

FREEDOM OF INFORMATION¹

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Freedom of Information (FOI) is really a misnomer. It has very little to do with “free” information.

The term “Freedom of Information” refers to laws and policies dealing with people’s access to government records or information.

These are sometimes called “open records” laws. In China, for example, these laws are called “Open Government Information” (“OGI”) laws. Indeed, in April 2007, the State Council of the People’s Republic of China took the historic step of issuing its first national OGI decree. I had the privilege of working with a number of experts associated with Yale Law School’s China Law Center in sharing experiences with China in this process, as well as earlier efforts relating to OGI laws in the cities of Guangzhou and Shanghai.

In addition, there is often a counterpart to “open records” laws dealing with people’s access to the meetings of public entities. These may also be called “Freedom of Information” or “Government in the Sunshine” laws.

It is important to note that some FOI laws are limited to government “records or files,” while other FOI laws cover all government “information” – even that which is not contained in a record or file. In such cases, people are entitled to obtain answers to their questions, even if no government records exist that specifically respond to their inquiry.

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The purpose of FOI laws is to provide what is called “transparency” in government so that people can see and understand what their government is doing. This topic will be discussed further later in this article.

In this context, it is important to understand the distinction between the “dissemination” of government records or information and the “disclosure” of government records or information. “Dissemination” refers to government on its own initiative making available information it believes the public ought to know. “Disclosure,” on the other hand, refers to government’s duty under FOI laws to provide information *requested* by members of the public.

No Freedom of Information regime can guarantee meaningful public access to government records unless that government has an efficient records management system. Thus, a country’s government “archival” laws and systems – which deal with records retention and disposal rules – are important for a successful FOI system.

Scope of application of FOI laws

FOI laws generally apply to executive and administrative entities of government. Sometimes the head of state and the head of government are excluded from the list of entities to which the law applies. Some FOI laws exclude the legislature, but most do not. Most FOI laws exclude the judiciary – at least with respect to their non-administrative functions – although those states with independent judiciaries often have some constitutional guarantees providing for open or public trials.

Quasi-public entities are typically legal entities created by government to perform some functions often provided by the private sector – such as providing energy, water and environmentally-sound waste disposal, or to serve as the government’s commercial enterprise in such matters as energy production and land development, for example. To

the extent such entities act in place of the government, they too are often subject to FOI laws.

To the extent private enterprises are given contracts to perform functions typically performed by government itself (“privatization”), such enterprises might also be subject to FOI laws – at least with respect to such functions. An example might be a private corporation managing the state’s prisons.

Application of FOI laws in the context of transnational or multinational government entities (e.g., United Nations, the European Union, the Organization for Security and Cooperation in Europe, and NATO) may raise peculiar issues. For instance, member states may have more or less restrictive FOI laws than those applicable to the transnational or multinational organizations to which they belong. The European Union, for example, and its member states have some of the most liberal FOI laws, yet those members that are also members of NATO are obliged to follow some of the most restrictive government information laws with respect to NATO transactions.

Who has access?

The issue often arises as to who may avail themselves of FOI laws. The options usually are:

- All persons (human and legal entities).
- Citizens only.
- Citizens and those non-citizens whose native states provide FOI access to the citizens of the state whose records or information are requested (reciprocity).

Given the globalization of commerce, the electronic information age in which we live, and increased international travel and employment by people from many countries, more countries with FOI laws are choosing the “all persons” or “reciprocity” option.

The Principal Reasons for FOI laws are:

- Their role in democratic societies. This was best stated by James Madison, fourth President of the United States, who wrote that a government that is to be responsive to its citizens, but which fails to provide those citizens with the information they need -- or the means of acquiring it -- "is but a Prologue to a Farce or a Tragedy; or perhaps both.... A people who mean to be their own Governor, must arm themselves with the power which knowledge gives." Democratic societies require the accountability of government officials to the people who elect them.
- Government transparency as an anti-corruption measure. Access to government records is a means to discover corrupt practices within government or by government officials. Thus, it also serves as a deterrent to such corruption.
- Transnationalism and multinationalism. As a condition for membership in, or transacting business with, transnational or multinational organizations, such organizations often require that states enact FOI laws and other anti-corruption measures. Examples of such organizations include the European Union, NATO, "G-8," the World Bank and the International Monetary Fund.
- Globalization. With electronic communications and efficient international travel, commerce has become globalized as never before. Indeed, information itself has become an important commercial commodity -- if not the most valuable commodity today -- and business enterprises all over the world seek it. Transparency laws are essential to this endeavor, and some investors will not commit large sums of money - or do business - in a state that lacks such laws.

