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Freedom of Information

Influence upon professional practice in recordkeeping

The United Kingdom (UK) is a medium-sized country on the western edge of Europe. In its recent history it has not suffered from brutal dictatorships, but it does have a tradition of secrecy and military adventurism. In selecting it as a case study, it is not intended to imply that the UK has added any new feature to the Freedom of Information (FoI) experience of other countries with an older experience of that movement. A case study of its experience as a latecomer is nevertheless of interest in our understanding of the evolution of recordkeeping services and practices.¹

FoI legislation now exists explicitly in more than 85 countries. New legislation is on the way in many more. Also, the broad provisions of FoI law already exist in many national constitutions and in international declarations, such as the United Nations Universal Declaration of Human Rights (1948), the Aarhus Convention of 1998, and the European Union Regulations of 2001 and 2003. The first open moves towards specific legislation on FoI were in the USA as far back as 1966 (not forgetting that Sweden was here first, in 1766). France followed in 1978; but most countries took this pathway in the late 1990s, or in

the present century; many are still on the road, but they are travelling in the same direction. It may be possible to say that FoI laws are or will be one of the distinguishing characteristics of the 21st century.

The introduction of FoI laws is generally stated to be in support of the transparency of government and its accountability. It is assumed that these are desirable qualities in governance, and it is difficult to argue against this view. Recordkeepers are central to the operation of FoI and similar provisions; and now one question that should be answered is, has accountability and transparency actually been achieved, or improved, by this means? Some attempt is here made to suggest an answer to this basic question from the case study.

Tony Blair, who became Prime Minister of the UK after a landslide election in 1997, was at that time in no doubt that FoI would prove an effective means of increasing transparency and accountability. In his election campaign he strongly supported the pressure group *Campaign for Freedom of Information*. In a speech to them in 1996 he said:

Our commitment to a Freedom of Information Act is clear, and I reaffirm it here tonight. We want to end the obsessive and unnecessary secrecy which surrounds government activity and make government information available to the public unless there are good reasons not to do so. So the presumption is that information should be, rather than should not be, released. In fact, we want to open

up the *quango state*² and the appointed bodies, which will of course exist under any government, but which should operate in a manner which exposes their actions to proper public scrutiny.³

At this point there was no doubt in his mind that FoI was a proper culmination of previous partial measures to promote the transparency of government, particularly as regards opening data relating to individuals.

Blair's government duly enacted the British FoI law, but it is clear that as soon as they were in power, the Blair coterie began to regret their commitment. In his recently published memoir, he made the following extraordinary pronouncement: 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.⁴

Tony Blair has not, apparently, abandoned his belief in the need for open government; he has therefore himself posed the central question: does FoI work, or does it work in the context of the government of the United Kingdom? Is there an important distinction between the interest of current government and the long-term interest of the citizenry, or of recordkeepers?

First of all, we should notice that FoI was preceded by a number of other measures,

or practices, in the UK, that were directed towards transparency. There are five of these:

- The Code of Practice on access to government information: a non-statutory predecessor to FoI, introduced in 1994.⁵
- Judicial review: this procedure is limited in the UK because there is no written constitution against which any official action can be measured, and there is an underlying principle of the sovereignty of Parliament. However the process has been used increasingly to investigate the justice and regularity of many actions of authority, including the measurement of official actions against the principles of natural justice.
- Public enquiries: during the late 20th century there have been increasing numbers of highly publicised enquiries. Probably the most famous is the Saville Inquiry, started in 1998, into the events of Bloody Sunday (when British army units killed members of the public during a public demonstration in Northern Ireland). This inquiry, which cost the nation many millions of pounds, was not completed until 2010, and resulted in a public apology from the government.⁶ The recently established inquiry into the causes of the war in Iraq,⁷ has built upon the precedents set up by the earlier Hutton inquiry.⁸ At this inquiry, current (or very nearly current) records were demanded from

the Cabinet Office, and subsequently published online. Some of these, including extremely sensitive documents annotated by the Prime Minister, have been published in the international press.

