Freedom of Information Banana Republics and the Freedom of Information Index

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ABSTRACT

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In 1996 the Australian Law Reform Commission suggested 106 amendments to the federal Freedom of Information legislation. These recommendations were comprehensively ignored by the legislature. Since then discontent has been rife among the users of FOI in Australia, particularly so among the media. But how bad is the situation really and how does Australia compare with other countries? This paper describes a research project which aimed to compare various FOI regimes around the world and to create an FOI Index which would demonstrate to what extent the different laws deliver on their promises. The results indicate that when it comes to access to information and protection of journalistic sources the banana republics are alive and well and thriving in democracies near you.

Introduction

This paper is about what could be one of the most potent political accountability tools available – if it worked properly. In the last two decades the numbers of Freedom of Information Acts (FOI) around the world have increased dramatically (Banisar, 2004, p. 1). Most mature liberal democracies have some form of FOI regime, as do many emerging democracies. Passing FOI laws is the easy bit, the trick is to make them work in practice. So, how do they measure up from a user's perspective? The research question for this project was: to what extent, if any, are the promises made by FOI legislation borne out by the practice in the countries of study? It will be shown that there is a consistent gap between the promise and the practice of FOI in the countries of study and that FOI has deteriorated into dysfunctionality in one of the 'template' systems. The paper will also argue that the foundation for an International Freedom of Information Index has been laid.

The paper describes the final findings of a PhD project at Murdoch University titled: *Keeping the Bastards Honest: the Promise and Practice of Freedom of Information.* The thesis will be submitted in the first half of 2006.

It should be made clear from the outset that this study is concerned with third party access (in particular FOI requests lodged by journalists) to government held information only. It does not evaluate access to personal/individual information. Because of the differences in political systems between the countries of study, the laws evaluated are the federal/national FOI Acts to allow for true comparisons between the different FOI systems.

Background and theory

The genesis of this, by now five-year project, was my puzzlement with the differences between the practical functionality of Swedish and Australian FOI. Working as a journalist in Sweden from 1989 to 1998 FOI provided the base for most journalistic practice. As we all know, this is not the case in Australia. This was explored in a previous comparative study that concluded,

among other things, that the extensive Swedish FOI regime provides the base for 'everyday investigative reporting', whereas investigative reporting in Australia is seen as something much more exclusive where FOI does not necessarily play a role (Lidberg, 2003, p. 91).

The first study led to the second more extensive one presented in this paper. The second study covered five countries and incorporated a number of sub-studies further discussed in the methodology section below, but first, a brief theory overview.

Being ruled is at times a painful experience. It can be a source of great frustration to feel unrepresented by the party/parties in government. It can be equally frustrating when the elected representatives renege on their earlier promises. Dunn puts it thus:

To be ruled is both necessary and inherently discomforting (as well as dangerous). For our rulers to be accountable to us softens its intrinsic humiliations, probably sets some hazy limits to the harms that they will voluntarily choose to do to us collectively, and thus diminishes some of the dangers to which their rule may expose us (1999, p. 342).

Dunn covers a lot of ground: political representation, political accountability and, implicitly, democracy. These concepts are all disciplines in their own right and to cover them in some depth would require numerous papers. Furthermore, there is little need to explain to the audience of this paper the deeper theoretical justifications for a well functioning FOI regime; it would be like preaching to the converted. For the purpose of this paper it is sufficient to observe that the FOI concept rests on two of the pillars of liberal democracy in its current form: political representation and accountability. Let me just touch on one point to show why political accountability is so crucial.

Defining accountability and justifying the need for it is quite easy. Much harder is making it work in practice. John Dunn identifies two main accountability tools in modern democracies (apart from elections): criminal law and the freedom of information regime (1999, p. 337). The legal option is very

limited and can only be utilized when criminal misconduct is suspected and then there is still the issue of proving the misconduct. Much more often the public is concerned with the representatives not fulfilling their end of the 'contract' – the election promises, or telling the truth – a 'misconduct' not covered by the law. This is where we turn to FOI and our expectation for it to deliver independent access to government-held information. Przeworski et al masterfully summarize the importance of this access for the accountability mechanism:

We do not want governments to take actions that they would have not taken had we known why they are taking them. But this means that we have to know what the governments are doing and why independently of what they want us to know. Our authorization to rule should not include the authority to hide information from us. Thus, even if elections give governments a broad authorization to rule, this authorization should not extend to informing us. Our information must not depend on what governments want us to know. The institutional implications are obvious: we need offices, independent statistical agencies. To coin a term, we need "accountability agencies," independent of other branches of government and subject to direct popular control, perhaps through elections (1999, p. 24).

A well functioning FOI regime is a prime example of such an 'accountability agency'.

Evolution of Freedom of Information

FOI emerges from the old conflict between secrecy and openness in the political and governing 'industries'. All countries that are investigated in this study have some form of democratic parliamentary system. As such they have sought inspiration from, and in some instances modeled their constitutions and instruments of government on, the British Westminster system. In its original form the Westminster system has one of the most secretive and closed governing structures in the democratic world (Terrill, 2000, p. 228-29). A telling example is that the British version of the FOI act came into full effect in 2005, long after most of the countries that formed the British Commonwealth and many emerging democracies had passed their acts. The BBC series *Yes Minister* provides insights into the British government administration, albeit from a satirical point of view. The Permanent Secretary to the Minister for Administration and Planning, Sir Humphrey Appleby, tries to explain to his newly elected minister why the public is happier if it knows less (Allen, 1979).