What information can be withheld?

FOI laws generally provide that all government records or information are open with specific exceptions.

An example of this provision is found in Connecticut law: “Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records . . . , or (3) receive a copy of such records. . . .”

Another common FOI rule is that the public access provisions are to be broadly construed, to ensure as much disclosure as possible, and the exceptions are to be narrowly construed.

Issues in accessing information?

Turning to the process for obtaining records or information under FOI laws, consider the issue of whether a request for records or information under FOI laws should be made orally or in writing. Written requests may be more precise, and avoid the need for a government official to create a new record of the request for compliance, statistical and other purposes, but some requesters may be illiterate or semi-literate and imprecise.

Also consider whether the requester needs to be identified. Is the requester a citizen? Are there fees to be collected for complying with the request? Will requiring proof of identity intimidate the requester or discourage people from seeking access to government records or information?

Under FOI laws, a request may be either to inspect or copy records. If the request is for inspection, the inspection should occur under the supervision of a government official

to ensure that the original record will not be taken, altered or damaged. If the request is for a copy of a record, duplicating costs will be incurred and they may be significant if the request is for many documents.

Today, FOI laws must deal with requests for government records in electronic format. On the one hand, requests for electronic records often may be easier and faster to comply with. Insertion of an inexpensive CD or DVD and a few clicks of a mouse may be all it takes. On the other hand, if the request is for databases - or information in formats or with software not available at a government office - compliance may be more difficult, more costly and slower.

Here's how Connecticut dealt with this problem. Its FOI law (Conn. Gen. Stat. §1-211(a)) provides that government agencies that maintain public records in a computer storage system shall provide copies (1) of any nonexempt data contained in such records (2) that are properly identified (3) to any person that makes a request pursuant to the Freedom of Information Act. These copies are to be provided on paper, disk, tape or any other electronic storage device or medium that is requested by the person, if the agency can reasonably make such copies or have such copies made. The agencies may charge a fee equal to the actual cost incurred by the agencies to provide copies, or have copies made, of the requested information.

Government response to requests

One basic issue with respect to government's response to requests for records or information is the timeliness of response. "Timeliness of response" means the requirement in most FOI laws that the requester be informed that the request has been received, is being processed and the approximate time it will take to provide the requested records or information, or an explanation as to why they will not be provided.

Most FOI laws also have some sort of time limit by which requested records or information must be provided. Such time limits may be defined by a fixed number of days or weeks, or by such terms as “within a reasonable time” or “promptly.” There may be penalties imposed for failure to comply with a request within the specified time limit, but often extenuating circumstances – such as the volume of documents requested or the difficulty in locating them – will mitigate the imposition of penalties for late compliance.

Often a request will include records or information that must be provided in their entirety, as well as for records or information that either must - or may - be withheld. In that case, FOI compliance normally requires partial compliance with the request. The portions of records withheld are said to be “redacted” - or edited out – usually by blacking them with a marker or by some other device that conceals the confidential information contained.

Again, most FOI laws require that the requester be provided with the reasons (preferably in writing) why all - or part - of a request for records or information is being denied. A statement of the reasons for a denial may be as simple as providing the requester with a copy of the legal rule mandating or permitting the confidentiality of the material sought. Or the statement may contain a more detailed explanation. Providing the reasons for the denial often serves to dissuade the requester from appealing the decision and to establish that the government is not acting arbitrarily or corruptly.

Fees

As mentioned earlier, a request for records may involve costs to the government entity – especially if the request is for voluminous records. There are costs attributable to reproduction (paper, toner, etc.). There are the labor costs of the people searching for the

records and reviewing them to determine whether they must or should be disclosed. And there are the labor costs for doing the reproduction work itself.

