PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

Edited by

Nicholas Bamforth
Fellow in Law,
The Queen's College, Oxford

and

Peter Leyland
Senior Lecturer in Law
London Metropolitan University

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CONCLUSION

Regulation has been discussed in a UK context as part of a governance narrative. This is an approach which seeks to investigate how power is exercised in the contemporary state. We have considered the institutional framework in terms of nationalisation, privatisation and regulation before proceeding to outline the impact of devolution and other less formal strategies which have changed the form and practice of government. This can be viewed as part of a shift from a welfare state model towards a regulatory model in the United Kingdom. In sum, we now find a policy sub-system of increasing complexity comprising of a wide range of public and private actors that are involved in policy formulation and implementation processes in the utility sector.[155]

In the first place this has had a profound impact on the crucial issue of accountability. In a formal sense regulators remain accountable to ministers and ultimately to Parliament (either central or devolved) under a statutory regime. However, the division of responsibilities between central and devolved government and between varying types of regulators at different levels has led to overlapping responsibilities which, for example, apply to establishing the terms of licences, setting price levels and determining the exercise of monopoly power and take-overs. In practice, we find that each industry operates as part of a process of circuitous decision-making, but beneath this veneer of statutory functions lies a masked reality of behind the scenes negotiation by the central players. Indeed, attribution of responsibility for the decisions that emerge is so unclear that lobbying on regulatory issues is targeted at ministers, regulators and the industries themselves.[156]

Secondly, at an operational level it is important to stress that certain structural deficiencies in the legislation have hampered the regulatory process. For example, it will be apparent that the original statutes failed to set out in sufficient detail the role and responsibility of regulators which allowed a personalised agenda of negotiated regulation based on bargaining and accommodation[157] to emerge for each industry.[158] Another disturbing tendency has been that regulators, although appearing to be as 'referees standing above the players in the game [and balancing conflicting interests]... in reality they can all too easily become involved in the game' by becoming too closely associated with their client industry.[159] Thirdly, it is evident that decisions by regulators require detailed financial information. The problem is that this is often generated by the client industry and such information may be manipulated so that it might be insufficient or superabundant to suit the

[155] Maloney, above, n 36, 627.

[156] See Sue Slipman, *Better Regulation Task Force* (July 2001).

[157] S Wilks, 'Utility Regulation, Corporate Governance, and the Amoral Corporation' in Wilks and Doern (eds), *Changing Regulatory Institutions in Britain and North America* (University of Torronto Press, 1998), 143.

[158] Thatcher, above n 25, at 132.

[159] J Morison and S Livingstone, *Reshaping Public Power* (London Sweet & Maxwell, 1995), 69. See in relation to Ofwat and Yorkshire Water, and the ORR and Railtrack.

purpose of compounding or evading the issue under consideration by the regulator.[160] In response to this difficulty it would appear that more rigorous accounting techniques need to be developed. Fourthly, a common criticism is that regulators have been deprived of the powers to make their own local regulatory rules which are essential to support many of the most sensitive decisions.[161]

This subject is normally discussed with regard to regulators, regulatory agencies and regulatory policies. However, it has been argued that any analysis of utility regulation must be directed at revising the nature of the corporate businesses which are themselves subject to regulation.[162] This has a particular resonance with the recent failure of Railtrack and the collapse of Enron and the resulting implications for the national economy, infrastructure and employment. The point is that improved performance requires more than changes to regulation. It calls for basic reforms to corporate governance that take into account wider issues of social responsibility and allow a substantially reduced role for financial markets. It has been suggested that this may also involve moving towards a corporate compliance model. Although the present Government is still attempting to blend 'the lean efficiency of the private sector with the social goals once exclusively associated with public ownership,'[163] it seems as clear now as it was during the first half of the twentieth century that there are certain natural monopolies that should remain under state control. This is because of the need to establish a structure which, rather than promoting the pursuit of profit, prioritises and rewards the public interest elements of universal access, safety, environmental protection, reliability and punctuality.[164]

[160] Foster, above n 43 at 235.

[161] Further, regulators were not given powers to make their own regulatory rules which were necessary to support their decisions. See M Loughlin and C Scott, 'The Regulatory State' in P Dunleavy, A Gamble, I Holliday and G Peele (eds), *Developments in British Politics* (Basingstoke, Macmillan, 1997), 209.

[162] Approaching this from a criminal law perspective, it has been pointed out that identifying corporate responsibility in the contemporary situation is fraught with difficulty and requires new forms of liability to be invented suitable for an organisational elite. 'Corporate regimes will either bargain organisational régimes to suit themselves or relocate elsewhere': see A Norrie, *Crime, Reason and History* (2nd edn, London, Butterworths, 2001), 103.