This brings up vital questions. How do politicians and public servants see their role as information keepers? Do they see themselves as facilitators that dispense information on request from citizens because they keep the information on behalf of the public? Or do they subscribe to the Sir Humphrey view that the less the public knows about government and governing the better? These attitudes at the core of FOI determine how well the regime works in practice.

The vast majority of FOI laws in the world are broadly similar and build on the same three principles summarized by the former Western Australian FOI Commissioner:

The first one is concerned with human rights and privacy. It enables people to gain access to information about themselves and to correct that information if necessary. The second is the principle of accountability and it seeks to open govern processes to public scrutiny to facilitate efficiency and competency in decision-making. The third principle is that of democratic participation to allow public participation in the policy process and in government itself (Keighly-Gerardy, 1999, p. 1).

There is little controversy concerning the first point, providing access to personal information for individuals. The sticking points are the two other objectives: to allow public scrutiny to inhibit, for instance, corruption and as a follow on to this, increase the publics' participation in the political process based on greater access to information. Why would anyone who is and has been in a privileged position with access to public funds for a long time want to be scrutinized? Banisar suggests that one reason could be to 'assist in developing citizen trust in government actions and maintaining a civil democratic society (2004, p. 3).' Banisar's global survey of all existing FOI acts is currently the most powerful document in providing an overview of the different FOI regimes. In the latest revision (May 2004), 58 countries had enacted FOI legislation and over thirty are in the process (ibid p. 2). It is interesting to note that although the concept of FOI has been around for centuries, more than half of the acts have been passed in the last ten years (ibid p. 3). But as the global FOI survey shows, there are many problems with existing FOI laws, even those that are supposedly well established. Banisar puts it thus:

Many of the laws are not adequate and promote access in name only. In some countries, the laws lie dormant due to a failure to implement them properly or a lack of demand. In others, the exemptions are abused by governments. Older laws need updating to reflect developments in society and technology. New laws promoting secrecy in the global war on terror have undercut access. International organizations have taken over the activities of national government but have not subjected themselves to the same rules (2004, p. 2).

Despite these problems, Banisar is still hopeful. 'Access to information ebbs and flows in any country but the transformation has begun and it is no longer possible to tell citizens that they have no right to know (ibid p.1).'

Another way of putting is that FOI laws seem to have become 'a right of passage' for emerging democracies: no FOI, no proper democracy and limited access to the international system.

Currently there are two major FOI models: the Swedish and the US. All other FOI systems draw from, and in some cases adopt, these two models. The majority are based on the US system (Lamble, 2003).

Methodology

The overarching research question for this project was: to what extent, if any, are the promises made by Freedom of Information Legislation borne out by the practice in the countries of study? The study design comprises three sub-studies each with its own sub-set of research questions. The primary aim was to determine whether there is a gap between the 'promise' of Freedom of Information Legislation (that is, what the legislation has as its aims) and what it delivers in 'practice' in the countries of study (ie. the level of public independent access to government held information).

A secondary aim of the project was to investigate whether it was possible to compile an International Freedom of Information Index built on the data collected in the project.

In framing the research questions and finding an adequate study design both qualitative and quantitative methodologies were considered. It was determined that triangulation was needed to construct an index. A multitude of researchers such as (Neuman, 2000), (Yin, 2003), (Miles, 1994) and (Denzin, 2003) are strongly in favour of triangulation. Denzin and Lincoln whose book *Collecting and Interpreting Qualitative Materials* has been labelled state of the art in the field of evaluating qualitative inquiry have this to say of triangulation:

Triangulation is not a tool or a strategy of validation, but an alternative to validation. The combination of multiple methodological practices, empirical materials, perspectives, and observers in a single study is best understood, then, as a strategy that adds rigor, breadth, complexity, richness, and depth to any inquiry (2003, p. 8).

The design of this project utilizes triangulation on two levels:

- Methodological triangulation applying three different methods towards the same overall research question.
- Data triangulation in collecting data that feeds into the overall research question.

All three sub-studies are predominantly qualitative in nature with some quantitative elements. While the survey study has quantitative elements it is mostly qualitative in nature. Expressing qualitative data in numerical terms has become a standard technique used by many qualitative researchers. Miles et al, point out that 'we have to face the fact that numbers and words are *both* needed if we are to understand the world (1994, p. 40).' This is well exemplified by a number of software aides such as QSR NUD*IST that in the last decade have come to play an important role in analysing qualitative data. It is very important to point out that the FOI Index is meant to provide an overview of the data and serve as an indication as to how well the FOI regime in question works in practice in providing independent access to information to the public. To appreciate the whole picture the Index score needs to be complemented by the qualitative comments and analysis of the system.

Countries of study

From an early stage it was decided that the study needed to be comparative to create both breadth and depth of data. Conducting the study within one country (eg. comparing the state and federal FOI legislations in Australia) was considered too narrow a scope for the project. The countries of study needed to represent a spread based on a number of parameters:

- Longevity of FOI regime
- Political system
- Level of democratisation
- Level of economic prosperity

A spread in relation to the above parameters was considered important as it was hypothesised that this would generate a spread in data useful for both qualitative and quantitative (FOI Index) purposes.