- At some time during the 1990s the principal secret services, known as MI5 (internal security) and MI6 (external and military) began to develop a public face, allowing access to information about their past activities and to their archives. This access was facilitated by a close liaison with the National Archives.⁹

All of these practices could be considered as precursors, alternatives or parallels to the eventual establishment of FoI laws. They were driven by the general feeling in the public at the time, by the pressures of the media, and by the growing influence of internet search engines. They may have had the effect of reducing the strength of the regulations under which records still in the possession of government offices, and not transferred to the National Archives, are excluded from public access. They all lacked the magic ingredient to be supplied by the FoI law when it came: this was that it gave the public a defined legal right to see information held in closed records, and extended this right to the records of all branches of the public service, not only central government. This enactment, when it occurs in any country, is as radical and powerful as a basis for recordkeeping than either of the two obvious historical

parallels: the law of 1790 that established the Archives Nationales of France, and the decrees of 1917 by Lenin in the early days of the Russian revolution.

In practice, FoI and its offshoots are important at every level. In high politics, its general importance is illustrated by news which broke at the start of June 2010. At last the world has definite written evidence that the state of Israel possesses nuclear weapons. We have this evidence through the operation of FoI laws in South Africa; for it appears that Israel offered to sell the nuclear materials for a weapon to that country in 1975, during the apartheid era.¹⁰ So the world has from the start accepted that FoI laws, if properly implemented, have had and will have considerable importance at the macro-political level.

But in a sense we always knew that: a purpose of this paper is to indicate some of the significance of FoI lower down, on the practice of archives and records managers, and on their relationship with their local and day-to-day clients. This paper gives some thoughts on how this may be illustrated in what has been happening in the United Kingdom, in the hope that these examples may be of use in countries where the same forces are at work.

FoI was brought into the UK in 2000, coming in on the back of the earlier Data Protection Acts 1984 and 1998, and supplemented by the Environmental Information Regulation 2004 (which gives the public legal rights of access to environmental

information). Taken together this body of legislation has already introduced profound changes in recordkeeping practice (only some of which were foreseen), and we can already see that in the normal course of administrative evolution, some even more profound changes are likely to occur in the next decades. These Acts cover all aspects of public service, not merely the departments of central government. FoI, then, spreads the effects and practices of record openness outwards from central government to all areas of public administration: to all social operations that cannot be called strictly secret or strictly private.

Profound changes in the way we appraise records and manage access to them were also prefigured in the data protection legislation that came in earlier than FoI. These laws made several profound changes. Sets of records containing personal information had henceforward to be registered with a government office, so there was central control with legal powers; they gave rights of access to records (rather than to information from records) to people who were the data subjects of those records. They gave rights to those people in certain cases to demand the destruction of particular records, and even, in some circumstances, to demand that the content of records be altered. There was still an expectation, though, that access to physical records would be given in the archives reading room, and that the general rules of closure would continue to apply.

All the same, the changes made by these laws were profound. Archives services that held personal records, such as social service case files, or the case files of children taken into care by the public authorities or transferred overseas, found that the people who obtained access might need personal counselling and support.¹¹ Users like this could not be treated as traditional researchers were. Issues of privacy began to take on greater significance. Counselling needs to take place in a very private setting, and it should be given by people who have received specific training. It should include careful explanation of the context in which the records were created and used. Here is an aspect of archives service where the proper conduct of the reading room remains essential. Another aspect may be the increasing need to keep the identity of the person making the enquiry confidential.

FoI requires workable records management practice. Clearly there is no point in giving people a right of access to documents or information where the records cannot be found. (We do have an illustration of this, in the case of Sierra Leone.¹²) We also now have the international standard for records management, ISO 15489, which provides a good basis for introducing good practices where they were lacking. In the UK, the FoI Act explicitly requires records management, and lays down some of its vital components. Two requirements in particular stand out: the publication scheme, and the code of practice. In the first,

organisations must prepare and publish a list of those parts of their record holdings which are or should be available for public reference. Obviously, no organisation can do this unless they have their records well under control. Once this publication scheme is completed, requests for information from the public can be referred to it, wherever this is possible.

To give authoritative advice on the implementation of open government provisions, the Code of Practice was first issued in 2002, and a second version, written in the light of experience and after a good deal of consultation, was published in 2009.¹³ There will certainly be future revisions, and it is equally certain, in the light of the experience gained, that revised versions will take account of the spread of good practice over different areas of administration. The code does not itself carry legislative force, but is a detailed set of guidelines for any organisation wishing to establish a practical records management system conformable to FoI.