[163] Wilks, above n 157, at 133 and 154 *et seq.* For example, it is suggested that, 'regulators working together could insist upon internal changes in organisation and process that would make the utilities more orientated towards regulatory compliance'. Also, the principle of mandatory consultation could be extended to all interested groups, including employees, customers and suppliers.

[164] J Freedland, 'These Hybrid Monsters,' *Guardian*, 27 March 2002.

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Freedom of Information: A New Constitutional Landscape?

STEPHANIE PALMER

FREEDOM OF INFORMATION laws are increasingly accepted as a necessary feature of advanced economic countries. Transparency and access to information has also been recognised as an important value in the European Union.[1] The United Kingdom has lagged behind most other Western countries in this respect but recent years have seen a marked change of policy. The Freedom of Information Act (FOIA) 2000 was introduced as one aspect of the Labour Party's commitment to modernise British government through constitutional change. The Lord Chancellor has promised that the government 'will govern with a new spirit of openness ... [in] partnership with the people.'[2] More recently the Scottish Parliament has passed its own legislation on freedom of information.

Freedom of information laws are closely linked to liberal political thought regarding the role of the state. Access to information about governmental decision-making is couched in terms of a democratic right: a right to know in which all citizens share. In this sense, freedom of information is a constitutional right, perhaps 'the most fundamental of our civic and political rights.'[3] These provisions are justified as enhancing democratic participation in government but they are also linked to accountability through increased oversight. In breathing new life into our traditional accountability mechanisms, freedom of information can be regarded as an important measure available for the control of power in the contemporary constitution. It can also play an instrumental role: a mechanism for improving public authority decision-making. The idea of greater openness, imposed through an Act of Parliament on a constitutional structure traditionally concerned with preserving secrecy, is potentially radical.

[1] EC Treaty Article 255. See S Peers, 'From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the EU, in V Deckmyn (ed), *Increasing Transparency in the European Union* (Maastricht, EIPA, 2002).

[2] Lord Irvine of Lairg, 'Constitutional Reform and a Bill of Rights' [1997] *EHRLR* 483.

[3] C Harlow, 'Freedom of Information and Transparency as Administrative and Constitutional Rights' (1999) 2 *Cambridge Yearbook of European Legal Studies* 285.

This legislation gives UK citizens for the first time a statutory right to official information. It extends to all information[4] except that which the FOIA defines as exempt. Other positive aspects of this legislation include independent scrutiny by the Information Commissioner and provision for a system of active disclosure through publication schemes.[5] The FOIA applies to public authorities in England, Wales and Northern Ireland. It received the Royal Assent on 30 November 2000 but it will not come fully into force until January 2005. In Scotland, the Freedom of Information (Scotland) Act (FOISA) 2002 was passed by the Scottish Parliament on 24 April, 2002. Application for access under the FOISA cannot be made until December 2005.

Any discussion concerning the regulation of information reveals certain tensions. On the one hand, information can be perceived as a public good, a resource or commodity necessary to support political rights and the market. On the other, much information is understood as inherently private or as property and not suitable for access or disclosure without potential damage to legitimate commercial concerns or to competitiveness.[6] In order to mediate between these competing claims on information the law regulates information in a different manner in the public and private spheres. The traditional view has been that the democratic objectives underpinning freedom of information are not relevant to private sector bodies. Hence the openness required of the public sector under freedom of information legislation should not be demanded of the private sector. Yet the new reality is that the distinction between the public and private sectors has become blurred. Across the Western world the apparatus of the state is shrinking. The 'hollowing out' of the state is a feature of modern government in the wake of privatisation, contracting out and Next Step Agencies amongst others.[7] In those circumstances then, where public services are contracted out to private sector bodies, there is a threat to the democratic objectives of freedom of information if access is automatically denied because the transaction is uncritically categorised as private. Underlying many of the contentious exemptions contained in the FOIA is this public/private divide.

This chapter will initially focus on the background to the freedom of information legislation in the United Kingdom and the principles underpinning it. It will then critically analyse the freedom of information schemes and assess whether the new legislation could provide greater public scrutiny of the process of government and strengthen accountability. In particular, the exemptions to information which concern the formulation of policy, investigations by public authorities, protection of commercial interests and information provided in confidence will be analysed. The main focus of the chapter will be on the FOIA but some reference to the FOISA will be made. This chapter concludes that the FOIA is significant in establishing the first enforceable freedom of information regime in the United Kingdom. Nevertheless, the legislation may not adequately promote a change to the ethos of secrecy in governance.

[4] See FOIA, *s* 84.

[5] FOIA, s 19.

[6] A vast amount of material held by public authorities has been obtained from third parties.