As the 'parents' of most other FOI systems, Sweden and the US were a given on grounds of maturity. They also represented mature liberal democratic systems with high levels of economic prosperity. Australia is also a mature democracy with a strong economy, with a relatively old FOI system (the federal FOI Act was passed in 1982), but with a very shaky FOI track record (Waters, 1999). The country also represents a mix of the Westminster and federal political systems. South Africa was picked as a newcomer to the FOI family (the Official Information Act was passed in 2000) with a very interesting Act since it in part applies to the private sector. South Africa was also considered interesting since it is a young, emerging democracy with social issues and big divides in prosperity. Initially Indonesia was the preferred fifth country. It was hoped that it would pass its FOI Act in time to be included in the project; however, this was unfortunately not the case. Instead Thailand was picked as a replacement (the Official Information Act was passed in 1998). Thailand represents a country with a lower level of prosperity compared to the US,

Sweden and Australia. It is a semi-mature democracy with some issues relating to freedom of the press and freedom of speech. Thailand is also significant in that it is one of only three south East Asian countries that have FOI (the other countries are Japan and South Korea).

Given the timeframe and financial resources of the project five countries were considered to provide a realistic spread for this initial survey which would comprise 15 studies in all (5x3 sub studies).

The thought of investigating whether it was possible to create an FOI Index based on the data collected in the project emerged early on. Hence, the concept of the index influenced the research design. To get an overview of the scope and methodologies behind existing socio-economic indexes the Corruption Perceptions Index, the Dow Jones Sustainability Index and the Conflict Barometer were analysed. A common problem identified in the methodology for all three indexes was that they were almost entirely based on surveys of perception and lacked a mechanism that put these attitudes to the test.

Literature review

The literature shows that while a number of comparisons of different FOI regimes have been made, these studies have focused on comparing the 'letters of the law' rather than the practical outcome - what the FOI laws deliver in actual access to information. Coulthart, 1999, Harrison and Cossins, 1993, Lamble, 2002, Ricketson, 1990, Snell, 2004, Terrill, 2000 and Waters, 1999, among others, have from an Australian perspective, and in Snell's and Lamble's cases with international outlooks, covered a wealth of legal aspects and journalistic uses of FOI. But there are no studies tracking actual FOI requests, testing the law if you like, and providing international comparisons on a practical level of how the different legislations deliver on their promises. The whistleblowing climate as part of the overall FOI regime is largely overlooked. Although shield laws for Australian journalists were subject to a senate inquiry

in Australia, researchers have not focused on their importance to the overall information climate.

The Swedish literature is also centered on the legal perspectives of FOI. There is ample literature analyzing and suggesting uses of FOI. Writings by, among others, Olsson, 1992, Sefastsson, 1999, Hederén, 1988, Gustafsdotter, 2001 and Löwenberg, 1992 cover these areas well. However, when it comes to testing what the Swedish FOI delivers, there are no scientific studies available. The Swedish journalism union, Svenska Journalistförbundet, SJF, conducted two 'openness tests', of Swedish Government agencies in 1997 and 2000 (Svenska Journalistförbundet, 1997), and although they give an indication of a relatively wide general knowledge of FOI among Swedish public servants compared to, for instance their Australian colleagues, they are of little use from a scholarly perspective.

A search for relevant literature and relevant studies in the United States shows a picture similar to Sweden and Australia, although there seems to be more emphasis on the practical workings of FOI in the US literature covered by writers such as Davies, 2000 and Rozell, 2002. However, the bulk of the studies are still concerned with legal issues (eg Richelson, 2003, Bass, 2002 and Siegel, 2002) and there are no comparative international FOI studies done as far as this literature search has been able to detect.

The other two countries of study, South Africa and Thailand, are relative newcomers to the FOI family. Their respective Acts came into effect in 2001 and 1997 (Banisar, 2004, p. 72, 80). For obvious reasons there is much less literature on FOI in these two countries. Snell points to one of the reasons: 'the Thai academics have barely had time to realize that FOI legislation is now operational (Snell, 2004, p. 60)', all the more reason to study these countries. The literature review found that Thailand is part of a study that compares the level of information access in eight Southeast Asian countries. The study uses 45 categories of records, such as population census data, data concerning the environment, local governments' budgets, military expenditures, etc. The study ranks the eight nations based on the level of access. Thailand and the

Philippines, rank as the most transparent nations in Southeast Asia (Coronel, 2001).

The scarcity of writings and studies done on the international comparative practice and outcomes of FOI is confirmed by an earlier literature review by Lidberg (2003, p. 37) and other reviews done by Snell (2004, p. 59-60) and Terrill, 2000. Terrill points out that 'secrecy, openness and publicity are unusual concepts to research. They are not concepts frequently found in indexes, and are often present only between lines or evident form the way that activities and events do – or do not – occur (2000, p. 3).'

So, this project is unique in three respects: firstly, it is the first project to systematically, or scientifically if you like, track actual FOI requests on an internationally comparative basis. Secondly, it is the first study to evaluate and take into account the protection and legal situation of media whistleblowers and the journalists they choose to work with. Thirdly, it lays the foundation for the International Freedom of Information Index.

Sub-study 1: The Practice

It is easy to make a promise but much harder to keep it. This holds particularly true for FOI legislation, as this project will show. No matter what the law promises in theory, the real test is what it delivers in practice. The objective of 'the practice' sub-study is to track freedom of information requests. The research question to be answered is: In practice, does FOI supply journalists (and media organizations) with independent access to government held information? The method used is a combination of selective observation and semi-structured interviews.