The decision of whether – or how much – to charge for copies of government records is a difficult and sensitive one. On the one hand, there are costs to government for providing copies of its records, and someone has to pay. The question is whether it should be the requester, the taxpaying public as a whole, or both. On the other hand, the fees for copies may be so burdensome that many people would be dissuaded from seeking copies of otherwise public records.

FOI laws typically address the issue of fees in one of three ways: The actual cost of all material and labor; a fixed, government subsidized fee; or an income-generating fixed fee.

Because governments are sensitive to the fee issue, FOI laws typically provide for some circumstances when fees can be waived or excused. The most common waivers are based on the indigency of the requester (based on some standard); whether the request is in the public interest; and if the request is from the news media, which can be expected to help disseminate the information widely to the public.

Dispute resolution

A preliminary decision to deny a request for government records or information is usually reviewed internally within a government entity by some responsible official or office within that entity. If the matter is important enough, the review may go to the leader of the entity for approval.

Often FOI laws require an administrative review of a denial of access either automatically or on appeal by the requester. The administrative review may be

undertaken by a higher level of government authority or by an independent administrative tribunal (like the Connecticut Freedom of Information Commission).

Whether or not there is an administrative review process, most jurisdictions provide for the appeal of a denial of access to – or through - the existing court system. Judicial review may be *ab initio* (looking at all issues “from the beginning” without reference to prior decisions) or may be limited to a review of the record of the previous decision-making process.

Because requests for government records may be extremely voluminous, it would require courts to spend enormous time and resources in such circumstances to review every document to determine whether the government properly denied access to all the records requested. To assist reviewing courts in this endeavor, government entities are often required to submit to the court a document – sometimes called a “Vaughn Index” (named after the law professor requester, Robert Vaughn, who brought the first case in which the document was used).

A “Vaughn Index” contains an identifier for each record - or portion of a record - at issue; a general description of that record or the material withheld from disclosure; reference to the specific laws that mandate or permit confidentiality of the withheld material; and any other explanation of why the requested record or information was not disclosed.

Exceptions

Exceptions under FOI laws may be either mandatory or permissive. If the exception is “mandatory” (“shall” or “must”), there is no choice but to keep the record or information confidential. If the exception is “permissive” or “discretionary” (“may”), the

government should disclose the record or information, unless there is a good reason not to.

Common examples of Freedom of Information exceptions include:

Official Secrets: At the national level, some jurisdictions – such as China - have a “state” or “official” secrets exception to their FOI laws. The term “official secrets” is extremely broad and can encompass anything the government does not want to disclose. It can include such legitimate matters as diplomatic correspondence and military dispositions. But it also can encompass information that is merely embarrassing to the government – such as the inefficiency and corruption of political or government officials. For this reason, an “official secrets” exception is not well regarded in the FOI community.

National Security/Defense: At the national level, I know of no country that does not have an FOI exception for national security or national defense. And, of course, this is a legitimate exception.

Where problems occur is in the application of the exception to circumstances where it is not obvious that the national security or national defense is implicated. Because courts ordinarily are reluctant to question or “look behind” government’s mere assertion of a national security or defense claim, sometimes the exception is invoked improperly. For example, former U.S. President Richard Nixon invoked the national security exemption to cover-up politically motivated criminal conduct by his supporters and government officials during the 1970s. A courageous judge - John Sirica – forced the government to produce the requested records for his inspection. He then saw that the claimed exception was inapplicable and ordered disclosure of the records. This led directly to the public

learning of the so-called “Watergate” corruption scandal, and Nixon’s resignation in disgrace as President of the United States.

Government Deliberations: FOI laws commonly contain an exception for some documents reflecting the internal deliberations leading to governmental decisions. The theory behind this exception is that advisors may not be totally candid if they believe internal debates and preliminary ideas and opinions may be made known publicly. This exception most often applies to cabinet and ministry level offices. Many countries’ archival laws provide for the disclosure of deliberative records for historical purposes after a considerable number of years - or after the death of the officials concerned. Typically, court deliberations are also beyond the reach of FOI laws.