[7] R Rhodes, 'The hollowing out of the state: The changing nature of public services in Britain' (1994) 65 *Political Quarterly* 138. See Peter Cane, ch 10 below.

BACKGROUND

In 1997, the Government quickly acted on its election promise to introduce freedom of information by publishing a White Paper outlining its proposals for a Freedom of Information Act and inviting public comment.[8] It was acknowledged in this White Paper that:

> Unnecessary secrecy in government leads to arrogance in governance and defective decision-making. The perception of excessive secrecy has become a corrosive influence in the decline of public confidence in government. Moreover, the climate of public opinion has changed: people expect greater openness and accountability from government than they used to.[9]

This statement is a clear reaction to the ethos of secrecy that has been a hallmark of the Westminster style of government. The traditional position in the United Kingdom is that all official information is secret unless governments choose to disclose it. Openness and transparency have been alien concepts in British government administration as the priority has been to protect official information. Stringent secrecy laws and the absence of any general statutory right of access to government-held information have permitted governments the freedom to regulate the public dissemination of information. The government controls the form in which information is released as well as the timing of any release. This authoritarian position aroused suspicions that governments could, and indeed would, elevate their interests over all others. These suspicions seemed confirmed by the inquiry into the 'arms to Iraq' affair and the collapse of the *Matrix Churchill* trial. Sir Richard Scott's report on the affair commented upon the 'consistent undervaluing by government of the public interest that full information should be available to Parliament'[10] which had contributed to a lack of governmental accountability.

The secrecy ethos of British governments has also been buttressed by the criminal law through the Official Secrets Act. The Official Secrets Act 1911 protected all government information regardless of its public interest or its importance. This 'blanket ban' on the release of all unauthorised official information made it impossible to argue directly for freedom of information legislation: a necessary prerequisite was the repeal of the notorious section 2 of the Official Secrets Act 1911. As David Williams stated in 1965:

> Our knowledge of the workings of the central government nowadays is to a very large degree controlled by the Official Secrets Acts. Outsiders cannot look in. Insiders can look out, but they dare not speak out. Solemn and stern reminders of the terms of the Official Secrets Acts have engendered a general attitude of caution.[11]

[8] *Your Right to Know* (Cm 3818, 1997).

[9] White Paper, above n 8, at para 1.1.

[10] *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (HC 115, 1995–6), para D1.165.

[11] David Williams, *Not in the Public Interest* (London, Hutchinson, 1965), 208.

Civil servants remain subject to disciplinary proceedings for any disclosures of information violating internal civil service rules and instructions.

Although the old discredited Official Secrets Act was reformed in 1989, the specified categories of information protected by the criminal law are still broad and there is no provision for a public interest defence.[12] In the recent decision in *R v Shayler*, concerning the effect of the Human Rights Act 1998 on the operation of the Official Secrets Act 1998, Lord Bingham commented on the issue of secrecy in a democratic state:

> Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated.[13]

Shayler was a former member of the security and intelligence services, who released intelligence documents to the public. He claimed that he was acting in the public interest. In spite of acknowledging the tension of secrecy laws in a democratic state, the Law Lords concluded that there was no opportunity for Shayler to claim disclosure was justified in the public interest.[14] This decision has not fractured, as some commentators had hoped, 'the national security-official security nexus' that has proved an enduring feature of the British constitutional structure.[15]

In the United Kingdom there has been a gradual trend towards less secrecy in government.[16] We have come a long way since the 1976 'Croham Directive,' instructing heads of departments to publish 'as much as possible of the factual and analytical material used as the background to major policy studies' but which remained secret until leaked some years later. In 1993 the previous Conservative Government published a White Paper, *Open Government*.[17] It proposed the introduction of a Code of Practice on Access to Government Information.[18] This non-statutory Code came into force in April 1994 and is still in operation at this date. One result of the introduction of the Code was that it raised expectations of greater openness in the public sector. The Code requires government departments to

[12] See S Palmer, 'Tightening Secrecy Law: The Official Secrets Act 1989' [1990] *Public Law* 243.

[13] [2002] 2 WLR 754.

[14] Although such a conclusion was a restriction on the right to freedom of expression, it was justifiable under ECHR Article 10(2) on the basis of national security. In the subsequent trial the focus was on the official position held by Shayler rather than on whether the material released damaged national security or showed wrongdoing in the operations of the security service.

[15] N Whitty, T Murphy and S Livingstone, *Civil Liberties Law: The Human Rights Act Era* (London, Butterworths, 2001), 368.

[16] During the 1980s and 1990s some progress had been made in establishing a right of access to certain categories of information. See eg Local Government (Access to Information) Act 1985, Environmental Information Regulations 1992, s 1 1992/3240, the Data Protection Act 1984 and more recently, 1998.