Parameters included in the evaluation instrument that tracked the FOI requests included, among others: turn around time, processing costs, attitudes encountered among public servants, the quality of the information obtained (if any) and the appeals process (if it went to an appeal of the agencies decision). Copies of 'the practice' research instrument, and the other two instruments, are available from the author on request.

After it was decided that triangulation was to play an important methodological role, three case studies¹ per country seemed to be an adequate number to cross reference data and to feed data into the index. The next issue was how to find and recruit the journalists. There were two alternatives: random selection and what Neuman describes as 'purposive or judgmental sampling (2000, p. 198).' This sampling is used when the group you want to sample can be categorized as 'select members of a difficult to reach, specialised population (ibid)'. In several of the countries of study only journalists undertaking investigative projects make use of FOI as a tool to obtain information; hence the sampling had to be 'purposive'.

The International Consortium of Investigative Journalists, ICIJ, is the international arm of the American based, non-profit, non-partisan organisation, Centre for Public Integrity. Through quality journalism the centre aspires to: 'serve as an honest broker for information – and to inspire a better-informed citizenry to demand a higher level of accountability from its government and elected leaders (Integrity, 2005, p. 1).' The ICIJ has 92 members from 48 countries, all leading investigative reporters and editors. The ICIJ member biography list (Integrity, 2003) was picked as a method of identifying at least the first of the three journalists from each country of study.

FOI topics

The role of the researcher in this project was as facilitator, coordinator, observer and interviewer. I endeavoured to make this as clear as possible to the journalists recruited to the project. One of the most important tasks was to make sure that the topics chosen for the FOI requests were as similar as possible to make for a true comparison between the countries of study. The journalists had to pick one topic each from the three available:

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¹ It could be argued the study design could also be described as ONE case study providing particular access to information across several national contexts. After some deliberation it was decided that the triangulation method was a more precise definition and provided a stronger case for generating data that could feed into the index. However, it is relevant to note that as with most studies of some breadth and depth, the method combines several research techniques.

- 1. The Prime Minister's/President's travel/expense account for 2002, 2003 or 2004.
- 2. A list of all weapons and munitions trade (import and/or export) or other relevant topic related to the defence force.
- 3. Refugee issues, such as: deaths/suicides in detention, number of entry refusals at border, etc.

The topics were intentionally kept quite general to allow for them to be adapted to suit the individual journalist and country. Although generating information for the reporter that could be used in a story was not an aim in itself, it was a very useful drawcard when recruiting journalists to the study. It was also necessary to allow for some variations between countries to draw up FOI requests that had a real chance of generating information. For instance:

Australia has mandatory detention for refugees so one Australian journalist framed a request for reports on suicides and self harm in custody. Sweden does not have mandatory detention, but there are issues arising out of the common refugee policy formulated by the European Union. The Swedish request was based on these issues.

Ethical considerations

The research design was submitted to Murdoch University's Human Research Ethics Committee for approval. The committee gave a positive response to two of the studies but raised several issues regarding 'the practice' sub-study. The main concern was the apparently 'covert' element arising from the fact that government agencies would not be informed that the request in question was not only from a journalist and media organisation, but was also part of a scientific study. The discussion that followed between the researcher and the committee was at times slightly frustrating, but in retrospect very useful in clarifying why the agencies could not know they were part of a study. As noted above identification of the researcher might corrupt the data by leading any agency that knew it was being evaluated to treat the FOI request in a non-

typical way. This point was made in a number of letters to the committee, which in the end gave approval to the study.

Sub-study 2: The Spin

The task of interpreting and implementing FOI legislation falls on the public servants in government agencies. The public servants are in turn influenced by the senior political heads of departments who direct them in relation to policy issues. Hence it was vital to capture the attitudes towards FOI among senior politicians and public servants, in other words their 'spin' on the legislation. To the greatest extent possible, the same questions were asked in 'the spin' as in 'the practice', staying true to the idea of triangulating the data.

The research question for 'the spin' was: What are the attitudes towards FOI and protection of journalistic sources among leading politicians and public servants?

One of the most important questions in the survey was:

Which of the following statements is closest to the attitude held by yourself and your staff?

- a) the government hold information on behalf of the people and I should endeavour to deliver the information requested as soon as possible
- b) the government hold information on behalf of the people but it is not my role to serve as an 'information facilitator' for an FOI applicant
- the government owns the information but increased openness and transparency is good
- d) the government owns the information and decides who will have access
- e) the government owns the information and decides who will have access and increased openness and transparency is not good

Another important part of 'the spin' concerned the public servants' and ministers' attitudes towards whistleblower protection. This was not covered by 'the practice', since it was not possible to simulate such a situation in real life.

Sampling issues

The sample population for 'the spin' was very large indeed. It consisted of all politically appointed staff and all public servants within the federal/national departments that make up the cabinet in each country of study. During the trial of the studies in Sweden the Swedish sample population was calculated to be 4 899 (4 729 public servants plus 170 political appointments such as ministers) (Falck, 2004). Clearly this was beyond the scope of the project. Again the 'purposive/judgmental' (as described above) sampling technique used in 'the practice' was applied. This method seemed logical since the policy on how to interpret and implement FOI is formulated at the top level of each department. Hence, the Minister and deputy Minister, or the equivalent, and the Chief Public servant (head of department) and the FOI Officer or equivalent were deemed a logical sample group. It was interesting to observe that all countries of study had a very similar number of departments in their cabinets, ranging between 15 and 19. It therefore made sense to aim for a similar number of questionnaires to each country to allow for a true comparison of response rates. The number of surveys sent to each sample group ranged from 66-68.