These enormously significant developments in records management (which only a few decades ago was a very much neglected area of public administration) are not necessarily obvious to members of the public, or to those with a direct interest in using the freedoms offered by FoI. What is obvious to these, however, are the provisions made for making records, or information from records, available to them in response to a request. The FoI law lays down that any person can submit

a request for information from records, in writing, and that the recipient organisation is obliged to provide that information or a copy of the relevant records, within a set period of time (normally 20 working days). There is a list of excuses that can be offered, which of course include defence or security secrets, personal privacy and commercial confidentiality, and “the frankness of internal government discussion.”¹⁴ If a request does not conflict with any of these, the information from the record must be produced. The important new situation here has multiple aspects:

The information (which would often, but not necessarily, be a copy of the relevant record) is sent to the requester, who therefore does not have to attend at an archival reading room.

The information is not restricted because of its date, so that it may be drawn from a record that has already become an archive, held by the National Archives, or from a current or semi-current record in its originating department.

In certain cases a copy record may be redacted – that is, sensitive information in it may be blacked out.

The originating office may make a charge for providing the information or the copy, but the amount of this is strictly regulated.

It perhaps takes some time to absorb all the consequences of these provisions. Records can be brought into archival use without going through the process of ageing and transfer that has been traditio-

nal. Records can be consulted long before they have been appraised and transferred from the originating office to the archives service. Free access can still be offered to users if they attend at the archives reading room, but may otherwise (and perhaps ordinarily) be provided by sending copies by post, against a fee. The Act has proved popular, and in some cases the consequent burden of work caused by answering FoI requests is proving an expensive difficulty. This problem may grow, and may perhaps lead to modifications of the law.

A critical question is that of enforcement. Many countries have some sort of provision for freedom of access to information, often in their constitutions, but do not have any sort of enforcement procedure for specific cases. In the UK, enforcement is the province of the *Information Commissioner*, an independent high-level judicial officer.¹⁵ The *Commissioner* receives appeals from members of the public and adjudicates on them. A list of cases and decisions is issued periodically. The existence of the *Information Commissioner's* office, which has status, resources and a public face, is an important new government facility. There is an appeal from the *Commissioner's* decisions, to the *Information Tribunal*.¹⁶ Both levels of this process include questions arising both from DPA and FoI, which may in some cases be a cause of confusion.

Several issues of importance to recordkeeping have already come to the surface. Perhaps the most striking is the question

of appraisal and scheduled destruction of records. Probably the most disturbing aspect of the appraisal question concerns records illustrating the confidential advice and discussion before any government action. Archivists have always been clear that these records are an essential part of their holdings; if an effect of FoI is to cause such records to be withheld or even destroyed, then that would be a very serious downside to the new legislation. As part of their normal working procedures, offices are now required to appraise their records and to operate a regular destruction schedule. If an FoI request is received which deals with a record that has been destroyed, it is essential that the originating office can prove that the destruction was in accordance with an approved schedule. If this is not done, or if the record simply cannot be found, then the originating office is held to be in breach of the law. The same applies if the originating office has lost a record holding personal information; there have been several cases of lost *memory sticks*.

The FoI Act also makes it an offence, if there is an application for information, for an authority or people under its direction (employees, officials or others) to “alter, deface, block, erase, destroy or conceal any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information in the communication of which the applicant would have been entitled”.¹⁷ In the same way, unscheduled destruction of records

would probably be classified as a criminal activity if it came to light as a result of an FoI request.

The boundaries of application of the Act are constantly being questioned. The early months of 2010, immediately leading up to (and probably in part causing) a general election, were occupied in debating whether or not the personal affairs of Members of Parliament are subject to the legislation. It was decided that they were, and as a direct consequence some members of the legislature were forced to resign, and some to pay fines, or make repayments of public money they had claimed. In the general election that followed, a record number of candidates were new to political office. The newly elected government then issued new regulations under which the salaries of public officials were to be published, and policy statements that included new extensions of publicity to the emoluments of people in private industry. It is likely that the *Information Commissioner's* remit will continue to expand in this way.

In the UK, all this new legal activity has brought the National Archives (TNA) centrally into the public arena. The appearance of FoI laws has effectively overridden the rules for transferring records into archives, and under which they became open for consultation. In the UK these rules go back to 1958, and of course resemble similar rules operating in many other countries. The procedure for closing active records, appraising them, and passing them to the archives were therefore long established.