Law Enforcement: Virtually all FOI laws contain some exception to the disclosure – or premature disclosure - of law enforcement records. Obviously, there are occasions in which it would be harmful to the successful conclusion of an investigation to disclose prematurely what the investigators are doing or have discovered. Likewise, the safety of witnesses, undercover agents, and other confidential sources might be at risk if disclosed. Therefore, some law enforcement records remain confidential until the investigation is completed, while others remain confidential for many years until they become available under archival laws for historical purposes.

Just as in the case of the national security/defense exception, a law enforcement exception is susceptible to serious abuse. For example, there have been numerous instances where police agencies have used this exception to disclosure under their FOI laws to hide misconduct -- even torture and murder -- and the illegal and corrupt practices of their members.

Commercial Information and Trade Secrets: As mentioned earlier, information is an important commercial commodity in today's world. Because government collects and keeps so much information, it is a valuable source to information seekers. People all over the world seek information – legally and illegally - from virtually every government in existence. Some of the most valuable information that any government obtains and keeps are commercial information and the trade secrets of its citizens, business enterprises, and those doing business within the state. Because the disclosure of such information to competitors would be harmful to the financial interests of information-providers, they usually insist that the government guarantee the confidentiality of the information as a condition precedent to providing it.

To effectuate such a guarantee, most jurisdictions have an exception to their FOI laws for commercial or financial information, given in confidence, as well as for trade secrets. Of course, the mere existence of such an exception does not in itself guarantee the confidentiality of the information. Protective safeguards also must be put in place. And access to the information must be extremely limited, lest corrupt officials obtain it and sell it to the information-provider's competitors.

“Trade secret” often is defined to include information such as formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, or customer lists that derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use and are the subject of efforts that are reasonable under the circumstances to maintain secrecy.

On the other hand, what if the disclosure of the commercial or financial information - or the trade secret - would reveal a terrorist connection, an illegal activity, or an

environmental or public health hazard? Should the guarantee of confidentiality nonetheless be honored? These are some of the most profound issues facing governments today in our globalized commercial world.

Personal Privacy/Data Protection: FOI laws typically contain an exception for information the disclosure of which would constitute an invasion of personal (human) privacy. In addition, because personal privacy is so highly valued as a human right, many states and transnational or multinational entities have created data protection laws designed to safeguard personal information kept by government and commercial entities.

“Personal data” or “personal information” typically includes any information about a person's education, finances, medical or emotional condition or history, employment or business history, family or personal relationships, reputation or character which because of name, identifying number, mark or description can be readily associated with a particular person.

The protection of personal data by government entities presents an interesting paradox. The increasingly common crime of “identity theft,” for example, is a serious issue that seemingly requires greater efforts to secure that personal information which can be used to steal another’s identity. On the other hand, so much personal information already is accessible in the public domain – especially through the Internet, where much of it has been voluntarily provided by the subjects of that information themselves - that, as a practical matter, no amount of additional security will serve to make that information confidential again. That is a problem that government, the private sector and all our citizens together must address.

Privileges Recognized by Law: The laws of some countries recognize a confidentiality privilege for communications between certain parties. For example, in the

United States, communications between a physician and patient, member of the clergy and communicant, and husband and wife, cannot be compelled to be disclosed by any legal process.

Perhaps the most notable of these privileges is communications between attorney and client. Thus privileged communications between a government lawyer and the government entity the lawyer represents is a common exception in U.S. FOI laws.

Government Litigation Strategy: Related to the attorney-client privilege is the exception to disclosure in many FOI laws for government litigation strategy. In the case of this exception, however, the information does not necessarily have to have been to -or from - an attorney and the attorney's government client.

FOI Enforcement Regimes

Experience has shown that the most successful FOI laws are those that contain an effective enforcement regime to address violations of the law by government officials. By enforcement, I mean the power to persuade or order some - or all - of the following:

- Disclosure - with or without payment of the required fee - of the government records or information wrongfully withheld from the requester;
- Reimbursement of the requester's legal expenses;
- Punishment of the officials who wrongfully withheld the requested records or information;
- Other relief: For example, additional training for key officials, review of entity FOI procedures and new or different office equipment to facilitate disclosure.