In effect this meant that the questionnaires went to all ministers in the countries of study, including President George W. Bush, USA, Prime Minister John Howard, Australia, Prime Minister Göran Persson, Sweden, President Thabo Mbeki, South Africa and Prime Minister Thaksin Shinawatra, Thailand. The questionnaires were anonymous (with a voluntary 'biographical details' section), hence there is no record of whether President Bush and his colleagues in the other countries of study replied or not.......

Sub-study 3: The Promise

The third sub-study was the most straightforward of the three. The research question was: What are the aims of the different legislations and what do they promise to deliver in terms of information access?

The purpose of 'the promise' was twofold: firstly, to identify the aims of the investigated FOI legislations and secondly, to generate data that fed into the overall research question and index.

Again the evaluation template used was firmly based on the first two studies and attempted to answer the same sets of questions. It was aimed towards identifying the in-built instruments that can inhibit the publics' independent access to information such as non-regulated processing fees, poor scope for appeals or costly appeals processes.

The Freedom of Information Index

Each sub-study generated a score for each country of study. The score was generated via a Likert scale-type coding, meaning that reply a) to each question received the score 4, b) 3 etc down to reply e) that was allocated the score 0. For instance: Sweden generated the following scores: 'the promise': 63, 'the spin': 65 and 'the practice²': 47. Added up these total 175. The total maximum score achievable was 212 (68+76+68). The index was calculated by dividing the total score for each country by 212. In Sweden's case 175/212. The index scale ranges from 0.0 to 10.0 where 10.0 is a totally functional FOI system scoring top on all evaluation parameters across all three sub-studies. 10.0 is not a utopian score. It is quite achievable, but requires a very farreaching FOI system including extensive legal protection of media whistle blowers and with public servants and politicians acting as information access facilitators. Sweden's score is 8.2 out of 10.0. Table 1 (starting on the next page) summarizes the scores and most important qualitative data.

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² The Swedish 'spin' score was calculated as follows: the individual scores of the 21 replies to the questionnaire were added to a total of 1362, then divided by 21 to produce the average score of 65. The individual score for the three cases in 'the practice' were similarly added up to a total of 140 and divided by 3 to arrive at the final score of 47. 'The promise' generated only one score, so no average calculations were needed.

Table 1	Sweden	Sweden	SA	SA	US	US	Australia	Australia	Thailand	Thailand	Overall
The FOI	Score	Comment	Score	Comment	Score	Comment	Score	Comment	Score	Comment	Analysis
Index											
The Promise (Max score 68)	63	Very far- reaching promise FOI system part of constitution Extensive legal protection of sources All information perceived public and accessible within days at very low cost No processing costs No agencies exempt from Act Act does not apply to private sector	31	Relatively ambitious legislation FOI system explicitly backed by constitution No legal protection of sources Most information perceived public within 30 days Processing costs No agencies exempt from Act Act applies to private sector	31	Relatively ambitious legislation FOI system backed by constitution No legal protection of sources Most information perceived public within 20 days Processing costs Several agencies exempt from Act Act does not apply to private sector	12	Very low legislative ambition This Act is not on the users' side. This is clearly illustrated by the 'conclusive certificate' function which effectively allows a minister to block most requests The evaluation showed that this Act was never meant to work. It cannot deliver on its aims and objectives in its current form 12 agencies exempt under the Act Very high processing costs	18	Very low legislative ambition Act delegates much of the interpretation to the 'Information Board' consisting of the Permanent Secretaries to the most influential departments The Act is very non-specific on key issues such as turn around time and processing costs 1 agency exempt No legal protection of sources Act does not apply to the private sector	One important reason for Sweden's high score is the extensive legal protection for media whistleblowers. The US and SA scores are close to 50% and must be regarded as a pass. Two things stand out: Sweden's source protection regime and that the SA Act applies to the private sector. The Australian and Thai FOI systems fail the test. These two legislations were never meant to work, not even in theory. They promise little and deliver nothing.

Table 1	Sweden	Sweden	SA	SA	US	US	Australia	Australia	Thailand	Thailand	Overall
continued	Score	Comment	Score	Comment	Score	Comment	Score	Comment	Score	Comment	Analysis
The Spin (Max score 76)	65	Result backs 'the promise' virtually no gap 'promise' - 'spin' Respondents see themselves as access facilitators and hold information on behalf of the public Very positive attitudes towards source protection	54	Gap between 'promise' and 'spin' indicating a 'spun' version of how FOI works in practice Respondents see themselves as access facilitators and hold information on behalf of the public Very positive attitudes towards source protection	48	Gap between 'promise' and 'spin' indicating a 'spun' version of how FOI works in practice Respondents see themselves as access facilitators and hold information on behalf of the public — but more hesitant to this concept compared to Sweden and SA. Great hesitancy towards source protection	49	Extensive gap between 'promise' and 'practice' indicating a very 'spun' version of how FOI works in practice Majority of respondents say that the government own the information and do not see themselves as information access facilitators Great hesitancy towards source protection	56	Greatest gap between 'promise' and 'spin' in the project. Very hard to conceive how such a weak legislation could deliver the level of access indicated by the result of 'the spin' Respondents see themselves as access facilitators and hold information on behalf of the public Very positive attitudes towards source protection	Only Sweden shows consistency between 'promise' and 'spin'. All other countries display gaps to various degrees. A high spin score and low promise score indicates that the respondents are projecting a 'spun' version of FOI that the Act does not back up. What really stands out is that the Australian 'spin' is the only one were most respondents thought that the government owns the information This is crucial in explaining Australia's poor Index score.