[17] Cm 2290, 1993.

[18] *Ibid* at 32.

respond to requests for information but it does not make the disclosure of official information obligatory. It also contained wide class-based exemptions. The Parliamentary Commissioner for Administration has been given a role in investigating complaints that departments have not complied with the Code,[19] yet there have been few complaints to the Commissioner concerning breaches of the Code. The reason for the paucity of complaints can probably be explained by the fact that there is no direct access to the Commissioner: individuals have to proceed through their Member of Parliament.[20] Overall these modest changes have not reversed the established atmosphere of secrecy in government. It is clear that a far more radical approach would be required in order to achieve a truly open system of government.

In December 1997, the newly elected Labour Government published a White Paper that set out proposals for the introduction of freedom of information legislation. These proposals seemed to signal the intention of the Government to effect a fundamental change to the administrative culture in the United Kingdom. The scope of the proposed Bill was to have an impressively wide application. The White Paper stated that it would cover not only government departments but, amongst others, privatised utilities, quangos, local bodies, universities and public service broadcasters. Services performed for public authorities under contract would also be subject to the new freedom of information. According to these proposals, exemptions should be limited to the following seven areas: national security; defence and international relations; law enforcement; personal privacy; commercial confidentiality; the safety of the individual, the public or the environment; information supplied in confidence; and the integrity of the decision-making and policy advice processes in government. The test for disclosure was based on an assessment of harm that disclosure might cause, and the need to safeguard the public interest.[21] In order to guarantee that decisions on disclosure would be based on a presumption of openness, the appropriate test for most categories of information was a substantial harm test. Of particular significance was the White Paper's total rejection of a ministerial veto or conclusive certificates mechanism. It was proposed that freedom of information legislation should be enforced by an Information Commissioner who would have the power to order disclosure of records and information. In addition the new legislation was to be accompanied by a policy of 'active' disclosure.

In spite of some flaws, the White Paper proposals were largely welcomed[22] but after the first year in office and a number of embarrassing disclosures, the govern-

[19] Code of Practice, cl 11.

[20] In 2001, Home Office ministers refused to abide by the decision of the Commissioner to release information concerning how often they had declared a possible conflict of interest to their colleagues under the ministerial code. This was the first time that a recommendation of the Commissioner has been refused.

[21] White Paper, above n 8, at para 3.4.

[22] See P Birkinshaw, 'An "All Singin' and All Dancin' " Affair: the New Labour Government's Proposals for Freedom of Information' [1998] *Public Law* 176; R Hazell, *Commentary on the Freedom of Information White Paper* (Constitution Unit, 1998) and S Palmer, 'Freedom of Information—Principles and Problems: A Comparative Analysis of the Australian and Proposed UK Systems' in Cambridge Centre for Public Law (ed), *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford, Hart Publishing, 1998), 147.

ment developed cold feet. Justice Michael Kirby has identified 'seven deadly sins of FOI.' The first was 'strangled at birth.' He reports an Australian politician as saying 'that it was imperative for any government proposing a freedom of information law to get the legislation enacted within the first year of office, lest the skeletons accumulating in the governmental cupboard thereafter render the prospect of enforceable rights of access to information too politically uncongenial to press on with.'[23] Unfortunately, the first sin had been committed. In July 1998, responsibility for freedom of information was moved from the Cabinet Office to the Home Office after the sacking of the minister responsible for its publication and amidst rumours that the White Paper proposals would be severely watered down.

In May 1999, the Government published a draft Freedom of Information Bill[24] for further consultation and for pre-legislative scrutiny by the House of Commons Select Committee on Public Administration[25] and the House of Lords Delegated Powers and Deregulation Committee.[26] This disappointing Bill abandoned many of the principles contained in the 1998 White Paper. Although providing a right to information, the draft Bill contained numerous devices ensuring that secrecy could be maintained by a government determined to do so.

Subsequently, in November 1999 the Government finally presented its long-awaited Freedom of Information Bill to Parliament. Although the Home Secretary responded to some of the criticisms of the draft Bill,[27] the Act has emerged as a 'pale shadow' of the proposals outlined in the White Paper. Any initial optimism that new freedom of information legislation would sweep aside the atmosphere of secrecy and radically alter the administrative culture in the United Kingdom has faded. In Scotland, the development of freedom of information shared some similarities to that South of the border. The new Scottish Executive initially published proposals for an freedom of information Bill in Scotland that rejected many of the key elements of the Bill before Westminster. In particular, its proposals concerning the publication of policy advice and the power of the Scottish Commissioner to order disclosure differed from the draft Bill before Westminster.[28] As we shall see below, the FOISA still retains some important differences from the FOIA but the final result shares similarities with the Act passed by Westminster.

