riddle or paradox comes from a very wise person, my mother-in-law. Often, we have unrealistic expectations of our children as people and of ourselves as parents. She has shared with me one of her secrets: we must constantly strive for improvement, not perfection. The challenge of freedom of information in this regard is how to achieve two goals simultaneously: (1) aiming high for transparency of government without excuse while (2) understanding how to achieve and accept partial, limited victories that help build such transparency step-by-step rather than expecting it at one stroke.

I would like to conclude my remarks with a quotation from Harold Cross' book that serves as a challenge to citizens, NGOs, government policymakers, and the media everywhere (1953, xiii):

Public business is the public's business. The people have the right to know.

Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings.

Most democratic societies have successfully emerged from royal rule. We have all made great strides in making our societies more open and democratic, but we still have far to go to ensure the benefits of such change to all of our citizens. The challenge of freedom of information is whether we will truly make the people sovereign.

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