Table 1 continued	Sweden Score	Sweden Comment	SA Score	SA Comment	US Score	US Comment	Australia Score	Australia Comment	Thailand Score	Thailand Comment	Overall Analysis
The Practice (Max score 68)	47	Information generated and released within days in two cases Very high FOI knowledge level among public servants Last case was appealed and reached the Highest Admin court within a year at no cost to appellant – information not released	0	The requests generated no information All three departments that received the FOI requests in severe breach of the time frame for decision making as set out by the Act. At the time of writing the breaches vary between 1 month to 6 months and counting	0	The requests generated no information All three departments that received the FOI requests in severe breach of the time frame for decision making as set out by the Act. At the time of writing the breaches are 6 months and counting	12	The requests generated no information within the framework of the Act Two requests were terminated after very costly processing costs were quoted Last request received incomplete access after 9 months	Incomplete	The reason for the incomplete score for Thailand is that the three journalists necessary to implement 'the practice' could not be recruited. The recruitment attempts went on for close to a year and exhausted all available contacts and channels. This indicates a great hesitancy among Thai journalists towards using FOI.	The most important finding is that only the Swedish study generated any information. Had the US and SA requests generated information, or even been handled according to the Acts, these two countries would have scored OK
FOI Index score Out of 10.0	8.2		4.0		3.7		3.5		Incomplete		

Main findings and conclusions

It is of course very disappointing, bordering on catastrophic for the practice of FOI, that only two out of 12 submitted FOI requests generated any information within the framework of the legislations. This is the main finding that clearly illustrates the very poor state of FOI in three of the countries where the studies were completed.

It is surprising how quickly the federal FOI system in the US has deteriorated from being one of the best functioning as late as the second half of the 1990s, to the sorry state illustrated by the 3.7 FOI Index score. The study clearly shows that the two 'template' FOI systems, Sweden and USA have gone down opposite paths since September 11 2001. The US has effectively become more secretive and does not facilitate access to information the way it used to. The shift can in part be traced to a memorandum put out by the then Attorney General, John Ashcroft immediately after the September 11 terrorist attacks in the US. The Memo is added to the FOI Act as guidance for implementation of FOI and is dated October 12, 2001. After initial assurances that the Attorney General is committed to FOI it gets down to business:

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.

In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOIA litigation matters. 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 (The Freedom of Information Act, 1966)

The messages to federal government agencies are clear: be much more restrictive in releasing information. If you refuse applications and they are appealed you can count on legal assistance from the Attorney General's

department. This memo is possibly the worst blow to US federal FOI since its inception in 1967. Because the US is one of the two 'model' FOI systems, what it does in terms of FOI is of particular importance.

In June 2002 the Swedish government finished its 'Open Sweden' campaign that sought to spread information and educate the public (particularly young adults and immigrants) and public servants about FOI and openness in general. The aim of the campaign was to make Sweden into an international role model of transparency and openness in governance. Interestingly the report identified the lack of a reporting system on the functionality of Swedish FOI as a problem (Sweden, 2002, p. 13). This study has also identified this as a problem and it is discussed below. The Open Sweden campaign was used to launch the attempts to export Sweden's FOI system to the European Union. Although critics point out that Sweden has slowed down the flow of information, in comparative terms its FOI regime still works well in practice, as indicated by its 8.2 FOI Index score. Unfortunately, because the US is a super power, its change will have a much greater impact on FOI globally than the Swedish attempts to become a role model in transparency.

The study clearly showed that the SA FOI legislation is quite progressive and that there is very strong support for the FOI concept among leading politicians and public servants. However, there is a major awareness and educational problem. The main reason appears to be that the agency responsible for overseeing the implementation of the FOI systems, the South African Human Right Commissions, is grossly under funded to the extent that it cannot do its job. This indicates that, although FOI is officially supported by the SA government, in practice it is not given priority.

It is hard to take the Thai 'spin' data seriously because of the great gap in scores between 'the promise' and 'the spin'. However, as long as 'the practice' is pending, it is not possible to comment further on Thailand.

In many respects Australia is the worst case in the study. Not only did it score lowest, it also projects what turns out to be a misleading and even false image of having a functioning mature FOI system as part of a mature

democracy. The study clearly shows that the Australian FOI regime is completely dysfunctional and not worthy of country that prides itself of being a mature liberal democracy. Former Prime Minister Paul Keating's pejorative reference to Australia as an economic 'banana republic' in the 1980s is no less appropriate in relation to Australia's FOI regime now.

The promise and practice gap

The overall research question for this project was: to what extent, if any, are the promises made by Freedom of Information legislation borne out by the practice in the countries of study? Ideally there should be no gap at all between promise and practice. Generally the study has shown that a gap exists in all countries evaluated in this project. The gap ranges from relatively small in Sweden and Australia to quite substantial in the US and SA (see table 2 below).

Table 2 'promise' - 'practice' gap

	Sweden	Australia	USA	SA	Thailand
'the promise'	63	12	31	31	18
'the practice'	47	13	0	0	incomplete

Although Sweden scores well, there is still a gap. Australia appears to score quite well with an apparent balance between the two. Unfortunately the promise-practice gap is small simply because the legislation promises very limited access and this is borne out by 'the practice'. So, relatively speaking, Australia plays in a different FOI league compared to Sweden. As discussed

further below, the US and SA gap is very large and particularly disappointing given the promising start in 'the promise'.