Whether openness in government can be converted from hollow rhetoric to vibrant reality depends in large measure on the extent to which the reforms are

[23] Justice Michael Kirby, 'Freedom of Information: The Seven Deadly Sins' [1998] *EHRLR* 245, 249.

[24] *Freedom of Information: Consultation on Draft Legislation* (Cm 4355, 1999).

[25] House of Commons, Public Administration Select Committee, Third Report session 1998–99, *Freedom of Information Draft Bill* (HC 570, July 1999).

[26] *Report from the Select Committee Appointed to Consider the Draft Freedom of Information Bill*, session 1998–99 (HL 97, July 1999).

[27] The Home Secretary made some important concessions in the second draft Bill. For example, the time for responding to requests was reduced to 20 working days; the remarkable 'jigsaw' exemption which allowed information to be withheld if it could be harmful in combination with other information was abandoned as was the right of the authorities to insist on knowing why an applicant wanted information or to disclose information on condition it was not given to a journalist.

[28] See *An Open Scotland. Freedom of Information: A Consultation.* This document was laid before the Scottish Parliament by the Scottish Ministers in November 1999.

grounded in democratic principle. The next section will outline the arguments justifying openness in government and freedom of information in the context of a constitutional right. These grounds are not self-contained and tend to overlap with each other. The final section will assess whether the government's new legislation can ensure the effective enjoyment of the citizen's right to know.

PRINCIPLES OF FREEDOM OF INFORMATION

Knowledge is a fundamental prerequisite to democracy. Although democracy itself is a contested concept, most would agree that democratic rights include the institutions and procedures of representative government, backed up by human rights operating in a constitutional system dedicated to the rule of law.[29] Although these features of a democratic system are important, even essential, democratic systems hold out the promise of far more than the legitimating of government through participation in periodic elections. A broader understanding of democracy would perceive it as a force for enhancing a culture of participation and equality among citizens.

Legislation on freedom of information could provide an important tool to promote these broader democratic aims. Access to information, as a fundamental democratic right in which all citizens share on an equal footing, is increasingly recognised as a significant aspect of institutional accountability. Such accountability lies at the heart of any conception of political responsibility: governments must answer to a democratically elected Parliament and ultimately to the electorate. Public bodies must be able to justify their actions by demonstrating that they are acting in the public interest.[30] The need for accountability and scrutiny through access to information is increasingly recognised as a necessary feature of a vigorous and vigilant public sphere. Indeed it is an idea which has been given prominence on the political agenda of Western democratic societies for many years.[31]

It is possible to distil a bundle of democratic themes underlying freedom of information legislation, some of which have already been touched upon. As citizens in a democratic society, there is an expectation to be fully informed about the government's actions, policies and decisions. Without information, individuals are unable to exercise their rights and responsibilities effectively. There is also an accompanying expectation by citizens to be able to participate in and perhaps even to influence government policy-making. This feature of democracy distinguishes it from other more authoritarian aspects of political organisation.[32]

[29] See S Marks, *The Riddle of All Constitutions* (Oxford, OUP, 2000), ch 3 and D Held, *Democracy and the Global Order: From the Modern State to the Cosmopolitan Governance* (Cambridge, Polity Press, 1995).

[30] See the discussion in Carol Harlow, ch 4 above.

[31] C Harlow, 'Freedom of Information and Transparency as Administrative and Constitutional Rights' (1999) 2 *Cambridge Yearbook of European Legal Studies* 285.

[32] See Marks, above n 29, at 51.

Freedom of information legislation could serve to strengthen the conventional arrangements underpinning our constitutional system. In our political system the executive is not sufficiently responsible to Parliament. The political reality is that the executive has significant control over Parliament. Without openness, the principle of responsible government is undermined. The work of select committees, the efficacy of parliamentary questions, the effectiveness of opposition parties and pressure groups all depend on the availability and accessibility of information. Power is at the heart of secrecy in government, and power and information are inextricably linked.[33] The executive has possession of a vast amount of information and is in a position to authorise selective disclosure in a manner and at a time convenient for the government. Partial disclosure may distort accountability.