As mentioned above, FOI laws typically include a process by which denials of access are reviewed. First, they are reviewed internally within the government entity. They may also be reviewed at a higher level within the government. But if the requester is still

not satisfied and believes his or her rights under the FOI laws are being violated, the best FOI laws provide for an appeal to a review authority that is independent of the government.

There are a number of models for FOI enforcement regimes. These are the most prominent ones:

The Judicial Model: This is the model employed by the United States government and most American states. It requires a disappointed requester to engage a lawyer, who then files a lawsuit appealing the denial of access to the records or information sought. It is typically a long, expensive process. The appeal may require a formal trial, or it may entail a review of the records or information at issue. It may also entail a review of the administrative record of the government entity below. This model also requires the expenditure of significant judicial resources. For these reasons, most FOI enforcement regimes outside of the United States do not follow this model – at least initially.

The Attorney General/Ministry of Justice Model: In this model, an officer or office of government – typically the Attorney General or an office in the Ministry of Justice – is responsible not only for advising all government entities on FOI compliance, but also may bring a lawsuit to court on behalf of any citizen whom the Attorney General, or ministry, believes was wrongfully denied access to records or information under the FOI laws.

Because the Attorney General - or Ministry of Justice - is a political arm of the government, that official or office usually supports the decisions made by the entities within that government, and rarely brings lawsuits on behalf of citizens. Consequently, this model tends to lack citizen trust and confidence and is not well-regarded. However, in a few places, such as the U.S. states of Florida, Texas and Kentucky, the model has

worked relatively well due to the independent nature of the Attorneys General of those states.

The “Ombudsman” Model: “Ombudsman” is a Scandinavian term that in the FOI context refers to a government official who investigates citizens' complaints against the government or its officials. Sweden, other Scandinavian countries, Canada and some of its provinces, Australia, New Zealand, and a number of other countries and jurisdictions use this model to great effect.

An FOI ombudsman generally has the power to investigate complaints from persons who believe they have been denied rights under FOI laws. An ombudsman may not order a complaint resolved in a particular way. Thus, an ombudsman relies on persuasion to solve disputes, asking for the assistance of the legislature, key government officials, or for a court review, only if a person has been improperly denied access and a negotiated solution has proved impossible.

The success of an ombudsman depends largely on the person who holds that office. An ombudsman must be both independent of the government of the day and an individual of the highest integrity. And most important, the individual must be perceived as such by both the public and the government officials whose actions are subject to investigation. Without that perception, recommendations are easily dismissed - or simply ignored in practice. But when an ombudsman holds the respect of the community, applicants, government officials, and indeed the courts, usually accept and implement an ombudsman's conclusions and recommendations.

The Commissioner Model: An FOI Commissioner is usually appointed for a fixed term by the head of government or by legislative leadership. In several Canadian provinces – such as Ontario and British Columbia - the Commissioner also has

privacy/data protection responsibilities. In addition to some Canadian provinces – which use this model to great effect – the model is also employed in France and a few other countries.

The FOI Commissioner model: This model often combines the usual functions of an ombudsman (including being independent of the government) with the power to enter binding orders on government entities. In Ontario, for example, the FOI Commissioner (who also serves as the Privacy Commissioner) is responsible for resolving appeals from refusals to provide access to information, ensuring that the government entities comply with the provisions of the FOI legislation, educating the public about the province's access to information laws, conducting research, and providing advice and comment on proposed government legislation and programs. Appeals from FOI Commissioner orders go to the courts.

The FOI Counselor Model: The Counselor model is used successfully in the U.S. states of New York, Indiana and Virginia. The Counselor may be appointed by the head of government or by the legislature and typically is a lawyer by profession. An FOI Counselor has no enforcement powers, just the power of persuasion. Counselors issue formal and informal opinions to government entities, the public, and the news media. The advice is generally followed because of the Counselor's expertise in FOI matters. Counselors may also mediate FOI controversies informally.

Requesters denied access to records or information, need not seek the Counselor's advice. They may appeal directly to court. However, if a requester goes directly to court without first seeking the Counselor's advice, the court may decline to require the government to pay the requester's attorney's fees, as is sometimes the case when the government loses the case.