So too were the rules under which records, once transferred to the archives, became open to users. All this is now changed. Information in records which are the subject of FoI requests must be made available whatever their age, and wherever they are kept. There is also a major change in the means of access. Anyone requesting information under FoI is supplied with the information by post: they do not have to attend at the TNA, and they do have to pay a fee. The amount of the fee is regulated, so that applications for information under the Act cannot be restricted by deliberate increases in the money demanded; however this element could sometimes deter poor applicants. Applications under FoI and DPA laws can, on the other hand, be a serious drain on the resources of the office holding the records. This too may emerge as an important change in archival practice, and indeed the question of fees may be a personal difficulty to many recordkeepers, who have throughout their careers fought to keep access to records free of charge.

Records which have not been requested under FoI remain subject to the ordinary archives law, but it is interesting to note that the standard 30-year rule is now being actively eroded. There are suggestions that the 30 years will be reduced to 20, and there are many cases where records series are being released early in order to provoke public interest.¹⁸

A recent study of these changes gives an example.¹⁹ If a member of the public re-

quests information contained in a murder case as yet unsolved by the police, the TNA first looks at it to determine whether the material can be disclosed. Access to the information can be refused if (a) it falls under a general closure, if for example, the file gives personal information or unsubstantiated allegations against individuals; or (b) there is a reason specific to the particular case, for example if the police are considering further prosecution. If neither of these reasons for refusing disclosure applies, then it is accepted that there is a public interest argument for allowing it.

Therefore we can imagine a future in which archives reading rooms are retained in use mainly for academic researchers who need to be able to search systematically through archival fonds. Family history or personal researchers will ordinarily get access to their information by using online search engines. FoI users, as we have seen, get their information remotely. These are significant changes for our profession. It must be admitted that some colleagues have claimed that these new principles (data protection and personal rights; FoI and the principle of public interest) have not made, and perhaps will not make, any noticeable difference to our general practice. We shall see.

The UK solution to the problems raised by these laws is to make the TNA the principal agent of disclosure to the public. This has given the TNA a valuable new place in the public face of government, and is enhancing its relationships with the public.

It no longer needs to wait until transferred records reach the age of 30 years; instead, a rolling programme of opening and publicising records with popular appeal can be set up, allowing new revelations periodically through the year. The public profile of TNA has been greatly enhanced.²⁰

All these legal changes, of course, also affect the management and use of electronic records in their various forms. Archivists are very familiar with the argument that they must seize the opportunities offered by the appearance of these new media. It is said, if we do not manage these records, then others will step forward to do it instead. This warning applies also to the changes related to FoI. In the UK, TNA has been very active in stepping forward to be the principal agency for the public access to information from records. It has programmes to promote records management in the various government offices, it has allied itself actively with data collection and access programmes elsewhere in government, and it has encouraged government offices to manage FoI access

to records held within those offices. The general effect of the FoI legislation, to abolish the old procedures for opening records after 30 years, has been brought into effect by the action of TNA. The office and work of the Information Commissioner is a significant benefit. These are very important milestones in the development of archival practice, which most countries will find themselves passing in the years ahead.

In this paper it has been argued that the coming of FoI and allied laws has radically changed all the professional practices of recordkeepers. Perhaps the most important of these changes has actually been to the practice of appraisal – the selection of records for keeping or disposal. A recent assessment of the importance of this practice defined appraisal as the archivist's first responsibility, from which all other activity flows (...) archivists need to be sensitive to the myriad of cultural, philosophical and socio-political dynamics of appraisal (...) appraisal constitutes a political act.²¹