The constitutional conventions of individual and collective ministerial responsibility are frequently used to legitimate the maintenance of government secrecy, by 'enforcing an internal governmental discipline in the control of information.'[34] The traditional theory of ministerial responsibility has led to the practice whereby ministers decide for themselves what information should or should not be disclosed to Parliament. Yet the reality is that the doctrine has been eroded to the point where it has been described as deserving 'the status of a legal fiction.'[35] The Matrix Churchill affair and the ensuing report by Scott highlighted the fact that the conventions operated as an obstacle to the availability of information and to holding the government to account. Woodhouse concludes that, even post-Scott, the convention of ministerial responsibility 'remains opaque and incoherent.'[36] Nevertheless, Adam Tomkins contends that to assume the doctrine of ministerial responsibility is no longer 'a fundamental doctrine of the constitution' is misjudged.[37] He argues that in recent years the principle of ministerial responsibility has been having a revival and that it is possible for parliamentary accountability to work, particularly through the reformed select committees of the House of Commons.[38] Undoubtedly, a strong freedom of information culture could contribute to such a revival and enhance the accountability of government and the influence of Parliament.

Ministers frequently use their powers to 'leak' information or give non-attributable briefings to journalists when it is politically expedient. The manipulation of information is inevitable. For example, it would seem that members of the government selectively leaked details of their White Paper proposals on competitiveness to the press before the documents were presented to Parliament. These actions led to questions being raised in Parliament.[39] The problem of leaking is compounded by the widely held belief that government information is the property of the gov-

[33] See EW Thomas, 'Secrecy and Open Government' in PD Finn (ed), *Essays on Law and Government: Principles and Values* (Sydney, Law Book Company, 1995).

[34] C Turpin, *British Government and the Constitution* (4th edn, London, Butterworths, 1999), 523.

[35] D Feldman, 'Public Law Values in the House of Lords' (1990) 106 *LQR* 246, 254.

[36] D Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] *Public Law* 262, 280.

[37] Adam Tomkins, ch 3 above, quoting J Jowell and D Oliver (eds), *The Changing Constitution* (4th edn, Oxford, Oxford University Press, 2000), viii.

[38] *Ibid.*

[39] See Points of Order, HC vol 363, cols 483–4 (15 February 2001).

ernment, even though this valuable resource is created and maintained at the taxpayers' expense. The Official Secrets Act also encapsulated the concept that all official information is vested in the administration. In other words, such information is 'owned' by the government and subject to protection as a property right.

Freedom of information legislation is a potentially important tool to redress the imbalance in power. It also enables more effective supervision of the executive within Parliament. In Australia, the opposition parties have made extensive use of the access to information provisions under the Freedom of Information Act 1982. On the one hand, the theory assumes that the potential exposure to criticism should enhance the government's performance. On the other, the threat of increased criticism makes a strong freedom of information legislation a highly unattractive prospect for governments. Yet one of the fundamental purposes of freedom of information legislation should be to strike a balance between competing public interests of openness and secrecy: neither are absolute values. In order for freedom of information legislation to satisfy the democratic mandate, the unfettered discretion accorded to governments to control the release of information must be subordinated to wider public interest considerations. These ideas have received judicial recognition in freedom of expression decisions such as *Derbyshire County Council v Times Newspapers Ltd*,[40] which stressed the importance of uninhibited criticism of government bodies as an important part of the democratic process: and *in Spycatcher (No 2)*,[41] where Lord Keith cited with approval from the Australian High Court:

> It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.[42]

A further justification for increased openness in government and freedom of information legislation focuses on the public's needs as consumers.[43] Public authorities hold a very wide range and quantity of information. This includes important economic information about the market, public services, and information supplied by individual companies. The Government has specifically recognised the role of people as citizens and consumers in their White Paper, *Modernising Government*.[44] Yet whether this information should fall within the public or private sphere is not so obvious. Information on consumer and environmental issues preserves political rights by providing citizens with the opportunity to make informed decisions as well as contribute to the public debate, while businesses which submit information to the government are concerned that any subsequent disclosure of that information could destroy proprietary interests in their research or trade secrets.

[40] [1993] 2 WLR 449.

[41] *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

[42] *Ibid* at 258, citing from *Commonwealth of Australia v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52.

[43] See D Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Milton Keynes, Open University Press, 1991), 169.

[44] Cm 4310, 1999.

Historically, freedom of information legislation has been justified as enhancing the democratic values of accountability and increased participation. The focus has been on the role of the state, its policy-making and government-held information. Yet the hiving-off of many traditional government functions through policies such as privatisation and outsourcing, means that power in the modern democratic state is fragmented. Non-government actors are increasingly carrying out traditional public functions that raise, perhaps even more starkly, the same accountability concerns as with governmental bodies.[45] We have new constitutional structures that are characterised by interdependence among a host of different public/private actors. In many circumstances these arrangements defy easy division into secure public or private compartments. In this new economic paradigm, distinguishing between governmental and private institutions may no longer even be useful.[46] Arguably, our traditional understandings of accountability and responsibility have not been adequately modified to respond to these challenging developments. Jody Freeman states that: 'If we are concerned about accountability...then the question is not how to make agencies accountable, but how to make regulatory regimes ... accountable?'[47] Does the new freedom of information legislation in the United Kingdom adequately provide for this new political reality? Are the traditional values of our public law system that underlie freedom of information, even adequate to meet the challenges posed by the 'hollowing-out' of the state?