FOI Counselors typically issue annual reports setting forth their observations and recommendations about implementation of their jurisdiction's FOI law to the head of government and the legislature.

The FOI Commission Model: This model is used to great effect in Connecticut and, more recently, in Mexico ("Federal Institute on Access to Information"). The model is also used in the U.S. state of New Jersey ("Government Records Council").

An FOI Commission is typically comprised of five members (an odd number so there will be few tie votes) appointed to fixed terms by the head of government, with agreement by the legislature. Although appointed by government, the Commission is independent of government, and does not report to any government official or entity with respect to its FOI duties and responsibilities.

FOI Commissions both administer and enforce all FOI laws. In furtherance of this responsibility, the Commissions in Connecticut and Mexico have all of the following powers and duties:

- Mediate FOI disputes, if possible.
- Issue formal and informal opinions as to the applicability of the FOI law to specified fact situations.
- Administratively decide FOI disputes and issue binding orders. In this regard, the Commission may hold formal evidentiary hearings and subpoena witnesses and records. Failure to comply with a Commission order is a crime and compliance can be compelled through court order.
- When appropriate, punish the officials responsible for FOI violations.

There are limited rights to appeal to court from Commission orders. A party cannot take a FOI dispute to court until the Commission issues an order. A Commission

lawyer – not the Attorney General/Ministry of Justice - represents the Commission in all court proceedings involving the Commission.

The Commission also is typically tasked with training government officials and educating the public on FOI matters. The Commission further acts as a “think tank” to identify and consider emerging and future information policy issues, and to advise the government and legislature on information policy.

Conclusions

A good FOI law - like any other good law - must take into account both the essential principles reflected in the law and the prospect for reasonably successful implementation. Thus, such a law must take into account the political and social cultures of the jurisdiction involved. It must also take into account the bureaucratic culture of the government.

No one lacking sufficient knowledge of these cultures can make precise recommendations as to what ought - or ought not - to be included in such legislation. The most we can offer is the experience in other jurisdictions as to what has worked well or poorly there, and advice on what we deem to be important items to be considered by those seeking to enact a new FOI law.

However, it is important to remember that information by its very nature is neutral. It can be used for good or for evil. It can be helpful to some and detrimental to others. What is clear from human experience, however, is that information is a source of power and, as such, officials and bureaucracies will always attempt to maintain exclusive control over the information they possess, notwithstanding laws forbidding it, such as FOI legislation.

Therefore, government almost always possesses an innate culture of secrecy. Consequently, a culture of openness within government must be carefully nurtured and constantly reinforced not only by the political leadership, but by civil society as a whole. Inevitably, this takes time.

More and more jurisdictions around the world are establishing Freedom of Information laws and enforcement regimes. Some are doing so because of the internal pressures from their citizens. Others are doing so because of the external pressures from transnational or multinational organizations or commercial enterprises. Some are doing so because of democratization benefits. Others are doing so as an anti-corruption measure.

In reality, some FOI laws work well. Others do not. For example, Canada's excellent FOI laws generally work well because government officials and bureaucrats obey them. On the other hand, some reports suggest that the excellent FOI laws in Bulgaria do not work well because neither the government nor bureaucrats will obey them, and there is little consequence to their failure.

FOI laws take time to effectuate, and one must appreciate the cultures and circumstances from which they emanate. For example, China's new Open Government Information Regulations appear relatively weak in comparison to other FOI laws. Yet, they represent both a monumental improvement and of great historical significance, when viewed from the perspective of where China started.

We are now in the midst of the "Information Age." Computers and the Internet provide more information, more rapidly, and to more people world-wide than ever imaginable even a few years ago. More information is available today than perhaps we, as human beings, have the capacity to synthesize or digest.

Information is no longer the private preserve of a relative few -- the intelligentsia, the government, the great industrialists. Anyone with a basic education and access to a computer can enter the brave new world of the "Information Age."

Undoubtedly, Freedom of Information laws will play a key role in developing that world because government information is so wide-ranging and so valuable.

FOI not only will continue to play an important role in the "Information Age," but also in the evolving relationships between governments and their citizens, and between transnational or multinational organizations, international commercial enterprises and individual states.