N O T A S

1. This paper is developed from a preliminary study, 'Freedom of Information: legislation that has radically changed archival practice,' *Atlanti* Vol. 20 (2010), 117-22.
2. *Quasi-autonomous non-government organisation*: this term is used in the UK to designate bodies officially constituted to carry out functions that would otherwise be the work of government departments. The practice of setting up quangos began about 1967 and there are now more than 1000 of them.
3. www.cfoi.org.uk. For a commentary on the operation of the Act, see www.foia.blogspot.com (accessed October 2010).
4. Tony Blair, *A Journey*, Hutchinson, September 2010. www.opendemocracy.net/ (accessed October 2010).
5. www.dfid.gov.uk/foi/foi_code_of_practice.htm. (accessed October 2010).
6. www.bloody-sunday-inquiry.org. (accessed October 2010)
7. The Iraq Inquiry, established 15 June 2009, www.iraqinquiry.org.uk.
8. The Hutton Inquiry into the circumstances surrounding the suicide of weapons of mass destruction expert David Kelly, established August 2003, www.the-hutton-inquiry.org.uk (accessed October 2010).
9. www.mi5.gov.uk. (accessed October 2010).
10. Sasha Polakov-Suransky, *The unspoken alliance: Israel's secret relationship with apartheid South Africa*, Pantheon, 2010.
11. An early notice of this development (1998) is by Deborah Jenkins, 'The courage of one's subjectivities: twenty-five years' archive practice,' www.ucd.ie/archives/html/conferences/cyber3.htm. (Accessed October 2010).
12. J A Kargbo, 'The connection between good governance and record keeping: the Sierra Leone experience,' *Journal of the Society of Archivists*, Vol.30, No.2 (Oct 2009), pp.249-60.
13. Issued by the Ministry of Justice and the National Archives, *Lord Chancellor's Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000*. Available at <http://www.justice.gov.uk/guidance/docs/FoI-section46-code-of-practice.pdf>. This should be read with *Records Management: Data Protection Act 1998*: a guide for records managers and archivists, www.nationalarchives.gov.uk/documents/dpguide.pdf. (Both accessed June 2010).
14. <http://webarchive.nationalarchives.gov.uk>. (Accessed October 2010).
15. General advice to the public on how to use the service is at www.ico.gov.uk, (accessed June 2010).
16. www.informationtribunal.gov.uk/index.htm (accessed October 2010).
17. M. Crockett, 'A practitioner's guide to the Freedom of Information Act 2000', *Journal of the Society of Archivists* 30 (October 2009), p.193.
18. Memorandum of Understanding between the *Keeper of Public Records and the Information Commissioner*, www.nationalarchives.gov.uk/documents/mou.pdf. (Accessed October 2010).
19. Lâle Özdemir, 'The National Archives and the Lord Chancellor's Advisory Council on National Records and Archives in the Freedom of Information era', *Journal of the Society of Archivists*, 30 (October 2009), 137-45.
20. www.nationalarchives.gov.uk, accessed June 2010.
21. Rachel Foss, 'We are what we keep: challenging tradition in appraisal and acquisition', (a commentary on Terry Cook, 'Missing piece or first responsibility: archival appraisal past present and future,' given at the ARA conference 2010), *ARC magazine*, Archives and Records Association UK and Ireland, 255, November 2010, p.6.

R E S U M O

A legislação referente à liberdade de informação existe atualmente em muitos países, seguindo precedentes e diretrizes de organismos internacionais. É provável que leis similares continuem a ser adotadas em mais países e organizações. Este artigo analisa os seus efeitos reais e potenciais sobre a prática de profissionais de arquivo no Reino Unido e faz observações sobre o significado internacional disso. A referida legislação inclui a Lei de Liberdade de Informação (*Freedom of Information (FoI Act)*) do Reino Unido, de 2000, as leis de proteção de dados (*Data Protection Acts*) de 1984 e 1998, e o Regulamento de Informação Ambiental (*Environmental Information Regulation*) de 2004, assim como outros procedimentos legais.

Palavras-chave: liberdade de informação (FoI); Reino Unido; proteção de dados.

A B S T R A C T

Freedom of Information (FoI) legislation now exists in many countries, following precedents and guidelines by international bodies. It is likely that similar laws will continue to be adopted in yet more countries and organisations. This paper examines the actual and potential effects upon professional recordkeeping practice in the United Kingdom, and makes observations on the international significance of these. The legislation referred to includes the (UK) FoI Act 2000, the Data Protection Acts 1984 and 1998, and the Environmental Information Regulation 2004 and other legal procedures.

Keywords: freedom of information (FoI); United Kingdom; data protection acts.

R E S U M O

La legislación sobre libertad de información ya existe en muchos países, siguiendo las pautas anteriores y directrices de organizaciones internacionales. Es probable que más países y organizaciones seguirán adoptándose también leyes similares. Este artículo analiza los efectos reales o potenciales de eso en la práctica de los profesionales en archivos del Reino Unido y observaciones acerca de la importancia internacional de las leyes. La legislación incluye el Freedom of Information (FoI) Act de Reino Unido, de 2000, las leyes de protección de datos (Data Protection Acts) de 1984 y 1998, y el Reglamento de Información Ambiental (Environmental Information Regulation) de 2004, así como otros procedimientos legales.

Palabras clave: libertad de información (FoI); Reino Unido; protección de datos.

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