Interestingly another gap also showed up during the course of the project: the difference between the 'spin' (how the leading politicians and public servants perceived FOI) and what the legislation promises and delivers in practice. Table 3 describes this phenomenon:

Table 3 gap between 'spin' and 'promise' and 'practice'

	Sweden	Australia	USA	SA	Thailand
'the promise' (max score 68)	63	12	31	31	18
'the practice' (max score 68)	47	13	0	0	Incomplete
'the spin' (max score 76)	65	49	48	54	56

Ideally the scores in the sub-studies should be as close as possible. In Sweden the scores are relatively close. But in the other countries of study the gap between 'the spin' and the other two sub-studies is very large indeed. This indicates that 'the spin', was a very adequate name for the survey study. Clearly the attitudes held by the respondents must be considered a 'spun' version of FOI reality.

The project also generated another research question: is it possible to design an evaluation tool that captures data that describes how a specific FOI regime works in practice and can it be presented in an index? The

data presented in this paper show that it is possible. The FOI Index will be further discussed below.

Discussion of findings

So, why did three out of four countries in the study score so poorly? There are several possible reasons:

In the case of SA, and to a certain extent Australia, the newness of the FOI concept and regime is part of the explanation. Going from secrecy in governance to true transparency is not easy in the best of circumstances. Among other things, it requires a change of the 'old guard' among the public servants and a very active, well resourced and independent overseeing agency is needed to drive the change of attitudes that is so important for FOI to work in practice. This is lacking in both Australia and SA. Coupled to this is the low awareness of FOI and its potential and uses. This is especially true for SA.

The main reason for the poor rating for the US has been discussed above. To be frank the US FOI regime has become a very good illustration of another general reason for poor FOI Index scores: FOI as democratic 'window dressing'. FOI is used by many nations as a way to convey an image of transparency and openness in governance that simply is not carried through in practice – in other words: it is a fabrication. In this study FOI as democratic 'window dressing' clearly applies to the US, Australia and SA. The SA FOI regime seems very sincerely meant, but is currently not working as intended. SA should probably be evaluated again in three to five years. The US and Australia both have mature FOI regimes and have no excuses for the poor score. From an international point of view it is embarrassing that these two countries are currently 'exporting' their version of democratic 'openness' to, for instance, Iraq.

Closely connected to democratic 'window dressing' is the concept of political will. As pointed out above, passing FOI legislation is relatively easy; the

hard part is making it work in practice. This requires sincere and real political will, not just during one political term, but consistently over decades. This political will never existed in Australia, it has gone dormant in the US, and the jury is still out on SA, though the current signs are not encouraging. The only country in the study where the political will to make FOI work still exists is Sweden.

Recommendations

Another way of looking at FOI in general is through the lens of political 'hardware' and 'software'. Knobel describes the concept thus:

You need, for example, an independent judiciary and an independent central bank (hardware), but you also need judges and central bankers who are comfortable with their independence (software).

You need laws and institution allowing for universal suffrage (hardware), but you also need a populace that doesn't feel intimidated into voting one way or another (software) (2005, p. 38).

If you apply this concept to FOI the FOI legislation is the hardware (as evaluated by 'the promise' in this project) and the software are the users and implementers (public servants and politicians), in this study described by 'the practice'. Although it could be said that the sheer fact that there are users that do not suffer any retribution from using FOI is a good first step, it is however, a very basic step. The logical continuation of the 'software' evaluation is how well it works in practice. Applying the hardware/software analogy to the countries of study in this project we get the following verdicts:

Sweden: functioning hardware and software.

Recommendations:

Implement some sort of statistical reporting system tracking FOI
requests. One possible problem with this is adding a
bureaucratic level to an otherwise very non-bureaucratic system,
which is one of the strengths of the Swedish FOI system.

Make the Secrecy Act part of the Constitution to stop the government of the day using this 'back door' to restrict FOI access.

South Africa: functioning hardware, software currently not working, hopefully under development.

Recommendations:

- Dramatically increase the funding of the South African Human Rights Commission to allow it to properly oversee the implementation of FOI and to run educational and awareness campaigns.
- 2. Legislate to provide legal protection for media whistleblowers.

The US: hardware functioning, software in hibernation

Recommendations:

- 1. Delete the Ashcroft memo.
- 2. Provide additional resources to government agencies to clear the backlog of FOI requests.
- Run an awareness and education campaign based on a new FOI
 memo reviving and reinforcing the aims and objects of FOI
 legislation.
- 4. Legislate to provide legal protection for media whistleblowers.

Australia: hardware released with several bugs leading to critical system errors combined with software that never got passed the booting sequence. This FOI system has never run properly.

Recommendations:

- Revoke the 'conclusive certificate' section in the Act that grants "papal-like" powers to ministers to effectively block most FOI requests and certainly all controversial ones
- 2. Point 1 is part of the 106 recommendations to changes and amendments made by in the review conducted by the Australian Law Reform Commission in 1996. The recommendations cover all the areas identified as problematic in this study. Consider the number of recommendations: 106 (Commission, 1996). This is a very clear illustration of the depth of inadequacy in the federal Australian FOI Act. The government has had this very potent reform tool at its disposal since 1996 and acted on almost none of the recommendations. This speaks volumes of the level of political commitment to FOI in Australia.