Freedom of information also raises questions about the relationship between access and privacy. There is a natural and healthy desire by citizens to know what information the government holds about individuals and, if necessary, to check and correct inaccurate data. Although as outlined below, these rights of access to data are further buttressed by Article 8 of the European Convention on Human Rights, personal information is already protected in the United Kingdom by the Data Protection Act 1998 which provides for access to personal information. These rights have been further extended by the FOIA. Carol Harlow refers to these personal rights, providing for individuals to seek access to personal information about themselves, as administrative law rights rather than constitutional rights.[48] The focus of this chapter is on constitutional rights, those rights to which individuals should have access without showing any special interest.

A further justification for the enactment of freedom of information provisions rests on the general right of freedom of expression. Without access to

[45] See J Freeman, 'The Real Democracy Problem in Administrative Law' in D Dyzenhaus (ed), *Recrafting the Rule of Law* (Oxford, Hart Publishing, 1999), 331.

[46] P Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8 *Governance* 527, 529.

[47] Freeman, above n 45, at 369. Maloney points out that the water industry is subject to '"heavier" regulation in the private sector ... than sponsoring departments ever did under the public ownership model.' W Maloney, 'Regulation in an Episodic Policy-Making Environment: the Water Industry in England and Wales', (2001) 79 *Public Administration* 625, 640–41. Maloney also points out that regulation raises the a classic principal/agent problem of information asymmetries: regulation depends on detailed technical knowledge that only the regulatee possesses. See also Peter Leyland, ch 8 above.

[48] Harlow, n 31, at 287.

information, freedom of expression is markedly diminished. Article 10 of the European Convention on Human Rights guarantees the right to receive and impart information. There is, however, rather surprisingly, no express guarantee for the right of access to information in the European Convention on Human Rights.[49] ECHR Article 10 provides for a right to 'receive information' which has been held to be limited to receiving information 'that others wish or may be willing to impart.'[50] More recently, the European Court of Human Rights has developed a limited right of access to information by way of a positive obligation under Article 8 (respect for private and family life). In the case of *Gaskin v United Kingdom*, [51] the Court found that in some circumstances an obligation on the government to impart information may arise. The United Kingdom was found to have violated the principle of proportionality in Article 8 because it failed to provide for an independent authority to decide on the issue of disclosure. The United Kingdom procedures were unsuccessfully challenged in *McGinley and E.E. v United Kingdom.*[52] The case concerned two servicemen who were exposed to nuclear bomb tests in the Pacific 40 years ago and had been denied access to their medical records. The European Court found no violation of either Articles 6 or 8. Nevertheless, the Court stated:

> Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.'[53]

Lord Justice Sedley notes that there is something odd about 'discovering a right to information in the entrails of Article 8, which says nothing about information,' while refusing to develop adequately this right under Article 10 which specifically refers to information.[54]

The Human Rights Act 1998 will underpin the access provisions for individuals who are seeking information about themselves but will not directly provide equivalent support for the other aspects of freedom of information legislation. It is crucial therefore that the legislation reflects the constitutional arguments and democratic principles outlined above by providing a freedom of information system that can achieve a real cultural shift in public administration. The next section will focus on the central issues in the FOIA.

[49] See G Malinverni, 'Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights' (1983) 4 *Human Rights Law Journal* 443.

[50] *Leander v Sweden* Series A No 116, 29, para 74 (1987).

[51] (1990) 12 *EHRR* 36. See also *Guerra v Italy* (1998) 26 *EHRR* 357.

[52] (1998) 27 *EHRR* 1.

[53] *Ibid* at 45.

[54] S Sedley, 'Information as a Human Right' in J Beatson and Y Cripps (eds), *Freedom of Expression and Freedom of Information* (Oxford, Oxford University Press, 2000), 245.

THE NEW FREEDOM OF INFORMATION LEGISLATION

In the 1997 White Paper that preceded the legislation, the Government acknowledged that it is in the best position to champion the cause of open government and to challenge the entrenched secrecy culture that has been an established feature of the administration of the United Kingdom government. This section will assess the extent to which the new legislation will achieve these objectives.

Section 1 of the FOIA provides for a general right of access to information held by public authorities. Pursuant to this section, a public authority has two distinct duties: the duty to confirm or deny whether it holds the requested information and the duty to communicate it. Each exemption provision specifies whether these duties apply or are exempted. The right conferred under this section covers 'information'[55] as well as original documents.

It is disappointing that the government decided not to include a 'purpose clause' in the FOIA.[56] The advantage of including the objective in the legislation itself is that it is likely to encourage an interpretation of the law that is consistent with its democratic purpose by establishing a clear presumption in favour of disclosure. These provisions are in evidence in other freedom of information legislation: in Australia, New Zealand and Ireland.[57] In New Zealand, for example, 'the Ombudsmen have stressed time and time again that the Act must receive such fair large and liberal interpretation as will best attain the objects of the Act set out in sections 4 and 5.'[58] Experience from Australia suggests that it is essential that the object of the legislation should include the underlying principle of the Act. [59] The section setting out the objectives of the Australian Freedom of Information Act has led to some interpretative difficulties: it was possible to conclude that the right of access provided by that Act was an end in itself, whereas an object clause which explained the broader public interest to be served by enabling access to government documents would encourage an interpretation favourable to disclosure.[60]

[55] See FOIA, s 84. Information 'recorded in any form' is covered as well as unrecorded information: FOIA, s 51(8).

[56] See eg the views of the Data Protection Registrar, Elizabeth French, given in her evidence to the House of Commons Select Committee on Public Administration (28 June 1999), paras 2.4–2.6. The Scottish Executive signalled that the Scottish legislation might contain a 'purpose clause' but the FOISA does not include such a clause.

[57] See the Australian Federal Freedom of Information Act 1982, s 3; New Zealand Official Information Act 1982, ss 4, 5. The purpose of the Irish Act is set out in the long title of the Freedom of Information Act 1997.

[58] I Eagles, M Taggart and G Liddell, *Freedom of Information in New Zealand* (Auckland, OUP, 1992), 4.

[59] Australian Law Reform Commission, Report No 77, Administrative Review Council, Report No 40, *Open Government: a Review of the Federal Freedom of Information Act 1982* (hereafter referred to as 'ALRC'). Section 3 of the Australian Freedom of Information Act states that the object of the legislation is 'to extend as far as possible the right of the Australian community to access information in the possession of the Government of the Commonwealth'.

[60] ALRC, above n 59, at paras 4.4–4.6. See also the comments of Dr Clark, HC Deb, 7 December 1999, vol 340, col 741.

The new legislation contains some very positive points. First, a statutory right of access to information, as opposed to a Code, has a major psychological as well as legal effect. The FOISA also makes provision for children to exercise rights under the legislation.[61] Secondly, the legislation will be fully retrospective which will avoid any problems with an 'access gap' in respect of documents created less than 30 years ago but before 1999. Thirdly, these public rights of access are determinable and enforceable by an authority independent of government, namely an Information Commissioner. The FOIA provides for free access to the Information Commissioner and an appeal to a tribunal. Finally, there are strict limits on the response times. The Home Secretary took the advice of the Select Committees and reduced the usual response time from 40 to 20 working days following the date of receipt.[62]

The FOIA covers public authorities and this includes a wide range of organisations at all levels of government. Section 3 sets out the different ways in which a body can be a public authority. Any body or organisation listed in Schedule 1 is a public authority for the purposes of FOI; bodies, persons or office holders designated as public authorities by order of the Secretary of State;[63] and publicly owned companies.[64] Obvious public authorities such as government departments, the Houses of Parliament, local authorities, NHS bodies, educational institutions, and police bodies are included in Schedule 1. In addition, the list of public authorities also includes such diverse bodies as the Advisory Committee on Hazardous Substances, the Law Commission, the Parole Board and the Zoos Forum.[65] Private organisations, such as bodies working on contracted–out functions and privatised utilities, may be designated as public authorities in relation to their public functions.[66] The breadth of the FOIA, then, is wider than many overseas freedom of information legislation. The broad coverage in this era of outsourcing is to be welcomed. Nevertheless, as discussed below, freedom of information applications concerning private bodies discharging public functions are subject to structural limitations inherent in the FOIA.[67]

It is striking that, for the purposes of FOI, the Government chose to include a list of authorities in a schedule rather than leave it primarily for the courts to determine what is a 'public authority', as in the Human Rights Act 1998. In the majority of circumstances, a public authority for the purposes of the Human Rights Act will also be considered as such in the FOIA. Yet, some differences may exist. For example, the security and intelligence services are not included in Schedule 1 to the FOIA but Convention rights should still be applicable.

[61] FOISA, s 69.
[62] FOIA, s 10(1).
[63] FOIA, s 5.
[64] FOIA, s 6.
[65] The Secretary of State has power to add further bodies if certain conditions are met: FOIA, s 4(1).
[66] FOIA, s 5. See also HC Standing Committee B, 11 January 2000, col 67.
[67] See M McDcDonagh, 'FOI and Confidentiality of Commercial Information' [2001] *Public Law* 256.