Thailand: the hardware is still trying to identify the operative system, which means the software has not booted yet.

Recommendations:

- Abolish the Information Board that consists of the head public servants in the most powerful national departments. The Board is granted extensive interpretation powers by the Thai FOI Act
- Amend the FOI Act to include specific time frames for processing requests.
- 3. Amend the Act to include clear guidelines on processing costs.
- 4. Regulate private ownership of media companies.
- 5. Encourage journalists to use FOI.

The spin reply league

As shown in table 4 below the response rates to 'the spin' were, from a quantitative perspective low, however 'the spin' was a qualitative study where

each response was viewed as a stand alone indicator on the attitudes among the top public servants and ministers. Nevertheless, it is interesting to compare the response rates as these indicate how important FOI issues are to each government of study. The hypothesis is that the higher the response rate – the higher FOI sits on the governments' agenda. Table 4 provides an overview of the response rates:

Table 4 Responses to 'the spin'

	Sweden	Thailand	USA	South Africa	Australia
Response rate	31%	25%	12%	9%	7%

The numbers underscore the findings in the rest of the study. Thailand's 25% is a bit of loose cannon, but cannot really be analysed fully since the data for this country is incomplete. Again, Australia scores poorly, further emphasizing that FOI does not register on the political radar.

FOI Index reliability and validity

The purpose of an index is to provide overview. Neuman observes that: 'an index is a combination of items into a single numerical score (2000, p. 177).' For evident reasons the reliability of an index is built on the reliability of the instruments used to capture the data on which the index is based.

A scale analysis using the SPSS software showed that the reliability of the sub-studies is very high (the Chronbach's Alpha score was 0.835 where 1.0 is the maximum score). Hence, it can be concluded that the reliability of the FOI Index is high as well. Another factor that contributes to the high reliability of the FOI Index is that it measures most evaluation parameters at least twice, which

is an important criterion to create a reliable index (ibid). It is also important that the instruments that capture the data for the index pose questions that pull in the same direction. The scale analysis of 'the spin' has shown that this is the case in this project.

It should be pointed out that the reliability for the FOI Index applies to the four countries evaluated in this study. The high overall reliability bodes well, however, the index will benefit from being implemented in as many countries as possible, preferably all that have passed FOI laws, to enable for further evaluation of its reliability.

From a validity point of view the FOI Index connects well back to the initial construct that sought to investigate the extent of a possible gap between FOI promise and practice. The FOI Index score clearly quantifies this gap: the higher the score the better FOI practice and the lower the gap between promise and practice.

Conclusion

This paper has outlined the background to and presented and analysed the findings in the study creating the basis for the fist international Freedom of Information Index.

The answer to the overall research question: to what extent, if any, are the promises made by Freedom of Information legislation borne out by the practice in the countries of study? Is that generally a gap does exist in the countries evaluated in this project. The gap varies from relatively small in the case of Sweden to very substantial in the cases of South Africa, the US and Australia. The FOI Index scores were Sweden: 8.2 out of 10.0, SA: 4.0, USA: 3.7 and Australia: 3.5. The higher the score the better practical functionality of the FOI system and the less the gap between promise and practice.

The main findings of the study are:

Only two out of 12 FOI requests lodged in four countries generated any information. The requests in SA, USA and Australia generated no information within the framework of the legislation.

The two 'template' FOI systems, Sweden and the US have gone done totally opposite FOI paths. The US has become more secretive, Sweden has attempted to go the opposite way.

The general awareness of FOI in SA is very low and the overseeing agency is poorly funded.

Australia is the worst case in the study. It scored the lowest and its top public servants and politicians are trying very hard to project an image of a mature functioning FOI system. This is false. The study clearly shows that the Australian FOI regime is close to completely dysfunctional from a user's perspective. Indeed Australia deserves the label "Freedom of Information Banana Republic" implying that this is not an information regime worthy of a country that perceives and portrays itself as a mature liberal democracy.

For those individual journalists and media organisations that take their fourth estate role seriously, the poor state of FOI showed in this study is very serious indeed. Without independent, un-spun access to government held information, how is media to fulfil its role as scrutinizers of political power? Can the media really become an 'accountability agency' as discussed at the start of this paper? If you define 'independent' as a key concept in scrutinizing power, it is hard to see how the fourth estate role can be fulfilled without a well functioning FOI system, including legal protection of journalistic sources.

The term 'democratic window dressing' was coined to describe a possible reason for the poor FOI Index scores. This term describes the process where government try to project an image of transparency and openness in governance, when the opposite is true. Based on this it can be argued that a new, more complex, paradigm has been reached in the flow of government held information. The old paradigm can be represented by the often-used quote by

former US President James Madison who chaired the committee that drafted the first amendment to the US Constitution:

Knowledge will forever govern ignorance, and a people who mean to be their governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both (Supperstone, 2001, p. v).

The new paradigm can be represented by the following: *there is only one thing worse than ignorance – the illusion of knowledge*³. Which is precisely the illusion non-functioning FOI regimes are aiming to create. The very tool that promises to provide independent access to government held information becomes part of the deception creating a climate where the citizens are constantly let down and deprived of their right to access to unspun information.

With a few exceptions it can be said that political representation is alive and well – political accountability, based on FOI, is in intensive care.

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³ Unfortunately this is not my quote. I have seen it attributed to Stephen Hawking, however this is still unconfirmed.

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